UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Oral Argument Requested]

MODOC LASSEN INDIAN HOUSING AUTHORITY, the tribally designated housing entity for other Grindstone Indian Rancheria of Wintun-Wailaki Indians of California, Plaintiff - Appellee, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants.	No. 14-1313 (D.C. No. 1:08-CV-02573- RPM)
TLINGIT-HAIDA REGIONAL HOUSING AUTHORITY, Plaintiff - Appellee, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants.	No. 14-1331 (D.C. No. 1:08-CV-00451-RPM)
CHOCTAW NATION OF OKLAHOMA, et al., Plaintiffs - Appellees/ Cross-Appellants, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants/ Cross-Appellees.	Nos. 14-1338 & 14-1340 (D.C. No. 1:08-CV-02577-RPM)

NAVAJO HOUSING AUTHORITY, Plaintiff - Appellee, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants.	No. 14-1343 (D.C. No. 1:08-CV-00826-RPM)
FORT PECK HOUSING AUTHORITY, Plaintiff - Appellee, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants.	No. 14-1407 (D.C. No. 1:05-CV-00018-RPM)
SICANGU WICOTI AWANYAKAPI CORPORATION, et al., Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants.	No. 14-1484 (D.C. No. 1:08-CV-02584-RPM)
BLACKFEET HOUSING, et al., Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants - Appellants.	No. 15-1060 (D.C. No. 1:07-CV-01343-RPM)

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CORPORATE DISCLOSURE STATEMENT

Under FRAP 26.1, all Appellees disclose that they have no parent corporations and that no publicly-held corporation owns 10% or more of the stock of any Appellee.

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES.......... 1

STATEMENT OF THE CASE.......... 2

A. NAHASDA's Predecessor and the Mutual Help Program 2

B. NAHASDA's Recognition of Tribes' 1937 Act Home Responsibilities 3

C. NAHASDA and Indian Self Determination 5

D. HUD's Initial NAHASDA Rulemaking.......... 6

1. 24 C.F.R. §1000.532 - the hearing regulation under NAHASDA §405 6
2. 24 C.F.R. §1000.318 - the FCAS regulation.......... 7

E. Administrative Proceedings.......... 8

F. District Court Proceedings.......... 15

SUMMARY OF ARGUMENT.......... 19

ARGUMENT 20

STANDARD OF REVIEW 20

A. NAHASDA and Its Implementing Regulations Bar HUD From Recapturing Funds Outside the Parameters of §§401 and 405 24

1. HUD Must Comply With Section 401(a) of NAHASDA Before Recapturing Allocated Grant Funds.......... 24
2. The 2008 NAHASDA Amendments to §401(a) Are Not Applicable and Are Misconstrued by HUD 32
   a. The Amendment Is Not a Mere Clarification of Pre-Existing Law 33

b. HUD Overstates the Significance of the 2008 Amendment 36

3. Even if this Court holds Section 401(a) Inapplicable, a Hearing is Still Required for Any Recapture Under NAHASDA Section 405(d) and 24 C.F.R. §1000.532 38

4. HUD could not recapture NAHASDA grant funds absent a finding that the funds had *not* already been spent on eligible affordable housing activities 43

a. NAHASDA Bars HUD From Recapturing Funds Spent on Affordable Housing Activities 43

b. NAHASDA's Implementing Regulations Also Bar HUD From Recapturing Funds Spent on Affordable Housing Activities 45

B. HUD Has No Inherent Power to Recapture FCAS Funds Without Following the Procedural Safeguards of §§401 and 405 of NAHASDA 47

C. HUD's Prejudice Argument is Inapplicable and Without Merit 52

1. A showing of prejudice is not required where an agency has violated rules involving important procedural safeguards 53

2. The District Court's finding of actual prejudice was not clear error 57

D. The District Court Had Jurisdiction Under 25 U.S.C. §702 to Order HUD to Restore Funds to Appellees that had been Recaptured in Violation of Statutory Requirements, Because the Order Constituted Specific Relief, Not the Payment of Money Damages 65

1. The District Court Order Constituted Specific Relief, Not Money Damages, as that Phrase has been Consistently Interpreted by the Courts 66

2. HUD's Reliance On *Houston* and *Sebelius* is Misplaced 70

a. Summary 70

b. The Facts of *Houston and Sebelius* 71

c. The Appropriations Clause, Central to the Holdings in *Houston* and *Sebelius*, Was Never Raised in These Appeals Because the Appropriations at Issue Here are No-Year Appropriations 73

i. NAHASDA's Appropriations are No-Year Appropriations 73

ii. HUD has Never Considered the Fiscal Year Origin of any NAHASDA Funds to be of any Relevance 75

iii. The Appropriations at Issue in *Sebelius* and *Houston* Were Limited by Congress to Specific Fiscal Years, and this Distinction was Determinative 77

d. Applying *Houston* and *Sebelius* when there is no Appropriations Clause issue is inconsistent with *Bowen* and with cases decided by this Court 78

3. The District Court Lawfully Ordered the Distribution of Escrowed Funds 80

E. A Remand to the Agency Would be Futile 84

CONCLUSION 86

REQUEST FOR ORAL ARGUMENT 86

TABLE OF AUTHORITIES

CASES

Abkco Music, Inc. v. Lavere, 217 F3d 684 (9th Cir. 2000) 36

Adams v. Director, OWCP, 886 F.2d 818 (6th Cir. 1989) 36

Am. Bus Ass. v. Slater, 231 F.3d 1 (D.C. Cir. 2000)............................ 48, 49, 50, 52

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970)...........54

Bennett v. New Jersey, 470 U.S. 632 (1985) 35

Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F3d 1259 (9th Cir. 1997).......................36

Board of Education v. Department of Health, Education and Welfare, 655 F.Supp. 1504 (S.D. Ohio 1987) 82

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).....................................22

Bowen v. Massachusetts, 487 U.S. 879 (1988).. passim

Breeden v. ABF Freight Sys., Inc., 115 F.3d 749 (10th Cir. 1997) 62

Burlington Truck Lines v. United States, 371 U.S. 156 (1962)..............................22

Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395 (D.C. Cir. 2004) 49

Cherokee Nation of Okla. v. Norton, 389 F.3d 1074 (10th Cir. 2004)....................21

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988)........................64

City of Boston v. U.S.H.U.D., 898 F.2d 828 (1st Cir. 1990) .... passim

City of Houston v. Department of Hous. & Urban Dev., 24 F.3d 1421 (D.C. Cir. 1994)... passim

Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984) 68

Coalition for Gov't Procurement v. Fed. Prison Indus., 365 F.3d 435 (6th Cir. 2004) 54

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102 37

County of Suffolk v. Sebelius, 605 F.3d 135 (2d Cir. 2010) .... passim

Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070 (10th Cir. 2009)....21

Crow Tribal Housing Authority v. H.U.D., 781 F.3d 1095 (9th Cir. 2015).... passim

Dep't of the Army v. Blue Fox, 525 U.S. 255 (1999)..69

Elwell v. Byers, 699 F.3d 1208 (10th Cir. 2012) 24

Fletcher v. USA, Dept. of Interior, 160 Fed. Appx. 792 (10th Cir. 2005) 78

Fort Belknap Hous. Dep't v. Office of Pub. & Indian Hous., 726 F.3d 1099 28, 29, 31, 64

Fort Peck Housing Authority v. HUD, 367 Fed. Appx. 884 (10th Cir. 2010) .. 9, 23, 72

Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431 (10th Cir. 1997)....................33

Grand Trunk W. Ry. v. United States, 252 U.S. 112 (1920)...................................51

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002)...................70

Holly Sugar Corp. v. Veneman, 355 F.Supp.2d 181 (D.D.C. 2005), *rev'd. on other grounds* 437 F.3d 1210 (D.C. Cir. 2006) 79

Jacksonville Port Authority v. Adams, 556 F.2d 52 (D.C. Cir. 1977).....................83

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982).................. 23, 55

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (10th Cir. 1984)...55

Joyce v. *Davis*, 539 F.2d 1262 (10th Cir. 1976)...68

Kansas City v. U.S.H.U.D., 861 F.2d 739 (D.C. Cir. 1988) .... passim

King v. Burwell, 135 S.Ct. 2480 (2015)..30

Landgraf v. USI Film Products, 511 U.S. 244 (1994)...35

Leslie v. Attorney General of the United States, 611 F.3d 171 (3d Cir. 2010) 54, 55

Louisiana Public Serv. Comm. v. FCC, 476 U.S. 355 (1986)......................... 49, 50

LTV Educ. Sys., Inc. v. Bell, 862 F.2d 1168 (5th Cir. 1989) 48

Lummi v. U.S., 106 Fed. Cl. 623 (Fed. Cl. 2012) .... passim

Marceau v. HUD, 540 F.3d 916 (9th Cir. 2008) 79

Maryland Dept. of Human Resources v. Department of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985) 68

Maughan v. SW Servicing, Inc., 758 F.2d 1381 (10th Cir. 1985) 62

Middleton v. City of Chi., 578 F.3d 655 (7th Cir. 2009) 33

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008) 85

Morton v. Ruiz, 415 U.S. 199 (1974).. 53, 55, 56

N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003).......54

NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361 (D. Mass. 1989)...................26

Nat'l Labor Relations Bd. v. Pueblo of San Juan¸ 276 F.3d 1186 (10th Cir. 2002)23

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)..85

Normandy Apartments, Ltd. v. HUD, 554 F.3d 1290 (10th Cir. 2009)..................78

North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008)...49

NRDC, Inc. v. United States, 760 F.3d 151 (2nd Cir. 2014) 28

Olenhouse v. Commodity Credit Corp., 136 F.R.D. 672 (D. Kansas 1991) 80

OXY USA, Inc. v. Babbitt, 230 F.3d 1178 (10th Cir. 2000)....................................26

Pennsylvania Med. Soc'y v. Snider, 29 F.3d 886 (3d Cir. 1994) 33

Phelan v. Wyoming Associated Builders, 574 F.3d 1250 (10th Cir. 2009).............70

Project B.A.S.I.C. v. O'Rourke, 907 F.2d 1242 (1st Cir. 1990)..............................34

Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).........................23

Ramah Navajo Chapter v. Salazar, 644 F.3d 1054 (10th Cir. 2011)............... 22, 35

School Committee of Burlington v. *Department of Education of Massachusetts*, 471 U.S. 359 (1985) 68

SEC v. Chenery Corp., 318 U.S. 80 (1943) 85

Service v. Dulles, 354 U.S. 363 (1957)..53

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 22

St. Louis Fuel and Supply Co. v. F.E.R.C., 890 F.2d 446 (D.C. Cir. 1989)............39

State of Connecticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982).........................82

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)....................................64

Suiter v. Mitchell Motor Coach Sales, 151 F.3d 1275 (10th Cir. 1998)..................33

U.S. v. Lahey Clinic Hosp., Inc., 399 F.3d 1 (1st Cir. 2005)...................................48

United States v. Mead Corp., 533 U.S. 218 (2001) 22

U.S. v. Texas, 507 U.S. 529 (1993)... 48, 50

U.S. v. Wurtz, 303 U.S. 414 (1938)..48

United Space Alliance, LLC v. Solis, 824 F.Supp.2d 68 (D.D.C. 2011) 54

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)................ 53, 54

United States v. Karo, 468 U.S. 705 (1984) 36

United States v. Mead Corp., 533 U.S. 218 (2001) 22

United States v. Munsey Trust Co., 332 U.S. 234 (1947)..51

United States v. State of Michigan, 781 F.Supp. 492 (E.D. Mich. 1991)................82

United States v. Vazquez-Rivera, 135 F.3d 172 (1st Cir. 1998) 34

Via Christi Regional Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259 (10th Cir. 2007) . 21, 22

Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982)...55

Vitarelli v. Seaton, 359 U.S. 535 (1959)... 53, 57

Walker River Paiute Tribe v. U.S. Dep't of Hous. & Urban Dev., 68 F.Supp.3d 1202 (D. Nev. 2014) 63, 64

Wheeling-Pittsburgh Steel Corporation v. Mitsui & Co., 221 F.3d 924 (6th Cir. 2000) 52

WildEarth Guardians v. United States Fish & Wildlife Serv., 784 F.3d 677 (10th Cir. 2015)...22

Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983) 82

Wirth v. United States, 36 Fed. Cl. 517 (Fed. Cl. 1996)...57

Zellous v. Broadhead Associates, 906 F.2d 94 (3rd Cir. 1990)...............................79

STATUTES

120 Stat. 2820 72

25 U.S.C. §702 65

42 U.S.C. §1437bb (1988) 2, 3

42 U.S.C. §5304(d) (1986) 25

42 U.S.C. §5304(e) 25

42 U.S.C. §5311 (1982) 25

5 U.S.C. §706 53

99 Stat. 913 71

OTHER AUTHORITIES

62 Fed. Reg. 35719 (July 2, 1997) 6

62 Fed. Reg. 35726 (July 2, 1997) 25, 38

62 Fed. Reg. 35743 7

62 Fed. Reg. 35746 (July 2, 1997) 7

63 Fed. Reg. 12334 6

63 Fed. Reg. 12343 (March 12, 1998) 3, 8

63 Fed. Reg. 12347 (March 12, 1998) 7

63 Fed. Reg. 12367 (March 12, 1998) 14

63 Fed. Reg. 12371 (March 12, 1998) 6

63 Fed. Reg. 4083 (Jan. 28, 1998) 3

72 Fed. Reg. 20025 (April 20, 2007) 14

Administrative Procedure Act 65

Appropriations Clause, Art. I, §9, cl. 7 .... 70, 71, 77

Principles of Federal Appropriations Law B-271607, June 3, 1996 73

Principles of Federal Appropriations Law B-279886, Apr. 28, 1998 73

Principles of Federal Appropriations Law 3 Comp. Dec. 623, 628 (1987) 73

Principles of Federal Appropriations Law 40 Comp. Gen. 694, 696 (1961) 73

Debt Collection Act of 1982 50

NAHASDA §102(b)(2)(A)(v) 5, 32

NAHASDA §106(b)(2) 6

NAHASDA §2(2) 5

NAHASDA §2(7) 5

NAHASDA §202 .... 4, 44

NAHASDA §203(b) 4, 13, 32

NAHASDA §302(d)(1)(A) 4

NAHASDA §401 .... passim

NAHASDA §405 .... passim

P.L. 106-568 §1003 (2000) 44

P.L. 106-568, §1003 47

P.L. 99-160 (Nov. 25, 1985) 71

Sen. Rpt. 110-238 (110th Cong., 1st Sess.) 34, 36

Sutherland Statutes and Statutory Construction § 18.07 at 90-91 (7th ed. 2009)...33

RULES

Fed. R. Civ. P. 52(a)(6) 21

REGULATIONS

24 C.F.R. §§905.102, 434 (1995) 4

24 C.F.R. §§905.401, *et seq.* (1995) 2, 5

24 C.F.R. §905, Subpart C (1995) 5

24 C.F.R. §905.427, 440(b) 3

24 C.F.R. §905.428(c)(1995) 4

24 C.F.R. §1000.318 .... passim

24 C.F.R. 1000.336 ....7, 14

24 C.F.R. §1000.520 58

24 C.F.R. §1000.524 59

24 C.F.R. §1000.528 7

24 C.F.R. §1000.530 .... 6, 7, 59, 60

24 C.F.R. §1000.532 .... passim

24 C.F.R. §1000.534 37

24 C.F.R. §1000.536 75

24 C.F.R. §1000.540 .... 14, 28, 56

24 C.F.R. Part 1000...4, 14

24 C.F.R. Part 26... 14, 28

GLOSSARY

ACC – Annual Contributions Contract

APA – Administrative Procedure Act

CDBG – Community Development Block Grant

FCAS – Formula Current Assisted Stock

FRF – Formula Response Form

HHS – U.S. Department of Health and Human Services

HUD – U.S. Department of Housing and Urban Development

IHBG – Indian Housing Block Grant

IHP – Indian Housing Plan

MHOA – Mutual Help and Occupancy Agreement

NAHASDA – Native American Housing and Self-Determination Act

ONAP – HUD's Office of Native American Programs

TAR – Tenant Account Receivable

TDHE – Tribally Designated Housing Entity

STATEMENT OF THE ISSUES

The Native American Housing Assistance and Self-Determination Act ("NAHASDA"), P.L. 104-330, (25 U.S.C. §§4101, *et seq.*),[1] requires Indian tribes to maintain and operate homes that were constructed under NAHASDA's predecessor, the 1937 Housing Act. NAHASDA further requires, subject to overall NAHASDA appropriations, the Department of Housing and Urban Development ("HUD") to make available sufficient funds (called Formula Current Assisted Stock or "FCAS" funds) to meet that obligation. The issues are:

1. Whether HUD must comply with NAHASDA's notice and hearing requirements before recapturing the tribes' FCAS funds;

2. Whether NAHASDA allows HUD to recapture portions of a tribe's FCAS funding without finding that the tribe failed to substantially comply with NAHASDA;

3. Whether NAHASDA prohibits HUD from recapturing a tribe's FCAS funding without finding that the tribe had not already expended those funds on affordable housing activities;

4. Whether the district court clearly erred in finding that the tribes were prejudiced by HUD's failure to comply with the regulations under NAHASDA

[1] Appellees will cite the applicable NAHASDA Public Law section rather than the U.S. Code section.

sections 401 and 405 before recapturing the tribes' FCAS funding;

5. Whether the district court abused its discretion in not remanding these appeals to HUD;

6. Whether the district court clearly erred in finding that the return of recaptured FCAS funds to the tribes through funding adjustments was not an award of "money damages" under §702 of the Administrative Procedures Act; and

7. Whether the district court abused its equitable discretion in ordering HUD to comply with its stipulation to return escrowed NAHASDA funds to certain tribes.

STATEMENT OF THE CASE

A. NAHASDA's Predecessor and the Mutual Help Program

Before passage of NAHASDA in 1996, Native American housing was provided under the United States Housing Act of 1937 (the "1937 Act"). *See* 42 U.S.C. §1437bb (1988). Virtually all homes at issue in these appeals were built before NAHASDA and funded under a 1937 Act program, the "Mutual Help" Program. *See* 24 C.F.R. §§905.401, *et seq.* (1995), Appellees' Addendum ("Aple.Add.") 1-20. Under NAHASDA, the Mutual Help program remained pertinent.[2] The lease-to-purchase agreements (the "MHOA"), under that program,

[2] NAHASDA §502.

most of which were for an initial 25-year term, survived and bound the parties.[3] NAHASDA §507. As HUD explained in its NAHASDA transition statement, appellees were required to "honor existing contracts the IHA has entered into with others prior to NAHASDA." 63 Fed. Reg. 4083 (Jan. 28, 1998), Aple.Add. 21.

The MHOA defined the conditions under which lessees could purchase the home. Upon lease execution, the home was assigned a purchase price that declined over a 25-year amortization period unrelated to the lessee's rent payment. 24 C.F.R. §905.427, 440(b), Aple.Add. 6-7, 11-12; Appellees' Supplemental Appendix ("Aple.App.") 62-63 (MHOA §§5.1, 7.2).

Although the lessee was generally expected to purchase the home by the end of the amortization period, he could not do so if the rent was in arrears. HUD Brief, 40; 63 Fed. Reg. 12343 (March 12, 1998), Aple.Add. 36-38 (preamble requires pay-off before home can be conveyed); Aple.App. 63 (MHOA §7.1) ("The homebuyer may at the homebuyer's option purchase the home on or after the date of occupancy, but only if the homebuyer has met all of his obligations under this Agreement.").

B. NAHASDA's Recognition of Tribes' 1937 Act Home Responsibilities

Although Mutual Help tenants were responsible for routine maintenance, the

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[3] HUD Brief, 3.

tribes retained significant responsibilities, including a duty to maintain the home in safe and sanitary condition. 24 C.F.R. §905.428(c)(1995), Aple.Add. 7-8. Because rent was based on tenants' income, those costs could not be recovered. Accordingly, HUD provided an annual operating subsidy over the project's life via an "Annual Contributions Contract" ("ACC"). 24 C.F.R. §§905.102, 434 (1995), Aple.Add. 104, 9-10.

In enacting NAHASDA, Congress recognized that tribes needed funds to operate and maintain all their 1937 Act homes. This obligatory funding would become Formula Current Assisted Stock ("FCAS") funding, which is taken off the top of the annual appropriation before other NAHASDA funding needs are met because FCAS funding is the only NAHASDA grant category for which Congress required that sufficient funds be set aside. 24 C.F.R. Part 1000, Appendix A, ¶¶1, 5, Aple.Add. 97-98. As further assurance, Congress provided that no tribe could receive a NAHASDA grant smaller than its operating and modernization subsidies under the 1937 Act. NAHASDA §302(d)(1)(A).

Having assured sufficient FCAS operating funds, Congress *twice* directed tribes themselves to provide sufficient funding to continue to operate those homes. NAHASDA §203(b) required each recipient owning or operating FCAS to "reserve and use for operating assistance under [NAHASDA §202(1)]… such [grant] amounts as may be necessary to provide for the continued maintenance and

efficient operation of such housing." NAHASDA §102(b)(2)(A)(v) also requires tribes to include in their annual housing plans "a description of the manner in which the recipient will protect and maintain the viability of housing owned and operated by the recipient…pursuant to the [1937 Act]."

C. NAHASDA and Indian Self Determination

Before NAHASDA, every material lease term was pre-written by HUD and mandated by regulation,[4] and virtually every aspect of construction was regulated by HUD. 24 C.F.R. §905, Subpart C (1995). NAHASDA represented a paradigm shift. It was a "Self Determination Act." Congress stressed "There exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people."[5] Congress added:

> Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-government….

NAHASDA §2(7).

To that end, Congress allowed HUD to conduct only a "limited review" of a tribe's Indian housing plan. Also HUD and the tribes were to jointly develop

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4 24 C.F.R. §905.401, *et seq.* (1995), Aple.Add. 1-20.

5 NAHASDA §2(2).

regulations through negotiated rulemaking. *Id.,* §106(b)(2). Tribes were allowed to expend grant funds on a wide spectrum of housing programs of their own design. *Id.*, §202. NAHASDA regulations require HUD to work with recipients to resolve issues before imposing any sanction. *See* 24 C.F.R. §1000.530, Aple.Add. 119-120. Consistent with NAHASDA's principle of self-determination, recapture could occur only where the tribe "failed to comply substantially" with NAHASDA. NAHASDA §401(a)(1).

D. HUD's Initial NAHASDA Rulemaking

In early 1997, under NAHASDA §106, HUD convened NAHASDA's first Negotiated Rulemaking Committee (the "Committee"), comprised of 48 tribal and 10 HUD representatives. *See* 62 Fed. Reg. 35719 (July 2, 1997), Aple.Add. 106-107. HUD published the Committee's Proposed rules on July 2, 1997, *id.,* and final rules were published on March 12, 1998. 63 Fed. Reg. 12334, Aple.Add. 22-103.

The two regulations most germane here changed substantially between proposed and final rulemaking:

1. 24 C.F.R. §1000.532—the hearing regulation under NAHASDA §405

As *enacted*, 24 C.F.R. §1000.532(b) required grant recipients to be provided an opportunity for a fair adjudicatory hearing before grant funds could be recaptured under §405. 63 Fed. Reg. 12371 (March 12, 1998), Aple.Add. 92-93. The regulation did not start out that way.

As proposed, HUD would have been empowered to summarily recapture funds under §405. Proposed 24 C.F.R. §1000.528, 62 Fed. Reg. 35746 (July 2, 1997), Aple.Add. 112-113. The tribes reacted vigorously:

> The tribal position in the proposed rule was that prior to the Department taking action under section 405(c) to adjust, reduce or withdraw future grant awards, the Department must provide notice and an opportunity for a hearing…
>
> Extensive comments were received which unanimously supported the tribal position…

63 Fed. Reg. 12347 (March 12, 1998), Aple.Add. 44. HUD relented: "The final rule states that HUD will…provide the recipient with a hearing identical to that provided under Section 401(a) of NAHASDA." *Id.* (24 C.F.R. §1000.532). In addition, a precondition was added to require HUD to give tribes the opportunity to take corrective action before funds could be recaptured under §1000.532. 24 CFR §1000.530. Neither existed in the proposed Rule. 62 Fed. Reg. 35746 (July 2, 1997), Aple.Add. 112-113.

2. 24 C.F.R. §1000.318—the FCAS regulation

HUD claims the original negotiated rulemaking committee was purposefully strict in terminating a unit's FCAS funding eligibility, lest tribes intentionally keep these units in inventory. HUD Brief, 35. The proposed rule was indeed rigid. No consideration was given to the "practicality" of conveyance. Proposed 24 C.F.R. 1000.336, 62 Fed. Reg. 35743, Aple.Add. 110.

In comments on the proposed rules, one commenter argued that units should be allowed to remain FCAS-eligible as long as they remained "in management." 63 Fed. Reg. 12343 (March 12, 1998), Aple.Add. 36. That proposal would have taken the rule to the opposite extreme—allowing tribes to perpetually claim FCAS for paid-off units it kept "in management." That, HUD responded, "gives the IHA no incentive to convey units out of management…." *Id.*

Ultimately:

> The Committee considered this concern and has added language that requires conveyance of the units as soon as practicable as they are paid off….

Id. The Committee added the word "practicable" to give the tribes discretion and flexibility.

E. Administrative Proceedings

In late 2001, an Inspector General's report criticized HUD for its failure to monitor compliance with §1000.318. Aplt. App. 725, 740. Before then, HUD had largely deferred to the tribes' determination when a tribally-owned home was no longer eligible for FCAS funding. *Id.*, 741. The Inspector General demanded FCAS funding be discontinued as soon as "units were paid off," regardless of individual circumstances. *Id.* HUD initially took issue with the report, arguing "[t]here are several situations where the tribe would continue to own, operate and maintain the units after 25 years, including…modernization which increased the

term or price of the unit…." *Id.,* 791. Nevertheless, going forward, HUD became unsympathetic to individual tribal circumstances.

Here, HUD claims the information it needed to recapture funds often came unsolicited from the tribes themselves—an assertion used to bootstrap several arguments. HUD Brief, 9-11, 31-34, 61-62. HUD focuses exclusively on a handful of cases where the tribe did not own the homes at the time of the original FCAS grant. *Id.,* 9-10, 31-34.[6] But the overwhelming majority of homes at issue in here were owned and operated by the tribes during the fiscal year for which the FCAS funds were originally granted.[7]

A careful reading of HUD's brief shows that, for these tribally-owned homes, HUD did not (and could not) rely on tribal confessions for its recaptures. HUD initiated these recaptures only because it "had reason to believe that some tribes" were overcounting FCAS. *Id.,* 9. HUD asserts it "also noticed" that, with respect to

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[6] HUD's focus on unrepresentative already-conveyed homes is consistent with its attempt to re-litigate *Fort Peck Housing Authority v. HUD,* 367 Fed. Appx. 884 (10th Cir. 2010) ("*Fort Peck I*") in these appeals. The district court ruled against the tribes in the present appeals on the applicability of *Fort Peck I*, and the tribes have not appealed that ruling.

The district court here understood that *Fort Peck I* "did not determine the validity of HUD's denial of funds for units that were still owned and operated" by the tribe. Aplt. Add. D-4. It is a distinction that HUD's brief works hard to muddle.

[7] *See, e.g.,* Aplt. App. 905-927; 1368-1382; 1410-1412; 1455-1467; 4032-47, 4051; 5680; 4306-4312; 2059, 2085-86.

this majority of affected homes, some MHOA's seem to have "expired," pointing to the projects' "Date of Full Availability" as reflected on the annual Formula Response Form ("FRF"). HUD Brief, 9, 11, n.6.

HUD prepares the FRF from internal agency records. While tribes are instructed to correct any errors on the Form,[8] the Inspector General criticized HUD's reliance on that process to obtain reliable FCAS information. Aplt. App. 741. The Inspector General recommended "audit[s]" of tribes' FCAS counts. *Id.,* 744.

HUD does not allege the FRF contains tribally-generated information sufficient to justify recaptures. The recaptures occurred in these appeals precisely because HUD concluded, based on other information, that the relevant FRF's had claimed homes ineligible for FCAS. Moreover, the Form says nothing about: (i) when individual MHOAs were signed and the 25-year amortization period commenced; or (ii) what circumstances may have caused the tribe to delay any conveyance. HUD acquired that critical information only during the course of the recapture proceedings themselves, as the tribe's responded to HUD's complaint. *See, e.g.*, Aplt. App. 876-895; 1863-1865, 4019-4027, 4306-4312, 4386, 5680-5682, 4971-4972. Thus, HUD makes its case on the basis of an unrepresentative microcosm—exacerbated by HUD's inclusion of houses not at issue in these

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[8] Aplt. App. 142.

appeals[9] and HUD's misstatements of fact.[10]

The administrative proceedings below did not involve "lengthy exchanges of information" in which the tribes had "essentially unlimited opportunities" to make their case. *Cf.* HUD Brief, 17. For example, Tlingit Haida was allowed to write two letters before HUD took final action on the recapture. Aplt. App. 876-879; 905-906; 925-927. The administrative record of that "proceeding"—from initial demand to final action—consumes 53 pages.[11] *See also* Aplt. App. 5054-5057,

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[9] For example: HUD wrongly asserts Bristol Bay claimed recoupment for FCAS units which were outside the six year statute of limitations and therefore not included in the judgment. HUD Brief, 11; Aplt. App. 5261, 5270, 3912, 6013 (judgment showing no award of funds to Bristol Bay recaptured before statute of limitations beginning date). HUD also cites to a recapture from Oglala Sioux—a recapture that is *not* part of the District Court's Judgment. HUD Brief, 10; Aplt. App. 2801-2814; 3854-3858; 3880-3881.

[10] HUD claims 52 Northwest Inupiat homes were conveyed before 1998 and hence ineligible for FCAS. HUD Brief, 33, n. 8. No Northwest Inupiat homes were conveyed prior to 1998; some were *paid off* before 1998 but conveyed in 1998 or later. Aplt. App. 5054-5057. In *Blackfeet*, HUD recaptured funds for units in the year they were conveyed, when in fact they did not become ineligible until the following fiscal year. Aplt. App. 4850 (due to the timing of reporting deadlines in the FRF, units conveyed in a one fiscal year are still funded in the following fiscal year. This occurs because funding for a fiscal year is based on the previous year eligible units. In short, FY2002 funds are based on the eligible FY2001 units, including those conveyed in FY2001).

[11] Aplt. App. 874-927. Tlingit Haida's entire 895-page "administrative record" includes 580 pages representing generalized notices sent to every tribe in the country over a 10-year period. Most of the remainder are standard forms covering Tlingit Haida's entire NAHASDA history through FY2008, including 6 years for which no recapture occurred. HUD pads all the administrative records with these same generalized notices and forms.

5060 (HUD removed 53 homes without affording Northwest an opportunity to explain the delayed conveyance); Aplt. App. 5671-5673 (removal and demand for repayment for 182 units after allowing Chippewa Cree a single letter and phone call in response).

HUD suggests it "accepted almost every reason the tribes gave" for any delayed conveyance. HUD Brief, 26. In support, HUD claims that only "several plaintiffs" raised rent arrearages and the pendency of repairs or modernization as a reason for postponing conveyance. *Id.*, 13-14.

To begin with, the grant restorations the district court ordered in these appeals totaled $19.5 million—demonstrating that HUD did not accede to "almost every" tribal request.[12] More fundamentally, for most of the tribes, the primary or sole reason HUD gave for recapture was the agency's refusal to allow, under any circumstance, for either: (i) ongoing tenant home repairs or modernization; or (ii) tenant rent account receivables (or "TARs") to serve a legitimate reason for delaying conveyance of the home. *See, e.g.*, Aplt. App. 905-925; 4022-4024, 4032-4047; 4310; 5680-5686; 5286; 4971-4974.

HUD's truncated process precluded any meaningful consideration of tribes' circumstances. For example, Tlingit Haida deferred conveyance of numerous units

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[12] Appellants' Addendum, A-1-A-62 ("Aplt. Add.").

because it was deep into implementation of a class action settlement over the condition of the region's homes. Aplt. App. 876-878. That settlement involved comprehensive repairs to hundreds of homes. Repairs went slowly; funding was sporadic; the tenants were engaged in a rent strike; and implementation of the executory settlement was on knife's edge. *Id.*

HUD's response was robotic. Without taking Tlingit Haida's circumstances into account, HUD simply restated that the pendency of repairs was no reason not to convey the homes, and "strict" MHOA enforcement under 24 C.F.R. §1000.318(b)(1) meant that, Tlingit Haida faced the Hobson's choice of: (i) conveying the homes in mid-repair, thus losing its only security for delinquencies owed by these often judgment-proof tenants; or (ii) work with the delinquent tenants while continuing the repairs, but losing those homes' FCAS funds—funds critically needed to complete those repairs. Aplt. App. 925-926.

Similarly, HUD ignored the unique situation created when Big Pine left its umbrella Housing Authority and formed its own Tribally Designated Housing Entity ("TDHE"). Aplt. App. 5835-5836. As a result, Big Pine was unable to access tenant files and could not determine if units eligible for conveyance had been paid off or met all requirements for conveyance. *Id.* HUD dismissed this issue with a two-sentence paragraph, citing NAHASDA §203. *Id.,* 5837.

In any event, HUD claims tribes were always advised of their right to appeal.

HUD Brief, 16-18. Not so. The only recourse Tlingit Haida was ever apprised of was the ability to appeal to a *subordinate* employee of the HUD official making the initial decision. Aplt. App. 875.[13] Many others were not advised of any appeal options. Aplt. App. 3688, 5060, 4050-4052, 5671-5673, 4671-72, 4494-4496. None of the tribes were given the notice required by §1000.532.

When a tribe was advised of "appeal" rights, the only avenue offered was 24 C.F.R. §1000.336, which only addressed challenges to census data, not FCAS corrections.[14] HUD Brief, 16. That "appeal" solely involved writing a letter to the Assistant Secretary. Aple.Add. 114-115. This in contradistinction to the adjudicatory hearing process under NAHASDA §401 or §405. Pursuant to 24 C.F.R. §1000.540, adjudicatory hearings under §§401 and 405 are governed by the formal hearing procedures of 24 C.F.R. Part 26, which include, *inter alia*, *de novo* review by an Administrative Law Judge or Board of Contracts Appeals Judge; and

[13] The initial decision was made by the Acting Deputy Assistant Secretary. The letter ended: "Should you believe this information is incorrect, please notify Jackie Kruszek of my staff…." Aplt. App. 875. No mention is made of any other appeal or challenge procedure. HUD's citation to the supposed advisement of Tlingit Haida's appeal rights is, in fact, a HUD letter written February 26, 2004 regarding Tlingit Haida's FY2004 grant—something not at issue in these appeals. *Compare* HUD Brief, 18 *with* Aplt. App. 981.

[14] It was not until 2007 that HUD expanded §1000.336 to include FCAS challenges. *Compare* 63 Fed. Reg. 12367 (March 12, 1998) *with* 72 Fed. Reg. 20025 (April 20, 2007), Aple.Add. 84, 117-118.

the rights to broad discovery, to secure subpoenas, to cross-examination, and to a decision based only on the record.

Finally, HUD's brief alleges that, when tribes requested an actual hearing, the agency took the position that no hearing was required because HUD "had common-law authority to recover the overpayments without a formal hearing." HUD Brief, 16. In fact, HUD never took that position during the administrative process. *See* Aplt. App. 875, 1868, 4074.

F. District Court Proceedings

These appeals address only the legal issues surrounding HUD’s recapture of FCAS funds without complying with the regulations implementing sections 401-405. The parties abandoned any potential factual issues in the District Court.

The District Court ordered "coordinated" briefing based on the parties' agreement that:

- the issues were "common legal issues"; and
- "coordinated briefing of [these] common legal issues would be the least expensive and most efficient means of adjudication of these issues."

Scheduling Order, May 27, 2011 at 1-2; Aplt. App. 573-574. HUD argues the court "ordered" this approach to handling these cases. HUD Brief, 19. While true, it was only because HUD joined the tribes in agreeing to it. Aplt. App. 573.

The district court issued a series of rulings. To begin with, the court did *not* rule that "HUD acted arbitrarily and capriciously in failing to accept every reason the tribes gave for failing to convey a unit on its conveyance date…." *Cf.* HUD Brief, 20. Rather, the court concluded HUD had acted arbitrarily in refusing to even consider whether it was "practicable" to convey away homes in six very specific examples. Aplt. Add. D-8-D-10. The court held that HUD violated NAHASDA §§401(a) and 405(d) and the implementing regulations by failing to offer tribes an adjudicatory hearing before recapturing their grant funds. *Id.,* D-11-D-12. Later, the court rejected HUD's claim of "inherent authority" to recapture funds summarily, noting that HUD's theory would make a dead letter of §§401 and 405 of NAHASDA, since HUD would likely never hold a hearing under either section if it could dispose of the matter through a perfunctory exchange. Aplt. Add. C-5. Next, the court held that HUD violated 24 C.F.R. §1000.532 by failing to consider whether funds being recaptured had already been expended on affordable housing activities. *Id*., C-6, B-15.

The court rejected HUD's request that all of the tribes' claims be remanded to HUD. The court held that a remand would be "futile and would further delay the resolution of these disputes." Aplt. Add. C-6. The court added that "it would be unjust to further delay" resolution of these old cases. Aplt. Add. B-14-B-15.

The court also rejected HUD’s argument that the tribes were not prejudiced

by the recaptures because HUD correctly determined that the FCAS units were ineligible under §1000.318. "HUD had no authority to recapture previously awarded grant funds without observing the procedural protections provided to the Tribes by the NAHASDA regulatory scheme. It was incumbent upon HUD to follow the NAHASDA's procedural requirements, and the agency's failure to do so was itself prejudicial." Aplt. Add. B-47-B-48, B-6.

Finally, the court rejected HUD's argument that the court's authority to order a return of the recaptured grant funds under APA §702 was limited to whatever funds might still be available from the fiscal years for which the disputed grants were originally awarded. The court held the critical actual distinction between the tribes' facts, and HUD's cited cases, was that NAHASDA appropriations were continuing appropriations that remained available until expended and were freely interchangeable among fiscal years. Aplt. Add. C-8. The court acknowledged it had previously ruled that ordering the funds' return did constitute compensatory damages, for which sovereign immunity is not waived under the APA; however, the court said, that ruling had been based on a "faulty factual premise." *Id.* The false premise was that annual NAHASDA fiscal year appropriations represented separate accounts that could not be comingled—a misperception that HUD, at the time, did nothing to correct. *Id.*

HUD's brief complains that the district court failed to address HUD's

allegation that some recaptured funds were attributable to homes that had been conveyed or never built. As to these homes, HUD argued the tribes were not prejudiced by HUD's failure to comply with NAHASDA's procedural safeguards. HUD Brief, 22. In fact, the district court addressed and rejected HUD's claims. With respect to *Sicangu*, the court:

> made a considerable effort to examine the administrative record to resolve these disputes and is unable to do so. As previously observed the process used was so informal, fluid and ill defined that no factual findings supporting the recaptures can be discerned. The deference given to factual findings by an agency required under APA review is not possible. There would be no such difficulty if HUD had provided the hearings that were required as this Court has previously ruled.

Aplt. Add. B-42. In the other cases, the court held that HUD's disputed factual assertions "should have been addressed at the hearing which HUD should have provided." Aplt. Add. B-23; *accord*, B-6-B-8, B-14, B-39. Ultimately, the court concluded "HUD had no authority to recapture previously awarded grant funds without observing the procedural protections provided to the Tribes by the NAHASDA regulatory scheme. It was incumbent upon HUD to follow the NAHASDA's procedural requirements, and the agency's failure to do so was itself prejudicial." Aplt. Add. B-47-B-48.

In its final judgments, the court ordered HUD to restore the grant funds illegally recaptured from the Tribes. The court also prospectively prohibited HUD from acting on any further recapture efforts for grants through FY2008 until the

agency complied with the requirements of NAHASDA §401(a).

SUMMARY OF ARGUMENT

The resolution of these appeals will define the scope of Indian tribes' hearing rights under NAHASDA. HUD recaptured roughly $19.5 million in previously-awarded housing grants from the tribes. The grants had been awarded years previously to help those tribes meet their obligation, under NAHASDA, to care for homes built under NAHASDA's predecessor statute—the 1937 Housing Act.

HUD recaptured those funds because, according to a 2001 HUD Inspector General's report, the tribes had misrepresented those homes' eligibility for assistance under NAHASDA by "inflat[ing]" their eligible housing counts nationwide. The IG urged HUD to audit individual tribes to identify the noncompliant, and that is what HUD did.

The tribes' position is that, when Congress empowered HUD to administratively recapture grant funds, it also placed limitations on that power. These include: (i) the availability of a hearing before the tribe's funds could be recaptured; and (ii) limiting administrative recapture to those circumstances in which the tribe had not substantially complied with NAHASDA.

The tribes believe these limitations are mandatory. HUD argues they are optional.

The tribes' position relies not only on the plain language of these statutes, but on the purpose of NAHASDA *in general* (*i.e.*, that it is an Indian self-determination law) and the NAHASDA enforcement provisions *in particular* (*i.e.*, that they are intended to protect against precipitous and arbitrary HUD actions that could cripple tribal efforts to meet their housing needs).

HUD's position disregards both, fixing instead on: (i) crabbed, litigation-driven and immaterial distinctions (these weren't cases of noncompliance, but rather of "error"); and (ii) hyper-technical word games (when is an "audit" not an audit?).

Two federal Courts of Appeals have already faulted HUD for the agency's eagerness to avoid granting any hearings under the language at issue here. In both cases, as here, HUD's goal was to lure the reader toward the myopic, ignoring what is really at stake. Reading the statutes as a whole, and in light of their purpose, the inevitable conclusion is that Congress intended to afford Native Americans a meaningful hearing before their housing programs could be jeopardized, and certainly disrupted, by HUD's recapturing critically-needed grant funds.

ARGUMENT

STANDARD OF REVIEW

This court reviews *de novo* the district court's decision reviewing the

decision of an agency. *See Via Christi Regional Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007). Here, that *de novo* review would encompass HUD's decision regarding the interpretation and application of NAHASDA.

There are, however, factual issues involved in this appeal that were not part of the agency decision. These include the lower court's factual findings that: (i) the tribes were prejudiced by HUD's failure to follow NAHASDA's procedural protections before recapturing FCAS funding; and (ii) that HUD's NAHASDA appropriations were part of a single source of funds that could be used to pay any fiscal year's obligations. These findings are reviewed only under the clear error standard. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1078 (10th Cir. 2009); Fed. R. Civ. P. 52(a)(6).

With regard to this court's review of the underlying agency decisions, agency actions are generally reviewed for abuse of discretion. An agency abuses its discretion when it fails to act in accordance with the law. *See Via Christi,* 509 F.3d at 1271. The APA requires agencies to comply with their own regulations. *Id.*, quoting *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004).

The core NAHASDA issues in this appeal are questions of statutory construction and interpretation. HUD's interpretations of the statutes here (NAHASDA §§401 and 405) were not developed through rulemaking or agency

adjudication, and thus lack the force of law. Therefore, they receive no *Chevron* deference from this court. *See United States v. Mead Corp.,* 533 U.S. 218, 229 (2001); *Via Christi*, 509 F.3d at 1272 (statutory interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, that lack the force of law do not warrant *Chevron* deference). Deference is particularly inappropriate when, as here, an agency's interpretation is simply a litigation position. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). "Common law" authority was never raised at the agency level. *See* Aplt. App. 1868, 4074.

Nor do HUD's interpretations warrant traditional *Skidmore* deference, as the issues are purely legal and involve no agency expertise. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *Mead Corp.*, 533 U.S. at 233-34; *WildEarth Guardians v. United States Fish & Wildlife Serv.*, 784 F.3d 677, 682-83 (10th Cir. 2015).

NAHASDA is legislation enacted for the aid and protection of Indians. Therefore, it is subject to the "canon of construction requiring that an act be construed in favor of a reasonable interpretation advanced by a tribe." *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1057 (10th Cir. 2011); *Crow Tribal Housing Authority v. H.U.D.,* 781 F.3d 1095, 1103 (9th Cir. 2015) ("*Crow*");

Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461 (10th Cir. 1997). The canons further provide "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002).

In *Fort Peck I*, the court declined to apply that canon, noting that the allocation of FCAS funds at issue in that case benefit some tribes at the expense of others. There is, however, no such zero-sum game here. *Cf.* HUD Brief, 27. The decision here will define the scope of *all* Indian tribes' hearing rights under NAHASDA—regardless whether the funds at issue are "needs" funds or FCAS. Every Indian tribe benefits from affirmance; every Indian tribe suffers from the kind of crabbed reading of NAHASDA's tribal procedural rights sponsored by HUD.

The order requiring HUD to comply with the stipulation to return escrowed funds was an exercise of equitable discretion and thus is reviewed for abuse of discretion only. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982). The district court's decision declining to remand these appeals to HUD was a discretionary decision, and therefore is reviewed for abuse of discretion.

Finally, as to all of the rulings and findings made by the district court, this Court can affirm them "on any grounds adequately supported by the record, even

grounds not relied upon by the district court." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012).

A. NAHASDA and Its Implementing Regulations Bar HUD From Recapturing Funds Outside the Parameters of §§401 and 405

Congress created a comprehensive enforcement regime in NAHASDA, empowering HUD to administratively recapture funds, or "make appropriate adjustments" only under specific circumstances. Those circumstances are laid out in NAHASDA §§401(a) and 405(d) and their implementing regulations.

1. HUD Must Comply With Section 401(a) of NAHASDA Before Recapturing Allocated Grant Funds

HUD begins its brief by claiming that the issue here is "[w]hether HUD had the authority to recover grant funds…." HUD Brief, 2. Nobody has ever questioned HUD's authority to recover grant funds. The issue is whether HUD lawfully did so.

Section 401 of NAHASDA resolves that issue by authorizing HUD to "terminate, reduce, or limit" a recipient's grant funds" but *only if* HUD satisfies two preconditions:

- providing the tribe with notice and an opportunity for hearing; and
- finding that the tribe had "failed to comply substantially" with NAHASDA—in shorthand, "substantial noncompliance."

§401(a)(1)(A)-(C).[15] Section 401(a) does not simply give HUD an optional recapture procedure; if it did, the section would become meaningless. HUD would never use the process—indeed, the agency has an institutional history of avoiding any hearings under such a clause, believing them time consuming. *Kansas City v. U.S.H.U.D.,* 861 F.2d 739, 741-42 (D.C. Cir. 1988).

The relevant language of §§401 and 405 was taken verbatim from their public housing counterparts. According to HUD, NAHASDA §401 "is patterned after the community development block grant (CDBG) legislation at Title I of the Housing and Community Development Act of 1974 [the "CDBG Act"]…." 62 Fed. Reg. 35726 (July 2, 1997), Aple.Add. 109.[16]

At the time of NAHASDA's enactment, those seminal provisions had been interpreted by two Courts of Appeals as requiring an adjudicatory hearing when HUD sought to: (i) require a recipient to refund improperly collected monies (*Kansas City*, 861 F.2d at 744); and (ii) terminate a grant before the recipient had received any grant funds. *City of Boston v. U.S.H.U.D.,* 898 F.2d 828 (1st Cir. 1990) ("*Boston*").

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[15] In addition, HUD can ask the Attorney General to bring a civil action to recapture the grant funds. §401(c).

[16] The counterpart provision to NAHASDA §401 was §111 of the "CDBG Act", 42 U.S.C. §5311 (1982). The counterpart to §405(d) was §104(d) of the CDBG Act, 42 U.S.C. §5304(d) (1986) (now codified at 42 U.S.C. §5304(e)).

Central to both rulings was the Courts' belief that:

> Statutory procedural protections play a critical role [in administering public housing laws]…because they insure that a [recipient]…legally entitled to an annual [housing law]…grant will not be 'precipitously deprived of funding' pursuant to arbitrary action by HUD.

Kansas City, 861 F.2d at 744; *Boston,* 898 F.2d at 833. Section 401(a) and 405(d)'s predecessors, the courts held, must be interpreted in light of that purpose, and not according to "hyper-technical" theories advanced by HUD for the apparent purpose of avoiding the hearing requirement whenever possible. *Boston,* 898 F.2d at 832; *Kansas City*, 861 F.2d at 744.

Presumably, in grafting these public housing law provisions onto NAHASDA, Congress was aware of and intended to incorporate, then-existing judicial interpretations of those provisions. *OXY USA, Inc. v. Babbitt,* 230 F.3d 1178, 1187, n.9 (10th Cir. 2000) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) for "the well-settled presumption that Congress understands the state of existing law when it legislates").

Kansas City and *Boston* held that HUD must follow §401's precursor when it seeks to reduce current grant funding as a remedy for past noncompliance. Other courts have accepted this same interpretation. *See NAACP, Boston Chapter v. Kemp*, 721 F.Supp. 361, 368-369 (D. Mass. 1989) *citing Kansas City,* 861 F.2d at

742-44; *see also City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1425 (D.C. Cir. 1994) ("*Houston*").

HUD mentions neither *Kansas City* nor *Boston* in its brief. Instead, HUD argues that §401(a) is inapplicable because the tribes were not charged with substantial noncompliance, which HUD views as a trigger for §401(a)'s hearing requirement. HUD Brief, 57-60. The argument should be rejected for several reasons.

First, HUD's right to recover funds for past noncompliance is defined by 401(a), which requires the "noncompliance" to be "substantial". The statute cannot be circumvented by assuming an independent remedy exists in cases where the noncompliance is insubstantial. HUD's remedies for past noncompliance are those Congress prescribed in 401. Second, HUD's position conflicts with the statutory language. Section 401(a) states that, "***if***" HUD finds, after an opportunity for hearing, "that the recipient failed to comply substantially with any provision of the Act," ***then*** the agency may recapture funds under §401(a)(1)(B) or 401(c). An opportunity for hearing and a finding of substantial noncompliance are express prerequisites to recapture. Conversely, substantial noncompliance is not a prerequisite to the law's hearing requirement. Under §401(a), the opportunity for hearing comes first. "After" that hearing, the agency makes its decision regarding substantial noncompliance. As the Second Circuit explained, "It seems to us that,

when a statute provides that an agency must take some action after a hearing, 'if it finds' something to be true, the more persuasive reading is that the finding referred to is the fruit of the required hearing." *NRDC, Inc. v. United States*, 760 F.3d 151, 163 (2nd Cir. 2014).

Third, HUD's view would lead to an absurd result. HUD argues that by avoiding the accusation that the tribes are guilty of "substantial noncompliance," it can act without providing any basic adjudicatory protection detailed in 24 C.F.R. Part 26 as required by 24 C.F.R. §1000.540. *See* pp. 14-15, *ante*. The answer to that is simple: "[w]hen a statute dictates that that parties receive notice and a hearing…the provision of those basic procedural rights is not left to be decided by administrative flexibility or discretion." *Kansas City,* 861 F.2d at 744 (citations omitted).

All this illuminates the flaw in *Crow* and *Fort Belknap*, which HUD cites for the proposition that, if the agency simply declines to label tribal "errors" "substantial noncompliance," it avoids, via *ipse dixit*, the statutory hearing requirement. HUD Brief, 58; *see Fort Belknap Hous. Dep't v. Office of Pub. & Indian Hous.*, 726 F.3d 1099. 1105 ("Because HUD never found Fort Belknap to be in substantial noncompliance," §401 does not apply.)[17] To begin with, neither

[17] *Fort Belknap*'s discussion of this issue should simply be disregarded. *See* n.23, *post*.

Crow nor *Fort Belknap* cited either *Kansas City* or *Boston*, though even HUD itself had relied on *Kansas City* to define the scope and intent of §401 in settings untainted by litigious motives. Moreover, both *Fort Belknap* and *Crow* applied a 2008 amendment to NAHASDA that does not apply to these recaptures, which mostly occurred in 2002. *See* Section A(2)*, post.*

Crow and *Fort Belknap* assumed HUD did not "attribute[] errors to the Tribe," and allowed that the whole matter was "partly [HUD's] fault." *Crow*, 781 F.3d at 1101-02. From these passing observations, HUD concludes this case is not about tribal noncompliance. To the contrary, alleged tribal "noncompliance" is at the heart of the matter. HUD had initially funded the disputed 1937 Act homes based on unit counts contained on the standard "FRF" FCAS list. HUD Brief, 9; Aplt. App. 142. This list was indeed initially drawn by HUD, from "HUD records." Aplt. App. 142. However, tribes are instructed to report any homes on that list which were eligible for conveyance under 24 C.F.R. §1000.318. *Id.* As HUD made clear from the outset, for discrepancies contained on the FRF, it is the tribes' responsibility "to review the information and report back to HUD any discrepancies prior to September 15 of that FY." Aplt. App. 2627.[18]

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[18] The Tribes' obligation to insure a correct FCAS count arises from NAHASDA itself. *See* §§102(c)(4) and 102(D)-(H) (1996); 203(b); 404(c).

In its 2001 audit, HUD's Inspector General criticized HUD for being so "heavily dependent" on tribal self-reporting of FCAS inventories that "inflat[ed]" their FCAS counts by not disclosing that their FRF contained units that were "ineligible" for FCAS funds. Aplt. App. 740, 744. Nor, the OIG stressed, was this tribal nondisclosure mere random "error." The OIG argued that, since it found that four of five audited tribes had received unlawful FCAS funding, "there is likely a significant problem nationwide." *Id.,* 743. One source of the problem, the OIG added, was that there is "little incentive" for a tribe to honestly report its eligible FCAS inventory—an indictment that sounds much like "noncompliance," and rather less like a math error. *Id.,* 741. To wit, HUD's only "fault" was (in HUD's view) not catching the tribes' unlawful FCAS claims sooner.

HUD next argues that, unless the funds at issue were actually "expended" in violation of NAHASDA, the agency is free to recapture those funds summarily. HUD Brief, 46-51. But while a single word viewed in isolation may superficially support a given reading (here the word "expended" in §401(a)(1)(B)), "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King v. Burwell,* 135 S.Ct. 2480, 2489 (2015). That maxim applies here.

Indeed, it was for that reason that *Kansas City* implicitly rejected HUD's theory, while *Boston* did so expressly. In *Kansas City*, HUD ordered the city to

refund certain assessments that HUD believed were unlawfully *collected*. 861 F.2d at 741. The court held that HUD could not recoup the funds without first affording the city a hearing under the counterpart of §401(a)(1) although the CDBG statute, like §401(a), referred to recapturing funds that "were not *expended* in accordance with this chapter." *Id.* There was no allegation of unlawful expenditure in *Kansas City,* but the court held that HUD's actions were subject to the hearing requirement. *Fort Belknap* ignored *Kansas City* when it held that §401(a) was inapplicable because HUD only alleged that the tribe "incorrectly received funding." 726 F.3d at 1106. Like this case, *Kansas City* squarely involved the incorrect receipt of certain assessments.

In *Boston,* the focus was on the predecessor to §401(a)(1)(A), which requires a hearing opportunity before HUD "*terminates* payments…" HUD's decision there was to withdraw a grant before any funds changed hands. HUD argued that a grant cannot be "terminated" unless the city had already received some grant funds, since (as HUD argued it) you cannot terminate something that has not begun. 898 F.2d at 831. Hence, HUD contended its action did not trigger the procedural protections of §401(a)'s precursor. The court found this interpretation "hyper-technical." 898 F.2d at 832. Rescinding a grant at the outset harms a city's housing program just as severely as terminating payments mid-stream. *Id.* Hence, HUD's interpretation

was at odds with both the context of the law and the statute's goal of providing recipients with meaningful procedural protection. *Id.,* 832, 833.

The funds at issue here were granted for a specific purpose—to *expend* them on the operation and maintenance of Mutual Help homes, which the tribes are statutorily bound to do. NAHASDA, §102(b)(2)(A)(v), §203(b). HUD's allegation is that these funds were not "expended in accordance with [NAHASDA]," because the homes for which the aid was specifically granted were not eligible for FCAS assistance. A narrower interpretation of §401(a)(1)(B) offends its purpose to protect tribes from precipitous action just as did HUD's "hyper-technical" position in *Boston.*

2. The 2008 NAHASDA Amendments to §401(a) Are Not Applicable and Are Misconstrued by HUD

In 2008, Congress passed a number of amendments to NAHASDA. P.L. 110-411. One of those amendments added this paragraph to NAHASDA §401(a):

> The failure of a recipient to comply with the requirements of section 302(b)(1) regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this title.

Id., §401. HUD claims that this amendment: (i) merely clarified pre-existing law, and hence is applicable to grant years reaching back to 1998; and (ii) means that, if the source of the HUD/tribal dispute is FCAS over-reporting, the

noncompliance is not "substantial," even if the funds in controversy reach into the millions, or compromise most (or potentially all) of the tribe's housing funds.

a. The Amendment Is Not a Mere Clarification of Pre-Existing Law

HUD's claim that this amendment was simply a clarification of existing law [19] relies on: (1) the *subtitle* of the Senate Report's discussion of this amendment which uses the word "clarification"; and (2) on the court's opinion in *Crow,* 781 F.3d 1095. The decision of the Crow court, in turn is distinguishable because the court did not make the required analysis of nor apply the Indian canons to the §401 amendment.

On the merits of HUD's argument, mere titles—even in statutes themselves—are unreliable indicators of legislative intent. 2A Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 18.07 at 90-91 (7th ed. 2009). Where, as here, the text and context of an amendment establish that it is a substantive change of the law, congressional report labels of

[19] Notably, HUD issued a formal opinion that the statutory language change was an "amendment" that would require a conforming regulation before it could be implemented. PIH Notice 2009-50 (ONAP)(December 3, 2009), Aple.Add. 123-159. If the change had merely clarified existing law, new regulatory language would not have been necessary.

"clarification" are given little weight, or no weight at all. *Middleton v. City of Chi.,* 578 F.3d 655, 664 (7th Cir. 2009); *Pennsylvania Med. Soc'y v. Snider*, 29 F.3d 886, 900 (3d Cir. 1994); *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431 (10th Cir. 1997); *Suiter v. Mitchell Motor Coach Sales*, 151 F.3d 1275, (10th Cir. 1998); *see also United States v. Vazquez-Rivera,* 135 F.3d 172, 177 (1st Cir. 1998) ("Painting black lines on the sides of a horse and calling it a zebra does not make it one.")

The actual substance of the Senate Report makes it clear that Congress was in fact substantively amending then-current law, not just "clarifying" it:

> *Under this amendment,* if a grant recipient is required to relinquish overpaid funds due to the inclusion of housing units deemed ineligible under Section 301, the action does not constitute substantial non-compliance by the grantee and does not automatically trigger a formal administrative hearing process. *This amendment has been included due to the significant amount of time and resources involved in a hearing,* which may not be necessary when a grant recipient is otherwise with[in] the requirements of the Act.

Sen. Rpt. 110-238 (110th Cong., 1st Sess.) at 10 (emphasis added). According to the Senate Report, "[t]his amendment has been included due to" an allegedly undesirable result that would otherwise occur under then-existing law (*i.e.*, a hearing). And, the change would occur "[u]nder this amendment." *Id*.

Moreover, in deciding whether or not the amendment is a clarification, in the context of retroactivity, when the amendment alters substantive rights and liabilities of federal grantees, the amendment is presumed to apply only

prospectively. *Bennett, post*. As the court recognized in *Project B.A.S.I.C. v. O'Rourke*, 907 F.2d 1242 (1st Cir. 1990):

> The Supreme Court has said that, because it is difficult, and sometimes unfair, to make a grantholder abide by new (post-grant) statutory obligations, a grant-holder's obligations normally should be "evaluated by the law in effect *when the grants were made*," *Bennett v. New Jersey,* 470 U.S. 632, 640, 105 S.Ct. 1555, 1560, 84 L.Ed.2d 572 (1985) (emphasis added), not by the law "in effect at the time" the court "renders its decision," *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Elaborating, the Court stated,
>
> > "Absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants."
>
> *Bennett*, 470 U.S. at 641, 105 S.Ct. at 1561.

907 F.2d at 1246. *See also Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

In deciding whether this 2008 amendment affected Indian hearing rights prospectively, or whether Congress intended to possibly prejudice this ongoing litigation by claiming to merely clarify existing law, that choice should be guided by the "canon of construction requiring that an act be construed in favor of a reasonable interpretation advanced by a tribe." *Ramah Navajo Chapter v. Salazar*, 644 F.3d at 1057. As discussed, p. 22-23, *ante,* the issue here involves the hearing rights of *all* Indian tribes, and therefore the canon governs.

The Ninth Circuit in deciding *Crow* failed to make the necessary analysis of the amendment required by the cases they relied on. Their decision begins and ends with reading the word "clarification" in the subtitle of the Senate report and accepting it at face value. *Crow* at 1101. However, the word clarification appears nowhere in the title or text of the 401(a) amendment itself. The cases cited by the *Crow* court require more than just a reading of a subtitle in a Senate report to determine whether or not an amendment is a clarification or new substantive law. *Abkco Music, Inc. v. Lavere*, 217 F3d 684, 690 (9th Cir. 2000) (finding that there were specific references in the legislative history to clarifying ambiguities and that the substantive text of the amendment explicitly applied to conduct occurring before the date of the law); *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F3d 1259, 1267 n.6 (9th Cir. 1997) (congressional statutory title of clarification was not dispositive alone, but also required a detailed examination of the parallel substantive provisions of the amendment). The *Crow* Court made no such analysis of the substantive provisions of the 2008 amendment to section 401(a) of NAHASDA and their ruling is therefore distinguishable.

b. HUD Overstates the Significance of the 2008 Amendment

The 2008 amendment provides that an FCAS over-report "shall not, *in itself*, be considered to be substantial noncompliance …." Sec. 401(a), *ante* (emphasis added). Using synonymous qualifying language, the Senate Report said that FCAS

overcounts do not "*automatically*" qualify as "substantial noncompliance." *Sen. Rpt.* 110-238 (110th Cong., 1st Sess.) at 10. "In and of itself" means "standing alone." *United States v. Karo*, 468 U.S. 705, 722-23 (1984). *See also Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989). On its face, then, the amendment tells us that (as of its effective date) the mere fact that the matter involves an FCAS over-report does not, without more, warrant a finding of substantial noncompliance.

But what if there is more? What if the FCAS funds involved represent "a material amount of the NAHASDA funds budgeted by the recipient," and hence, *for that reason,* allegedly receiving those FCAS would meet the regulatory definition of "substantial noncompliance"—a definition that has not changed since the 2008 amendments? 24 C.F.R. 1000.534(c). Similarly, what if the FCAS overcount was fraudulent, or "represent[ed] a material pattern or practice of activities constituting willful noncompliance"—a circumstance also rising to "substantial noncompliance" under HUD's rules. *Id.*, §534(b). As we have seen, the recaptures in these appeals ran into millions. *See* p. 12*, ante.* It is unreasonable to impute to Congress an intent to deny every Indian tribe any hearing right, even when millions are at stake and tribal housing plans are at jeopardy, simply because, almost parenthetically, the controversy arose because of an FCAS funding dispute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania,*

Inc. 447 U.S. 102, 118 n.13 ("subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment"); *Lummi v. U.S.*, 106 Fed. Cl. 623, 630 n.13 (Fed. Cl. 2012) ("*Lummi II*")(expressing doubt that 2008 amendments could be applied to recipients' pre-2008 NAHASDA grants).

3. Even if this Court holds Section 401(a) Inapplicable, HUD was still required to comply with the regulations implementing section 405

Section 405(d) provides HUD the authority to review a grant recipient's performance to determine whether the recipient has complied with NAHASDA and its implementing regulations, and to "adjust the amount of a grant…in accordance with the findings of the Secretary." The court in *Kansas City* reconciled the §§401(a) and 405 equivalents by explaining that the predecessor to §401(a) applies in situations where HUD seeks to reduce, limit, or terminate grant funds that have already been awarded as a remedy for past noncompliance, while the precursor of §405 authorizes the Secretary to make funding adjustments to assure compliance in the *current grant year going forward.* 861 F.2d at 743 (emphasis supplied). HUD subscribed to that distinction in its preamble to the initial proposed NAHASDA rulemaking. 62 Fed. Reg. 35726 (July 2, 1997), Aple.Add. 108-109.

Besides being consistent with "the language and the context" of the section (*Kansas City,* 861 F.2d at 743, n.6), the court's past-vs.-future interpretation avoided statutory redundancy and also checked HUD's efforts to use §405(d)'s precursor as a means to avoid the hearing requirements of §401(a). 861 F.2d at 744.

The Negotiated Rulemaking Committee and Congress chose more direct means of checking HUD's predisposition against any meaningful hearing. When the recaptures in these cases occurred, the rule implementing §405(d), 24 C.F.R. §1000.532 (1998), required that HUD provide an adjudicatory hearing opportunity before taking any action under §405(d). *Id.*, §532(b). *See* pp. 10-11, *ante*. The regulation requires HUD to provide a recipient a hearing before adjusting the recipient's future year's grant amount—a requirement that exists only because of widespread tribal protest, during the initial Negotiated Rulemaking, over a proposed rule that contained no hearing requirement. *See* p. 6-7, *ante.*

In 2000, Congress amended §405(d) to require that any action taken under the subsection be "[s]ubject to section 401(a)." Sec. 405, P.L. 106-568. When a remedy (§405) is made "subject to" the procedural requirements of another section (§401), "subject to" is synonymous with "under," and means that actions under Section 405 "require[] full agency adherence to all [of §401(a)'s]….procedural

components." *St. Louis Fuel and Supply Co. v. F.E.R.C.*, 890 F.2d 446, 448-49 (D.C. Cir. 1989).

Kansas City teaches that, because of the nature of HUD's actions in these appeals (curing alleged past NAHASDA violations rather than addressing current and future problems), §401 governs here. But because of two unique circumstances here—HUD's hearing concession in rulemaking, and Congress' "subject to" proviso—there is no need to decide whether to adopt the past/future distinction between §401 and §405 drawn by *Kansas City,* since both sections require an adjudicatory hearing.

HUD argues its actions do not fall within the language of §405(d)—echoing the "hyper-technical" arguments rejected in *City of Boston.* HUD maintains §405(d) does not apply, arguing §405(d) authorizes HUD to make grant "adjustments" only if they are a product of some "report," "audit" or "review" of the recipient.

Section 405(b) sets out the kinds of reviews and audits contemplated by §405(d):

> In addition to any audit or review under subsection (a), to the extent the Secretary determines such action to be appropriate, the Secretary may conduct an audit or review of a recipient in order to--
>
> (A) determine whether the recipient—
>
> (i) has carried out--
>
> (I) eligible activities in a timely manner; and

> (II) eligible activities and certification in accordance with this Act and other applicable law;
> (ii) has a continuing capacity to carry out eligible activities in a timely manner; and
> (iii) is in compliance with the Indian housing plan of the recipient; and
>
> (B) verify the accuracy of information contained in any performance report submitted by the recipient under section 404.

This is no narrow or "hypertechnical" list (*cf. Boston,* 898 F.2d at 832-33)—a point stressed in *Lummi II,* 106 Fed. Cl. at 624. In *Lummi II*, the Court of Claims rejected HUD's assertion that §405 applied only to a narrow category of reviews and audits that did not include FCAS matters:

> HUD acted pursuant to an audit conducted at the direction of HUD's Office of Inspector General to determine whether ineligible housing had been included in the allocation formula. *Such a review, we believe, comes within Section 405's broad mandate to ensure that the grant program is being conducted in accordance with NAHASDA. See, e.g.,* §405(b)(1)(A)(i)(II)…. In addition, HUD ultimately characterized as ineligible for grant purposes housing units that plaintiffs contend should properly have been included as FCAS, a dispute that should have been the subject of a hearing and not the object of unilateral resolution by HUD. (emphasis supplied) *Id.,* 630.

There, as here, HUD argued that, because 405(b) does not specifically reference reviews of FCAS counts, the procedural protections of §405 and 24 C.F.R. §1000.532 do not apply. HUD Brief, 49.

Section 405(d) poses a limitation on HUD's grant "adjustment" authority—it may be undertaken only after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under…[§405]." According to HUD,

the limiting language in §405(d) really means that HUD need provide an adjudicatory hearing only if the "adjustment" was the product of a studied review of a report or audit. Conversely, if the "adjustment" were done with no predicate investigation (and thus more prone to being arbitrary), HUD could "adjust" the grant with no hearing rights whatsoever. *See* Sections A(3) and B*, post.* In other words, a hearing is unnecessary when the circumstances suggest it is most needed.

HUD's interpretation is absurd, suggesting that §405 does not authorize HUD to conduct a review or audit of a tribe's FCAS counts. Given the importance of adequate FCAS funding to Congress, and FCAS' primacy in the NAHASDA funding pecking order (*see* pp. 4-5*, ante)* it is difficult to believe Congress denied HUD the ability to audit a tribe's FCAS counts.

HUD in fact conducted some form of cursory predicate review or audit of each tribe in these appeals. HUD's review of all of the tribes' FCAS was itself the product of a 2001 audit by HUD's Inspector General. Aplt. App. 725-817; *Lummi II.* The Inspector General's report recommended HUD "*[a]udit* the Formula Current Assisted Stock for all Housing Entities and remove ineligible units from HUD's Formula Current Assisted Stock." Aplt. App. 744 (emphasis supplied). HUD, in turn, assured the Inspector General that "all actions it has taken resolve *all audit recommendations*." *Id.,* 743 (emphasis supplied). HUD's actions included notifying the tribes of alleged discrepancies. In virtually every case,

HUD directed the targeted tribe to report: (i) the date each unit was occupied; and (ii) the reasons why any allegedly aged unit remained in inventory. *See, e.g.*, Aplt. App. 876-879; 3354-3355; 3519-3520; 3671-3672.

The court in *Lummi II* also noted that HUD had originally intended for grant recipients to report changes in their FCAS numbers in their Annual Performance Reports--"a report whose accuracy Section 405 review is designed to ensure [under §405(b)(1)(B)]." 106 Fed. Cl. at 631. But "because of timing considerations, … the final version of the implementing regulations specified that such information should instead be included in a grant recipient's Formula Response Form." *Id.* The court concluded:

> The fact that FCAS information is included in a separate form due to administrative necessity does not, in our view, take the review of FCAS outside the purview of Section 405. Indeed, a later regulation specified that "[r]eview of FCAS will be accomplished by HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring, or other reviews." 24 C.F.R. § 1000.319(d) (2007). Given this framework, we think it evident that HUD's audit of plaintiffs' FCAS counts, conducted at the direction of the OIG, falls squarely within the agency's authority under Section 405. *Id.*

4. HUD could not recapture NAHASDA grant funds absent a finding that the funds had *not* already been spent on eligible affordable housing activities

a. NAHASDA Bars HUD From Recapturing Funds Spent on Affordable Housing Activities

The plain meaning of §§401 and 405 prohibited HUD from recapturing any grant funds that had already been expended on affordable housing activities. Section 401(a) provides, *inter alia*, that:

> (1)… the Secretary shall—
>
> ***
>
> (B) reduce payments under this Act to the recipient *by an amount of such payments that were not expended in accordance with this Act*;…

(Emphasis added). Thus, under §401(a), HUD may not recapture funds if they have been spent "in accordance with NAHASDA." Congress placed this restriction in the law when it first enacted NAHASDA and it has never been removed. Funds are spent in accordance with NAHASDA when they are expended on eligible affordable housing activities. *See* NAHASDA § 202.

Section 405(c), as enacted in 1996, allowed the Secretary to adjust, reduce, or withdraw grant amounts "*except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe*." *Id*. (emphasis added). The plain meaning of this section prohibited HUD from recapturing any grant funds that had already been expended on affordable housing activities.

Section 405 of NAHASDA was amended in 2000. P.L. 106-568 §1003 (2000). The amendment removed the clause quoted above but added the following italicized proviso:

> (d) Effect of Reviews-*Subject to 401(a)*, after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient under this Act in accordance with the findings of the Secretary with respect to those reports and audits.

Id. (emphasis added). In its argument that the 2000 NAHASDA amendments freed HUD to recapture funds already spent on affordable housing activities, the agency ignores the "[s]ubject to 401(a)" directive now in §405. In actuality, after the 2000 Amendment, HUD's actions, including adjustments to the amount of a grant made to a recipient, are expressly subject to the requirements of §401(a)--including the bar on recapturing funds that were spent on eligible housing activities in §401(a)(1)(B).

Before recapturing the funds here, HUD never made a finding, nor did it prove in any administrative hearing that the funds had not been expended "in accordance with [NAHASDA]". §401(a)(1)(B). The recaptures thus failed a mandatory precondition, and were thus unlawful under §401(a)(1)(B) and §405.

b. NAHASDA's Implementing Regulations Also Bar HUD From Recapturing Funds Spent on Affordable Housing Activities

24 C.F.R. §1000.532 provided, at all material times, as follows:

> §1000.532 What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?
>
> (a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant

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> to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, *except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.*

(Emphasis added).

Section 1000.532(a) (2006), Aple.Add. 120, bars recapture of "grant amounts already expended on affordable housing activities." In pursuing the recaptures at issue here, HUD gave no regard to this provision.

As originally enacted, §405(c) mirrored the language of §1000.532 and provided that "grant amounts already expended on affordable housing activities may not be recaptured or deducted from future grant assistance . . . ." *Id.* Thus, at least through 2000, HUD's approach to recapture plainly violated both §1000.532 *and* §405(c). Nevertheless, HUD argues a 2000 amendment to §405(c) that struck this clause also impliedly "repealed" that recapture limitation in §1000.532. HUD Brief, 47-51.

Here, HUD ignores the most salient provisions of the post-2000 version of NAHASDA and what they reveal about Congress's intent. *See ante*, pp. 39-40, 44. At §401(a)(1)(B), the post-2000 version of NAHASDA indicates that HUD's authority to recapture is limited to circumstances where NAHASDA funds were misspent by a Tribe or "not expended in accordance with the Act." This provision

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dovetails with the enduring restriction within 24 C.F.R. §1000.532 on recapturing "grant amounts already expended on affordable housing activities."

HUD's interpretation also disregards the contemporaneous (2000) amendment to §405, which clearly indicates that HUD's authority to recapture under §405(d) is "subject to" the recapture limitations of 401(a)(1)(B). *See* P.L. 106-568, §1003.

The court in *Lummi II* also rejected the notion that the 2000 amendment repealed any of 24 C.F.R. §1000.532: "It is not clear from the legislative record why this change was made, and the parties were unable to provide an explanation. What is clear is that the accompanying regulation—24 C.F.R. §1000.532(a) (requiring a hearing and explicitly prohibiting HUD from recapturing or deducting from future assistance grant funds that have "already [been] expended on affordable housing activities")—remains in force. *Lummi II,* at 632 n.15.

B. HUD Has No Inherent Power to Recapture FCAS Funds Without Following the Procedural Safeguards of §§401 and 405 of NAHASDA

Denying that it acted under either §401(a) or §405(d) of NAHASDA, HUD maintains it has "common law" authority to summarily recapture NAHASDA grant funds. HUD Brief, 44-45. HUD's notion of its inherent power is overbroad, lacks merit and is a theory manufactured for litigation. While HUD claims it invoked its "common law authority" theory in response to some tribes' hearing requests, HUD

Brief, 16, the record shows it did not. Aplt. App. 1868, 4074. The invocation of some "common law" right appears nowhere in any of the tribes' administrative records.

HUD relies on the following cases to support its "inherent power" argument: (1) *U.S. v. Wurtz*, 303 U.S. 414 (1938); (2) *U.S. v. Texas*, 507 U.S. 529 (1993); (3) *LTV Educ. Sys., Inc. v. Bell*, 862 F.2d 1168 (5th Cir. 1989); and (4) *U.S. v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1 (1st Cir. 2005). None of these cases support HUD's position. Rather, they demonstrate that the federal government retains the inherent authority to bring a civil common law action in an Article III court to recover funds that were paid by "mistake," through the common law cause of "unjust enrichment", absent statutory language to the contrary. *See Wurtz*, 303 U.S at 415, 416; *Lahey Clinic*, 399 F.3d at 16. The Tribes here do not quarrel with HUD's inherent recourse to the judiciary. Indeed, §401(c) of NAHASDA expressly reserves that right.

HUD, however, misappropriates this authority by suggesting that the United States' right to file a civil claim also gives HUD the inherent right, without statutory authority, to bypass the court system and simply take money from the tribes as a matter of administrative sanction. No such inherent authority exists--any authority to recover funds by purely administrative means must come from express statutory delegation of that authority from Congress. *See generally, Am.*

Bus Ass. v. Slater, 231 F.3d 1, 5 (D.C. Cir. 2000) (agency's authority to bring a civil action does not equate to authority to take money by administrative sanction; "civil action provision" "actually undermines" the agency's argument to the contrary).

HUD's authority to administer the federal block grant funds for the tribes' benefit comes solely from NAHASDA. HUD has no authority to act outside of the boundaries of NAHASDA unless it identifies another statute that gives it such authority. *Louisiana Public Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986); *see North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (a federal agency is "a creature of statute," and has "only those authorities conferred upon it by Congress"; "if there is no statute conferring authority, a federal agency has none."); *Cal. Indep. Sys. Operator Corp. v. FERC,* 372 F.3d 395, 398 (D.C. Cir. 2004) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. "[I]f there is no statute conferring authority, FERC has none." (Citations omitted)). Accordingly, the Court of Claims correctly rejected the notion that HUD has an independent "common law remedy with no apparent rules or limitations." *Lummi II* at 631. Any authority HUD has to "terminate", "reduce" or "limit" block grant funds comes solely by virtue of §§401 and 405 of NAHASDA.

As a general proposition, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *American Bus*, 231 F.3d at 5. That is especially true under our circumstances. HUD's actions here sought to recapture funds spent often years earlier, in an effort to force recipients to cover the recapture by diverting money needed for *current* housing needs. The court in *Boston* put it this way:

> The cutting off of a contractually promised grant has serious impact. A grantee in this type of situation may already have made a heavy investment in reliance on HUD's promise. By providing that HUD must give notice and an opportunity for a hearing before sanctioning development grant recipients for noncompliance with statutory provisions, and by providing for judicial review, Congress gave to recipients the opportunity to try to convince the agency, and later a court, that they had complied.

898 F.2d at 833.

A federal agency has only those powers conferred upon it by Congress. *See American Bus*, 231 F.3d at 8 ("were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with…the Constitution.")(emphasis in original); *Louisiana Pub. Ser. Comm'n.,* 476 U.S. at 374 ("an agency literally has no power to act…unless and until Congress confers power upon it."). HUD's "inherent power" argument turns this principle upside down.

HUD's reliance on *U.S. v. Texas* is also unavailing. In *Texas*, the Court held that the Debt Collection Act of 1982 did not abrogate the government's common law right to collect pre-judgment interest. 507 U.S. at 530. The case did not involve any inherent right to assess monetary liability administratively, but simply reaffirmed United States' common law right to prejudgment interest if it files a civil claim that a court ultimately reduces to a judgment.

HUD also relies on *United States v. Munsey Trust Co*., 332 U.S. 234 (1947) and *Grand Trunk W. Ry. v. United States*, 252 U.S. 112 (1920) for the assertion that it can recover funds paid by mistake under a contract through an administrative offset in place of an actual civil court action. HUD Brief, 45. However, both the Ninth Circuit and the Court of Claims have rejected HUD's explicit reliance on *Grand Trunk* to circumvent the protections of NAHASDA. In *Crow* and *Lummi II,* HUD explicitly cited to *Grand Trunk* for the same proposition it is used in the case at bar. *Brief for Appellant,* Case No. 13-35284, Dkt. 9-1, p. 3 (*Crow*); *Defendant's Motion to Dismiss*, Case No. 1:08-cv-00848-JPW, Dkt. 45, p. 5 (*Lummi II*). The *Lummi II* court rejected HUD's contention on the grounds that HUD could not resort to federal common law when Congress has spoken to the issue and provided a statutory scheme for the recapture of funds paid. *Lummi II* at 632. The Ninth Circuit would follow suit stating "[a]s it does here, HUD claimed in *Lummi* that it acted through its inherent, common law authority to recover

payments made by mistake. The Court of Federal Claims rejected that argument, as do we." *Crow* at 1105.

Title IV of NAHASDA lays out a detailed and complete scheme of statutory remedies, "reveal[ing] the legislature's intent that the statute's enumerated remedies were to be exclusive…". *American Bus.,* 231 F.3d at 4. With so many specific remedies laid out, the statute's silence on the existence of a remedy without §§401 and 405's procedural protections speaks louder than words. *See Wheeling-Pittsburgh Steel Corporation v. Mitsui & Co.,* 221 F.3d 924, 926 (6th Cir. 2000) ("Generally, when Congress sets forth remedies in a statute, those remedies are exclusive.").

C. HUD's Prejudice Argument is Inapplicable and Without Merit

HUD attempts to side step its failure to follow the congressionally mandated notice and hearing requirements, as well as its own regulations, by arguing the tribes were not prejudiced. As support, HUD spends much of its brief attempting to convince the court what a good job it did applying §1000.318, spotlighting the assertion that some dwelling units were ineligible because they were "conveyed" or "never built." HUD Brief, 22, 60, 62. For these units, HUD suggests it can freely recapture funds without according the §401 and §405 protections simply because these tribes did not comply with §1000.318. In other words, according to HUD, these tribes had no right to NAHASDA's protections because the tribes

would have lost after a hearing had one been offered. But the fact that HUD may have recaptured funds for some units that were allegedly conveyed or never built is no excuse to ignore its obligation to comply with the law. Section 1000.318 does not itself authorize HUD to reduce or recapture the tribes' funds in cases where tribes may not have complied with its terms. Instead, that authorization comes from §§401 and 405 and their underlying regulations, which HUD concededly ignored.

As shown below, the court should not allow HUD to escape its obligation to comply with NAHASDA's important procedural protections under the guise of its convoluted prejudice argument. The law required HUD to accord the important procedural protections prior to recapturing the funds. There was no excuse for HUD's refusal to do so.

1. A showing of prejudice is not required where an agency has violated rules involving important procedural safeguards

Although 5 U.S.C. §706 requires courts to give "due regard" to the rule of prejudicial error, the court must first determine if the rule applies at all. In this case it does not. The Supreme Court has declared unequivocally that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures". *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). This rule has an even greater force when an agency violates its own published regulations. *See Service v. Dulles*, 354 U.S. 363 (1957) (invalidating agency action where the agency failed to

comply with its regulations granting procedural safeguards). From this rule, and the Court's earlier decisions in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954), and *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959), there evolved a rule that prejudicial error analysis is not appropriate in cases where an agency violates a statutory mandate or its own procedural rules designed to protect the rights of individuals, including grant recipients. *See United Space Alliance, LLC v. Solis*, 824 F.Supp.2d 68, 83-84 (D.D.C. 2011). This is so because an agency's violation of such a law or regulation is, "itself, prejudicial". *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003) ("The rule of prejudicial error informs our review of an agency's adherence to its statute and regulations; it has never been used to introduce discretion into actions made mandatory by Congress."); *accord, Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435 n.53 (6th Cir. 2004). The Third Circuit said:

> [W]hen an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party.

Leslie v. Attorney General of the United States, 611 F.3d 171, 180 (3d Cir. 2010). The court reasoned that its rule comported with *Accardi* and *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 538-539 (1970), which exempted procedural regulations "adopted for the orderly transaction of business"

from *Accardi*'s holding:

> *Accardi* teaches that some regulatory violations are so serious as to be reversible error without a showing of prejudice, and *American Farm Lines*, 397 U.S. at 539, exempts from this principle those procedural regulations "adopted for the orderly transaction of business." With these precepts in mind, we believe a prejudice rule that distinguishes between regulations grounded in fundamental constitutional or statutory rights and agency-created benefits successfully carves out the procedural regulations exempted by *American Farm Lines* while honoring *Accardi's* insistence that some regulatory violations are so serious as to merit judicial relief.

Leslie, 611 F.3d at 178.

Additionally, in cases where the federal government acts in the role of trustee for Indians, this court has indicated that the rule of prejudicial error does not apply. The court rejected a prejudicial error analysis in a case where the agency violated a notice regulation concerning an Indian oil and gas lease designed to protect Indian interests. "We are not persuaded that the violation of the notice regulation flawing the bidding for the leases fits within the §706 pattern of prejudicial error. The violation did not occur as a mere error in hearing procedures..." *Jicarilla*, 687 F.2d at 1336-1337; *see Vigil v. Andrus,* 667 F.2d 931, 936 (10th Cir. 1982)(The trust responsibility owed by the federal government to Indians "suggests that the withdrawal of benefits from Indians merits special consideration"); *see also Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir.

1984) (Seymour, J, dissenting) [20] (Agency actions "are constrained by principles of Indian trust obligations as well as by standards of administrative law." *Morton v. Ruiz* implicitly recognized that "stricter standards apply to federal agencies when administering Indian programs.").

Like *Andrus* and *Ruiz,* this case does not involve mere procedural irregularities. Instead HUD ignored the congressionally mandated protections in §§401 and 405 and the agency's implementing regulations adopted through negotiated rulemaking. HUD deprived each tribe of its right to be protected from a reduction in funding without a finding by a neutral decision-maker that a recipient failed to comply substantially with NAHASDA. HUD also deprived each tribe of its substantive rights under HUD's own regulations found at 24 CFR §§1000.520-540. These rights were designed to protect against HUD's arbitrary action and are grounded not only in the statute, but in the constitutional right to due process of law. That is why Congress mandated the notice and hearing requirements, and the requirement that a grant recipient not suffer a funding reduction by HUD to remedy its past noncompliance unless that noncompliance was found to be substantial. Inasmuch as HUD defied a congressional mandate and its own regulations designed to protect the tribes' interests, the harmless error rule simply does not apply. The

[20] Adopted on rehearing *en banc* in *Jicarilla Apache Tribe v. Supron Energy Corp.,* 782 F.2d 855, 857 (10th Cir. 1986).

Court in *Lummi II* discussed the importance of the procedural protections created by NAHASDA:

> [s]uch protections play "a critical role" in the statutory scheme because they "ensure that a city legally entitled to an annual . . . grant will not be precipitously deprived of funding pursuant to arbitrary action by HUD." Of particular relevance to the instant case, the court [in *Kansas City*] pointed out that "[i]n most cases, Congress has been silent on the question of a grantee's procedural rights when an agency decides to terminate some or all of its federal grant. When, as in this case, Congress has not been silent, a court has a special obligation to ensure that the agency does not end-run the clear procedural protections which Congress provided."

Lummi II at 632 (quoting *Kansas City*, 861 F.2d at 745).

To the tribes' knowledge, no case holds that denial of a hearing guaranteed by regulation or statute is "prejudicial" only if the complainant can show that it would have prevailed if such a hearing had been held. *Cf.* HUD Brief, 60-61. *See Vitarelli*, 359 U.S. at 540 (denial of core hearing rights guaranteed by regulation, and intended to protect private citizens, was "more than mere procedural irregularities.")

2. The District Court’s finding of actual prejudice was not clear error

Even if a prejudice analysis were applicable, there is ample support for the district court’s finding that HUD’s failure to observe the procedural protections of the NAHASDA regulatory scheme was “itself prejudicial” Aplt. App. 5995-5996. Prejudice "means injury to an interest that the statute, regulation, or rule in

question was designed to protect." *Wirth v. United States*, 36 Fed. Cl. 517, 525 (Fed. Cl. 1996). There were specific injuries to the tribes' interest in being accorded the protections of §§401 and 405 of NAHASDA and the implementing regulations before having their grant funds recaptured. Not only did HUD refuse to accord the tribes their right to a hearing, it failed to fulfill the preconditions that had to be satisfied before it could even have the hearing.

HUD smothered the Tribes right to even request the hearing required by §1000.532. HUD was required to issue a notice pursuant to §1000.532 itself, something HUD concedes it refused to do.[21] This violated HUD's promise to its beneficiaries that it would provide the substantive and procedural protections under sections 401 and 405 prior to taking action to reduce the Tribes' grant funding.

The prejudice also stems not only from the failure to accord the notice and hearing required by §§401, 405 and their implementing regulations, but also from HUD's refusal to comply with a number of very substantive protections that tribal representatives demanded and that HUD put into its regulations under §§401 and 405, codified at 24 CFR §§1000.520–532, and 540 (2006). Section 1000.520 stated that "at least annually, HUD will review each recipient's performance to determine whether the recipient has carried out" its obligations under NAHASDA

[21] Instead, HUD stubbornly instructed Tribes that its regulations governing data challenges applied to the recapture of FCAS funds. *Ante*, p.14.

and its implementing regulations. Had HUD complied with this obligation, it should have discovered early any issue whether Tribes were reporting FCAS changes correctly. HUD could then have taken appropriate steps to correct any reporting deficiency pursuant §§1000.524–1000.530 and provided the tribes with adequate notice that they may or may not have been in compliance with their FCAS reporting obligations. HUD failed to do so, choosing instead to circumvent the whole regulatory process, allowing alleged overpayments to mount into the millions.

Other provisions of the regulations contain important procedural and substantive rights designed to protect the Tribes' interest in not having their grant funds adjusted or reduced as a result of failure to report its FCAS correctly. Section 1000.524 provided performance measures that HUD must evaluate before it took action to adjust or reduce the Plaintiffs funding pursuant to section 1000.532. Most significant is the requirement that the recipient "has substantially complied with the requirements of 24 CFR Part 1000 and all other applicable Federal statutes and regulations." §1000.524(f).[22]

Even more significant, §1000.530 contained important preconditions that had to be met before HUD could recapture funds under either §§1000.532 or 538.

[22] A finding of substantial noncompliance pursuant to §1000.524 would have led HUD to the hearing required by §1000.538.

These preconditions were designed "to prevent the continuance of the performance problem", "mitigate any adverse effects or consequences" and "prevent a recurrence of the same or similar performance problem." §1000.530(a). Significantly, the regulation prohibited HUD from adjusting or reducing grant funds under either §§1000.532 or 538 unless HUD took at least one of the following actions:

> (1) *Issue a letter of warning…*;
>
> (2) *Request the recipient to submit progress schedules…*;
>
> ***
>
> (6) *Recommend that the recipient obtain appropriate technical assistance….*
>
> ***
>
> (b) Failure of a recipient to address performance problems specified in paragraph (a) above may result in the imposition of sanctions *as prescribed in §1000.532 … or §1000.538 ….*

24 C.F.R. §1000.530(a)-(b) (2006), Aple.Add. 119-120 (emphasis added). HUD acknowledges that it failed to accord the tribes these important rights. As a result, the tribes were denied the opportunity to correct any reporting deficiency after a fair warning, to be put on a corrective action plan to prevent the same deficiency from reoccurring, or the opportunity to obtain technical assistance to ensure proper corrections were made going forward.

Moreover, §1000.532 itself contained important protections for the Tribes' benefit. Section 1000.532(a) authorized HUD to make "appropriate adjustments in

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the amount of the annual grants" but only if the adjustments were made "in accordance with the findings of HUD pursuant to reviews and audits". In other words, HUD could make downward adjustments only after it completed the review process laid out in §§1000.520-530, something it refused to do here, instead choosing an "ill-defined process" with "no apparent rules or limitations". Aplt. Add. B-42; *Lummi II* at 631. Section 1000.532(b) also required HUD to "notify the recipient in writing" of the actions it intends to take pursuant to the findings resulting from its § 405 review, and that it must do so "before undertaking any action" to adjust or recapture the plaintiff's grant funds. The notice must provide the recipient "an opportunity for an informal meeting to resolve the deficiency." Obviously, the "deficiency" is a performance deficiency identified in accordance with §§1000.520–530. This notice, had it been given, would have given the Tribes fair warning that their performance was being evaluated under §§401 or 405 and their implementing regulations. Section 1000.532(b) goes on to state that, if the deficiency is not resolved, only then can HUD take action to adjust or reduce the recipient's grant funding. Implicit in §1000.532 is the requirement that HUD provide notice to the recipient if the deficiency is not resolved, including notice that the recipient may request a hearing in accordance with §1000.540. Both as a matter of its trust responsibility and fundamental principles of due process of law,

HUD was required to provide sufficient notice so that the Tribes had a meaningful opportunity to exercise their rights under the Section 401 and 405 regulations.

The tribes also showed specific examples of prejudice from the absence of a hearing. Without a hearing, there was no opportunity to adjudicate the individual circumstances behind each case. For example, whether conveying a home is "practicable" under 24 C.F.R. §1000.318, or what "strict compliance" means under the circumstances, are questions that hinge on the reasonableness of the tribes' actions—something that is inherently a question of fact. *See Breeden v. ABF Freight Sys., Inc.,* 115 F.3d 749, 754 (10th Cir. 1997); *Maughan v. SW Servicing, Inc.,* 758 F.2d 1381, 1387 (10th Cir. 1985).

The factual and case-specific nature of these issues become manifest when one considers the circumstances that drove individual tribes to decide that immediate conveyance was not "practicable"--circumstances that HUD mechanically rejected with its one size fits all policies. As described at p. 12-14, *ante*, Tlingit Haida retained homes in its inventory because of exigencies of an executory class action settlement and a concomitant rent strike. An evidentiary hearing would have enabled Tlingit Haida's housing managers, and its tenants, to explain (to a neutral trier of fact) the consequences of either: (i) initiating mass evictions against its rent strikers; or (ii) conveying the homes and losing both the FCAS funding to continue settlement repairs and any realistic chance of the often

judgment-proof tenants contributing to the remaining repair costs (or paying back their strike-driven rent arrearages). The trier would then have a meaningful record on which to make the ultimate finding of "practicality."

Similarly, HUD expressed complete disinterest in the unique factual situation facing Big Pine (described at p.13, *ante*) which delayed conveyance of its homes because of a difficult transfer of responsibility from a different TDHE. Big Pine would have benefitted from an evidentiary hearing before a neutral finder of fact. A rational and neutral finder of fact would have seen the outright difficulty that Big Pine faced in conveying units in the face of these unique difficulties.

More broadly, there was also actual prejudice to all the tribes in (1) the failure to provide the opportunity for a neutral decision-maker to consider the various conveyance impediments faced by the tribes and summarily dismissed by HUD; and (2) forcing the tribes to plead their case in mere letter correspondence to HUD itself (and in some cases to subordinates of the HUD official making the original decision). HUD failed to accord proper deference to tribal decisions regarding conveyance or eviction under its contracts with its low income tenants. As the court in *Walker River Paiute Tribe v. U.S. Dep't of Hous. & Urban Dev.*, 68 F.Supp.3d 1202, 1213 (D. Nev. 2014), found:

> HUD's interpretation of Section 1000.318 is arbitrary and capricious. Nothing in the regulation supports HUD's position that assistance-based dwelling units are no longer eligible for FCAS calculation simply because the original twenty-five year term has expired.

> Instead, Section 1000.318 speaks in terms of whether or not a tribe has the "legal right to own, operate or maintain the unit." 24 C.F.R. § 1000.318. A TDHE maintains the legal right to own, operate or maintain the unit until it is actually conveyed. Further, the legal right to own, operate, or maintain a unit is measured by the terms of the MHOA between the tribe and the Indian family. It is fundamental that the tribe have latitude in determining the need for subsidized housing among its people.
>
> Moreover, HUD's interpretation has disregarded the fact that both the tribe and homebuyer may have certain contract rights under an MHOA, including the extension of the repayment schedule for a delinquent balance. HUD's interpretation would disqualify any unit that had its lease term extended to overcome payment delinquency despite the fact that the tribe still owns or operates the units. HUD's interpretation has effectively usurped the rights of the tribe to determine how to enforce its own contracts.
>
> Additionally, WRPT has identified multiple scenarios where HUD's categorical exclusion of units past their initial twenty-five year lease period is arbitrary and capricious. For example, HUD's interpretation excludes units that could not be conveyed because they were undergoing federally funded repair or modernization work; excludes demolished units that were scheduled for replacement but haven't been rebuilt yet; and excludes units that were not or could not be conveyed due to title impediments.

2014 U.S. Dist. LEXIS 173113 at *22-24.[23]

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[23] The *Walker River* court also felt bound by *Fort Belknap's* dicta, addressing the payment by mistake doctrine. The Ninth Circuit subsequently rejected the payment by mistake doctrine in *Crow,* 781 F.3d at 1104, thus signaling its disagreement with *Fort Belknap*. Moreover, *Fort Belknap* held that it lacked subject matter jurisdiction to hear a petition filed directly with the appeals court under §401(d). 726 F.3d at 1100. As such, any further discussion on the merits, *i.e.* whether the payment by mistake doctrine gave HUD a remedy outside of §401(a), must be disregarded. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94

D. The District Court Had Jurisdiction Under 25 U.S.C. §702 to Order HUD to Restore Funds to Appellees that had been Recaptured in Violation of Statutory Requirements, Because the Order Constituted Specific Relief, Not the Payment of Money Damages

HUD argues that the district court was barred by sovereign immunity from ordering HUD to restore to the tribes grant funds that HUD had unlawfully recaptured in fiscal years through 2008. HUD Brief, 64.

The Administrative Procedure Act ("APA") waives the sovereign immunity of the United States for an action by a "person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action . . .," entitling that person "to judicial review thereof." That waiver grants the district court jurisdiction to order any "relief other than money damages." 25 U.S.C. §702 ("§702").

It is worthwhile noting, at the outset, that the sovereign immunity issue in these appeals is actually quite narrow. HUD does not contend that either: (i) ordering the escrow of NAHASDA grant funds to secure a possible court-ordered

(1998). Finally, *Fort Belknap* is inapplicable here as it addressed the post-2008 version of the statute that is not applicable to these appeals.

return of previously recaptured grant funds; or (ii) the actual ordering of that return of grant funds, constitutes an order for "money damages." HUD Brief 66, n.12. Rather, HUD contends these orders only raise sovereign immunity concerns to the extent that they require HUD to use funds from one fiscal year to return grant funds unlawfully recaptured from a different fiscal year. *Id.*

The point of this section is to show the distinction is without a difference.

1. The District Court Order Constituted Specific Relief, Not Money Damages, as that Phrase has been Consistently Interpreted by the Courts

Bowen v. Massachusetts, 487 U.S. 879 (1988) ("*Bowen*") is the leading case interpreting the phrase "relief other than money damages" as used in §702. The Court held that a district court order effectively compelling the Secretary of Health and Human Services ("HHS Secretary") to reimburse Massachusetts for certain wrongfully recaptured Medicaid aid payments constituted relief other than money damages and was, therefore, within the district court's jurisdiction under §702--even though the order required the payment of money to the state. *Bowen* at 885.

Under the Medicaid program, the HHS Secretary makes advance payments of projected Medicaid expenditures to the states on a quarterly basis. 42 U.S.C. §1396b(d)(5). *Bowen* at 884. In *Bowen*, the HHS Secretary determined that a prior quarterly payment to Massachusetts had included ineligible payments—a

decision that triggered a statutory obligation to recover the funds (if it had not done so already) by debiting the state's next quarterly advance.[24]

Massachusetts sued, and the district court reversed HHS' decision. And, although the lower court's ruling was not expressed in a dollar amount, compliance with the lower court order would have required HHS to "reimburse Massachusetts the requested sum." *Bowen* at 910. Because the lower court's order did was not expressed in monetary terms, the Court first concluded that the order was not a "money judgment." However, the Court then held that, even if it was a money judgment, the order was not for "money damages" under the APA exclusion. *Id.*

In holding that ordering the recoupment of those prior grant payments did not constitute an award of "money damages" under the APA, the Court refused to give the phrase "money damages" the same meaning as "monetary judgment." In defining "money damages," the Court relied both on the plain meaning of the phrase "money damages" and on the legislative history of the 1976 amendments to §702. The Court noted that:

> Our cases have long recognized the distinction between an action at law for damages -- which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation -- and an equitable action for specific relief -- which may

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[24] The record in *Bowen* was unclear as to how the funds were recaptured; what was clear was that compliance with the district court's order would require "reimburse[ment]" of the disallowed grant funds. *Bowen* at 883 n.3, 887 nn.8-9, 910.

> include an order providing for the reinstatement of an employee with backpay, or for "the recovery of specific property **or monies**, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 688 (1949) (emphasis added).

Bowen at 893.

Bowen characterized money damages as compensatory relief that substitutes for a suffered loss, whereas specific remedies give the plaintiff the very thing to which he was entitled. *Bowen* at 895. Examples of a specific remedy that did not constitute an award of money damages included an order to reimburse parents retroactively for special education payments that should have been paid by a school district, *School Committee of Burlington* v. *Department of Education of Massachusetts*, 471 U.S. 359, 370-371 (1985); specific performance of a contractual obligation to pay money, *Joyce* v. *Davis*, 539 F.2d 1262, 1265 (10th Cir. 1976); and an action to compel an official to repay money improperly recouped, *Clark v. Library of Congress*, 750 F.2d 89, 104 n.33 (D.C. Cir. 1984).

The *Bowen* Court quoted from the decision in *Maryland Dept. of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1445 (D.C. Cir. 1985):

> [The State] is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that [the State] will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the

> federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought -- specific relief, not relief in the form of damages.

Bowen at 901. The Court also found the legislative history of the 1976 amendment to §702—the amendment adding the "money damages" proviso—demonstrated that Congress amended the statute to *expand* the remedies available under the APA. *Bowen* at 892. It would be incongruous, the Court believed, to put a limiting construction on an amendment intended to broaden the curative reach of the statute.

Additionally, the Court found that one of the purposes of the those amendments was to authorize effective district court review of the administration of federal grants-in-aid programs—something that would be impossible if the APA did not allow district courts to order the return of unlawfully withheld recaptured grant funds. *Bowen,* at 898.

Based on this legislative history, the Court concluded that there is no basis for reading the phrase "money damages" more broadly than its common law meaning or to disallow an order that grants full relief once a court determines that a federal agency either disallowed or recouped payments to which the plaintiff was statutorily entitled.

The Supreme Court had occasion to apply *Bowen* in *Dep't of the Army v. Blue Fox*, 525 U.S. 255, 261 (1999). HUD suggests *Blue Fox* retreats from

Bowen's distinguishing of specific and substitute relief. To the contrary, *Blue Fox* illustrates well how *Bowen*'s dichotomy functions. In *Blue Fox*, the Court held that an action enforcing a statutory lien is an action for substitute relief, and hence money damages. As the Court noted, liens provide an archetypical example of substitute relief—one asks for a lien when one is unable to get at the underlying debt or obligation the lien secures. *Blue Fox*, 525 U.S. at 262-263.

Applying *Bowen* here, the district court ordered that HUD return NAHASDA FCAS grant funds that the agency had unlawfully recaptured. The tribes did not ask for, and did not receive, "damages." They only asked for, and only received, "funds to which a statute allegedly entitles it, rather than money in compensation for the losses." *Bowen* at 901.

2. HUD's Reliance on *Houston* and *Sebelius* is Misplaced

a. Summary

HUD argues the district court awarded damages rather than specific relief because HUD could not restore the tribes' funds from the same fiscal year in which they were originally awarded. HUD Brief, 66-67. HUD relies primarily on *City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421 (D.C. Cir. 1994) and *County of Suffolk v. Sebelius*, 605 F.3d 135 (2d Cir. 2010) ("*Sebelius*"), which held

that the specific relief as to which §702 waives the federal government's sovereign immunity is limited by the Constitution's Appropriations Clause, Art. I, §9, cl. 7.[25]

Thus, *Houston* and *Sebelius* were based on the Appropriations Clause and not a construction of §702. The agencies' Congressional expenditure authority for the fiscal years at issue had lapsed by the time the relief issue arose. Indeed, in *Sebelius* the grant program itself had terminated. By contrast, in every pertinent year, NAHASDA appropriations were "no year appropriations," because they were not constrained by any temporal limit. That is why no Appropriations Clause issue has ever arisen in these appeals, and why *Houston* and *Sebelius* have no bearing here.

b. The Facts of *Houston and Sebelius*

In *Houston,* HUD reduced the city's CDBG funding based on a finding that the city failed to expend the grant for fiscal year 1986 in a timely manner. The FY

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[25] HUD also cites *Phelan v. Wyoming Associated Builders*, 574 F.3d 1250, 1254 (10th Cir. 2009) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) for the principle that *any* order compelling the payment of money constitutes “money damages.” HUD Brief, 64-65. Neither case, however, involved the interpretation of §702 of the APA. Rather, both sought to define the scope of equitable remedies available under ERISA. As Justice Scalia cautioned in *Great-West*: “*Bowen* ‘did not turn on distinctions between ‘equitable” actions and other actions [as does ERISA]...but rather [on] what Congress meant by ‘other than money damages’ in the Administrative Procedure Act.” 534 U.S. at 212.

1986 appropriation expressly expired on September 30, 1988. *Houston* at 1425.[26] During fiscal year 1987, HUD reallocated the funds it had recovered from Houston in the previous fiscal year to other cities.

Houston filed suit seven months after the FY 1986 appropriation had lapsed. *Id.* HUD thus maintained there were no FY 1986 funds remaining available to repay Houston, even if the city were to prevail. The court agreed, holding that, because of the constraints of the Appropriations Clause, an award of monetary relief from any source of funds other than the time limited 1986 CDBG appropriation would constitute money damages rather than specific relief, and so would violate the Appropriations Clause.

In *Sebelius* the plaintiff was funded under an Act providing money for the treatment of HIV/AIDS administered by HHS. In FY2007, plaintiff's funding was reduced because its status was reclassified. The entire Act then sunsetted on October 1, 2009. Section 703, 120 Stat. 2820.

On February 27, 2007, plaintiff filed suit under §702, seeking to restore the higher level of funding for FYs 2007 and 2008. *Sebelius* at 138-139. Like the court in *Houston*, the court in *Sebelius* read the Appropriations Clause as barring recovery unless the funds utilized are taken from the same fiscal year as the original grant—that is, from what the court considered the same "*res*." *Sebelius* at 141. As with the

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[26] 99 Stat. 913, P.L. 99-160 (Nov. 25, 1985).

appropriation in *Houston*, Congress had placed strict temporal limits on FY2007 and FY2008 appropriations, both of which had expired before the *Sebelius* decision. *Id.*, 144. Moreover, the grant program itself had terminated a year before that decision was issued. Since, as the court found, there were no FY2007 or FY2008 funds remaining to pay the plaintiffs, the case was dismissed as moot. *Id.*

c. The Appropriations Clause, Central to the Holdings in *Houston* and *Sebelius*, Was Never Raised in These Appeals Because the Appropriations at Issue Here are No-Year Appropriations

In a 2006 ruling in the *Fort Peck I* litigation, the district court found that Fort Peck's request for monetary relief constituted impermissible "money damages," relying primarily on *Houston*. Aplt. App. 557. Conversely, in its March 7, 2014 decision in these coordinated appeals, the court concluded that its earlier ruling "rest[ed] on a faulty factual premise." Aplt. App. 611. That faulty premise was the court's earlier misperception that the appropriations at issue in these cases were materially similar to those at issue in *Houston*. *Id.*

In fact, these two species of appropriations lie at the opposite ends of the spectrum:

i. NAHASDA's Appropriations are No-Year Appropriations

The General Accounting Office's "Principles of Federal Appropriations Law," states in Vol. 1, Chpt. 5, Subsection A.2.c. that:[27]

> A no-year appropriation is available for obligation without fiscal year limitation. For an appropriation to be considered a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. §1301(c). *The standard language used to make a no-year appropriation is "to remain available until expended."*

40 Comp. Gen. 694, 696 (1961); 3 Comp. Dec. 623, 628 (1987); B-279886, Apr. 28, 1998; B-271607, June 3, 1996 (emphasis added.), Aple.Add. 122. Each of the relevant NAHASDA appropriations in this matter contained the following language: "For the Native American Housing Block Grants program, as authorized under title I of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4111 *et seq.*), $... million, **to remain available until expended**, . . ." Emphasis added.[28] Hence, they are "no year" appropriations.[29]

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[27] http://www.gao.gov/assets/210/202437.pdf.

[28] *See* **(FY1998)** P.L. 105-65; 111 Stat. 1344, 1355; **(FY1999)** P.L.105-276; 112 Stat. 2461, 2475; **(FY2000)** P.L. 106-74; 113 Stat. 1047, 1059; **(FY2001)** P.L. 106-377; 114 Stat. 2000; **(FY2002)** P.L. 107-73; 115 Stat. 651, 661; **(FY2003)** P.L. 108-7; 117 Stat. 11; **(FY2004)** P.L. 10 -199, 376; 118 Stat. 3; **(FY2005)** P.L. 108-447, 3298; 118 Stat. 2809; **(FY2006)** P.L. 109-115; 119 Stat. 2396, 2445; **(FY2007)** P.L. 110–5; **(FY2008)** P.L. 110-161; 121 Stat. 1844.

[29] Commencing with FY2011, Congress began imposing a five-year expenditure limit on NAHASDA funds. *See, e.g,* Division C, Title II, P.L. 112–55 (Nov. 18, 2011), (for FY2012). These later year appropriations have no bearing

Moreover, NAHASDA appropriates funds "for the Native American Housing block grant program"—*not for projects in any particular year, but for the program generally*. *See,* n.28, *post.* There was, in sum, no clear error in the lower court's finding that these appropriations were not subject to any temporal limitation.

ii. HUD has Never Considered the Fiscal Year Origin of any NAHASDA Funds to be of any Relevance

The district court found that HUD's own regulations and past practice have always considered NAHASDA's annual appropriations freely interchangeable:

> HUD's own regulations are consistent with its practice of treating all NAHASDA funds as fungible. 24 C.F.R. 1000.536 addresses the question, "What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under §1000.532?" and provides the following answer:
> Such NAHASDA grant funds shall be distributed by HUD in accordance with the next NAHASDA formula allocation.

Aplt. Add. C-8-C-9.

For example, HUD used funds appropriated in fiscal years 1998-2008 both to augment underfunding in prior fiscal years and to supplement funds

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upon HUD's sovereign immunity argument. *First,* in both *Houston* and *Sebelius* the relevant fiscal years were those in which the contested funds were originally granted. Here, those years are almost entirely 1998-2002 (years in which NAHASDA appropriations were "no-year" appropriations). *Second* (for example), FY2015 NAHASDA funds remain available until September 30, 2019, and may be expended on any matter related to the NAHASDA program, regardless of that matter's age.

appropriated in subsequent fiscal years. Thus, when funds are recaptured from an *earlier* fiscal year, they are reallocated to other tribes to augment those tribes' grants in *later* fiscal years. 24 C.F.R. §1000.536. That is precisely what happened with the funds recaptured in these cases—they were used to augment other tribes' grants in subsequent fiscal years. *See* Aple.App. 80-97 (Declaration of Jacqueline A. Kruszek, *Fort Peck Housing Authority v. United States Department of Housing and Urban Development,* Case No. 05-cv-00018 (D. Colo.)).

Further, in a situation more akin to the escrowed funds here, HUD's regulations provide that if a tribe wins an administrative appeal after the challenged fiscal year has expired (and presumably after all of that fiscal year's funds have been distributed to other tribes), HUD will take subsequent fiscal year funds and "retroactive[ly]" increase that prior year's grant, using the subsequent fiscal year's appropriation. 24 C.F.R. §1000.336(e)(4)(i).

HUD described this process as it was used to take over $26 million of FY2008 funds to back fund FCAS underpayments in prior fiscal years—the exact thing that HUD says it cannot do in these appeals:

> [Many tribes' 2008] allocations incorporate back-funding for any under-count of units that occurred and was reported or challenged prior to October 30, 2003. As part of the changes to §1000.315 and §1000.319, and, as noted in the preamble to the revised IHBG formula regulations, HUD agreed to such back-funding….In total, $26,126,845 of FY2008 IHBG funds was distributed based on this back-funding provision.

Aple.App. 98-101 (March 24, 2008 letter from HUD to Tribal Leaders).[30]

It is impossible to determine whether funds from a particular fiscal year have actually been expended. Funds appropriated in different fiscal years are regularly passed back and forth. Certainly, nothing in these records indicates that the funds from any particular fiscal year have been forever exhausted.

iii. The Appropriations at Issue in *Sebelius* and *Houston* Were Limited by Congress to Specific Fiscal Years, and this Distinction was Determinative

As discussed at p.71-72*, ante,* it is only because of the limitations Congress put on these appropriations that the plaintiffs were denied relief in these cases. *Sebelius* at 141.

Here, HUD has never claimed that the Appropriations Clause prevents the use of NAHASDA appropriations for different fiscal years' grants than the ones in which they are appropriated. Given the open-ended nature of NAHASDA appropriations, HUD simply could not have maintained such a claim.

Indeed, given the factual divide between these appeals and *Houston* and *Sebelius,* the tribes submit that the courts in those cases would affirm the district court here. *Sebelius* makes that most obvious. *Sebelius* advised looking to

[30] During negotiated rulemaking, "HUD … agreed to provide back funding for any undercount of units that occurred and was reported or challenged prior to October 30, 2003." 72 Fed. Reg. 20020, Aple.Add. 116. Tlingit Haida, for example, received $343,484. Aple.App. 113. The 9-page list of tribes and projects eligible to receive FY2008 funds to pay grant obligations for FY2002 and earlier is contained in each Plaintiff's Administrative Record. *See* Aple.App. 114-122.

Congress to determine whether, for purposes of applying *Bowen*, a "*res*" of funds is comprised of one or many years, and hence whether an award from that "*res*" is specific or substitute relief. In *Sebelius* and *Houston*, the "*res*" was tightly defined by Congress. Congress, in essence, put a fence around the permissible use of the appropriations at issue. Here, there is no Congressional fence. The "*res*" is the sum of all NAHASDA appropriations, carried forward and backward as they may be, and ordering the return of funds from that "*res*" is an order for specific relief.

d. Applying *Houston* and *Sebelius* when there is no Appropriations Clause issue is inconsistent with *Bowen* and with cases decided by this Court

Houston and *Sebelius'* narrow view of the permissible "res" of recovery under the APA, if applied outside an Appropriations Clause case, is inconsistent with *Bowen* and the weight of authority that follows it.

In *Fletcher v. USA, Dept. of Interior*, 160 Fed. Appx. 792 (10th Cir. 2005) (*"Fletcher"*), this Court applied *Bowen* in deciding whether the district court had jurisdiction under §702 to compel the Department of Interior ("Interior") to make royalty payments to plaintiffs from the Osage tribal mineral estate. *Id.*, 793, 795-797. Rejecting Interior's argument that plaintiff's claims were for money damages, the court followed the *Bowen* distinction between money damages and an equitable claim for specific relief which compels the payment of money. It also endorsed *Bowen's* examples of specific relief, including reinstatement of an employee with

back-pay and the recovery of specific property or monies. No attention was paid to the fact that the compelled royalty payments would be made with funds other than those from the fiscal year in which the royalty payments were originally due.

This application of *Bowen* was also followed by this Court in *Normandy Apartments, Ltd. v. HUD*, 554 F.3d 1290, 1296-1298 (10th Cir. 2009). There, this Court determined that even if the prime objective of a lawsuit was the payment of money that would constitute monetary relief, §702 would still waive the federal government's sovereign immunity as long as equitable relief was not a *substitute* for a suffered loss. *Id.*, 1298.

Cases from other circuits likewise focus on this distinction between equitable relief to enforce a federal monetary mandate and money to compensate for damage resulting from the failure of the federal government to comply with that mandate.

To begin with, in *Marceau v. HUD*, 540 F.3d 916, 929 (9th Cir. 2008) the court held that the homebuyers of houses constructed by the Blackfeet Housing Authority could seek under §702 to compel HUD to spend money to repair their houses because HUD allegedly required the use of improper materials in the construction of the houses. In so holding, the court wrote:

> Plaintiffs seek an injunction, which constitutes specific relief. The injunction sought by Plaintiffs seeks not to compensate, but to "give the plaintiff[s] the very thing to which [they] w[ere] entitled." *Bowen*,

> 487 U.S. at 895 (internal quotation marks omitted). We therefore conclude that this relief is not "money damages" under 5 U.S.C. §706.

Id.

There is no mention in *Marceau* of the source of the funds that would pay for the repairs. The thing to which the plaintiffs were entitled was repair of the houses. *See also Zellous v. Broadhead Associates,* 906 F.2d 94, 98 (3rd Cir. 1990) (plaintiffs sought refunds for allegedly excessive Section 8 rent obligations for the years 1985 and previous. The "money damages" issue was brought later, at a time when granting the requested funds would require use of post-1985 Section 8 appropriations); *Holly Sugar Corp. v. Veneman*, 355 F.Supp.2d 181 (D.D.C. 2005), *rev'd. on other grounds* 437 F.3d 1210 (D.C. Cir. 2006) (plaintiffs sought a refund of excessive interest charged on commodity loans from 2002-2005. The *Bowen* issue reached the District Court in January 2005, yet the issue of whether there remained any FY2002-2004 commodity loan program funding available to reimburse the plaintiffs was not even raised); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672 (D. Kansas 1991) (in an action seeking additional farm support payments for 1987 crop, court denied a motion to dismiss premised on the assertion that the appellant was seeking "money damages," even though the action came before the District Court in May 1991 and would undoubtedly require the use of a post-1987 appropriation for farm support).

3. The District Court Lawfully Ordered the Distribution of Escrowed Funds

In its judgment in favor of Tlingit Haida and the Blackfeet tribes, the district court ordered that certain escrowed funds be released to those tribes. Aplt. Add. A-4. Those funds had been escrowed, by agreement of the parties and order of the court, at the outset of litigation, "so that the funds will be available if the Court subsequently orders HUD to provide them for the Plaintiffs under federal law." Aple.App. 124 ¶4, 127.[31]

Now, after declining to seek a stay of this aspect of the district court's order, and delivering the escrowed funds to those tribes, HUD maintains that implementing the stipulated escrow agreement violated HUD's sovereign immunity. HUD Brief, 66 n.12. Its rationale is that, because the funds escrowed were appropriated in FY2008, "the district court improperly ordered HUD to use 2008 funds to compensate the tribes for the loss of funds from earlier appropriations. *Id.*

The previous subsection demonstrated that the temporal origin of NAHASDA funds is irrelevant to any sovereign immunity claim, because all the pertinent NAHASDA appropriations were "no year appropriations." The point is

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[31] NHA's preliminary injunction imposed a different escrow arrangement. HUD does not contend this order offended sovereign immunity. HUD Brief, 66 n.12. NHA's escrow is therefore not discussed further.

equally applicable here—the district court's distribution of the escrowed funds was no different than HUD's own use of FY2008 funds to restore $26 million in FCAS underfunding in fiscal years 1998-2003. *See* p. 76, *ante*.

As to the escrowed funds in particular, those funds were managed by the court under the equitable authority of §705 of the APA, which provides, *inter alia*, that:

> [T]o the extent necessary to prevent irreparable injury, the reviewing court...may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Id.

The funds were escrowed in light of HUD's position that, were these funds distributed under NAHASDA, there would be no source of recovery, even if the tribes prevailed. 5 U.S.C. §705 is intended to prevent this kind of hollow victory. And, the court's power over the escrowed funds is governed only by the court's "inherent equitable powers to maintain the status quo…so that plaintiff will have something more than a pyrrhic victory." *United States v. State of Michigan,* 781 F.Supp. 492, 497 (E.D. Mich. 1991) (court enjoined the transfer of funds to a different account pending the outcome of the litigation). *Accord Wilson v. Watt*, 703 F.2d 395, 403 (9th Cir. 1983); *State of Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982) (court empowered to order retention of funds beyond statutory lapse date).

The same equitable jurisdiction in APA cases to preserve funds pending appeal applies with equal force to their distribution if and when a plaintiff prevails. The following cases illustrate the breadth and discretion inherent in that jurisdiction. First, in *Board of Education v. Department of Health, Education and Welfare*, 655 F.Supp. 1504 (S.D. Ohio 1987), the court ordered that "$2,896,762 currently being held by HEW pursuant to our earlier orders, be released immediately to the [prevailing] Board of Education [to restore certain unlawfully withheld grant funds]…", *id.,* 1548, despite a disagreement between the Board and HEW over the proper amount of the actual shortfall. Using its equitable powers, the Court ruled that it was fair to distribute the entire escrowed amount because, even were HEW correct, the remainder of the funds could properly be deemed prejudgment interest. *Id.,* 1548-1550.

Second, in *Jacksonville Port Authority v. Adams,* 556 F.2d 52 (D.C. Cir. 1977), the district court had *denied* a preliminary injunction that would have escrowed the disputed grant funds, and those funds had lapsed prior to the appeal being heard. Nevertheless, the Court of Appeals reversed, and held that it was within the district court's power to grant Jacksonville its entitlement, essentially deeming that the funds had been timely preserved. *Jacksonville,* 556 F.2d at 56 ("[T]he equitable power of the Federal Courts is broad, and it is a well-established prerogative of the Court to treat as done that which should have been done.").

The district court's actions were certainly contemplated by the escrow stipulation itself. That agreement made those funds available to the tribes if the district court found they were due the tribes "under federal law." Aple.App. 124 ¶4. There was no fiscal year limitation on whatever "federal law" violation the court found.[32] And, the absence of any temporal limitation on the use of the escrowed funds is plainly consistent with the stipulation's agreed purpose—*i.e.*, to avoid having an overly-broad application of *Houston* result in a meaningless judgment. Aple.App. 128-129. In that regard, and at the time that the escrow stipulation was signed, HUD knew that the funds it recaptured were not from FY2008, but rather from FY1998-2002.

E. A Remand to the Agency Would be Futile

HUD carefully calculates its request for a remand, arguing that "if a hearing was required, the proper remedy is a remand." HUD Brief, 76. In order to be entitled to the recapture remedy, at the required administrative hearing HUD would have to establish that the tribe was in substantial noncompliance with NAHASDA.

[32] Estimated FY2008 underfunding provided the measure of the amount escrowed. Aple.App. 123 ¶1. Some figure had to be used to define the escrow, or the amount would have been whimsical. But using 2008 underfunding as a measure of the escrow did not translate into a limitation as to the escrowed funds. The parties' joint motion to approve the escrow noted the parties disagreed on the issue of any fiscal year limitations on grant funds, and this stipulation *avoided* that argument. Aple.App. 128-129.

HUD's litigation position in the district court, however, was that the tribes have *not* committed any action constituting "substantial noncompliance". For this reason, HUD can never prevail at any hearing, making remand futile.[33] *See* HUD Brief, 58 ("HUD neither alleged nor concluded that any tribe 'failed to comply substantially with NAHASDA'.") Clearly, nothing would be accomplished by remanding these cases to HUD. Similarly, a remand would be futile and would further delay the resolution of these disputes because HUD maintains any hearing on remand would be under 24 C.F.R. §1000.336 which the district court found "does not provide for a hearing—it provides for an exchange of written information." *See* Aplt. App. 609.

It is fundamental that courts are not required to remand a case to an agency where the remand would be futile. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion)("To remand would be an idle and useless formality. [*SEC v. Chenery Corp.,* 318 U.S. 80 (1943)] does not require that we convert judicial review of agency action into a ping-pong game.") *reaffirmed*

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[33] This is not to say that the tribes were not prejudiced by the failure of HUD to provide the requisite administrative hearing which, for some tribes should have been held 15 years ago. At the time of the threatened recaptures (and before HUD adopted the "no substantial noncompliance" litigation position before the district court), the tribes would have presented evidence establishing the reasons the disputed homes were properly included in FCAS and showing why any alleged noncompliance with NAHASDA was not substantial. *See* pp. 59-63, *ante*.

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 545 (2008).

Given HUD's position before the district court, nothing remains to be accomplished by remanding back to the agency. A remand would serve only to absorb more of the limited resources of these parties, resources that should be directed towards addressing the affordable housing needs of the native people served by these housing authorities. The district court did not abuse its discretion by declining to remand.

CONCLUSION

The District Court's Judgments and Orders should be affirmed.

REQUEST FOR ORAL ARGUMENT

The tribes request oral argument because these cases involve the construction and application of numerous NAHASDA statutes and regulations at varying points along NAHASDA's history and because the actual impact this Court's decision will have on the tribes is significant.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and this Court's order of December 5, 2014, I hereby certify that the foregoing Brief for Appellees is in 14-point Times New Roman font and was produced on Microsoft Word 2007, Version ServicePac 3MSO. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 19,981 words, according to the word processor's word count.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made; (2) any required paper copies of this document to be submitted to the court are exact copies of the version filed electronically; and (3) that the electronic submission was scanned for viruses using Endpoint Protection, Version 1.213.1735.0, last updated January 4, 2016, and found to be virus-free.

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CERTIFICATE OF SERVICE

I certify that on January 4, 2016, I electronically filed the foregoing brief with the Clerk of the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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APPELLEES' ADDENDUM

INDEX

PAGE

24 CFR §§ 905.401-905.458 (1995) **1**

63 Fed. Reg. 4083 .... **21**

63 Fed. Reg. 12334-12374 .... **22**

24 CFR § 905.102 (1995) **104**

62 Fed. Reg. 35718 excerpts **105**

24 CFR § 1000.336 (1998) **114**

24 CFR § 1000.118 (1998) **115**

72 Fed. Reg. 20018 excerpts **116**

24 CFR § 1000.530 (2006) **119**

Excerpt from U.S. General Accounting Office Principles of Federal Appropriations Law (3d Edition 2004) **121**

HUD Notice PIH 2009-50 (ONAP) (December 3, 2009) **123**

Subpart E—Mutual Help Homeownership Opportunity Program

§ 905.401 Scope and applicability.

(a) *Scope*. This subpart sets forth the requirements that are applicable to the MH Homeownership Opportunity Program. For any matter not covered in this subpart, see the provisions of the other subparts contained in this part. Projects developed under the Self-Help development method must comply with the requirements of this subpart and of subpart F.

(b) *Applicability*. The provisions of this subpart are applicable to all MH

projects placed under ACC on or after March 9, 1976, and to any projects converted in accordance with §905.455 or §905.503.

§905.404 Program framework.

(a) An MH project using a method of development not involving Self-Help, involves three basic contracts: an ACC, an MHO Agreement and a Construction Contract, each in a form prescribed by HUD. (See §905.220(d)(i).)

(b) Projects under the Mutual Help form of ACC may not be consolidated with projects under other forms of ACC.

§905.407 Application.

(a) *General*—(1) *Availability of eligible homebuyers*. An application for an MH project shall include a certification that there is a sufficient number of eligible homebuyers to ensure the viability of the project.

(b) *Sites*. The application must identify the sites and, for Self-Help projects, pre.approved plans and specifications, with only minor modifications.

(1) *Purchase*. An IHA may purchase a homesite if neither the Tribe nor the homebuyers can donate or contribute enough sites suitable for project use.

(2) *Availability of sites for use by another homebuyer*. Each homesite shall be legally and practicably available for use by another homebuyer. If a site is part of other land owned by the prospective homebuyer, the lease or other conveyance to the IHA shall include the legal right of access to the site by any substitute homebuyer.

(3) *Alternative sites and substitution of sites*. In order to minimize delay to the project in the event of the withdrawal of a selected homebuyer or an approved site, the IHA should have a reasonable number of alternatives available. No substitution of a site shall be permitted after final site approval unless the change is necessary by reason of special circumstances. Unless HUD has issued a corrective action order with respect to this function, in accordance with §905.135, HUD approval of substitution of a site is not required.

(c) *Authorizing resolution*. The application must include a certified copy of the resolution adopted by the IHA's Board of Commissioners authorizing the appropriate officers to submit the application to HUD and must indicate approval of participation in the Self-Help program, if applicable.

(Information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under OMB control number 2577-0030)

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992]

§905.410 HUD review of application.

(a) *Completeness*. HUD will review each application in accordance with §905.220 (and §905.469, if Self-Help development method).

(b) *Program reservation*. When an application ranks high enough for funding, HUD will issue a program reservation and execute an ACC, and the IHA will proceed to submit a development program.

§905.413 Special provisions for development of an MH project.

(a) *MH construction contracts*—(1) *Special provisions to be included in advertisements*. The advertisement for a construction contract other than one used in Self-Help shall state that:

(i) The project is an MH project,

(ii) The contractor may obtain a copy of the proposed MH construction contract, and

(iii) The contractor may obtain a list of the sites.

(2) *Responsibility of contractor*. The construction contract shall provide that the contractor is responsible for acceptable completion of all the homes.

(b) *Consultation with homebuyers*. The IHA shall provide for soliciting comments from homebuyers and other interested parties, as provided in §905.225(c), concerning the planning and design of the homes. Any changes resulting from such consultation shall be consistent with project standards and cost limitations.

(c) *Financial feasibility*. The application shall be supported by signed applications maintained in the IHA's office of a sufficient number of selected homebuyers who are able and willing to pay the projected administration charge, meet the other obligations under MHO Agreements (see

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§905.416(b)), and enter into MHO Agreements. HUD may request submission of the applications, as necessary, to determine feasibility of the development.

(d) *Rights under MHO agreement if project fails to proceed.* Any MHO Agreement shall be subject to revocation by the IHA if the IHA or HUD decides not to proceed with the development of the project in whole or in part. In such event, any contribution made by the homebuyer or Tribe shall be returned. If the contribution was a land contribution, it will be returned to the contributor.

(e) *Mutual Help contribution.* See §905.419.

(f) *Insurance.* Upon occupancy, the homebuyer is responsible for payment of insurance coverage as part of its administration charge (see §905.427(b)).

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992]

§905.416 Selection of MH homebuyers.

(a) *Admission policies*—(1) *Low-income families.* An IHA's written admission policies for the MH program, adopted in accordance with §905.301, must limit admission to low-income families, except as otherwise permitted in this paragraph.

(i) An IHA may provide for admission of applicants whose family income exceeds the levels established for low-income families to the MH program operated on an Indian reservation or in an Indian area, if the IHA demonstrates to HUD's satisfaction that there is a need for housing for such families that cannot reasonably be met except under this program.

(ii) An IHA may provide for admission of a non-Indian applicant to the MH program operated on an Indian reservation or in an Indian area, if the IHA determines that the presence of the family on the Indian reservation or other Indian area is essential to the well-being of Indian families and the need for housing for the family cannot reasonably be met except under this program. If the IHA permits admission of non-Indians to its MH program, the IHA must specify the criteria it uses to determine whether a family's presence is essential in its admission policies.

(2) *Limitation on number of units for non-low income families.* The number of dwelling units in any project assisted under the MH program that may be occupied by or reserved for families on Indian reservations and other Indian areas whose incomes exceed the levels established for low-income families (*i.e.*, applicants admitted under paragraph (a)(1)(i) of this section) may not exceed whichever of the following is higher:

(i) Ten percent of the dwelling units in the project; or

(ii) Five dwelling units.

(3) *Different standards for MH program.* (i) The IHA's admission policies for MH projects should be different from those for its rental or Turnkey III projects. The policies for the MH program should provide standards for determining a homebuyer's:

(A) Ability to provide maintenance for the unit; and

(B) Potential for maintaining at least the current income level.

(ii) The policies for the Mutual Help program must include procedures for determining the successor to a unit upon the death of a homebuyer (in the event that the homebuyer has not designated a successor or the successor fails to qualify).

(b) *Ability to meet homebuyer obligations.* A family shall not be selected for MH housing unless, in addition to meeting the income limits and other requirements for admission (see §905.301), the family is able and willing to meet all obligations of an MHO Agreement, including the obligations to perform or provide the required maintenance, to provide the required MH Contribution and its own utilities, and to pay the administration charge.

(c) *MH waiting list.* (1) Families who wish to be considered for selection for MH housing shall apply specifically for such housing. A family on any other IHA waiting list, or a tenant in a rental project of the IHA, must also submit an application for selection in order to be considered for an MH project; and

(2) The IHA shall maintain a waiting list, separate from any other IHA waiting list, of families that have applied for MH housing and that have been determined to meet the admission requirements. The IHA shall maintain an MH waiting list in accordance with requirements prescribed by HUD and

HeinOnline -- CFR 170 1995

shall make selections in the order in which they appear on the list.

(d) *Making the selections.* Within 30 days after HUD approval of the application for a project, the IHA must proceed with preliminary selection of as many Homebuyers as there are homes in the project. Preliminary selection of homebuyers must be made from the MH waiting list in accordance with the date of application, qualification for a federal preferences, ranking preferences, and local preferences, in accordance with §§905.303 through 905.307, other pertinent factors under the IHA's admissions policies established in accordance with §905.301, and all admissions are subject to 24 CFR part 750. Final selection of a homebuyer will be made only after the site for that homebuyer has received final site approval and the form of MH contribution to be made by that homebuyer (or donated for that homebuyer) has been determined.

(e) *Principal residence.* A condition for selection as a homebuyer is that the family agrees to use the home as their principal residence during the term of the MHO Agreement. Ownership or use of a residence other than the MH home that would continue after participation would disqualify a family from the MH program. However, there are two situations that are deemed not to violate the principal residence requirement. First, ownership or use of a secondary home that is necessary for the family's livelihood or for cultural preservation, as described in the IHA's admission and occupancy policy, is acceptable. Second, a family's temporary absence from its MH home, and related subleasing of it is acceptable if it is done for reasons and time periods prescribed in the IHA's admission and occupancy policy.

(f) *Notification of applicants.* The IHA shall give families prompt written notice of whether or not they have been selected. If a family is not selected, the notice must state the basis for the determination and that the family is entitled to an informal hearing by the IHA on the determination, if a request for a hearing is made within a reasonable time (as specified in the notice). Such a hearing should be held within a reasonable time.

(g) *Change in income.* (1) If a family's income changes after selection but before execution of the MHO agreement in such a way as to make it ineligible (either too high or too low), the IHA may reject the family for this program. However, even a family with an income above the low-income limits may be admitted to this program, provided that the number of such families admitted does not exceed the limit stated in paragraph (a)(2) of this section.

(2) If a family s income changes after the MHO agreement is executed but before the unit is occupied so that it no longer qualifies for the program, the IHA may reject the family for this program. If it becomes evident that a family s income is inadequate to meet its obligations, the IHA may counsel the family about other housing options, such as its rental program. Inability of the family to meet its obligations under the homebuyer agreement is grounds for termination of the agreement.

(Information collection requirements have been approved by the Office of Management and Budget under control number 2577-0003)

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992; 59 FR 36655, July 18, 1994]

§905.419 MH contribution.

(a) *Amount and form of contribution.* As a condition of occupancy, the MH homebuyer will be required to provide an MH contribution. Contributions other than labor may be made by an Indian Tribe on behalf of a family.

(1) The value of the contribution must be $1500.

(2) The MH contribution may consist of land, labor, cash, materials, equipment, or any combination thereof. Land contributed to satisfy this requirement must be owned in fee simple by the homebuyer or must be assigned or allotted to the homebuyer for his or her use before application for an MH unit. Contributions of land donated by another person on behalf of the homebuyer will satisfy the requirement for an MH contribution. A homebuyer may provide cash to satisfy the MH contribution requirement where the cash is used for the purchase of land, labor, or materials or equipment for the homebuyer's home.

HeinOnline -- CFR 171 1995

(3) The amount of credit for an MH contribution in the case of land, labor, or materials or equipment shall be based upon the market value at the time of the contribution, but in no case will the credit exceed $1500. In the case of labor, materials or equipment, market value shall be determined by the contractor and the IHA. In the case of land, market value shall be determined by the IHA, but in no case will the credit exceed $1,500 per homesite. The use of labor, materials or equipment as MH contributions must be reflected by a reduction in the Total Contract Price stated in the Construction Contract and the amount must be approved by the HUD field office.

(b) *Execution of agreements.* For projects other than Self-Help development projects, MHO Agreements must be signed for all units before execution of the construction contract for the project, unless the IHA obtains approval by the HUD field office of an exception. Land leases for trust land must be signed and approved by BIA before construction start. The MHO Agreement must include the homebuyer's agreement to satisfy the MH contribution requirement before occupancy of the unit.

(c) *Total contribution to be furnished before occupancy.* The homebuyer cannot occupy the unit until the entire MH contribution is provided to the IHA. If the homebuyer is unable or unwilling to provide the MH contribution before occupancy of the project, the MHO Agreement for the homebuyer shall be terminated, any MH contribution paid by the homebuyer shall be refunded in accordance with § 905.446, and the IHA shall select a substitute homebuyer from its waiting list.

(d) *MH contribution in event of substitution of homebuyer.* If an MHO Agreement is terminated and a substitute homebuyer is selected, the amount of MH contribution to be provided by the substitute homebuyer shall be in accordance with paragraph (a) of this section. The substitute homebuyer may not occupy the unit until the complete MH contribution has been made.

(e) *Disposition of contribution.* If an MHO Agreement is terminated by the IHA or the homebuyer before the date of occupancy, the homebuyer may receive reimbursement of the value of the MH contribution made plus other amounts contributed by the homebuyer, in accordance with § 905.446.

§ 905.422 Commencement of occupancy.

(a) *Notice.* (1) Upon acceptance by the IHA from the contractor of the home as ready for occupancy, the IHA shall determine whether the homebuyer has met all requirements for occupancy, including satisfaction in full of the MH contribution, and fulfillment of mandatory homebuyer counseling requirements. (See § 905.453.) The IHA shall notify the homebuyer in writing that the home is available for occupancy as of a date specified in the notice, which is called the date of occupancy.

(2) If the IHA determines that the homebuyer has not fully provided the MH contribution or met any of the other conditions for occupancy by the date of occupancy, the homebuyer shall be sent a notice in writing. This notice must specify the date by which all requirements must be satisfied and shall advise the homebuyer that the MHO Agreement will be terminated and a substitute homebuyer selected for the unit if the requirements are not satisfied. (See § 905.446 and § 905.419(d).)

(b) *Credits to MH accounts and reserves.* Promptly after the date of occupancy, the IHA shall credit the amount of the MH contribution to the homebuyer's accounts and reserves in accordance with § 905.437 and shall give the homebuyer a statement of the amounts so credited.

§ 905.425 Inspections, responsibility for items covered by warranty.

(a) *Inspection before move-in and identification of warranties.* (1) To establish a record of the condition of the home on the date of occupancy, the homebuyer (including a subsequent homebuyer) and the IHA shall make an inspection of the home as close as possible to, but not later than, the date the homebuyer takes occupancy. (The record of this inspection shall be separate from the certificate of completion required by § 905.260(f), but the inspections may, if feasible, be combined.) After the inspection, the IHA representative shall give the homebuyer a

HeinOnline -- CFR 172 1995

signed statement of the condition of the home and equipment and a full written description of all homebuyer responsibilities. The homebuyer shall sign a copy of the statement, acknowledging concurrence or stating objections; and any differences shall be resolved by the IHA and a copy of the signed inspection report shall be kept at the IHA. This written statement of the condition of the home shall not limit the homebuyer's right to claim latent defects in construction that may be covered by warranties referenced in paragraph (a)(2) of this section.

(2) Within 30 days of commencement of occupancy of each home, the IHA shall furnish the homebuyer with a list of applicable contractors', manufacturers' and suppliers' warranties, indicating the items covered and the periods of the warranties, and stating the homebuyer's responsibility for notifying the IHA of any deficiencies that would be covered under the warranties.

(b) *Inspections during contractors' warranty periods, responsibility for items covered by contractors', manufacturers' or suppliers' warranties.* In addition to the inspection required under paragraph (a) of this section, the IHA will inspect the home regularly in accordance with paragraph (c). However, it is the responsibility of the homebuyer, during the period of the applicable warranties, to promptly inform the IHA in writing of any deficiencies arising during the warranty period (including manufacturers' and suppliers' warranties) so that the IHA may enforce any rights under the applicable warranties. If a homebuyer fails to furnish such a written report in time, and the IHA is subsequently unable to obtain redress under the warranty, correction of the deficiency shall be the responsibility of the homebuyer.

(c) *Annual inspections.* The IHA shall perform inspections annually, in accordance with §905.428.

(d) *Inspection upon termination of agreement.* If the MHO Agreement is terminated for any reason after commencement of occupancy, the IHA shall inspect the home after notifying the homebuyer of the time for inspection and shall give the homebuyer a written statement of the cost of any maintenance work required to put the home in satisfactory condition for the next occupant (see §905.446).

(e) *Homebuyer permission for inspections; participation in inspections.* The homebuyer shall permit the IHA to inspect the home at reasonable hours and intervals during the period of the MHO Agreement in accordance with rules established by the IHA. The homebuyer shall be notified of the opportunity to participate in the inspection made in accordance with this section.

§905.426 Homebuyer payments—pre-1976 projects.

The amount of the required monthly payment for a homebuyer in an MH project placed under ACC before March 9, 1976 is determined in accordance with the MH Agreement and provisions of §§905.315 and 905.102 concerning income. Utility reimbursements are not applicable to the Mutual Help program.

§905.427 Homebuyer payments—post-1976 projects.

(a) *Applicability.* The amount of the required monthly payment for a homebuyer in an MH project placed under ACC on or after March 9, 1976, and a homebuyer admitted to occupancy in an existing project on or after the conversion of the project in accordance with §905.455 is determined in accordance with this section.

(b) *Establishment of payment.* (1) Each homebuyer shall be required to make a monthly payment ("required monthly payment"), as determined by the IHA and approved by HUD. The schedule will provide that the minimum required monthly payment equal the administration charge.

(2) Subject to the requirement for payment of at least the administration charge, each homebuyer shall pay an amount of required monthly payment computed by: (i) multiplying adjusted income (determined in accordance with §905.315) by a specified percentage; and (ii) subtracting from that amount the utility allowance determined for the unit. The specific percentage shall be no less than 15 percent and no more than 30 percent, as determined by the IHA and approved by HUD.

(3) The IHA's schedule shall provide that the required monthly payment may not be more than a maximum

HeinOnline -- CFR 173 1995

amount. The maximum shall not be less than the sum of:

(i) The administration charge; and

(ii) The monthly debt service amount shown on the homebuyer's purchase price schedule.

(4) If the "required monthly payment" exceeds the administration charge, the amount of the excess shall be credited to the homebuyer's monthly equity payments account (see § 905.437(b)).

(c) *Administration charge.* The administration charge should reflect differences in expenses attributable to different sizes or types of units. It is the amount budgeted by the IHA for monthly operating expenses covering the following categories (and any other operating expense categories included in the IHA's HUD-approved operating budget for a fiscal year or other period, excluding any operating cost for which operating subsidy is provided):

(1) Administrative salaries, payroll taxes, etc.; travel, postage, telephone and telegraph, office supplies; office space, maintenance and utilities for office space; general liability insurance or risk protection costs; accounting services; legal expenses; and operating reserve requirements (§ 905.431); and

(2) General expenses, such as premiums for fire and related insurance, payments in lieu of taxes, if any, and other similar expenses.

(d) *Adjustments in the amount of the required monthly payment.* (1) After the initial determination of a homebuyer's required monthly payment, the IHA shall increase or decrease the amount of such payment in accordance with HUD regulations to reflect changes in adjusted income (pursuant to a reexamination by the IHA in accordance with § 905.315), adjustments in the administration charge, or in any of the other factors affecting computation of the homebuyer's required monthly payment.

(2) In order to accommodate wide fluctuations in required monthly payments due to seasonal conditions, an IHA may agree with the homebuyer for payments to be made in accordance with a seasonally adjusted schedule which assures full payment of the required amount for each year.

(e) *Homebuyer payment collection policy.* Each IHA shall establish and adopt written policies, and use its best efforts to obtain compliance to assure the prompt payment and collection of required homebuyer payments. A copy of the policies shall be posted prominently in the IHA office, and shall be provided to a homebuyer upon request. Unless HUD has issued a corrective action order with respect to this function, in accordance with § 905.135, HUD approval is not required.

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992]

§ 905.428 Maintenance, utilities, and use of home.

(a) *General.* Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and homebuyers. A copy of such written policies shall be posted prominently in the IHA office, and shall be provided to an applicant or homebuyer upon entry into the program and upon request.

(b) *Provisions for MH projects.* For MH Projects, the written maintenance policies shall contain provisions on at least the following subjects:

(1) The responsibilities of homebuyers for maintenance and care of their dwelling units and common property;

(2) Procedures for providing advice and technical assistance to homebuyers to enable them to meet their maintenance responsibilities;

(3) Procedures for IHA inspections of homes and common property;

(4) Procedures for IHA performance of homebuyer maintenance responsibilities (where homebuyers fail to satisfy such responsibilities), including procedures for charging the homebuyer's proper account for the cost thereof;

(5) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(6) Procedures for charging homebuyers for damage for which they are responsible.

(c) *IHA responsibility in MH projects.* The IHA shall enforce those provisions of a Homebuyer's Agreement under which the homebuyer is responsible for

HeinOnline -- CFR 174 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 119

maintenance of the home. The IHA has overall responsibility to HUD for assuring that the housing is being kept in decent, safe, and sanitary condition, and that the home and grounds are maintained in a manner that will preserve their condition, normal wear and tear excepted. Failure of a homebuyer to meet the obligations for maintenance shall not relieve the IHA of responsibility in this respect. Accordingly, except as discussed below, the IHA shall conduct a complete interior and exterior examination of each home at least once a year, and shall furnish a copy of the inspection report to the homebuyer. The IHA shall take appropriate action, as needed, to remedy conditions shown by the inspection, including steps to assure performance of the homebuyer's obligations under the homebuyer's agreement. The IHA may inspect the home once every three years, in lieu of an annual inspection where the homebuyer;

(1) Is in full compliance with the original terms of the homebuyer's agreement, including payments, and

(2) The home is maintained in decent, safe, and sanitary condition, as reflected by the last inspection by the IHA. However, if at any time the IHA determines that the homebuyer is not in compliance with the homebuyer's agreement, it must reinstitute annual inspections.

(d) *Homebuyer responsibility in MH program.* (1) The homebuyer shall be responsible for routine and nonroutine maintenance of the home, including all repairs and replacements (including those resulting from damage from any cause). The IHA shall not be obligated to pay for or provide any maintenance of the home other than the correction of warranty items reported during the applicable warranty period.

(2) *Homebuyer's failure to perform maintenance.* (i) Failure of the homebuyer to perform maintenance obligations constitutes a breach of the MHO Agreement and grounds for its termination. Upon a determination by the IHA that the homebuyer has failed to perform its maintenance obligations, the IHA shall require the homebuyer to agree to a specific plan of action to cure the breach and to assure future compliance. The plan shall provide for maintenance work to be done within a reasonable time by the homebuyer, with such use of the homebuyer's account as may be necessary, or to be done by the IHA and charged to the homebuyer's account, in accordance with §905.437. If the homebuyer fails to carry out the agreed-to plan, the MHO agreement shall be terminated in accordance with §905.446.

(ii) If the IHA determines that the condition of the property creates a hazard to the life, health, or safety of the occupants, or if there is a risk of damage to the property if the condition is not corrected, the corrective work shall be done promptly by the IHA with such use of the homebuyer's accounts as the IHA may determine to be necessary, or by the homebuyer with a charge of the cost to the homebuyer's accounts in accordance with §905.437.

(iii) Any maintenance work performed by the IHA shall be accounted for through a work order stating the nature of and charge for the work. The IHA shall give the homebuyer copies of all work orders for the home.

(e) *Homebuyer's responsibility for utilities.* The homebuyer is responsible for the cost of furnishing utilities for the home. The IHA shall have no obligation for the utilities. However, if the IHA determines that the homebuyer is unable to pay for the utilities for the home, and that this inability creates conditions that are hazardous to life, health, or safety of the occupants or threatens damage to the property, the IHA may pay for the utilities on behalf of the homebuyer and charge the homebuyer's accounts for the costs, in accordance with §905.437. When the homebuyer's account has been exhausted, the IHA shall pursue termination of the homebuyer agreement and may offer the homebuyer a transfer into the rental program if a unit is available.

(f) *Obligations with respect to home and other persons and property.* (1) The homebuyer shall agree to abide by all provisions of the MHO Agreement concerning homebuyer responsibilities, occupancy and use of the home.

(2) The homebuyer may request IHA permission to operate a small business in the unit. An IHA shall grant this authority where the homebuyer provides the following assurances and may re-

HeinOnline -- CFR 175 1995

scind this authority upon violation of any of the following assurances:

(i) The unit will remain the homebuyer's principal residence;

(ii) The business activity will not disrupt the basic residential nature of the housing site; and

(iii) The business will not require permanent structural changes to the unit that could adversely affect a future homebuyer's use of the unit. The IHA may rescind such authority whenever any of the above assurances are violated.

(g) *Structural changes*.

(1) A homebuyer shall not make any structural changes in or additions to the home unless the IHA has determined that such change would not:

(i) Impair the value of the home, the surrounding homes, or the project as a whole; or

(ii) Affect the use of the home for residential purposes.

(2)(i) Additions to the home include, but are not limited to, energy-conservation items such as solar panels, wood-burning stoves, flues and insulation. Any changes made in accordance with this section shall be at the homebuyer's expense, and in the event of termination of the MHO Agreement the homebuyer shall not be entitled to any compensation for such changes or additions.

(ii) If the homebuyer is in compliance with the terms of the MHO Agreement, the IHA may agree to allow the homebuyer to use the funds in the MEPA for betterments and additions to the MH home. In such event, the IHA shall determine whether the homebuyer will be required to replenish the MEPA or if the funds are to be loaned to the homebuyer at an interest rate determined by the IHA. The homebuyer cannot use MEPA funds for luxury items, as determined by the IHA.

(Information collection requirement contained in paragraph (c) has been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 and assigned OMB control number 2577–0114)

§ 905.431 Operating reserve.

(a) The IHA shall maintain an operating reserve for the project in an amount sufficient for working capital purposes, for estimated future nonroutine maintenance requirements for IHA-owned administrative facilities and common property, for the payment of advance premiums for insurance, and for unanticipated project requirements approved by HUD. A contribution to this reserve shall be determined by the IHA and included in the administration charge. The amount of this contribution shall be increased or decreased annually to reflect the needs of the IHA for working capital and for reserves for anticipated future expenditures and shall be included in the operating budget submitted to the HUD field office for approval. If the IHA fails to maintain an adequate operating reserve level, HUD may issue a corrective action order prescribing specific actions that the IHA must take to improve its financial condition. (See § 905.135.)

(b) At the end of each fiscal year or other budget period, the project operating reserve shall be:

(1) Credited with the amount by which operating receipts exceed operating expenses of the project for the budget period, or

(2) Charged with the amount by which operating expenses exceed operating receipts of the project for the budget period, to the extent of the balance in the operating reserve.

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992]

§ 905.434 Operating subsidy.

(a) *Scope*. This section authorizes the use of operating subsidy for Mutual Help projects; establishes eligible costs; and provides for determination of operating subsidy on a uniform basis for all MH projects.

(b) *Eligible costs*. The reasonable cost of an annual independent audit is an eligible cost for operating subsidy. Operating subsidy may also be paid to cover proposed expenditures approved by the HUD field office for the following purposes:

(1) Administration charges for vacant units where the IHA submits evidence to the HUD field office's satisfaction that it is making every reasonable effort to fill the vacancies;

(2) Collection losses due to payment delinquencies on the part of homebuyer families whose MHO Agreements have

HeinOnline -- CFR 176 1995

been terminated and who have vacated the home, and the actual cost of any maintenance (including repairs and replacements) necessary to put the vacant home in a suitable condition for a subsequent homebuyer family. Operating subsidy may be made available for these purposes only after the IHA has previously used all available homebuyer credits. Every reasonable effort shall be made to collect charges from a vacated homebuyer, including court judgments, professional collection services, etc., as appropriate;

(3) The costs of HUD-approved homebuyer counseling program(s) but not in duplication of homebuyer counseling costs funded under a development cost budget (in accordance with subpart C);

(4) HUD-approved costs for training and related travel of IHA staff and Commissioners;

(5) The costs of a HUD-approved professional management contract; and

(6) Operating costs resulting from other unusual circumstances justifying payment of operating subsidy, if approved by HUD.

(7) Subject to appropriations, in accordance with the provisions of subpart O of this part and procedures determined by HUD, each IHA shall receive $25 per unit per year for units represented by a duly elected resident organization for resident participation activities. Of this amount, $15 per unit per year shall fund resident participation activities of the duly elected ROs including but not limited to stipends. Ten dollars per unit per year shall fund IHA costs incurred in carrying out resident participation activities.

(c) *Ineligible cost.* No operating subsidy shall be paid for utilities, maintenance, or other items for which the homebuyer is responsible except, as necessary, to put a vacant home in condition for a subsequent family as provided in paragraph (b)(2) of this section.

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992; 59 FR 43630, Aug. 24, 1994]

§905.437 Homebuyer reserves and accounts.

(a) *Refundable and nonrefundable MH reserves.* The IHA shall establish separate refundable and nonrefundable reserves for each homebuyer effective on the date of occupancy.

(1) The refundable MH reserve represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's cash MH contribution or the value of the labor, materials or equipment MH contribution.

(2) The nonrefundable MH reserve also represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's share of any credits for land contributed to the project and the homebuyer's share of any credit for non-land contributions by a terminated homebuyer.

(b) *Equity accounts*—(1) *Monthly equity payments account* ("MEPA"). The IHA shall maintain a separate MEPA for each homebuyer. The IHA shall credit this account with the amount by which each required monthly payment exceeds the administration charge. Should the homebuyer fail to pay the required monthly payment, the IHA may elect to reduce the MEPA by the amount owed each month towards the administration charge, until the MEPA has been fully expended. The MEPA balance must be comprised of an amount backed by cash actually received in order for any such reduction to be made.

(2) *Voluntary equity payments account* ("VEPA"). The IHA shall maintain a separate VEPA for each homebuyer. The IHA shall credit this account with the amounts of any periodic or occasional voluntary payments (in excess of the required monthly payment) that the homebuyer may desire to make to acquire ownership of the home within a shorter period of time. The IHA may amend an individual homebuyer's MHOA to permit a more flexible use of the VEPA for alterations of the unit, cosmetic changes, additions, betterments, etc.

(3) *Investment of equity funds.* Funds held by the IHA in the equity accounts of all the homebuyers in the project shall be invested in HUD-approved investments. Income earned on the in-

HeinOnline -- CFR 177 1995

vestments of such funds shall periodically, but at least annually, be prorated and credited to each homebuyer's equity accounts in proportion to the amount in each such account on the date of proration. If HUD determines that accounts are not properly managed and has issued a corrective action order pursuant to § 905.135, it may ultimately remove responsibility of the IHA for managing such accounts to a HUD-approved escrow agent.

(c) *Charges for maintenance.* (1) If the IHA has maintenance work done in accordance with § 905.428(a), the cost thereof shall be charged to the homebuyer's MEPA.

(2) At the end of each fiscal year, the debit balance, if any in the MEPA shall be charged, first to the voluntary equity payments account; second, to the refundable MH reserve; and third, to the nonrefundable MH reserve, to the extent of the credit balances in that account and those reserves.

(3) In lieu of charging the debit balance in the MEPA to the homebuyer's refundable MH reserve and/or nonrefundable MH reserve, the IHA may allow the debit balance to remain in the MEPA pending replenishment from subsequent credits to the homebuyer's MEPA.

(4) The IHA shall at no time permit the accumulation of a debit balance in the MEPA in excess of the sum of the credit balances in the homebuyer's refundable and nonrefundable MH reserves, unless the expenditure is required to alleviate a hazard to the life, health or safety of the occupants, or to alleviate risk of damage to the property.

(d) *Disposition of reserves and accounts.* When the homebuyer purchases the home, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 905.440. If the MHO agreement is terminated by the homebuyer or the IHA, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 905.446.

(e) *Use of reserves and accounts; nonassignability.* The homebuyer shall have no right to receive or use the funds in any reserve or account except as provided in the MHO agreement, and the homebuyer shall not, without approval of the IHA and HUD, assign, mortgage or pledge any rights in the MHO agreement or to any reserve or account.

§ 905.440 Purchase of home.

(a) *General.* The IHA provides the family an opportunity to purchase the dwelling under the Mutual Help and Occupancy Agreement (a lease with an option to purchase), under which the purchase price is amortized over the period of occupancy, in accordance with a purchase price schedule. For acquisition under the MHO agreement, see paragraph (e) of this section. If a homebuyer wants to acquire ownership in a shorter period than that shown on the purchase price schedule, the homebuyer may exercise his or her option to purchase the home on or after the date of occupancy, but only if the homebuyer has met all obligations under the MHO agreement. The homebuyer may obtain financing, from the IHA or an outside source, at any time, to cover the remaining purchase price. The financing may be provided using such methods as a mortgage (e.g., see 24 CFR 203.43h), or a loan agreement. If the homebuyer is able to obtain financing from an outside source, the IHA will release the homebuyer from the MHO agreement and terminate the homebuyer's participation in this program. For acquisition under methods other than under the MHO agreement, see paragraph (d) of this section and § 905.443.

(b) *Purchase price and purchase price schedule.*—(1) *Initial purchase price.* The IHA shall determine the initial purchase price of a home for the homebuyer who first occupies the home, pursuant to an MHO Agreement as follows (unless the IHA, after consultation with the homebuyer, has developed an alternative method of apportioning among the homebuyers, the amount determined in Step 1, and the alternative method has been made a part of the HUD-approved development program):

Step 1: From the estimated Total Development Cost (TDC) (including the full amount for contingencies as authorized by HUD) of the project as shown in the development cost budget in effect at the time of execution of the construction contract, deduct the

HeinOnline -- CFR 178 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 123

amounts, if any, not directly attributable to the dwelling cost and equipment, including, but not limited to:

(i) Relocation costs,

(ii) Counseling costs,

(iii) The cost of any community, administration or management facilities, including the land, equipment, and furnishings attributable to such facilities as set forth in the development program for the project, and

(iv) The total amount attributable to land for the project

(v) Off-site water and sewer,

(vi) Other administrative costs associated with the development of the project.

Step 2: Multiply the amount determined in Step 1 by a fraction of which the numerator is the development cost standard for the size and type of home being constructed for the homebuyer, and the denominator is the sum of the unit development cost standards for the homes of various sizes and types comprising the project.

Step 3: Determine the amount chargeable to development costs, if any, for acquisition of the homesite.

Step 4: Add the amount determined in Step 3 to the amount determined in Step 2. The sum determined under this step shall be the initial purchase price of the home.

(2) *Purchase price schedule.* Promptly after execution of the construction contract, the IHA shall furnish to the homebuyer a statement of the initial purchase price of the home, and a purchase price schedule that will apply, based on amortizing the balance (purchase price less the MH contribution) over a period, not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA, provided that the rate does not exceed the prevailing interest rate for Veterans Administration guaranteed mortgage loans at the time the schedule is established. The IHA may choose to forego charging interest and calculate the payment with an interest rate of zero.

(c) *Purchase price schedule for subsequent homebuyer.*—(1) *Initial purchase price.* When a subsequent homebuyer executes the Mutual Help and Occupancy Agreement, the purchase price for the subsequent homebuyer shall be determined by the IHA based on one of the following procedures: (i) The current appraised value; (ii) the current replacement cost of the home or; (iii) the remaining purchase price of the unit.

(2) *Purchase price schedule.* Each subsequent homebuyer shall be provided with a purchase price schedule, showing the monthly declining purchase price over the term of the MHO agreement, commencing with the first day of the month following the effective date of the agreement.

(d) *Notice of eligibility for financing.* If the IHA offers IHA homeownership financing in accordance with §905.443 and has funds available for that purpose, it shall determine, at the time of each examination or reexamination of the family's earnings and other income, whether the homebuyer is eligible for that financing. If the IHA determines that the homebuyer is eligible, the IHA shall notify the homebuyer in writing that IHA homeownership financing is available to enable the homebuyer to purchase the home, if the homebuyer wishes to do so and, that if the homebuyer chooses not to purchase the home at that time, all the rights of a homebuyer shall continue (including the right to accumulate credits in the equity accounts) and all obligations under the MHO agreement shall continue (including the obligations to make monthly payments based on income). The IHA shall convey ownership of the home when the homebuyer exercises the option to purchase and has complied with all the terms of the MHO agreement. The homebuyer can exercise the option to purchase only by written notice to the IHA, in which the homebuyer specifies the manner in which the purchase price and settlement costs will be paid.

(e) *Conveyance of home*—(1) *Purchase procedure.* In accordance with the MHO agreement, the IHA shall convey title to the homebuyer when the balance of the purchase price can be covered from the amount in the two equity accounts (MEPA and VEPA). The homebuyer may supplement the amount in the equity accounts with reserves or any other funds of the homebuyer.

(2) *Amounts to be paid.* The purchase price shall be the amount shown on the

HeinOnline -- CFR 179 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 124

purchase price schedule for the month in which the settlement date falls.

(3) *Settlement costs.* Settlement costs are the costs incidental to acquiring ownership, including the costs and fees for credit report, field survey, title examination, title insurance, inspections, attorneys other than the IHA's attorney, closing, recording, transfer taxes, financing fees and mortgage loan discount. Settlement costs shall be paid by the homebuyer who may use equity accounts or reserves available for the purchase in accordance with paragraph (e)(4) of this section.

(4) *Disposition of homebuyer accounts and reserves.* When the homebuyer purchases the home, the net credit balances in the homebuyer's equity accounts (MEPA and VEPA, as described in § 905.437), supplemented by the nonrefundable MH reserve and then the refundable MH reserve, shall be applied in the following order:

(i) For the initial payment for fire and extended coverage insurance on the home after conveyance if the IHA finances purchase of the home in accordance with § 905.443;

(ii) For settlement costs, if the homebuyer so directs;

(iii) For the purchase price; and

(iv) The balance, if any, for refund to the homebuyer.

(5) *Settlement.* A home shall not be conveyed until the homebuyer has met all the obligations under the MHO Agreement, except as provided for in § 905.440(e)(8). The settlement date shall be mutually agreed upon by the parties. On the settlement date, the homebuyer shall receive the documents necessary to convey to the homebuyer the IHA's right, title, and interest in the home, subject to any applicable restrictions or covenants as expressed in such documents. The required documents shall be approved by the attorney representing the IHA and by the homebuyer or the homebuyer's attorney.

(6) *IHA investment and use of purchase price payments.* After conveyance, all homebuyer funds held or received by the IHA from the sale of a unit in a project financed with grants shall be held separate from other project funds, and shall be used for purposes related to low-income housing use, as approved by HUD. Homebuyer funds held or received by the IHA from the sale to a homebuyer of a unit in a project financed by loans are subject to loan forgiveness. Homebuyer funds include the amount applied to payment of the purchase price from the equity accounts (MEPA and VEPA), any cash paid by the homebuyer for application to the purchase price and, if the IHA finances purchase of the home in accordance with § 905.446, any portion of the mortgage payments by the homeowner attributable to payment of the debt service (principal and interest) on the mortgage.

(7) *Removal of home from MH program.* When a home has been conveyed to the homebuyer, whether or not with IHA financing, the unit is removed from the IHA's MH project under its ACC with HUD. If the IHA has provided financing, its relationship with the homeowner is transformed by the conveyance to that of lender, in accordance with the documents executed during settlement.

(8) *Homebuyers with delinquencies.* If a homebuyer has a delinquency at the end of the amortization period, the unit is no longer available for assistance from HUD or the IHA, even though the unit has not been conveyed. The IHA must take action to terminate the MHOA or to develop a repayment schedule for the remaining balance to be completed in a reasonable period, but not longer than three years. The payment should be equal to a monthly pro-rated share of the remaining balance owed by the homebuyer, plus an administrative fee consisting of the cost of insurance and the IHA's processing cost. If the homebuyer fails to meet the requirements of the repayment schedule, the IHA should proceed immediately with eviction.

[57 FR 28250, June 24, 1992; 57 FR 37085, Aug. 18, 1992, as amended at 57 FR 40117, Sept. 2, 1992]

§ 905.443 IHA homeownership financing.

(a) *Eligibility.* If the IHA offers homeownership financing, the homebuyer is eligible for it when the IHA determines that:

HeinOnline -- CFR 180 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 125

(1) The homebuyer can pay (from the balance in the homebuyer's reserves or accounts, or from other sources):

(i) The amount necessary for settlement costs; and

(ii) The initial payment for fire and extended coverage insurance carried on the home after conveyance; and

(iii) Maintenance reserve (at the option of the IHA).

(2) The homebuyer's income has reached the level, and is likely to continue at such level, at which 30 percent of monthly adjusted income is at least equal to the sum of the monthly debt service amount shown on the homebuyer's purchase price schedule and the IHA's estimates of the following monthly payments and allowances:

(i) Payment for fire and extended coverage insurance;

(ii) Payment for taxes and special assessments, if any;

(iii) The IHA mortgage servicing charge;

(iv) Amount necessary for maintenance of the home; and

(v) Amount necessary for utilities for the home.

(b) *Promissory note, mortgage, and mortgage amortization schedule.*

(1) When IHA homeownership financing is utilized, the homebuyer shall execute and deliver a promissory note and mortgage. The mortgage shall be a first lien on the property recorded by the IHA at the BIA title plant, if applicable, and/or other Tribal approved agencies or departments used for such purposes. It shall secure performance of all the terms and conditions of the promissory note. The principal amount of the promissory note shall be equal to the amount of the unpaid balance of the purchase price of the home as determined in accordance with §905.440.

(2) The IHA shall furnish the homebuyer at settlement with a mortgage amortization schedule based on the principal amount of the promissory note. This schedule shall provide for level monthly reduction in and complete amortization of the principal amount of the promissory note, based upon debt service needed to complete the amortization. The amortization period shall commence on the first day of the month following the date of settlement and shall end on the first day after the end of the period shown on the amortization schedule. The rate of interest, if any, shall be determined by the IHA.

(c) *Monthly payment.* The promissory note or mortgage shall require the homeowner to make a monthly payment to the IHA equal to the sum of the following:

(1) *Insurance.* An amount sufficient to provide the IHA with funds for payment of the insurance premium for fire and extended coverage insurance in an amount and on terms acceptable to HUD (which policy shall be maintained until termination of the obligation under the mortgage.)

(2) *Taxes.* An amount sufficient to pay taxes and any special assessments when next due.

(3) *Mortgage service fee.* A representation of the IHA's monthly cost.

(4) *Mortgage debt service payment.* As shown on the mortgage amortization schedule.

(5) *Maintenance reserve.* An amount to replenish the reserve when required.

(d) *Application of monthly payment.* Each monthly payment shall be applied by the IHA in the following order:

(1) Insurance premium;

(2) Taxes, or payments in lieu of taxes, and special assessments;

(3) Mortgage servicing charge;

(4) Monthly debt service; and

(5) Replenishment of the maintenance reserve, if applicable.

(e) *Reduced payment resulting from reduced income.* If the homeowner's family income is reduced because of circumstances beyond the homeowner's control, to a point where 30 percent of the monthly adjusted income is insufficient to pay the required monthly payment, the IHA must reduce the monthly payment using the following guidelines:

(1) The payment shall be the greater of:

(i) 30 percent of the monthly adjusted income, or

(ii) The sum of the monthly amounts for insurance, taxes and assessments, if any, and the mortgage servicing charge.

(2) The period of reduced payments should be for the minimum amount of time projected by the IHA to be needed by the family to recover from the cause

HeinOnline -- CFR 181 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 126

of the lost income—normally no longer than 12 months.

(3) The IHA and homeowner should execute a payment plan reflecting the agreed upon reduced payment amount and term.

(4) The IHA will apply the monthly payment, to the extent that there are funds available, in the order specified in paragraph (d) of this section.

(f) *Transformation of MH relationship.* Upon conveyance of the home with IHA financing, the relationship of the IHA and homebuyer is transformed to that of mortgagee (lender) and mortgagor (borrower), and the MH program rules are no longer applicable to the unit.

(g) *HUD review and approval.* Unless HUD has issued a corrective action order with respect to this function, in accordance with § 905.135, the IHA may proceed with providing IHA financing without prior HUD approval. IHAs without prior experience in IHA financing should consult with the HUD field office.

[57 FR 28250, June 24, 1992, as amended at 57 FR 40117, Sept. 2, 1992]

§ 905.446 Termination of MHO agreement.

(a) *Termination upon breach.* (1) In the event the homebuyer fails to comply with any of the obligations under the MHO agreement, the IHA may terminate the MHO agreement by written notice to the homebuyer, enforced by eviction procedures applicable to landlord-tenant relationships. Foreclosure is an inappropriate method for enforcing termination of the homeownership agreement, which constitutes a lease (with an option to purchase). The homebuyer is a lessee during the term of the agreement and acquires no equitable interest in the home until the option to purchase is exercised.

(2) Misrepresentation or withholding of material information in applying for admission or in connection with any subsequent reexamination of income and family composition constitutes a breach of the homebuyer's obligations under the MHO agreement. *Termination*, as used in the MHO agreement, does not include acquisition of ownership by the homebuyer.

(b) *Notice of termination of MHO agreement by the IHA, right of homebuyer to respond.* Termination of the MHO agreement by the IHA for any reason shall be by written notice of termination. Such notice shall be in compliance with the terms of the MHO agreement and, in all cases, shall afford a fair and reasonable opportunity to have the homebuyer's response heard and considered by the IHA. Such procedures shall comply with the Indian Civil Rights Act, if applicable, and shall incorporate all the steps and provisions needed to comply with State, local, or Tribal law, with the least possible delay. (See § 905.340.)

(c) *Termination of MHO agreement by homebuyer.* The homebuyer may terminate the MHO Agreement by giving the IHA written notice in accordance with the agreement. If the homebuyer vacates the home without notice to the IHA, the homebuyer shall remain subject to the obligations of the MHO agreement, including the obligation to make monthly payments, until the IHA terminates the MHO agreement in writing. Notice of the termination shall be communicated by the IHA to the homebuyer to the extent feasible and the termination shall be effective on the date stated in the notice.

(d) *Disposition of funds upon termination of the MHO agreement.* If the MHO agreement is terminated, the balances in the homebuyer's accounts and reserves shall be disposed of as follows:

(1) The MEPA shall be charged with:

(i) Any maintenance and replacement cost incurred by the IHA to prepare the home for the next occupant;

(ii) Any amounts the homebuyer owes the IHA, including required monthly payments;

(iii) The required monthly payment for the period the home is vacant, not to exceed 60 days from the date of receipt of the notice of termination, or if the homebuyer vacates the home without notice to the IHA, for the period ending with the effective date of termination by the IHA; and

(iv) The cost of securing a vacant unit, the cost of notification and associated termination tasks, and the cost of storage and/or disposition of personal property.

(2) If, after making the charges in accordance with paragraph (d)(1) of this section, there is a debit balance in the

HeinOnline -- CFR 182 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 127

MEPA, the IHA shall charge that debit balance, first to the VEPA; second, to the refundable MH reserve; and third, to the nonrefundable MH reserve, to the extent of the credit balances in these reserves and account. If the debit balance in the MEPA exceeds the sum of the credit balances in these reserves and account, the homebuyer shall be required to pay to the IHA the amount of the excess.

(3) If, after making the charges in accordance with paragraphs (d) (1) and (2) of this section, there is a credit balance in the MEPA, this amount shall be refunded, except to the extent it reflects the value of land donated on behalf of the family. Similarly, any credit balance remaining in the VEPA after making the charges described above shall be refunded.

(4) Any credit balance remaining in the refundable MH reserve after making the charges described above shall be refunded to the homebuyer.

(5) Any credit balance remaining in the nonrefundable MH reserve after making the charges described above shall be retained by the IHA for use by the subsequent homebuyer.

(e) *Settlement upon termination*—(1) *Time for settlement.* Settlement with the homebuyer following a termination shall be made as promptly as possible after all charges provided in paragraph (d) of this section have been determined and the IHA has given the homebuyer a statement of such charges. The homebuyer may obtain settlement before determination of the actual cost of any maintenance required to put the home in satisfactory condition for the next occupant, if the homebuyer is willing to accept the IHA's estimate of the amount of such cost. In such cases, the amounts to be charged for maintenance shall be based on the IHA's estimate of the cost thereof.

(2) *Disposition of personal property.* Upon termination, the IHA may dispose of any item of personal property abandoned by the homebuyer in the home, in a lawful manner deemed suitable by the IHA. Proceeds, if any, after such disposition, may be applied to the payment of amounts owned by the homebuyer to the IHA.

(f) *Responsibility of IHA to terminate.* (1) The IHA is responsible for taking appropriate action with respect to any noncompliance with the MHO agreement by the homebuyer. In cases of noncompliance that are not corrected as provided further in this paragraph, it is the responsibility of the IHA to terminate the MHO agreement in accordance with the provisions of this section and to institute eviction proceedings against the occupant.

(2) As promptly as possible after a noncompliance comes to the attention of the IHA, the IHA shall discuss the matter with the homebuyer and give the homebuyer an opportunity to identify any extenuating circumstances or complaints which may exist. A plan of action shall be agreed upon that will specify how the homebuyer will come into compliance, as well as any actions by the IHA that may be appropriate. This plan shall be in writing and signed by both parties.

(3) Compliance with the plan shall be checked by the IHA not later than 30 days from the date thereof. In the event of refusal by the homebuyer to agree to such a plan or failure by the homebuyer to comply with the plan, the IHA shall issue a notice of termination of the MHO agreement and evict the homebuyer in accordance with the provisions of this section on the basis of the noncompliance with the MHO agreement.

(4) A record of meetings with the homebuyer, written plans of action agreed upon and all other related steps taken in accordance with paragraph (f) shall be maintained by the IHA for inspection by HUD.

(g) *Subsequent use of unit.* After termination of a homebuyer's interest in the unit, it remains as part of the MH project under the ACC. The IHA must follow its policies for selection of a subsequent homebuyer for the unit under the MH program. (See §905.449(g) for use of unit if no qualified subsequent homebuyer is available.)

§905.449 Succession upon death or mental incapacity.

(a) *Definition of "event." Event* means the death or mental incapacity of all of the persons who have executed the MHO agreement as homebuyers.

(b) *Designation of successor by homebuyer.* (1) A homebuyer may designate

HeinOnline -- CFR 183 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 128

a successor who, at the time of the "event", would assume the status of homebuyer, provided that at that time he or she meets the conditions stated in paragraph (c) of this section. The designation shall be made at the time of execution of the MHO agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

(c) *Succession by persons designated by homebuyer.* (1) Upon occurrence of an "event", the person designated as the successor shall succeed to the former homebuyer's rights and responsibilities under the MHO agreement if the designated successor meets the following conditions:

(i) The successor is a family member and will make the home his or her primary residence;

(ii) The successor is willing and able to pay the administration charge and to perform the obligations of a homebuyer under an MHO agreement;

(iii) The successor satisfies program eligibility requirements; and

(iv) The successor executes an assumption of the former homebuyer's obligations under the MHO agreement.

(2) If a successor satisfies the requirements of paragraphs (c)(1) of this section except for paragraph (c)(1)(iii), the successor may execute an outright purchase of the home.

(d) *Designation of successor by IHA.* If at the time of the event there is no successor designated by the homebuyer, or if any of the conditions in paragraph (c) of this section are not met by the designated successor, the IHA may designate, in accordance with its occupancy policy, any person who qualifies under paragraph (c).

(e) *Occupancy by appointed guardian.* If at the time of the event there is no qualified successor designated by the homebuyer or by the IHA in accordance with the foregoing paragraphs of this section, and a minor child or children of the homebuyer are living in the home, the IHA may, in order to protect their continued occupancy and opportunity for acquiring ownership of the home, approve as occupant of the home an appropriate adult who has been appointed legal guardian of the children with a duty to perform the obligations of the MHO agreement in their interest and behalf.

(f) *Succession and occupancy on trust land.* In the case of a home on trust land subject to restrictions on alienation under federal law (including federal trust or restricted land and land subject to trust or restriction under State law), or under State or Tribal law where such laws do not violate federal statutes, a person who is prohibited by law from succeeding to the IHA's interest on such land may, nevertheless, continue in occupancy with all the rights, obligations and benefits of the MHO agreement, modified to conform to these restrictions on succession to the land.

(g) *Termination in absence of qualified successor.* If there is no qualified successor in accordance with the IHA's approved policy, the IHA shall terminate the MHO agreement and select a subsequent homebuyer from the top of the waiting list to occupy the unit under a new MHO agreement. If a new homebuyer is unavailable or if the home cannot continue to be used for low-income housing in accordance with the Mutual Help program, the IHA may submit an application to HUD to approve a disposition of the home, in accordance with subpart M.

§ 905.452 Miscellaneous.

(a) *Annual statement to homebuyer.* The IHA shall provide an annual statement to the homebuyer that sets forth the credits and debits to the homebuyer equity accounts and reserves during the year and the balance in each account at the end of each IHA fiscal year. The statement shall also set forth the remaining balance of the purchase price.

(b) *Insurance before transfer of ownership, repair or rebuilding*—(1) *Insurance.* The IHA shall carry all insurance prescribed by HUD, including fire and extended coverage insurance upon the home.

(2) *Repair or rebuilding.* In the event the home is damaged or destroyed by fire or other casualty, the IHA shall consult with the homebuyers as to whether the home shall be repaired or rebuilt. The IHA shall use the insurance proceeds to have the home repaired or rebuilt unless there is good

HeinOnline -- CFR 184 1995

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 129

reason for not doing so. In the event the IHA determines that there is good reason why the home should not be repaired or rebuilt and the homebuyer disagrees, the matter shall be submitted to the HUD field office for final determination. If the final determination is that the home should not be repaired or rebuilt, the IHA shall terminate the MHO agreement, and the homebuyer's obligation to make required monthly payments shall be deemed to have terminated as of the date of the damage or destruction.

(3) *Suspension of payments*. In the event of termination of a MHO Agreement because of damage or destruction of the home, or if the home must be vacated during the repair period, the IHA will use its best efforts to assist in relocating the homebuyer. If the home must be vacated during the repair period, required monthly payments shall be suspended during the vacancy period.

(c) *Notices*. Any notices by the IHA to the homebuyer required under the MHO Agreement or by law shall be delivered in writing to the homebuyer personally or to any adult member of the homebuyer's family residing in the home, or shall be sent by certified mail, return receipt requested, properly addressed, postage prepaid. Notice to the IHA shall be in writing and either delivered to an IHA employee at the office of the IHA, or sent to the IHA by certified mail, return receipt requested, properly addressed, postage prepaid.

§ 905.453 Counseling of homebuyers.

(a) *General*. The IHA shall provide counseling to homebuyers in accordance with this section. The purpose of the counseling program shall be to develop:

(1) A full understanding by homebuyers of their responsibilities as participants in the MH Project,

(2) Ability on their part to carry out these responsibilities, and

(3) A cooperative relationship with the other homebuyers. All homebuyers shall be required to participate in and cooperate fully in all official pre-occupancy and post-occupancy counseling activities. Failure without good cause to participate in the program shall constitute a breach of the MHO Agreement.

(b) *Contents of the Program*. The counseling program shall consist of a pre-occupancy phase and a post-occupancy phase. While some elements of the program lend themselves more to one phase than the other, counseling in the two phases shall be coordinated and interrelated. The counseling program shall include, but not be limited to, the following areas:

(1) *Explanation of the MH Program*. The homebuyers should be given a full explanation of the MH Program and how each homebuyer relates to the program. Each homebuyer should be made aware of his financial and legal responsibilities and those of the IHA.

(2) *MH Contribution*. Each homebuyer should be given counseling necessary to assure that the homebuyer has a full understanding of and will be able to provide the particular form or forms of contribution that are required under the MHO Agreement, as well as an understanding of homebuyer rights in connection with the MH contribution.

(3) *Property care and maintenance*. Each homebuyer should be made familiar with the overall operation of basic systems of the home such as electrical, plumbing, heating systems; major appliances such as refrigerators, ranges, dishwashers; minor appliances such as openers, toasters, the surroundings of the home, i.e. yards and gardens; the care and maintenance to be provided by the homebuyer; the basic provisions of all applicable warranties; and the homebuyer's responsibilities in connection with the warranties.

(4) *Budgeting and money management*. Each homebuyer should be counseled on the importance of family budgeting and meeting financial obligations, methods for allocating funds for utilities and any other necessities, the use of credit, and consumer matters.

(5) *Information on community resources and services*. Each homebuyer should be supplied with information relating to resources available in the community to provide services in areas such as educational opportunities, upgrading employment skills, legal services, dental and health care, child care for working mothers, counseling on family

157-084 O—95——7

HeinOnline -- CFR 185 1995

problems such as marital problems, alcoholism or drug problems.

(c) *Planning*. (1) The counseling program shall be carefully designed to meet the special needs of the MH Project, and shall be flexible and responsive to the needs of each homebuyer. While many subjects lend themselves to group session, provision should be made for individual sessions, as needed. Individuals should not be required to attend classes on material with which they are familiar unless they can actively participate in the instruction process.

(2) Special attention shall be directed to the needs of working members of the family for sessions to be held during a time when they can attend. There shall be recognition of the communication and value systems of the participants and an understanding and respect for their background and experience. Maximum possible use shall be made of local trainers to insure good communication and rapport.

(3) The program may be provided by the IHA staff, or by contract with another organization, but in either case with voluntary cooperation and assistance of groups and individuals within the community. It is essential that the training entity be completely knowledgeable concerning the MH Program. Where contractors are utilized, there shall be a close working relationship with the IHA staff who will have the ongoing responsibility for counseling.

(d) *Submissions of Program for approval*. (1) The IHA shall submit to HUD an application for approval of a counseling program and approval of funds for it. The application shall be submitted before any counseling costs are incurred but no later than the submission of the working drawings and specifications.

(2) The application pursuant to paragraph (d)(1) of this section shall include a narrative statement outlining the counseling program, and copies of any proposed contract and other pertinent documents. This statement shall include the following:

(i) A showing that the training entity has the necessary knowledge and capability for effectively carrying out the proposed program, including a statement of the experience and qualifications of the organization and of personnel who will directly provide the counseling.

(ii) A description of the method and instruments to be used to determine individual counseling needs.

(iii) A description of the scope and content of the proposed program, including a detailed breakdown of tasks to be performed, products to be produced, and a time schedule, including provision for progress payments for specific tasks.

(iv) A description of the methods and instruments to be used.

(v) A statement of the local community resources to be used.

(vi) The estimated cost and methods of payment for the task and products to be performed or produced, including separate estimates of costs for the pre-occupancy and post-occupancy phases of the program, and a description of services and funds to be obtained from non-HUD sources, if any.

(3) No counseling costs shall be incurred until the HUD field office has approved the counseling program.

(4) If the counseling program is to be substantially the same as previously approved by HUD, the IHA in lieu of a detailed submission pursuant to paragraph (d)(2) of this section may submit a statement identifying the previously approved counseling program and highlighting any proposed changes.

(e) *Funding*. The development cost for the project shall include an estimated amount for costs of the counseling program not to exceed $500 multiplied by the number of homes in the Project (including follow-up needs during the management stage, and counseling in connection with turnover). The approved amount for counseling shall be included in the contract award development cost budget. If the approved amount is less than $500 per home the amount may, if necessary, be amended up to the $500 per home limitation with the approval of the HUD field office, but not later than the Final Development Cost Budget.

(f) *Progress reports*. Unless otherwise required in a corrective action order, IHAs shall submit an annual progress report with the annual budget submission to the HUD field office.

HeinOnline -- CFR 186 1995

(g) *Termination of counseling program.* If HUD determines that an IHA's counseling program is not being properly implemented, the program may be terminated after notice to the IHA stating the deficiencies in program implementation, and giving the IHA 90 days from the date of notification to take corrective action, and in the event of termination the amount included in the Development Cost Budget for the program shall be reduced so as not to exceed expenses already incurred at the time of termination.

§905.455 Conversion of rental projects.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the HUD field office for approval to convert any or all of the units in an existing rental project to the MH program. Any conversion of existing units shall not affect in any way the IHA's status for funding for new development.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the units must be single family detached homes, or apartment/row houses for conversion to condominium/cooperative ownership. In addition, the units must have individually metered utilities and be in decent, safe and sanitary condition. The project(s) which possess the proposed conversion units must have received an approved actual development cost certificate.

(2) Tenants or other applicants to be homebuyers of the proposed conversion units must qualify for the program under §905.416(b). The entire MH contribution required of the homebuyer must be made before the rental unit occupied by a tenant can be converted to the MH program.

(3) In the case of conversion of apartments or row houses to condominium or cooperative ownership, all units in a structure must be converted, with all occupants at the time of the application qualified, in accordance with paragraph (b)(2) of this section. Any occupants who do not qualify or desire to convert must be satisfactorily relocated and replaced with qualified occupants before application for conversion of the structure.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The HUD field office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; evidence units are habitable, safe and sanitary; family qualifications as discussed in paragraph (b)(2); and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining rental units must not be adversely affected.

§905.458 Conversion of Mutual Help Projects to Rental Program.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the HUD field office for approval to convert any or all Mutual Help project units to the rental program, wherever or whenever a homebuyer or homebuyers have lost the potential for ownership because of the inability to meet the cost of their homebuyer responsibilities.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the project must have received an approved ADCC.

(2) The remaining balances in any reserve accounts shall be accounted for individually for each unit converted in a manner consistent with project intent and in a manner prescribed by HUD.

(3) The balance remaining in the MEPA, if any, is applied first to outstanding tenant accounts receivable, then to repair of homebuyer maintenance items, and finally returned to the homebuyer.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The HUD field office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining units must not be adversely affected.

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income without HUD approval. HUD approval is required if a recipient plans to use more than 10% of its 1937 Act funds for such assistance or to provide housing for families over 100% of median income.

For vacancies in homeownership programs where the units were under management as of September 30, 1997, occupancy by families whose income falls within 80 to 100% of median income may not exceed 10% of the dwelling units in the project or 5 dwelling units, whichever is greater, without HUD approval. HUD approval is required if a recipient plans to admit more than this amount in a project or to provide housing for families over 100% of median income.

Question 17. Can an IHA or recipient develop additional units with funds provided through the 1937 Act and have the extra units included in the IHBG formula?

Answer 17. No. While developing the maximum number of affordable housing units is encouraged, housing units over the number specified in the original grant approval will not be included in the total number of units developed with 1937 Act funds.

Question 18. Can an IHA be a NAHASDA sub-grantee of the tribe or TDHE for the purpose of maintaining housing developed under the 1937 Act?

Answer 18. Yes. Additionally, an IHA could be a sub-grantee for the purpose of developing and managing housing with NAHASDA funds.

Effect on 1937 Act Funding

Question 19. Must an IHA (or its successor entity) use grant funds provided under the 1937 Act for the original purpose after October 1, 1997?

Answer 19. No. Funds provided to an IHA under the 1937 Act can be used for any activity eligible under NAHASDA. An IHA (or its successor entity) must honor existing contracts the IHA has entered into with others prior to NAHASDA; however, an IHA may reprogram the use of funds for eligible activities subject to written notification to HUD.

Question 20. Will Indian housing authorities (IHA), tribes or tribally designated housing entities (TDHE) be eligible to apply for assistance under any programs covered by the 1937 Act?

Answer 20. No. Section 501 of NAHASDA repealed Title II of the 1937 Act and made Titles I and III inapplicable to Indian housing after September 30, 1997. Therefore, as of October 1, 1997, IHAs and tribes are ineligible for funding for the following programs:

-New development

-Modernization (both the Comprehensive Improvement Assistance Program and the Comprehensive Grant Program including the disaster/emergency reserve)

-Operating subsidy

-HOPE for Public and Indian Housing Homeownership

-Indian Housing Childhood Development

-Section 8

Question 21. Will any operating subsidy be provided to IHAs after October 1, 1997?

Answer 21. Yes. The Fiscal Year (FY) 1997 appropriation for operating subsidy under Section 9 of the 1937 Act covers IHAs fiscal years beginning (FYB) January 1, 1997 and ending December 31, 1997; FYB April 1, 1997 and ending March 31, 1998; FYB July 1, 1997 and ending June 30, 1998; and FYB October 1, 1997 and ending September 30, 1998. IHAs

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Reporter
63 FR 12334

Federal Register* > *1998* > *March* > *Thursday, March 12, 1998* > *Rules and Regulations* > *DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) -- Office of the Assistant Secretary for Public and Indian Housing (OASPIH)

Title: Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Final Rule

Action: Final rule.

Agency

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) > Office of the Assistant Secretary for Public and Indian Housing (OASPIH)

Identifier: [Docket No. FR-4170-F-16] > RIN 2577-AB74

Administrative Code Citation

24 CFR Parts 950, 953, 955, 1000, 1003, and 1005

Synopsis

[*12334] SUMMARY: On July 2, 1997, HUD published a rule proposing to implement the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). NAHASDA reorganizes the system of Federal housing assistance to Native Americans by eliminating several separate programs of assistance and replacing them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance. This rule makes final the policies and procedures set forth in the July 2, 1997 proposed rule, and takes into consideration the public comments received on the proposed rule. As required by section 106(b)(2) of NAHASDA, HUD developed the proposed and final rules with active tribal participation and using the procedures of the Negotiated Rulemaking Act.

Text

SUPPLEMENTARY INFORMATION:

I. The July 2, 1997 Proposed Rule

On July 2, 1997 *(62 FR 35718),* HUD published for public comment a rule proposing to implement the Native American Housing Assistance and Self-Determination Act of 1996 *(25 U.S.C. 4101* *et seq.*) (NAHASDA). NAHASDA streamlines the process of providing housing assistance to Native Americans. Specifically, it eliminates several separate programs of assistance and replaces them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance.

The July 2, 1997 rule proposed to implement NAHASDA in a new 24 CFR part 1000. Part 1000 is divided into six subparts (A through F), each describing the regulatory requirements for a different aspect of NAHASDA. The Committee elected to present new part 1000 in a ″Question and Answer″ format. Additionally, the rule as much as practicable did not repeat statutory language. A reader was therefore required to have the statute available while reading the rule.

The July 2, 1997 rule also proposed to make several conforming amendments to HUD's existing Indian housing regulations. For example, the rule proposed to remove 24 CFR part 950 from the Code of Federal Regulations. Part 950, which sets forth the regulatory requirements for the ″old″ system of funding, was made obsolete by NAHASDA.

The rule also proposed to redesignate 24 CFR part 953 (Community Development Block Grants for Indian tribes and Alaskan Native Villages) and 24 CFR part 955 (Loan Guarantees for Indian Housing) as 24 CFR parts 1003 and 1005, respectively. These redesignations were designed to consolidate HUD's Indian housing regulations in the ″1000 series″ of title 24, and assist program participants by presenting uniformity.

Finally, the July 2, 1997 rule proposed amendments to the regulations currently set forth in part 955. These revisions were designed to reflect the amendments made by NAHASDA to section 184 of the Housing and Community Development Act of 1992 *(12 U.S.C. 1715z-13a).*

The July 2, 1997 proposed rule provided a detailed description of the amendments to title 24 of the CFR.

II. Negotiated Rulemaking.

Section 106(b)(2)(A) of NAHASDA provides that all regulations required under NAHASDA be issued according to the negotiated rulemaking procedure under subchapter II of chapter 5 of title 5, United States Code. The rulemaking procedure referenced is the Negotiated Rulemaking Act of 1990. Accordingly, the Secretary of HUD established the Native American Housing Assistance and Self-Determination Negotiated Rulemaking Committee (Committee) to negotiate and develop a proposed rule implementing NAHASDA.

The Committee consisted of 58 members. Forty-eight of these members represented geographically diverse small, medium, and large Indian tribes. There were ten HUD representatives on the Committee. Additionally, three individuals from the Federal Mediation and Conciliation Service served as facilitators. While the Committee was much larger than usually chartered under the Negotiated Rulemaking Act, its larger size was justified due to the diversity of tribal interests, as well as the number and complexity of the issues involved.

Tribal leaders recommended and the Committee agreed to operate based on consensus rulemaking. The protocols adopted by the Committee define ″consensus″ as general agreement demonstrated by the absence of expressed disagreement by a Committee member in regards to a particular issue. HUD committed to using, to the maximum extent feasible consistent with its legal obligations, all consensus decisions as the basis for the proposed rule.

The Committee divided itself into six workgroups. Each workgroup was charged with analyzing specified provisions of the statute and drafting any regulations it believed were necessary for implementing those provisions. The draft regulations developed by the workgroups were then brought before the full Committee for review, amendment, and approval. A seventh workgroup was assigned the task of reviewing the approved regulations for format, style, and consistent use of terminology.

During February, March, and April 1997 the Committee met four times. The meetings were divided between workgroup sessions at which regulatory language was developed and full Committee sessions to discuss draft regulations produced by the workgroups. Tribal leaders were encouraged to attend the meetings and participate in the rulemaking process.

It was the Committee's policy to provide for public participation in the rulemaking process. All of the Committee sessions were announced in the **Federal Register** and were open to the public.

After the Negotiated Rulemaking Committee delivered a proposed rule, the Department placed the rule in clearance in accordance with its customary procedures for the finalization of proposed rules. As a result, numerous changes were suggested by offices within HUD which **[*12335]** had not been part of the negotiated rulemaking process. The Department

did not send up a ″red flag″ or adjust its customary process, notwithstanding the fact that the proposed rule was the product of a negotiated rulemaking process. As a result, changes were made to the negotiated rule and were not communicated to the Negotiated Rulemaking Committee for comment prior to publication.

After discussing conflicting views of the propriety of the Department's actions, the Committee determined (with HUD agreement) that the Department's changes would be given consideration in a manner similar to public comments. As with public comments, the Department's changes were accepted by the Committee where they contributed to the clarity or legal accuracy of the rule, or where they more effectively implemented NAHASDA.

The Department regrets any misunderstanding its actions may have caused.

III. Discussion of Public Comments on the July 2, 1997 Proposed Rule

The public comment period on the July 2, 1997 proposed rule expired on August 18, 1997. The rule was of significant interest to Indian country, as demonstrated by the 134 public comments submitted on the regulations. These comments offered detailed and helpful suggestions on the implementation of NAHASDA. The Committee met during August, September, and October 1997 to consider the public comments and develop this final rule. This section of the preamble presents a summary of the significant issues raised by the public commenters on the July 2, 1997 proposed rule, and the Committee's responses to these comments. For the convenience of readers, the discussion of the public comments is organized by subpart and regulatory section.

Subpart A--General

Subpart A contains the legal authority and scope of the regulations. It also sets forth definitions for key terms used in the balance of the regulations. Subpart A also cross-references to other applicable Federal laws and regulations. Additionally, subpart A describes the conflict of interest provisions which are applicable under the new Indian housing block grant program.

Section 1000.1. Section 1000.1 describes the applicability and scope of 24 CFR part 1000. The Committee has made a clarifying amendment to this provision. Specifically, a sentence has been added to explain that to the extent practicable the regulations do not repeat statutory language.

Section 1000.2. Several commenters believe that the final rule should restate the trust responsibility of the United States to Indian tribes. One of the commenters recommended language regarding trust responsibility for inclusion in the final rule. The Committee has adopted the language suggested by this commenter and added a new undesignated paragraph at the end of § 1000.2.

Section 1000.4. Several commenters believe that this section did not accurately reflect the objectives of NAHASDA. The Committee has addressed this concern by specifically reiterating the language of NAHASDA section 201(a) which sets forth the primary objective of NAHASDA.

Section 1000.6. Several commenters objected to the unilateral change made by HUD to this section. Specifically, the language originally adopted by the Committee provided that the new Indian Housing Block Grant (IHBG) program is a ″formula driven″ program. HUD revised this to read ″formula grant program.″ The Committee has adopted the suggestion made by these commenters to use the original regulatory language. The Committee believes this language more accurately reflects the nature of the IHBG program.

Section 1000.8. Several commenters believe that this section, which merely cross-referenced to HUD's general regulatory waiver provision at *24 CFR 5.110*, was unclear. The Committee has corrected this by revising the section to reiterate the language of § 5.110.

Another commenter recommended that HUD should be required to respond to waiver requests within 30 days of receipt or the waiver should be automatically approved. The authority to grant regulatory waivers rests solely with the Secretary.

The default approval procedure suggested by the commenter would contradict this principle. Accordingly, the comment has not been adopted.

Section 1000.10. A number of comments were received which suggested changes to definitions contained in the proposed rule. The Committee reviewed each of the comments and determined as follows:

1. *Adjusted income.* Several comments suggested excluding child support from annual income. The definition of adjusted income is specified in the statute. The statutory definition allows the Indian tribe to include in its Indian Housing Plan (IHP) other amounts they decide to exclude from annual income. Accordingly, no revision was made to the proposed rule.

2. *Annual income.* A number of suggestions were received to remove from the definition of annual income specific items such as per capita payments, lease payments, education stipends, etc. The definition in the proposed rule is modeled on the obsolete 1937 Act definition which was repealed by NAHASDA. In response to these comments, the Committee has revised the definition of ″annual income″ to provide Indian tribes with greater flexibility in determining what is annual income. The revised definition is modeled on the definition of annual income in the HOME program (24 CFR part 92) and provides three distinct definitions of annual income from which a recipient may choose.

3. *Homebuyer payment.* The Committee has added a new definition of ″homebuyer payment.″ As explained in the preamble to the proposed rule *(62 FR 35722),* the term ″homebuyer payment″ is limited to lease-purchase payments, such as those in the Mutual Help Homeownership Opportunity Program. The addition of this new definition will clarify the meaning of the phrase for readers of the regulations.

4. *Indian area.* The proposed rule provided the broadest possible definition of ″Indian area″ to allow Indian tribes or Tribally Designated Housing Entities (TDHEs) to operate. The Committee has chosen not to make substantive revisions to this definition. However, in response to several comments, it has clarified the definition.

5. *Indian tribe.* One commenter suggested that only Federally recognized Indian tribes be recognized in Alaska. The definition of eligible recipients is statutory; therefore, no change was made to the definition.

6. *Median Income.* The Committee has amended the definition of median income. The proposed rule merely cross-referenced to the statutory definition. The amendment clarifies the definition for purposes of eligibility under a recipient's program.

7. *Person with disabilities.* HUD made several changes to language adopted by the Committee at the proposed rule stage designed to clarify that this definition was based on HUD's definition of ″physical, or mental impairment″ at *24 CFR 8.3*. The regulations at 24 CFR part 8 implement section 504 of the Rehabilitation Act of 1973 *(29 U.S.C. 794).* The Committee reviewed the HUD changes and determined they were unnecessary. Accordingly, this final rule reflects the original Committee language.

8. *Total development cost.* Several comments suggested clarifications and **[*12336]** modifications to this definition. Total development cost is a term used only for purposes of the formula. Therefore, the term is being defined under subpart D and is being removed from this section.

Section 1000.12. This section describes the nondiscrimination requirements that are applicable to the Indian Housing Block Grant (IHBG) program. In response to several public comments, the Committee has made several clarifying revisions to § 1000.12. The section now clarifies that the Indian Civil Rights Act applies to Federally recognized Indian tribes exercising powers of self-government. Further, § 1000.12(b) now clearly provides that title VI of the Civil Rights Act of 1964 *(42 U.S.C. 2000d)* and title VIII of the Civil Rights Act of 1968 *(42 U.S.C. 3601 et seq.)* apply to Indian tribes that are not covered by the ICRA. However, the title VI and title VIII requirements do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

Section 1000.14. Several commenters objected to the relocation and property disposition requirements set forth in this section. The commenters wrote that these requirements were burdensome and redundant. Several commenters suggested that § 1000.14 simply cross-reference to the Department of Transportation regulations at 49 CFR part 24. The Department

of Transportation is the lead agency in the implementation of the Uniform Relocation Act. The Committee has reviewed § 1000.14 and determined that it provides clear and concise guidance to recipients. Accordingly, no changes have been made.

Section 1000.16. A number of comments were received which expressed concern with the application of Davis-Bacon Act requirements to NAHASDA. The payment of Davis-Bacon wage rates to laborers and mechanics in the development of affordable housing under NAHASDA is a statutory requirement under section 104(b) of NAHASDA and cannot be removed by regulation.

Other commenters suggested that the regulations limit the applicability of Davis-Bacon to projects larger than 12 units. This suggestion was not adopted by the Committee for lack of statutory authority.

A number of commenters suggested that the labor standards section was not sufficiently clear. The Committee has replaced the language in the proposed rule, including those provisions modified by HUD without the consent of the Committee, with a more explicit discussion of labor standards including the applicability of Davis-Bacon wage rates, HUD determined wage rates, the Contract Work Hours and Safety Standards Act, and miscellaneous related laws and issuances.

Section 1000.18. One commenter questioned whether HUD or the recipient will have to conduct an Environmental Assessment (EA) before HUD's compliance determination for an IHP. The commenter recommended that the final rule clarify this issue. Section 1000.18 has been revised to provide that an environmental review does not have to be completed prior to HUD's compliance determination for an IHP.

One commenter noted that 24 CFR parts 50 and 58 do not refer to the Archaeological Resources Protection Act and Native American Graves Protection and Repatriation Act. The commenter believed these statutes should be addressed in the final rule. The Committee has not adopted this suggestion. Parts 50 and 58 list only statutes that apply to Federal projects specifically. The statutes referenced by the commenter have a broader scope.

Section 1000.20. Forty-seven comments were received on this section. These comments deal with HUD's environmental review responsibilities addressing the payment of review costs; the timely completion of reviews; and the eligibility, under NAHASDA, for NEPA training.

This section has been modified by the Committee to provide greater flexibility in addressing environmental review requirements. In addition to requesting HUD to complete reviews or the Indian tribe completing reviews, the Indian tribe can now choose to provide HUD with necessary information for HUD to complete the environmental reviews. Also, a sentence has been added which clearly notifies recipients that environmental reviews must be completed before affordable housing activities affecting the environment can begin.

Additionally, HUD raised an issue in the preamble of the proposed rule concerning the timing of environmental reviews as it relates to approval of the IHP. HUD has reviewed the IHP approval process and has determined that the approval of the IHP does not have an impact on the completion of the environmental reviews.

Section 1000.22. One commenter suggested that the final rule state whether additional funds will be available to the Indian tribes to meet the environmental review requirements. The rule states in § 1000.22 that environmental review costs are eligible costs. Another commenter wrote that Indian tribes should be reimbursed for all related expenses to the extent they assume environmental review responsibilities. The Committee has not revised § 1000.22 in response to these comments. There will be no additional funds available to Indian tribes for the review.

Section 1000.26. Several commenters objected to the applicability of 24 CFR part 85 to recipients under NAHASDA. These commenters believed that making part 85 applicable violated the self-governance principles of NAHASDA. Part 85 establishes uniform administrative requirements for grants and cooperative agreements to State, local, and Federally recognized tribal governments. The Committee determined that the consensus language of § 1000.26 should not be changed.

Several commenters recommended that the final rule specify which administrative provisions are applicable to NAHASDA. The Committee has adopted this comment. Accordingly, § 1000.26 has been revised to list the administrative requirements which apply to NAHASDA.

Section 1000.28. Several commenters believed the Committee should provide a definition of "self governance tribe." The Committee has added a sentence to this section which provides that for purposes of § 1000.28, a self-governance Indian tribe is an Indian tribe that participates in self governance activities as authorized under Public Law 93-638 (25 U.S.C. 450 *et seq.*).

Other commenters wrote that making the part 85 requirements applicable to self-governance Indian tribes violated the principles of tribal self-determination. The Committee agrees with these comments. Accordingly, the provision has been revised to provide that a self-governance Indian tribe may certify that its administrative requirements and standards meet or exceed the comparable requirements set forth in § 1000.26.

Section 1000.30 through 34. Several commenters objected to the inclusion of specific conflict of interest provisions in the proposed rule. The commenters believe that recipients should make their own determination regarding conflict of interest based on local conditions or the fact that other programs administered by the recipient may have conflict of interest requirements that are not entirely consistent with the proposed requirements. The Committee has not revised § 1000.30 based on these comments. The Committee determined that the final rule should set forth specific conflict of interest provisions to guide recipients.

Other commenters objected to the unilateral changes made by HUD subsequent to Committee approval. The **[*12337]** Committee reviewed the language modifications made by HUD and determined the language is clearer than the original language. Accordingly, the change has been incorporated.

In response to a number of public comments, the Committee has clarified the meaning of the term "family ties" used in this section. Section 1000.30 has been revised to make clear that this term applies to immediate family ties, which are determined by the Indian tribe or TDHE in its operating policies.

The Committee has also removed the reference to 24 CFR part 84, *Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,* from this section based upon its determination that the common rule requirements of part 85, *Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments,* apply to recipients. The part 85 requirements apply to governmental entities and therefore are more appropriate for recipients of NAHASDA assistance.

Additionally, the Committee has added a new § 1000.30(c) which excludes from the conflict of interest provisions those individuals who would otherwise be eligible for program benefits. Additional language clarifications were also made to sections 1000.32 and 1000.34.

Section 1000.36. Proposed § 1000.36 would have required a recipient to retain records regarding exceptions made to the conflict of interest provisions for a period of at least 5 years. Section 1000.548 of the proposed rule, renumbered as § 1000.552 in the final rule, requires that recipients maintain all other IHBG program records for a period of three years. One commenter suggested that the final rule establish a uniform time period for the retention of program records. The commenter further suggested that the three-year time period set forth in § 1000.548 of the proposed rule, now § 1000.552, be adopted. The Committee agrees and has revised § 1000.36 accordingly.

Section 1000.38. Several commenters objected to HUD's changes to the original Committee language. These commenters believe that the revisions made by HUD establish onerous flood insurance requirements. Other comments expressed concern with the workability of flood insurance requirements and suggested adding exclusions such as for inability to obtain coverage or for costs below $ 5000, or exemptions from the requirements due to lack of available land outside marginal floodplain areas. Another commenter stated that flood insurance requirements should be limited to acquisition and construction projects.

The Committee has decided to retain the revisions made by HUD to § 1000.38. HUD's changes added a citation to the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001-4128) (FDPA). In addition, the changes clarified that flood insurance requirements apply under the FDPA to financial assistance for "acquisition and construction purposes", rather than to all affordable housing activities under NAHASDA. There is no authority to administratively adopt the exemptions

suggested. Section 102(c)(2) of the FDPA contains an exclusion from the flood insurance purchase requirement for loans that have an original outstanding balance of $ 5000 or less and a repayment term of one year or less.

One commenter suggested that the following language from the FDPA should be added to the end of paragraph 1000.38(b): ″Provided, that if the financial assistance provided is in the form of a loan or an insurance or guaranty of a loan, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the term of the loan.″ The Committee has made the recommended change with minor revisions.

Section 1000.40. A number of comments were received questioning the applicability of lead-based paint poisoning prevention requirements to NAHASDA, the complexity and cost of complying with program regulations which applied to housing developed under the 1937 Act, and the limited information provided under the proposed rule as to the lead-based paint poison prevention requirements. In order to streamline the lead-based paint poisoning requirements applicable to NAHASDA and to provide guidance to recipients on protection against lead poisoning from applied paint, the Committee has replaced the limited language in the proposed rule with more extensive, grant activity based language utilizing HUD's experience in the HOME program.

Section 1000.42. Several commenters objected to the applicability of HUD's regulations at 24 CFR part 135, *Economic Opportunities for Low-and Very Low-Income Persons,* which implement section 3 of the Housing and Urban Development Act of 1968. The commenters believe that independent Section 3 regulations should be developed for the IHBG program. The Committee has determined that the development of independent Section 3 regulations would be extremely time-consuming. Further, the part 135 regulations provide an existing set of useful and comprehensive requirements for implementing the Section 3 requirements. Accordingly, the Committee has decided to retain the reference to 24 CFR part 135.

The Committee has made two changes to § 1000.42. First, the lengthy sentence explaining the purpose of section 3 has been removed and has been replaced with a more concise statement of purpose. This sentence merely repeated the language already found in *24 CFR 135.1*. Second, a new § 1000.42(b) has been added which clarifies that the section 3 requirements apply only to those Section 3 covered projects or activities for which the amount of assistance exceeds $ 200,000.

Sections 1000.44 and 1000.46. Similar public comments were received on these two sections. Section 1000.44 provides that the prohibitions in 24 CFR part 24 on the use of debarred, suspended, or ineligible contractors apply to the IHBG program. Section 1000.46 provides that requirements of the Drug-Free Workplace Act of 1988 *(41 U.S.C. 701 et seq.*) and HUD's implementing regulations in 24 CFR part 24 apply to the IHBG program.

Several commenters recommended that Indian tribes be allowed to develop their own debarment and drug-free workplace procedures. The Committee reviewed the requirements set forth in 24 CFR part 24, and determined that they should continue to be referenced in the regulations. The Committee did make one clarifying change to §§ 1000.44 and 1000.46. Specifically, the sections have been revised to clarify that the part 24 requirements apply, in addition to any tribal debarment and drug-free workplace requirements.

Sections 1000.48 through 1000.54. One commenter recommended that the rule be amended to state that an Indian tribe or TDHE may provide preferences in the employment, training, procurement and services to members of the Federally recognized Indian tribes. The reason Indian preference was not addressed in the proposed rule is because it was a non-consensus item as indicated in the preamble to the proposed rule. The Committee has added four sections which address the applicability of Indian preference, requirements for the provision of Indian preference in program administration and procurement, and methods for addressing complaints.

Sections 1000.56, 1000.58, and 1000.60. Numerous comments were received on the issue of the method of NAHASDA payments, identified as a nonconsensus issue in the proposed **[*12338]** rule. After full consideration, HUD and the tribal members of the Committee have agreed to add new §§ 1000.56, 1000.58, and 1000.60, which track the statutory language of section 204(b) of NAHASDA. Section 204(b) authorizes a recipient to invest grant amounts for the purposes of carrying out affordable housing activities in investment securities and other obligations as approved by the Secretary.

The new regulatory provisions provide for a ″phase-in″ of the recipient's ability to drawdown NAHASDA funds for investment purposes. Specifically, new § 1000.58(f) provides that a recipient may invest its IHBG annual grant in an

amount equal to the annual formula grant less any formula grant amounts allocated for the operating subsidy element of the Formula Current Assisted Housing Stock (FCAS) component of the formula multiplied by the following percentages, as appropriate: 50% in Fiscal Years 1998 and 1999; 75% in Fiscal Year 2000; and 100% in Fiscal Year 2001 and thereafter. Investments under these provisions may be for a period no longer than two years.

Section 1000.62. 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.

Tribal representatives and HUD agree that § 1000.62 provides that all program income must be used for affordable housing activities, but Indian tribes argue that program income is not subject to the requirements applicable to NAHASDA grant amounts. HUD disagrees, and interprets § 1000.62 to mean that the use of program income is subject to the same requirements as grant amounts and intends to implement § 1000.62 accordingly. This would have the effect of requiring program income to be subject to other statutory requirements such as environmental review requirements and maximum rent requirements applicable to grant amounts.

The Committee recognizes the importance of the need for developing guidance for accounting for program income grant amounts generated by the combined use of NAHASDA grant amounts and other funds. This guidance will be jointly developed by HUD and tribal representatives appointed by the Committee co-chairs. Every attempt will be made to develop and issue this guidance as expeditiously as possible.

Subpart B--Affordable Housing Activities

Subpart B contains the regulations necessary for the implementation of title II of NAHASDA. Among the topics addressed by subpart B are eligible affordable housing activities, low-income requirements, lease requirements and tenant selection.

Section 1000.104. Several commenters objected to the language, ″absent evidence to the contrary″, added at the end of each sentence. This language was stricken. This section was intended to clarify that NAHASDA and these regulations do not affect the eligibility of homebuyers and tenants assisted under the 1937 Act. The regulations were revised to reflect this intent. The original language was unclear regarding whether current families residing in housing units were automatically eligible for all NAHASDA activities or only for continued occupancy. One commenter commented that all Indians residing in Indian Country should be eligible for housing assistance. All Indians are eligible for assistance under specified activities under NAHASDA. However, the regulations are written to reflect the intent of Congress to provide assistance primarily for low income Indian families and to establish eligibility requirements for non low-income Indian families. NAHASDA does not impose requirements on continuing income eligibility after a participant enters a housing program.

Section 1000.106. One comment was received on the different standards applied to non low-income Indian families and non-Indian families. The regulations reflect the statutory requirements in NAHASDA and the Congressional intent to provide housing primarily for low income Indian families, while recognizing an Indian tribe's need to house other persons who are essential to the well-being of Indian families.

Section 1000.108. The Committee agreed with comments to remove the phrase ″other housing activities″ from this section and § 1000.112 to clarify that these regulations are addressing the assistance to non low-income Indian families and model housing activities.

Section 1000.110. For purposes of clarity, § 1000.118 has been redesignated as § 1000.110 and moved to immediately follow § 1000.108. Former §§ 1000.108 through 116 were renumbered to conform to this change.

NAHASDA requires a family to be low income at the time of purchase of a home. This caused problems for families buying homes pursuant to a lease purchase agreement. To solve the problem, the section was revised by adding a new paragraph (a) to make families who are not low income at the time of purchase of a home, eligible under the non low-income requirements. In addition, this section was revised to allow recipients to provide housing to non low-income Indian families

who have been determined by the recipient to be essential to the well-being of the Indian families in the area, without requiring a higher repayment than low income Indian families.

Numerous comments were received that the formula for providing assistance to non low-income Indian families was difficult to understand. The formula was simplified. Comments were received that the amount a non low-income family must pay for the assistance should not be more than the fair market value of the assistance. Comments were received that the regulations gave HUD too much discretion. The regulations were revised to give more discretion to recipients, including the authority to limit payments to Fair Market Value.

Section 1000.112. One commenter believed that these regulations give too much discretion to HUD in evaluating model housing activities. The Committee disagreed with the comment because the regulations provide that HUD will review the proposals with the goal of approving the activities.

Section 1000.114. One commenter asked that the regulations state how notice is to be given. The regulations were changed to clarify that notice by HUD will be given in writing. One commenter commented that HUD should be given 90 days rather than 60 to approve or disapprove a proposal. The Committee believes that sixty days is sufficient time for HUD to approve or disapprove a proposal. This time period is consistent with the time period for approving an IHP.

Section 1000.116. A commenter requested that this section establish a time frame. The time frame is specified in § 1000.114. Other commenters asked whether the time period is affected by the consultation requirement. The time period within which HUD must respond is not affected by the requirement to consult with a recipient regarding its proposal.

Section 1000.118. Commenters asked whether the days specified in this section were calendar or business days and suggested that the number of days be consistent in each step of the appeal **[*12339]** process. The number of days specified in paragraphs (b), (c) and (d) of this section were changed to 20 calendar days. Paragraph (a) of this section was clarified to read ″30 calendar days.″ The appeal process is consistent with other administrative appeal processes.

Section 1000.122. Several commenters stated the answer to the question should be ″yes.″ The final rule clarifies that while NAHASDA does not prohibit the use of grant funds as matching funds, other programs may or may not have restrictions on what may be used as matching funds.

Section 1000.124. Many comments were received that the 30 percent maximum rent or homebuyer payment would impose a hardship in areas where the administrative fee alone exceeds 30 percent of a family's income. The 30 percent requirement is statutory and cannot be changed by the regulations. Many comments were also received on the impact of these regulations on current Mutual Help participants and Section 8 participants. These regulations do not apply to current participants of a lease purchase agreement, including Mutual Help or Homeownership participants under the 1937 Act or Section 8 participants. Their contracts are not affected by NAHASDA. A definition of ″homebuyer payment″ has been added to the list of defined terms in subpart A, which only refers to payments made under a lease purchase agreement for the purchase of a home. This clarifies that § 1000.124 applies only to rental payments and homebuyer payments made under a lease purchase agreement.

A commenter requested clarification on how adjusted income is determined. Guidance on adjusted income is provided in the definitions section. The section was revised to clarify that these regulations apply only to units assisted with NAHASDA grant amounts. A sentence was also added to address minimum rents.

Section 1000.126. Several commenters objected to the 30 percent limitation on rent or homebuyer payments. The 30 percent requirement is statutory.

Section 1000.132. Many commenters supported this section.

Section 1000.134. One commenter suggested that all HUD requirements for demolition or disposition be provided under this part. This section sets forth all requirements for demolition or disposition. Comments were received asking for more flexibility in disposing of units especially where units were sold to low-income Indian families. This section was revised to reflect this concern. The change allows a recipient to dispose of a home to a low-income Indian family without maximizing the sale price, so long as the disposition is consistent with a recipient's IHP.

Section 1000.138. Several commenters asked that the regulations exempt from the procurement requirements insurance purchased from Amerind. Language was added to the regulations to provide an exemption for nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD.

Section 1000.142. Many comments were received regarding the necessity of HUD determining ″useful life″ and the criteria used to make such determination. The statute requires HUD to make determinations of what is ″useful life.″ The regulations clarify this while ensuring that the determination will be made in accordance with the local conditions of the Indian area.

Section 1000.146. Many commenters expressed concern about the requirement that homebuyers be income eligible at the time of purchase. This is a statutory requirement. However, § 1000.110 was revised to allow families buying a home under a lease purchase agreement and who are no longer low-income at the time of purchase to be eligible as a non low-income family. This section has been revised to cross reference to § 1000.110.

Section 1000.148. This section of the proposed rule was removed because it was attempting to clarify the statutory language in section 207(a)(3) of NAHASDA concerning what law is applicable regarding the period of time required in giving notice. The answer confused rather than clarified that the law applicable to notice timing requirements is the applicable State, tribal or local law. The issue of applicable law can best be resolved in the recipient's lease.

Section 1000.150. One commenter asked whether HUD would pay the costs of obtaining the criminal conviction information. Another asked if it was a requirement to obtain the criminal conviction information. The costs of obtaining criminal conviction information is an eligible cost of NAHASDA. A recipient is not required to obtain such information. One commenter asked what could be done if such agencies refuse to comply with the request. HUD cannot force other agencies to comply, but the Indian tribe may seek a legal recourse.

Section 1000.154. One commenter suggested that persons other than those specified in NAHASDA section 208(c) be authorized to receive criminal conviction information. The Committee believes this is inconsistent with NAHASDA.

Section 1000.156. Many comments were received on this section. Many commented on the various elements included in the total development cost. One commenter asked whether donations counted towards total development cost. One commenter objected to any limits. The section was revised to clearly establish a limit on the amount of IHBG funds that can be used on the dwelling construction and equipment of a unit, and to clarify that other costs of development were eligible NAHASDA costs but not subject to the limit.

The costs of making a unit handicapped accessible is a part of the dwelling construction cost. The limit was placed in these regulations in recognition of the few cases of abuse in past Indian housing programs and was developed to prevent abuses in the new IHBG program.

Subpart C--Indian Housing Plan (IHP)

Subpart C sets forth the regulatory requirements concerning the preparation, submission, and review of an Indian tribe's IHP. (Note: The numbers of several sections in this subpart have been amended due to the addition of new sections. For example, § 1000.210 of the proposed rule is numbered as § 1000.218 of this final rule.)

Section 1000.201. One commenter requested that language be added to the beginning of the sentence to indicate ″At the beginning of every fiscal year HUD will distribute funds.″ The language ″At the beginning″ was not incorporated because the allocation of the formula is subject to appropriations and allocation at the beginning of the Fiscal Year cannot be guaranteed. Also, distribution of the grant is based on submission and approval of an IHP which may not take place at the beginning of the FY.

Another commenter suggested that funds should be allowed to be carried forward from one fiscal year to another. Based on NAHASDA, a recipient has more than one year to expend each annual grant based on goals and objectives in the IHP. As a performance measure, § 1000.524 provides that within 2 years of grant award, 90 percent of the funds must be obligated by the recipient. Another commenter asked what would happen to an Indian tribe's or TDHE's allocation under NAHASDA if an IHP was not submitted by November 3, 1997 deadline. A new provision has been added to address this question. **[*12340]**

Section 1000.202. One commenter requested that eligible recipients should include TDHEs which existed and received funding as a Public Housing Agency (PHA) or Indian Housing Authority (IHA) under the 1937 Act. The Committee believes the language in § 1000.202 is clear as to who is an eligible recipient and the specific recipients are more fully defined in § 1000.206. Also, a new section (§ 1000.208) has been added which addresses the commenter's concern regarding an Indian tribe which had two IHAs established prior to September 30, 1996. However, under NAHASDA, PHAs are not default TDHEs unless otherwise recognized as IHAs under these regulations.

Section 1000.204. One commenter asked if the Indian tribe is obligated to notify an existing TDHE for its jurisdiction within a certain time period, if the Indian tribe designates itself as the grant recipient. First, if the Indian tribe designates itself as the recipient, there is no TDHE. Also, there is no requirement in NAHASDA which requires any notification to an existing entity which may own or manage units developed under the 1937 Act. The same commenter asked whether the TDHE is required to submit an IHP for its existing housing stock if the Indian tribe is also submitting an IHP within the same jurisdiction. If an Indian tribe designates itself as a recipient, there is no TDHE and the Indian tribe must provide for existing housing stock in its IHP. One commenter raised several concerns regarding the administration of NAHASDA regarding conflicts of interest, mismanagement, fraud, and abuse. The regulations as a whole were written to address these concerns.

Section 1000.206. Several commenters requested clarification on how TDHEs in Alaska are designated. TDHEs in Alaska are designated in the same manner as any other TDHE. Several commenters also stated that a default TDHE should be able to submit an IHP and obtain funding without obtaining Tribal certification. Section 102(d) of NAHASDA requires Tribal certification for each IHP including a default TDHE. However, the Committee has added § 1000.210 to address the commenters' concern regarding what would happen to 1937 Act units if an Indian tribe did not submit an IHP or if a default TDHE could not obtain tribal certification.

Section 1000.208 of the proposed rule. This section was formerly designated as § 1000.208, but has been redesignated as § 1000.212 due to the addition/redesignation of other regulatory text. One commenter questioned the need for a detailed five-year plan; another requested that the five-year plan be submitted at the end of the first year of funding; and another requested deleting the requirement for the one-year plan. These requirements are statutory; however, the Committee believes the submission requirements are reasonable. Several commenters have requested an extension of the IHP submission deadline and clarification on what happens if the deadline date is not met. Section 100.214 (formerly designated as § 1000.209) has been amended to address the commenters concerns regarding the IHP submission deadline date. Also, § 1000.216 has been added to clarify what happens if the deadline date is not met.

Section 1000.211 of the proposed rule. This section was formerly designated as § 1000.210, but has been redesignated as § 1000.218 due to the addition/redesignation of other regulatory text. One commenter asked what plan requirements were necessary for a consortium of Indian tribes. The Committee agrees that this comment needs to be addressed and language has been added to § 1000.212 to address this concern. Two commenters stated that the reference in the proposed rule was incorrect. The rule has not been revised, because it reflects the proper statutory reference.

Section 1000.212 of the proposed rule. This section was formerly designated as § 1000.212, but has been redesignated as § 1000.220 due to the addition/redesignation of other regulatory text. A commenter requested that additional language be added to this section to encourage Indian tribes to assess the ability of the existing infrastructure to support additional housing. In response, the Committee believes that the current language that Indian tribes are encouraged to perform comprehensive housing needs assessments is adequate.

Section 1000.214 of the proposed rule. This section was formerly designated as § 1000.214, but has been redesignated as § 1000.222 due to the addition/redesignation of other regulatory text. Two commenters requested that waiver authority be given to a TDHE. The Committee agrees and adopted the comment by adding a new § 1000.224. Comments were received in support of the definition of ″small Indian tribe″ and also agreeing that ″small Indian tribe″ should not be defined. No changes have been made to the regulations because the Committee believes that the IHP requirements are reasonable and the deadline date has been extended to allow small Indian tribes additional time to complete the plan.

Section 1000.216 of the proposed rule. This section was formerly designated as § 1000.216, but has been redesignated as § 1000.226 due to the addition/redesignation of other regulatory text. Two commenters requested that the HUD changes

made to this section be deleted. One stated that Title II of the Civil Rights Act would create problems for Indian tribes. The Title II referred to in § 1000.12 is the Indian Civil Rights Act. However, because the nondiscrimination requirements, as well as other Federal requirements outlined in these regulations apply whether or not the recipient certifies that it will comply, the language inserted in § 1000.226 is not needed and has been removed.

Section 1000.218 of the proposed rule. This section was formerly designated as § 1000.218, but has been redesignated as § 1000.228 due to the addition/redesignation of other regulatory text. One commenter stated that the word ″will″ should be changed to ″shall″ and the word ″substantial″ should be removed. The word ″will″ and ″shall″ have the same meaning in these regulations. Also, the Committee has agreed that NAHASDA gives HUD the authority to develop the IHP format and minor changes may be needed to address comments. Accordingly, no changes have been made to this section.

Section 1000.220 of the proposed rule. This section was formerly designated as § 1000.220, but has been redesignated as § 1000.230 due to the addition/redesignation of other regulatory text. One commenter stated that HUD should be given a limit of 60 days to respond. This requirement is statutory and is outlined in § 1000.230(b). Another commenter stated that a recipient should be required to agree to reasonable time frames for which to provide required certifications. The certifications are a requirement of the IHP submission and are statutory. An IHP cannot be determined to be in compliance without the certifications based on section 102(c)(5) of NAHASDA unless waived under § 1000.226.

A commenter stated that HUD approval should be required only for substantial modifications to the IHP. The Committee agrees with this comment and has added appropriate language to § 1000.232. A commenter stated that the limited HUD review of the IHP should be clearly defined. This limited review is outlined in section 103(c) of NAHASDA and the Committee determined that it was not necessary to repeat these statutory requirements. Another commenter asked when a HUD review would not be **[*12341]** necessary.NAHASDA mandates an IHP review by HUD.

Two commenters addressed the waiver provision in § 1000.230. One requested that the words ″requested and approved″ be added in paragraph (d). The Committee agrees and has added the language. The second stated that the waiver could not impose conditions which the recipient could not comply with due to conditions beyond the recipient's control. The Committee does not believe this language is necessary since the waiver indicates that HUD has determined the recipient cannot meet certain plan requirements.

Another commenter requested a new section to address partial approval of an IHP. HUD can only make a grant if it is determined that the plan meets the requirements of section 102 of NAHASDA. Therefore, this additional language has not been included in the regulations. However, HUD may approve an IHP pending approval of a model activity or assistance to non low-income Indian families.

Section 1000.222 of the proposed rule. This section was formerly designated as § 1000.222, but has been redesignated as § 1000.232 due to the addition/redesignation of other regulatory text. Several commenters addressed the requirement for modifications of the IHP including the 60-day timeframe for review. The Committee has addressed these comments by providing language in the regulations which limits when HUD's review and determination of compliance is necessary and provides the flexibility requested.

Section 1000.224 of the proposed rule. This section was formerly designated as § 1000.224, but has been redesignated as § 1000.234 due to the addition/redesignation of other regulatory text. One commenter recommended defining applicable judicial review available following final agency action. No change to the regulations is required because an agency's action may be challenged under the Administrative Procedure Act. Another commenter requested that a question be added on the requirements of the form HUD 50058. It is not necessary to address this in final regulations, however, the requirements as of October 1, 1997 will be covered in the transition notice published in the **Federal Register**.

Section 1000.226 of the proposed rule. This section was formerly designated as § 1000.226, but has been redesignated as § 1000.236 due to the addition/redesignation of other regulatory text. Several comments were received on this section. Some commenters requested a percentage should be set for administration and planning; others felt that the recipient should set the percentage. Several commenters asked that indirect costs be included as an eligible expense. There were also several questions related to reimbursement for reasonable planning costs associated with developing the IHP. NAHASDA states

that the Secretary shall, by regulation, authorize each recipient to use a percentage of any grant amounts for administrative and planning expense. Section 1000.238 has been added which establishes a percentage which can be used for these costs and clarifies the eligibility of indirect costs. This percentage can be exceeded with HUD review and approval. The Committee has also made changes to § 1000.236 which are intended to further clarify what are considered administrative and planning costs.

Section 1000.228 of the proposed rule. This section was formerly designated as § 1000.228, but has been redesignated as § 1000.240 due to the addition/redesignation of other regulatory text. There were many comments received on this section. The Committee has clarified when a local cooperation agreement is needed. A statutory amendment would be required to address any of the other comments.

Section 1000.230 of the proposed rule. This section was formerly designated as § 1000.230, but has been redesignated as § 1000.242 due to the addition/redesignation of other regulatory text. There were many comments received on this section. The Committee has clarified when the tax exemption requirement applies. A statutory amendment would be required to address any of the other comments.

Subpart D--Allocation Formula

Subpart D implements title II of NAHASDA. Specifically, it establishes the formula for allocating amounts available for a fiscal year for block grants under NAHASDA.

Section 1000.301. One commenter felt that the following sentence should be added to § 1000.301: ″Native Regional Housing Authorities in Alaska shall be the recipients of grants awarded under section 202(1) of NAHASDA for the maintenance and operation of current assisted stock.″ This cannot be done by regulation; it is a statutory requirement that Indian tribes be funded directly. The Committee agreed to adopt the clarifying changes made by HUD to this section at the proposed rule stage.

Section 1000.302. Several commenters wrote that the references to 24 CFR part 950 should be removed from the definition of ″Allowable Expense Level (AEL) factor.″ As the commenters noted, the part 950 regulations are made obsolete by this final rule. The Committee agreed and revised the definition to reflect the removal of 24 CFR part 950.

Four commenters felt there was no reference provided for how AELFMR, AEL, FMR factor, local area cost adjustment factor for construction, and TDC are computed or what office is responsible for determining these rates or how they can be challenged. Except for AEL and TDC, the Committee felt the definitions are complete as written in the rule. The definition for AEL has been changed in the rule to improve its clarity. AEL was calculated by ONAP and will not be calculated again, there is a method to challenge FMR and the requirements are available from HUD. The definition of TDC has been added to the rule.

Six commenters were concerned with separate definitions of annual income for formula purposes than in the rest of the rule. The definition of annual income is different for purposes of the formula because the formula uses data collected by Census while the annual income for the remainder of the rule relates to income data collected from families by the Indian tribe or TDHE (and is statutory). For clarity, the definition has been changed to ″Formula Annual Income″ and the census definition is included.

Numerous comments were received on the definition for formula area. Several commenters proposed alternative definitions. Some commenters felt the rule should clearly state that a local cooperation agreement is not required where an Indian tribe or TDHE is providing housing services. Several commenters believed that other service areas designated by an Indian tribe as historical areas of operation or areas of service described in the Indian tribe's ordinance should be included in the definition of formula area. Three commenters felt that Tribal Jurisdictional Statistical Area and Tribal Designated Statistical Area should be defined or removed from the definition.

In response to comments, new language was added which maintains the integrity of the formula by both allowing Indian tribes that provide housing assistance off tribal lands to include a larger geographic area. The regulations still constrain the area and the population counted for an Indian tribe so that it would be fair and equitable for all Indian tribes.

The Committee added a definition of ″Formula Response Form″ to reflect the changes made elsewhere in the rule. The proposed rule would have required data for the formula to be included in **[*12342]** the IHP. However, because the data is needed before the IHP submission date, the Committee decided to require formula data to be submitted on a separate form.

One commenter felt the definition of ″Section 8 unit″ should be clarified. Some Section 8 assistance is not tied to a unit; rather, it is tenant-based assistance. The commenter believed this definition lumps all Section 8 under the definition and is confusing. The Committee considered the comment, and believes the definition is clear.

Sections 1000.304 and 1000.306. Several commenters believed that proposed § 1000.304(a) puts the burden on Indian tribes to develop measurable and verifiable data. The commenters felt this should be HUD's responsibility. The Committee believes that proposed § 1000.304 adequately meets the concerns of the commenters. However, the section may have been unclear to commenters so it has been split into two sections (§§ 1000.304 and 1000.306). An additional reference to reviewing the factors in Formula Current Assisted stock is added in reference to comments received on funding for Section 8 noted later.

One commenter recommended that the final rule require the use of more reliable data as soon as possible, and not establish a five year waiting period. The Committee believes the method currently proposed satisfies this concern as efforts to improve data must be begun immediately in order to complete the effort within five years.

Section 1000.308. A commenter believed the formula should be modified by a committee in the same fashion as the formula was developed. Section 1000.306 allows public participation in revision of the formula. While the tribal Committee members encourage HUD to convene a tribal group to negotiate modifications, the rule was not changed to require this.

Section 1000.310. Two commenters stated that the word ″formula″ added by HUD makes no sense. One commenter felt the proposed §§ 1000.308 and 1000.310 didn't seem to work together. The commenter also believed there is inconsistency among the proposed §§ 1000.308, 1000.324, 1000.326, and 1000.328 which need clarification. The word ″formula″ is included to maintain consistency in the rule. In response to the confusion over the relationship of Formula Current Assisted Stock to Section 8, they were combined under the single heading of Formula Current Assisted Stock. Furthermore, to provide greater clarity, the order of presentation was changed so that Formula Current Assisted Stock is listed before Need because this is the manner in which the formula is actually calculated. As a result of this change the sections on FCAS are moved ahead of the sections on Need and are renumbered accordingly.

Section 1000.312. Four comments were received relating to who should receive funding under Current Assisted Stock in cases where the ownership of the Current Assisted Stock remains separate from the Indian tribe. One commenter suggested that a new § 1000.346 be added, responding to the issue of whether IHAs or TDHEs are entitled to continued financial assistance for rental public housing projects. NAHASDA requires that the funding for Current Assisted Stock be provided to the Indian tribe where the Current Assisted Stock is located. Because of this statutory requirement, the Committee could not make the changes requested by the commenters, however language in § 1000.327 does address this concern as it relates to the overlapping areas unique to Alaska due to the Alaska Native Settlement Claims Act (ANSCA).

Section 1000.314. Two commenters felt the explanation on how the formula addresses units developed under the 1937 Act and in the development pipeline on October 1, 1997 was unclear. The Committee agreed and has reworded §§ 1000.314 through 1000.320 to improve clarity. The major change was to combine Section 8 into the ″formula current assisted stock″ component of the formula. As noted earlier under definitions, changes to IHP submission dates required the creation of a Formula Response Form.

Two commenters felt that units developed under NAHASDA should be included in the funding formula. One of the commenters felt that by not providing such a subsidy creates an incentive not to add either rental or homeownership units because the formula will not take into account the maintenance costs of these units. NAHASDA allows for great flexibility in developing housing stock. At this time the Committee is not able to determine the level of need for NAHASDA stock subsidy. This will be re-evaluated within the required 5-year time frame as noted in § 1000.306.

Two commenters stated that the development of housing units for homeownership under a model distinct from the existing Mutual Help program requires a larger initial subsidy investment to reduce the mortgage burden for the homeowner.

However, the formula, because it fails to account for this greater expense, fails to count non-mutual help homeownership units, or include sufficient development funds. This encourages the use of the mutual help model instead of the mortgage model, which discourages the leveraging of private funds for mortgages and goes against NAHASDA. The Committee felt no changes were necessary. Under self-determination Indian tribes have responsibility to develop affordable housing activities within their available resources.

Section 1000.316. One commenter wrote that proposed § 1000.330 is confusing. The commenter questioned how Section 8 contracts that have expired or are due to expire in any subsequent year can be meaningful to a number derived as of September 30, 1997. The Committee agrees that the section is confusing and has incorporated it into § 1000.316 and reworded it for clarity.

One commenter wrote that Section 8 units should be multiplied by the national per unit average for low-rent units and not the Section 8 unit average since they are administered as low income rental units. The Committee disagrees. In developing the base funding for homeownership, Low-Rent, and Section 8 of the Formula Current Assisted Stock, the Committee sought to develop the base funding for each which reflects the actual operating cost of each.

One commenter wrote that Section 8 participants should continue to have flexibility to pay more than 30 percent of income in order to compete for units on the private rental market. Statutorily, recipients are not allowed to charge low-income families receiving subsidy under NAHASDA more than 30 percent of the family's adjusted income for affordable housing.

Four comments received were opposed to funding expired Section 8 contracts under NAHASDA. Opinions were expressed that NAHASDA does not have enough appropriation to fund the Section 8 and that the Section 8 administered by IHAs has a large number of non-Indians. Two commenters specified support for funding Section 8 under the formula.

Once a Section 8 contract administered by an IHA expires it cannot be renewed under the 1937 Act. To maintain this assistance for the households currently served by the Indian tribes, the Committee felt it was important to provide assistance under NAHASDA. Nonetheless, the Committee understands the concerns about the limited assistance available for Indian housing and has made note in this section and § 1000.306 that in five years subsidy for Section 8 should be reconsidered as a component of the formula. **[*12343]**

Section 1000.317. Many comments were received from IHAs in Alaska concerning funds to maintain and operate 1937 Act units owned by the IHAs. In response to these comments, a new section has been added which states that formula funds for 1937 Act units owned by Regional Native Housing Authorities in Alaska will be allocated to the regional tribe.

Section 1000.318. One commenter wrote that even if units are conveyed over to a homeowner, the units should still count as Current Assisted Stock if the units are part of the five-year Comp Grant plan because there is a continuing obligation on the part of the Indian tribe's housing program to provide the assistance which has been promised. However, a conveyed unit, because it has become a private home, does not qualify as Current Assisted Stock. However, conveyed units for which Comprehensive Grant funding has been obligated in prior years may be modernized as scheduled.

One commenter stated that block grant amounts should be fixed based on units in management and should only be reduced as units leave management. The grant will not be increased when units are added to management after October 1, 1997. This gives the IHA no incentive to convey units out of management nor does it provide for costs of management of rental units added by the grant. The Committee considered this concern and has added language that requires conveyance of the units as soon as practicable as they are paid off under existing homeownership contracts.

One commenter noted that TDHEs should not be required to repay grant amounts for housing inventories reduced within the FY. The next grant year should be based on inventory at that date. The Committee agrees and has clarified this provision.

Two commenters suggested that the last sentence in the proposed § 1000.336 have the following added: ″...by the Tribe or TDHE.″ The Committee has incorporated this change and also added ″or IHA″ to take into account situations where the IHA, not designated as the TDHE, continues to own the units.

Section 1000.324. The Committee agreed to adopt the clarifying change made by HUD to this section. One commenter noted that the ″without kitchen or plumbing″ variable is not an accurate measure of substandard housing because some Indian tribes building housing in remote location or extreme environmental conditions build new homes without kitchen or plumbing. After careful consideration of many issues, including the concern of the commenter, the Committee felt that it was important to include some indicator of substandard housing. Currently, the only indicator of substandard housing collected in a uniform manner for all Indian tribes related to substandard housing is ″without kitchen or plumbing.″ Accordingly, no change has been made to the rule.

One commenter expressed that ″Without kitchen or plumbing″ should include heating. While the Committee considered this issue, it was not felt that the available data would adequately address the concern and thus the change to the variable could not be accommodated.

Two commenters noted that because most reservations are poverty areas and the majority of housing consists of HUD built homes and 30 percent is the maximum amount charged, the housing cost burden component appears to mainly reflect urban need. The commenter felt the need components should measure criteria which are proportionally consistent across the country and not include regional or special group needs. Because housing need is different throughout the country, each of the variables in the formula has some regional bias, including the housing cost burden variable referenced in the comment. However, it is the Committee's position that the combination of all of the variables in the formula most fairly allocates funds toward housing need in all regions of the country.

Two commenters felt there should be two need components. One as AIAN households which are overcrowded and the second as AIAN Households without kitchen or plumbing. Separating the two variables was considered. However, they were combined because they are highly correlated; places with overcrowding tend to also have households without complete kitchen or plumbing. The Committee combined the two variables in order to reflect both overcrowding and some components of substandard housing.

One commenter felt the need component should include non-Indians presently living in current assisted stock. IHAs provide housing for both Indians and non-Indians alike. The Committee recognizes that households with a divorced non-Indian with Indian children are not counted by the household variables, nor are other non-Indians that an Indian tribe may choose to serve. However, the needs side of the formula is intended to target toward Native American housing need. After receiving the funds based on Native American housing need, the Indian tribe may choose who they wish to serve. The current assisted stock component of the formula funds per unit regardless of the race of the resident.

One commenter noted that the formula does not adequately take into consideration the disparity between communities that currently have adequate infrastructure and those that do not. Among tribal communities in the same geographic region, the per-unit cost of infrastructure development typically varies much more than the per-unit cost for the houses alone. Tribal communities located in places that require capital investment infrastructure, such as very deep wells or long pipelines, will be severely disadvantaged under the current formula. The Committee sought out infrastructure data to be used in the formula. However, after discussions with Indian Health Service staff, it was determined that at this time the data were not appropriate for this formula. However, this will be one factor to be considered during the review of the formula over the next five years.

Several commenters recommended that the formula points and methods to weight these components agreed to by the Committee should be added to the regulations. The Committee agreed and has included the weights in the proposed rule.

Section 1000.326. Several comments submitted regarding ″overlapping service areas″, when more than one Indian tribe defines the same formula area. One commenter indicated that in Alaska there are tribal boundaries and a number of projects that border two or more Indian tribes. Furthermore, Alaska Native Land Claims Corporations overlap many Indian tribes. One commenter feared that without a quick HUD determination regarding overlapping formula area, Indian tribes might be placed in the situation of having to do political ″battle″ with one another to determine their fair share. The Committee agrees with the comments and have revised § 1000.326 to address overlap disputes between state and Federal Indian tribes as well as § 1000.327 to address the allocation of data for the unique overlapping areas in Alaska.

In addition, one comment was received relating to dual tribal membership and a change was made in the rule to reflect that concern. The other concern related to HUD's timing for dealing with issues related to overlapping areas and a change was made to put in a date specific when overlapping issues will be addressed. **[*12344]**

One commenter indicated that the IHS is interested in working with HUD and other agencies on developing better data sources regarding the number and conditions of AIAN homes. Over the next 5 years HUD and the Indian tribes intend to improve the data available on Native American Housing need. IHS participation in this process is greatly appreciated. Furthermore, IHS assistance with current data that might be used for addressing problems related to overlapping service areas will be extremely helpful.

Section 1000.328. Twenty-four of the comments suggested that the needs component of the formula should provide a minimum level of funding, thirteen of the commenters suggesting a base allocation of $ 150,000.

After giving this issue serious consideration, the Committee agreed that if an Indian tribe receives less than $ 50,000 under the needs side of the formula in the first year it applies for funding, its need component is set to $ 50,000 with a downward adjustment for all other Indian tribes to cover this cost. In subsequent years up to the year 2002, an Indian tribe receiving less than $ 25,000 under need has their grant adjusted up to $ 25,000.

The Committee determined this minimum grant amount was allowable under NAHASDA under ″other objectively measurable conditions as the Secretary and Indian tribes may specify.″

Section 1000.330. One commenter felt it would be more equitable to allocate a standard across-the board housing allowance for every registered Native American who is a member of a recognized Indian tribe. A housing allowance for every registered Native American is contrary to the intent of the Act. NAHASDA requires that the block grants be targeted to the need of the Indian tribes and the Indian areas of the Indian tribes for assistance for affordable housing activities (Sec. 302(b)).

Two commenters felt that U.S. Census data do not reflect the housing need in Indian country. One commenter recommended the use of tribal waiting lists for housing and that those waiting lists be audited to ensure accuracy. In developing the proposed rule, issues of Census data quality and potential use of waiting list were discussed and carefully considered. Although recognizing the limitations of Census data, it is currently the only data available that is collected in a uniform manner that can be confirmed and verified for all Indian tribes on income and housing need. Section 1000.306 notes that a new set of measurable and verifiable data on Native American housing need will be developed not later than 5 years from the date of issuance of these regulations. Waiting lists tend to reflect local need rather than national need that is comparative across Indian tribes.

Section 1000.332. Three commenters felt this section (designated in the proposed rule as § 1000.318) should provide the procedural requirements for securing HUD approval, including automatic approval if HUD fails to act within a specified time. The Committee believes the details provided in § 1000.336 are adequate. However, the Committee felt commenters were confused by the order of the questions and answers presented in proposed §§ 1000.316 and 1000.318. Accordingly, the final rule reverses the order of these two sections.

Fourteen comments were received discussing HUD's provision of notice regarding formula data. Several commenters recommended that the data should be provided to Indian tribes/TDHEs immediately for review. Commenters also suggested that HUD be required to provide notice of data and projected allocation not less than 120 days before the end of HUD's fiscal year. Other commenters recommended that HUD should be required to provide notice of data and projected allocation not less than 120 days before the date IHPs are required to be submitted.

The section was changed by adding a specific date (August 1 of each year) by which HUD will provide each Indian tribe with the data and a preliminary allocation based on an estimated appropriation for the next fiscal year. For consistency, all other deadlines in the formula component of the rule were made date specific.

Section 1000.334. Several related comments were made reflecting what information could be used for challenge. One commenter stated that many States, counties, cities, universities and other educational institutions have better data than the

U.S. Census. The commenters asked why more systems need to be created if they are in place at the regional or local level. One commenter wrote that if the TDHE is providing accurate, verifiable information to be used in the formula, HUD should not be able to disallow that information. Two commenters wrote that challenge data could be certified by the Indian tribe and the BIA, as the BIA already uses tribal enrollment numbers for some contract funding.

The data used for the formula must be uniformly and consistently collected for all Indian tribes. Local data sources do not necessarily provide this. However, the Committee revised the rule to allow HUD greater discretion to accept data.

Section 1000.336. Five commenters requested more detail on ″a method acceptable to HUD″ for challenge. A more detailed explanation of ″a method acceptable to HUD″ for challenge will be included in the information packet sent out with the data to be used in the formula. Nonetheless, the Committee agreed that the section needed to be clarified in respect to submission of challenge material and the rule was changed accordingly.

Section 1000.338 of the proposed rule. This section was formerly designated as § 1000.338 but has been redesignated as § 1000.325 for purposes of clarity and better organization of the regulatory text. One commenter wrote that this section on adjusting for local area costs is unclear to someone unfamiliar with the existing program. An explanation of this section is included in the appendix which explains how the formula works. In addition, TDC is defined in § 1000.302.

Section 1000.340. Because many small IHAs did not receive modernization funding in FY 1996, two commenters felt the formula should be based on a three to five year average of operating subsidy and modernization received by the IHA. However, the current use of FY 1996 modernization is a statutory requirement that cannot be changed by regulation. Nonetheless, the comments reminded the Committee that an explanation of how this statutory requirement is incorporated into the formula was mistakenly not included in the proposed rule. Accordingly, new § 1000.342 has been added.

Section 1000.342. The proposed rule specifically requested comment on the issue of whether or not there should be an emergency and disaster relief set-aside as part of the block grant allocation.

Seventeen commenters opposed a set-aside. Several commenters wrote that funds should not be taken off the top of the block grant. These commenters believed this would serve to punish everyone for the disasters impacting the few. Other commenters suggested that an Indian tribe should address disaster relief by setting aside its own reserves for such circumstances. One commenter noted that a fund should not be established because insurance requirements protect TDHE property and FEMA is available for natural disasters. Another commenter opposed a set aside due to the lack of accepted definitions for ″emergency″ and ″disaster.″ One of the comments suggested individual insurance coverage **[*12345]** should be required to be sufficient to cover disaster situations at 100 percent.

Thirty-three commenters were in favor of a disaster and/or emergency set aside. Many of these commenters recommended that the fund not exceed $ 10 million. Several commenters suggested that Indian tribes applying for this funding should be required to show that no other relief is available from other sources. One commenter supported the emergency fund, but recommended that Indian tribes should also have the option of establishing an emergency fund with a portion of their grant funds. After considering all of the comments, the Committee determined that a set aside would be difficult to implement and inadvisable. The Committee recommends that recipients consider the establishment of an insurance pool.

Performance Variable. The July 2, 1997 proposed rule solicited comments on the use of a performance variable in the formula allocation. Numerous comments were received.

Many commenters supported the inclusion of a performance variable in the allocation formula. These commenters believed a performance variable was necessary to establish a connection between performance and the amount of funding an Indian tribe receives. Further, the commenters believed that the inclusion of a performance variable would encourage proper fiscal management by Indian tribes. One commenter recommended that the performance objectives be established by the Indian tribes and be tribally driven.

Many commenters were opposed to the performance variable. These commenters believe that a performance variable is unnecessary and would only serve to divide Indian tribes. These commenters believed that the inclusion of a performance

variable would lead to the high-performing recipients getting rewarded at the expense of low-performing recipients, which are in most need of assistance. One commenter writing against the proposal believes the inclusion of a performance variable would allow HUD subjectivity in funding decisions.

The Committee believes that performance is an important issue. However, the Committee determined that the inclusion of a performance variable in the formula would be inappropriate. Rather, the Committee has addressed performance measures in subpart F of these regulations, which deals with compliance issues and adjustments to funding.

General comments on the allocation formula. Several commenters submitted comments that did not refer to a specific section of subpart D, but rather concerned the allocation formula generally.

One commenter suggested the allocation formula be published as part of the final rule. The Committee agrees and the formula is published as part of the appendix to this final rule.

Another commenter suggested splitting allocations by region or size of Indian tribe on a bi-annual or tri-annual basis. This suggestion was considered and not adopted by the Committee for reasons of fairness and equity.

One commenter questioned whether special consideration would be given to the high costs of construction and maintenance in Alaska. The Committee provided for different regional costs to be accounted for in the formula.

Another commenter recommended that $ 15 million of the total amount of funds under the Need component be reserved annually for development of off-site sanitation facilities (water, sewer, and solid waste facilities) and allocated to Indian tribes based on a separate methodology. The Committee considered but did not adopt this proposal due to the impracticality of administering such a fund.

Subpart E--Federal Guarantees for Financing of Tribal Housing Activities

Subpart E describes the regulatory requirements necessary for the implementation of title VI of NAHASDA. This subpart establishes the terms and conditions by which HUD will guarantee the obligations issued by an Indian tribe or Tribally Designated Housing Entity for the purposes of financing eligible affordable housing activities. (Note: The numbers of several sections in this subpart have been amended due to the addition of new sections. For example, § 1000.406 of the proposed rule is numbered as § 1000.408 of this final rule.)

Section 1000.402. Several commenters suggested that State recognized Indian tribes should not be eligible for participation in Title VI. Two of these commenters added that if any State recognized Indian tribes were permitted to participate that their funding should come from a separate appropriation. The regulations were not changed because the statute allows for participation by State Indian tribes that meet the definition in section 4(12)(c) of NAHASDA.

Section 1000.404. This section of the final rule contains new language. Section 1000.404 of the proposed rule has been redesignated as § 1000.406 in the final rule. The preamble to the proposed rule sought input on whether a definition of lender should be added in the final rule. Some commenters agreed that the language should be added while others stated that no regulatory language should be added. It was the decision of the Committee that a lender definition was advisable. It was further agreed to utilize the language found in HUD's regulations for the Section 184 Loan Guarantee Program (currently located in 24 CFR part 955, but redesignated by this final rule as 24 CFR part 1005) to provide consistency in the two loan guarantee programs. Further, it was agreed that the additional language added to the definition of lender in part 1005 was appropriate for Title VI as well (see discussion of changes to part 1005 below). These agreements are implemented in the revised § 1000.404 of the final rule.

Section 1000.406 of the proposed rule. Section 1000.406 of the proposed rule has been redesignated as § 1000.408 in the final rule. One commenter suggested that HUD require only a certification and not volumes of paperwork. The Committee agreed with the comment but made no change to the proposed rule as the language as published was sufficiently broad and did not require excessive paperwork. An additional commenter stated that the financing terms of a non-guaranteed loan should not exceed the financing terms of a guaranteed loan to avoid penalizing financially responsible Indian tribes. The

Committee concurred and reworded the rule to conform with statutory language regarding the timely execution of program plans.

Section 1000.408 of the proposed rule. Section 1000.408 of the proposed rule has been redesignated as § 1000.410 in the final rule. Numerous comments were received stating that the term of the Title VI loan should be longer than 20 years. The commenters noted that the proposed rule language provided no flexibility and was counterproductive to establishing creative financing mechanisms. One commenter requesting the longer loan term suggested that each application stand on its own merits. The Committee agreed with this suggestion and amended the language in the final rule. Additionally, the language in paragraph (a) was amended to correct wording which erroneously provided that security pledged with the note or other obligation could have been sold if the note was sold.

Section 1000.412 of the proposed rule. Section 1000.412 of the proposed rule has been redesignated as § 1000.414 in the final rule. While no comments were received, this section was divided into separate paragraphs to clearly show the **[*12346]** reader that NAHASDA contains two, distinctive requirements.

Section 1000.414 of the proposed rule. Section 1000.414 of the proposed rule has been redesignated as § 1000.416 in the final rule. Several commenters requested a change in wording from ″may″ to ″will″ which they believed responded to concerns from Indian tribes and was more grammatically correct. The Committee concurred and amended the language as noted.

Section 1000.418 of the proposed rule. Section 1000.418 of the proposed rule has been redesignated as § 1000.420 in the final rule. Two comments requested a change in the proposed rule by adding ″should not″ instead of the proposed wording of simply ″not.″ The Committee did not concur with this change as the statute limits the net interest costs to 30 percent and does not provide for the flexibility the commenter is seeking.

Section 1000.422 of the proposed rule. Section 1000.422 of the proposed rule has been redesignated as § 1000.424 in the final rule. Several comments were received requesting the removal of the certification on the drug-free workplace and relocation requirements and the rewording of the certifications in general to be clearer to the reader. The Committee concurred with these recommendations and further streamlined the listing of required certifications. Several commenters requested that ″regulation″ be changed to ″requirements″ since the reference is to a statutory requirement, as opposed to a regulatory requirement. The Committee accepted this change.

Section 1000.428 of the proposed rule. Section 1000.428 of the proposed rule has been redesignated as § 1000.430 in the final rule. Several commenters suggested that the word ″reasonable″ be added to the conditions under which HUD may list conditions in the issuance of a guarantee certificate. The Committee concurred and made this change in paragraph (c) of this section. A comment was received requesting that a 45 day limit be placed on HUD to provide its request for information. The Committee agreed that a review period should be established and retained the 30 day review period.

Section 1000.432 of the proposed rule. Section 1000.432 of the proposed rule has been redesignated as § 1000.434 in the final rule. Two comments requested that the allocation process for title VI applicants be based only on seeking loan guarantee assistance. The Committee did not recommend any changes based on this comment as the Title VI applications will be received by the Department throughout the year and not at one time. Therefore, it is impossible for the Department to accurately predict the number of loans and the amount of those loans when applying the formula.

Two comments requested that the date when applications could be submitted for the unused funds be changed from the fourth quarter to the third quarter. The Committee agreed with these comments and the language was amended. Additionally, language was added to make clear to the reader that an application previously denied under the regional allocation method would need to be resubmitted at the beginning of the third quarter to be made eligible for unused funds.

Two comments stated that the allocation method should be based on need. The Committee did not adopt this recommendation as there is no statutory basis for such a requirement. The Committee believes that the language in the proposed rule provided a fair distribution of available funds. During the third quarter, an adjustment will be made for regions with higher participation or lower participation in Title VI.

Section 1000.434 of the proposed rule. Section 1000.434 of the proposed rule has been redesignated as § 1000.436 in the final rule. A comment was received which supported the monitoring of Title VI funds by HUD. The Committee agreed with this comment but determined that such monitoring was fully provided for in the proposed rule language. Therefore, no change was necessary. A comment was also received which recommended that this provision be deleted from the rule. The Committee did not concur on this provision as it would contradict the statute.

Subpart F--Recipient Monitoring, Oversight and Accountability

Subpart F implements title IV of NAHASDA. Among other topics, this subpart addresses monitoring of compliance, performance reports, HUD and tribal review, audits, and remedies for noncompliance. (Note: The numbers of several sections in this subpart have been amended due to the addition of new sections. For example, § 1000.528 of the proposed rule is numbered as § 1000.532 of this final rule.)

General comment. One commenter suggested that HUD elevate its capabilities to insure that it can effectively monitor NAHASDA activities. No regulatory changes were proposed.

Section 1000.501. One commenter was in favor of this provision.

Section 1000.502. HUD had added the word ″periodically″ in describing the HUD review process which otherwise was cross-referenced to section § 100.520. This prompted several negative comments. Section 1000.520 states that HUD will ″at least annually″ review each recipient's performance. Therefore, the word ″periodically″ has been removed.

HUD also added citations to *24 CFR 8.56* and *24 CFR 146.31*. Several commenters objected to this addition. These referenced regulations are not applicable to these reviews and NAHASDA regulations, so they have been deleted.

In paragraph (c) one commenter expressed concern about adding the word ″auditing″ to HUD's review practices since HUD is unlikely to conduct financial audits of recipients. Therefore, the word ″auditing″ has been deleted.

One commenter challenged HUD's monitoring and suggested further regulating how Indian tribes and HUD should carry out their monitoring responsibilities. NAHASDA mandates that HUD monitor activities and the Committee believes that it is prudent for both HUD and Indian tribes to monitor recipients. The Committee additionally believes that Indian tribes and HUD should generally not be further restricted in their monitoring activities.

Several commenters wanted further detail on monitoring activities. However, the Committee believes the regulations as currently stated are adequate and appropriate.

Section 1000.508. A number of commenters objected to the regulations mandating that recipients take certain specified actions if they identified programmatic concerns. The regulations have been changed to state that some corrective action must be taken, but is not limited to the remedies outlined.

A comment argued that HUD has an obligation to provide technical assistance. This comment was considered but no language was adopted.

Section 1000.510. Similar to some comments regarding § 1000.508, commenters were concerned about the language added by HUD concerning ″responsibility″ and how this might be interpreted or what consequences it might have. However, the Committee agreed to retain the language.

Section 1000.512. At the suggestion of several commenters, paragraph (c) has been changed to cross-reference to § 1000.524.

Section 1000.514. Contrary to the suggestions of several commenters, the Committee does not believe that it is necessary to address the particulars of audit submissions in this section. Many **[*12347]** comments were received suggesting that Indian tribes need more time to submit performance reports. Therefore, the proposed period of 45 days has been changed to 60 days. Also, based on one comment, ″program year″ has now been changed to ″recipient's program year.″

Section 1000.516. As with the change made to § 1000.514, the term ″program year″ has been changed to read ″recipient's program year.″

One commenter inquired about staggering IHP deadlines to allow them to fit different fiscal years. The submission period for IHPs has been changed to permit IHP submission anytime prior to July 1 of the Federal Fiscal Year for which funds are appropriated (See § 1000.214). Coordination of plan submission with individual fiscal years has been left to the discretion of the individual recipients.

Section 1000.521. At the suggestion of several commenters, this new question and answer has been added giving HUD 60 days to issue a report on a recipient's performance.

Section 1000.522. Many comments were received regarding the notice for on-site reviews. In response, the regulations have been changed to require a 30-day written notice in most cases. One commenter suggested that in emergency situations where a notice is not required, that the term ″emergency″ be defined. However, the Committee believes that such a definition would be too cumbersome. One commenter proposed that the recipient and HUD be required to mutually agree on whether an on-site review should be done. The Committee does not agree with this proposal because it might conflict with the rights and duties that HUD has under NAHASDA.

The Committee encourages HUD to be sensitive to the right of Indian tribes to participate in exit reviews. Though no specific action is promulgated, HUD should incorporate such rights in its review procedures.

Section 1000.524. As addressed in the discussion of previous sections, paragraph (d) is changed to read ″recipient's program year.″

At the suggestion of several commenters, the amount of time that a recipient has to submit an annual performance report has been changed from 45 days to 60 days.

One commenter wanted to expressly address treatment of obligated funds and to define them as expended funds. However, the Committee feels this is not an appropriate definition and that explanatory language is not necessary.

One commenter felt that ″substantial″ compliance with regulations and statutes should be required in paragraph (f). The Committee agrees with this commenter and has changed the regulations accordingly.

One commenter suggested that HUD review be done biannually. However, this conflicts with the statutory requirement that HUD review recipients annually.

Section 1000.526. Many commenters objected to HUD adding paragraph (i) to the list of information which it may consider in reviewing a recipient's performance. It was agreed that this section be revised to apply only to ″reliable″ information relating to performance measurements.

One commenter asked whether paragraph (h) is an inappropriate waiver of attorney-client privilege. The Committee does not interpret this as a waiver because the section merely allows HUD to take into account matters that may be in litigation.

Section 1000.530. This section of the final rule contains new language. Section 1000.530 of the proposed rule has been redesignated as § 1000.538 in the final rule. A number of comments were received which stated that the proposed regulations did not provide a recipient a period of time to cure a performance problem before the Department initiates remedies available to it under either § 1000.528 of the proposed rule, redesignated as § 1000.532 in the final rule, (adjustments to future grants) or § 1000.530 of the proposed rule, redesignated as § 1000.538 in the final rule, (adjustments to current grant based on substantial noncompliance). The final rule adds new language at § 1000.530 which, depending upon the severity of the performance problem, provides a number of corrective and remedial measures which the recipient may take to cure the performance problem. At least one or more of the corrective and remedial actions must be taken by the Department before the Department pursues the remedies available to it under §§ 1000.532 or 1000.538 of the final rule. Such corrective or remedial measures are designed to (1) prevent continuance of the problem, (2) mitigate any adverse

effects, and (3) prevent recurrence of the problem. The corrective and remedial actions are phrased as requests and recommendations to recipients.

Section 1000.528 of the proposed rule. Section 1000.528 of the proposed rule has been redesignated as § 1000.532 in the final rule. The July 2, 1997 proposed rule identified the reduction of grant amounts under section 405(c) of NAHASDA without affording notice and an opportunity for a hearing to be a nonconsensus issue. The tribal position in the proposed rule was that prior to the Department taking action under section 405(c) to adjust, reduce or withdraw future grant awards, the Department must provide notice and an opportunity for a hearing which would be available to the recipient under section 401(a) of NAHASDA (relating to substantial noncompliance issues involving the current year grant). The Department took the position in the proposed rule that section 405(c) permits the Department to adjust, reduce, withdraw, or take other appropriate actions based on the Department's review and audit of the recipient without providing prior notice and an opportunity for hearing.

Section 1000.528 of the proposed rule was drafted by the Department to implement section 405(c). The section, as drafted, did not provide notice and an opportunity for hearing.

Extensive comments were received which unanimously supported the tribal position that the Department afford notice and an opportunity for hearing prior to the Department taking the section 405(c) remedies against the future year grant. The final rule states HUD will (1) provide notice and an informal meeting to resolve program deficiencies prior to taking the section 405(c) remedies and following the future grant adjustment, reduction, withdrawal, or other action, and (2) provide the recipient with a hearing identical to that afforded recipients under section 401(a) of NAHASDA. The funds adjusted, reduced, or withdrawn shall not be reallocated until 15 days after this hearing has been held and a final decision rendered.

Several comments stated that the statutory language in section 405(c) regarding ″appropriate adjustments″ to future grants is vague and provides little or no guidance to either the Department or recipients. They recommended that some explanation be provided as to the standard that applies when HUD makes a determination to adjust a future grant. Paragraph (c) provides such a standard and mandates that the Department make adjustments in the recipient's future grant appropriate to the deficiency when the recipient has not complied significantly with a major activity of its IHP. If a reduction is made, a recipient may request a hearing identical to that provided for reductions under section 401(a) of NAHASDA.

Other comments were received that were directed at reducing the share of grant funds to recipients who failed to meet their own IHP goals and objectives. The solution to this situation recommended by these commenters was **[*12348]** to provide a performance variable in the funding allocation formula. Also received were comments specific to the issue of whether annual funding would continue for programs with identified management and performance shortfalls and whether, as proposed, the regulations would implement a system that could increase the existing project development pipeline. However, many comments were received that opposed adding performance variables to the formula to reduce funding to non-performing programs.

The response to these varied comments is the insertion of paragraph (c)-a mandatory program sanction which HUD must take. The sanctions only occur if a recipient fails to comply significantly with a major activity of its IHP and the deficiencies that caused the failure were not beyond the control of the recipient.

Since each participant prepares its own IHP and conducts monitoring and oversight activities to assure the IHP will be accomplished, the Committee believes that the actions taken by HUD in the new paragraph (c) are necessary to provide a ″means of last resort″ when the recipient fails in a way that wastes or mismanages NAHASDA funding. Further, the Committee intends that inclusion of paragraph (c) underscores HUD's responsibility to assure that funds are allocated to programs that address the goals and objectives set forth in their housing plans, thereby playing an active role in assuring the program's success.

Section 1000.530 of the proposed rule. Section 1000.530 of the proposed rule has been redesignated as § 1000.538 in the final rule. A number of commenters submitted questions regarding the definition of ″substantial noncompliance.″ Several comments were received concerning providing a review and allowing an opportunity to cure a case of substantial

noncompliance. In whole or in part, these concerns have been addressed in changes and additions made under §§ 1000.530, 1000.532, 1000.534, and 1000.536 of the final rule. One commenter endorsed the language as published.

Section 1000.532 of the proposed rule. Section 1000.532 of the proposed rule has been redesignated as § 1000.540 in the final rule. Numerous comments were received regarding hearing procedures to be followed. The reference to 24 CFR part 26 has been left intact. However, the references to the Rehabilitation Act and the Age Discrimination Act (which were added by HUD) have been removed since these laws are not applicable in the context of this section.

Section 1000.534 of the proposed rule. Section 1000.534 of the proposed rule has been redesignated as § 1000.542 in the final rule. Commenters in Alaska were concerned about how this section might apply to them and the unique circumstances when an Indian tribe might refuse to both certify a TDHE and submit an IHP covering certain existing units. This issue has been addressed in § 1000.210.

Several commenters were concerned with the structure and language of paragraph (b). The Committee has not revised the language, because the current language reflects the statute.

One commenter expressed concern that this section is inconsistent with the principles of self-determination, although the commenter acknowledges that the section is required by the statute. Because it is mandated by NAHASDA, no change was made to the regulations.

Section 1000.534 of the final rule. This section of the final rule contains new language. Section 1000.534 of the proposed rule has been redesignated as § 1000.542 in the final rule. The proposed rule identified as a nonconsensus issue the question of a definition of the term ″substantial noncompliance″ contained in section 401 of NAHASDA. The Indian tribes proposed a definition for this term which is the basis for terminating, reducing, or limiting payments under NAHASDA. HUD disagreed with inclusion of the definition, but welcomed public comment on whether the term should be defined and how. There were many public comments on this matter and all urged inclusion of a definition. The final rule adds a definition at § 1000.534 that indicates both the substantiality and noncompliance aspects of the definition.

Section 1000.536 of the proposed rule. This question was added to the proposed rule by HUD and the proposed rule language has been completely removed. One commenter's challenge to this question made the Committee realize that this provision is not needed. Tribal conditions and performance are evaluated each year by HUD upon the submission of an IHP. At that time, HUD shall make a new determination as to whether the recipient is in substantial compliance. Therefore, HUD is required to follow this process instead of determining that a particular instance of substantial noncompliance has ceased.

Section 1000.536 of the final rule. This section of the final rule contains new language. The language of § 1000.536 of the proposed rule has been removed from the final rule. This new question and answer provides that NAHASDA grant funds withheld from a recipient and not returned as a result of the hearing will be distributed by HUD in accordance with the next NAHASDA formula allocation.

Section 1000.538 of the proposed rule. Section 1000.538 of the proposed rule has been redesignated as § 1000.544 in the final rule. Several comments were received on this section. The regulations have been changed to better explain this requirement. (Also, see changes to §§ 1000.546 and 1000.548 of the final rule, which were §§ 1000.542 and 1000.544 of the proposed rule.)

Section 1000.540. The proposed rule language for this entire section has been removed because OMB Circular A-133 establishes new procedures for cognizant agencies and auditing oversight. Section 1000.532 of the proposed rule has been redesignated as § 1000.540 in the final rule.

Section 1000.552 of the proposed rule. Section 1000.552 of the proposed rule has been redesignated as § 1000.556 in the final rule. Several comments were received asking for clarification on this section. Language has been added to explain that there may be other laws or policies which are applicable.

Section 1000.554 of the proposed rule. Section 1000.554 of the proposed rule has been redesignated as § 1000.558 in the final rule. Several comments were received asking for clarification on this section. Language has been added to explain that there may be other laws or policies which are applicable.

Amendments to 24 CFR Part 1005--Section 184 Loan Guarantee Program Regulations

Section 1005.103. A comment was received which recommended a clarifying rewording of the definition for ″Holder.″ The Committee agreed and revised the wording of the section accordingly.

Section 1005.104. One commenter provided several comments on the eligibility of lenders for the 184 program. While these comments were directed to the requirements of other Federal agencies, the rule was amended to expand the eligibility of lenders.

Section 1005.105. The Committee agreed to reword the provisions of paragraph (b) for further clarity and compliance with NAHASDA.

Many comments were received regarding paragraph (f) of this section. One commenter noted the adverse affect on HMDA data if loan applicants must go through a denial process. A comment discussed the shortage of housing in **[*12349]** rural Alaska and noted that a requirement for a written documentation would present a disadvantage to buyers under this program. Questions were also raised about the type and amount of documentation required. Several commenters requested removal of the ″lack of access to private financial markets″ language. Several commenters noted that the proposed language would discourage access to private markets which was inconsistent with the objective of NAHASDA. One commenter proposed that this provision be delayed until a later time so that market comparables could be established.

The Committee considered all comments and determined that the language regarding ″lack of access″ could not be removed as it is contained in NAHASDA. The Committee agrees with the comments that the provision, as drafted, could be detrimental to the program and Indian country and therefore the rule was revised. The new requirement provides for a certification from the borrower that they lack access to private financial markets. Written documentation is no longer required to support this certification.

Section 1005.107. Several commenters believed that NAHASDA intended that the TDHE servicing the Indian tribe be eligible under the liquidation provision. The Committee agreed with this comment and added the language.

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (*42 U.S.C. 3501*-3530), and assigned OMB control number 2577-0218. *An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number*.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969 *(42 U.S.C. 4332).* That Finding of No Significant Impact remains applicable to this final rule and is available for public inspection during business hours in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism,* has determined that the policies contained in this rule have no federalism implications, and that the policies are not subject to review under the Order.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

This rule will not pose an environmental health risk or safety risk on children.

Unfunded Mandates Reform Act

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 *(2 U.S.C. 1532),* that this rule does not impose a Federal mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $ 100 million or more in any one year.

Executive Order 12866, Regulatory Planning and Review.

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the final rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410-0500.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act *(5 U.S.C. 605*(b)) has reviewed and approved this rule, and in so doing certifies that this rule would not have a significant economic impact on a substantial number of small entities.

Regulations

List of Subjects

24 CFR Part 950

Aged, Grant programs-housing and community development, Grant programs-Indians, Indians, Individuals with disabilities, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 953

Alaska, Community development block grants, Grant programs-housing and community development, Indians, Reporting and recordkeeping requirements.

24 CFR Part 955

Indians, Loan programs-Indians, Reporting and recordkeeping requirements.

24 CFR Part 1000

Aged, Community development block grants, Grant programs-housing and community development, Grant programs-Indians, Indians, Individuals with disabilities, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs-housing and community development, Indians, Reporting and recordkeeping requirements.

24 CFR Part 1005

Indians, Loan programs-Indians, Reporting and recordkeeping requirements.

Accordingly, for the reasons described above, in title 24 of the Code of Federal Regulations, Chapter IX is amended as follows:

PART 950-- [REMOVED]

1. Part 950 is removed.

PART 953-- [REDESIGNATED]

2. Part 953 is redesignated as part 1003.

2a. Part 955 is redesignated as part 1005.

3. Part 1000 is added to read as follows:

PART 1000-- NATIVE AMERICAN HOUSING ACTIVITIES

Subpart A-- General

Sec.

1000.1 What is the applicability and scope of these regulations?

1000.2 What are the guiding principles in the implementation of NAHASDA?

1000.4 What are the objectives of NAHASDA?

1000.6 What is the nature of the IHBG program?

1000.8 May provisions of these regulations be waived?

1000.10 What definitions apply in these regulations?

1000.12 What nondiscrimination requirements are applicable?

1000.14 What relocation and real property acquisition policies are applicable? [*12350]

1000.16 What labor standards are applicable?

1000.18 What environmental review requirements apply?

1000.20 Is an Indian tribe required to assume environmental review responsibilities?

1000.22 Are the costs of the environmental review an eligible cost?

1000.24 If an Indian tribe assumes environmental review responsibility, how will HUD assist the Indian tribe in performing the environmental review?

1000.26 What are the administrative requirements under NAHASDA?

1000.28 May a self-governance Indian tribe be exempted from the applicability of § 1000.26?

1000.30 What prohibitions regarding conflict of interest are applicable?

1000.32 May exceptions be made to the conflict of interest provisions?

1000.34 What factors must be considered in making an exception to the conflict of interest provisions?

1000.36 How long must a recipient retain records regarding exceptions made to the conflict of interest provisions?

1000.38 What flood insurance requirements are applicable?

1000.40 Do lead-based paint poisoning prevention requirements apply to affordable housing activities under NAHASDA?

1000.42 Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?

1000.44 What prohibitions on the use of debarred, suspended or ineligible contractors apply?

1000.46 Do drug-free workplace requirements apply?

1000.48 Are Indian preference requirements applicable to IHBG activities?

1000.50 What Indian preference requirements apply to IHBG administration activities?

1000.52 What Indian preference requirements apply to IHBG procurement?

1000.54 What procedures apply to complaints arising out of any of the methods of providing for Indian preference?

1000.56 How are NAHASDA funds paid by HUD to recipients?

1000.58 Are there limitations on the investment of IHBG funds?

1000.60 Can HUD prevent improper expenditure of funds already disbursed to a recipient?

1000.62 What is considered program income and what restrictions are there on its use?

Subpart B-- Affordable Housing Activities

1000.101 What is affordable housing?

1000.102 What are eligible affordable housing activities?

1000.104 What families are eligible for affordable housing activities?

1000.106 What families receiving assistance under title II of NAHASDA require HUD approval?

1000.108 How is HUD approval obtained by a recipient for housing for non low-income Indian families and model activities?

1000.110 Under what conditions may non low-income Indian families participate in the program?

1000.112 How will HUD determine whether to approve model housing activities?

1000.114 How long does HUD have to review and act on a proposal to provide assistance to non low-income Indian families or a model housing activity?

1000.116 What should HUD do before declining a proposal to provide assistance to non low-income Indian families or a model housing activity?

1000.118 What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income Indian families or a model housing activity?

1000.120 May a recipient use Indian preference or tribal preference in selecting families for housing assistance?

1000.122 May NAHASDA grant funds be used as matching funds to obtain and leverage funding, including any Federal or state program and still be considered an affordable housing activity?

1000.124 What maximum and minimum rent or homebuyer payment can a recipient charge a low-income rental tenant or homebuyer residing in housing units assisted with NAHASDA grant amounts?

1000.126 May a recipient charge flat or income-adjusted rents?

1000.128 Is income verification required for assistance under NAHASDA?

1000.130 May a recipient charge a non low-income family rents or homebuyer payments which are more than 30 percent of the family's adjusted income?

1000.132 Are utilities considered a part of rent or homebuyer payments?

1000.134 When may a recipient (or entity funded by a recipient) demolish or dispose of current assisted stock?

1000.136 What insurance requirements apply to housing units assisted with NAHASDA grants?

1000.138 What constitutes adequate insurance?

1000.140 May a recipient use grant funds to purchase insurance for privately owned housing to protect NAHASDA grant amounts spent on that housing?

1000.142 What is the ″useful life″ during which low-income rental housing and low-income homebuyer housing must remain affordable as required in sections 205(a)(2) and 209 of NAHASDA?

1000.144 Are Mutual Help homes developed under the 1937 Act subject to the useful life provisions of section 205(a)(2)?

1000.146 Are homebuyers required to remain low-income throughout the term of their participation in a housing program funded under NAHASDA?

1000.150 How may Indian tribes and TDHEs receive criminal conviction information on adult applicants or tenants?

1000.152 How is the recipient to use criminal conviction information?

1000.154 How is the recipient to keep criminal conviction information confidential?

1000.156 Is there a per unit limit on the amount of IHBG funds that may be used for dwelling construction and dwelling equipment?

Subpart C-- Indian Housing Plan (IHP)

1000.201 How are funds made available under NAHASDA?

1000.202 Who are eligible recipients?

1000.204 How does an Indian tribe designate itself as recipient of the grant?

1000.206 How is a TDHE designated?

1000.208 What happens if an Indian tribe had two IHAs as of September 30, 1996?

1000.210 What happens to existing 1937 Act units in those jurisdictions for which Indian tribes do not or cannot submit an IHP?

1000.212 Is submission of an IHP required?

1000.214 What is the deadline for submission of an IHP?

1000.216 What happens if the recipient does not submit the IHP to the Area ONAP by July 1?

1000.218 Who prepares an submits an IHP?

1000.220 What are the minimum requirements for the IHP?

1000.222 Are there separate IHP requirements for small Indian tribes and small TDHEs?

1000.224 Can any part of the IHP be waived?

1000.226 Can the certification requirements of section 102(c)(5) of NAHASDA be waived by HUD?

1000.228 If HUD changes its IHP format will Indian tribes be involved?

1000.230 What is the process for HUD review of IHPs and IHP amendments?

1000.232 Can an Indian tribe or TDHE amend its IHP?

1000.234 Can HUD's determination regarding the non-compliance of an IHP or a modification to an IHP be appealed?

1000.236 What are eligible administrative and planning expenses?

1000.238 What percentage of the IHBG funds can be used for administrative and planning expenses?

1000.240 When is a local cooperation agreement required for affordable housing activities?

1000.242 When does the requirement for exemption from taxation apply to affordable housing activities?

Subpart D-- Allocation Formula

1000.301 What is the purpose of the IHBG formula?

1000.302 What are the definitions applicable for the IHBG formula?

1000.304 May the IHBG formula be modified?

1000.306 How can the IHBG formula be modified?

1000.308 Who can make modifications to the IHBG formula?

1000.310 What are the components of the IHBG formula?

1000.312 What is current assisted stock? [*12351]

1000.314 What is formula current assisted stock?

1000.316 How is the Formula Current Assisted Stock (FCAS) Component developed?

1000.317 Who is the recipient for funds for current assisted stock which is owned by state-created Regional Native Housing Authorities in Alaska?

1000.318 When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?

1000.320 How is Formula Current Assisted Stock adjusted for local area costs?

1000.322 Are IHA financed units included in the determination of Formula Current Assisted Stock?

1000.324 How is the need component developed?

1000.325 How is the need component adjusted for local area costs?

1000.326 What if a formula area is served by more than one Indian tribe?

1000.327 What is the order of preference for allocating the IHBG formula needs data for Indian tribes in Alaska not located on reservations due to the unique circumstances in Alaska?

1000.328 What is the minimum amount an Indian tribe can receive under the need component of the formula?

1000.330 What are data sources for the need variables?

1000.332 Will data used by HUD to determine an Indian tribe's or TDHE's formula allocation be provided to the Indian tribe or TDHE before the allocation?

1000.334 May Indian tribes, TDHEs, or HUD challenge the data from the U.S. Decennial Census or provide an alternative source of data?

1000.336 How may an Indian tribe, TDHE, or HUD challenge data?

1000.340 What if an Indian tribe is allocated less funding under the block grant formula than it received in Fiscal Year 1996 for operating subsidy and modernization?

Subpart E-- Federal Guarantees for Financing of Tribal Housing Activities

1000.401 What terms are used throughout this subpart?

1000.402 Are State recognized Indian tribes eligible for guarantees under title VI of NAHASDA?

1000.404 What lenders are eligible for participation?

1000.406 What constitutes tribal approval to issue notes or other obligations under title VI of NAHASDA?

1000.408 How does an Indian tribe or TDHE show that it has made efforts to obtain financing without a guarantee and cannot complete such financing in a timely manner?

1000.410 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

1000.412 Can an issuer obtain a guarantee for more than one note or other obligation at a time?

1000.414 How is an issuer's financial capacity demonstrated?

1000.416 What is a repayment contract in a form acceptable to HUD?

1000.418 Can grant funds be used to pay costs incurred when issuing notes or other obligations?

1000.420 May grants made by HUD under section 603 of NAHASDA be used to pay net interest costs incurred when issuing notes or other obligations?

1000.422 What are the procedures for applying for loan guarantees under title VI of NAHASDA?

1000.424 What are the application requirements for guarantee assistance under title VI of NAHASDA?

1000.426 How does HUD review a guarantee application?

1000.428 For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?

1000.430 When will HUD issue notice to the applicant if the application is approved at the requested or reduced amount?

1000.432 Can an amendment to an approved guarantee be made?

1000.434 How will HUD allocate the availability of loan guarantee assistance?

1000.436 How will HUD monitor the use of funds guaranteed under this subpart?

Subpart F-- Recipient Monitoring, Oversight and Accountability

1000.501 Who is involved in monitoring activities under NAHASDA?

1000.502 What are the monitoring responsibilities of the recipient, the grant beneficiary and HUD under NAHASDA?

1000.504 What are the recipient performance objectives?

1000.506 If the TDHE is the recipient, must it submit its monitoring evaluation/results to the Indian tribe?

1000.508 If the recipient monitoring identifies programmatic concerns, what happens?

1000.510 What happens if tribal monitoring identifies compliance concerns?

1000.512 Are performance reports required?

1000.514 When must the annual performance report be submitted?

1000.516 What reporting period is covered by the annual performance report?

1000.518 When must a recipient obtain public comment on its annual performance report?

1000.520 What are the purposes of HUD review?

1000.521 After the receipt of the recipient's performance report, how long does HUD have to make recommendations under section 404(c) of NAHASDA?

1000.522 How will HUD give notice of on-site reviews?

1000.524 What are HUD's performance measures for the review?

1000.526 What information will HUD use for its review?

1000.528 What are the procedures for the recipient to comment on the result of HUD's review when HUD issues a report under section 405(b) of NAHASDA?

1000.530 What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under §§ 1000.532 or 1000.538?

1000.532 What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?

1000.534 What constitutes substantial noncompliance?

1000.536 What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under § 1000.532 or § 1000.538?

1000.538 What remedies are available for substantial noncompliance?

1000.540 What hearing procedures will be used under NAHASDA?

1000.542 When may HUD require replacement of a recipient?

1000.544 What audits are required?

1000.546 Are audit costs eligible program or administrative expenses?

1000.548 Must a copy of the recipient's audit pursuant to the Single Audit Act relating to NAHASDA activities be submitted to HUD?

1000.550 If the TDHE is the recipient, does it have to submit a copy of its audit to the Indian tribe?

1000.552 How long must the recipient maintain program records?

1000.554 Which agencies have right of access to the recipient's records relating to activities carried out under NAHASDA?

1000.556 Does the Freedom of Information Act (FOIA) apply to recipient records?

1000.558 Does the Federal Privacy Act apply to recipient records?

Appendix A to Part 1000-Indian Housing Block Grant Formula Mechanics

Appendix B to Part 1000-IHBG Block Grant Formula Mechanisms

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

Subpart A-- General

§ 1000.1 -- What is the applicability and scope of these regulations?

Under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) the Department of Housing and Urban Development (HUD) provides grants, loan guarantees, and technical assistance to Indian tribes and Alaska Native villages for the development and operation of low-income housing in Indian areas. The policies and procedures described in this part apply to grants to eligible recipients under the Indian Housing Block Grant (IHBG) program for Indian tribes and Alaska Native villages. This part also applies to loan guarantee assistance under title VI of NAHASDA. The regulations in this part supplement the statutory requirements set forth in NAHASDA. This part, as much as **[*12352]** practicable, does not repeat statutory language.

§ 1000.2 -- What are the guiding principles in the implementation of NAHASDA?

(a) The Secretary shall use the following Congressional findings set forth in section 2 of NAHASDA as the guiding principles in the implementation of NAHASDA:

(1) The Federal government has a responsibility to promote the general welfare of the Nation:

(i) By using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular, assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances or factors beyond their control;

(ii) By working to ensure a thriving national economy and a strong private housing market; and

(iii) By developing effective partnerships among the Federal government, state, tribal, and local governments, and private entities that allow government to accept responsibility for fostering the development of a healthy marketplace and allow families to prosper without government involvement in their day-to-day activities.

(2) There exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people.

(3) The Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people.

(4) The Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with 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.

(5) Providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping Indian tribes and their members to improve their housing conditions and socioeconomic status.

(6) The need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal government should work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for Indian tribes and their members.

(7) Federal assistance to meet these responsibilities 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 or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 *et seq.*).

(b) Nothing in this section shall be construed as releasing the United States government from any responsibility arising under its trust responsibilities towards Indians or any treaty or treaties with an Indian tribe or nation.

§ 1000.4 -- What are the objectives of NAHASDA?

The primary objectives of NAHASDA are:

(a) To assist and promote affordable housing activities to develop, maintain and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low-income Indian families;

(b) To ensure better access to private mortgage markets for Indian tribes and their members and to promote self-sufficiency of Indian tribes and their members;

(c) To coordinate activities to provide housing for Indian tribes and their members and to promote self-sufficiency of Indian tribes and their members;

(d) To plan for and integrate infrastructure resources for Indian tribes with housing development for Indian tribes; and

(e) To promote the development of private capital markets in Indian country and to allow such markets to operate and grow, thereby benefiting Indian communities.

§ 1000.6 -- What is the nature of the IHBG program?

The IHBG program is formula driven whereby eligible recipients of funding receive an equitable share of appropriations made by the Congress, based upon formula components specified under subpart D of this part. IHBG recipients must have the administrative capacity to undertake the affordable housing activities proposed, including the systems of internal control necessary to administer these activities effectively without fraud, waste, or mismanagement.

§ 1000.8 -- May provisions of these regulations be waived?

Yes. Upon determination of good cause, the Secretary may, subject to statutory limitations, waive any provision of this part and delegate this authority in accordance with section 106 of the Department of Housing and Urban Development Reform Act of 1989 *(42 U.S.C. 3535*(q)).

§ 1000.10 -- What definitions apply in these regulations?

Except as noted in a particular subpart, the following definitions apply in this part:

(a) The terms ″*Adjusted income*,″ ″*Affordable housing*,″ ″*Drug-related criminal activity*,″ ″*Elderly families and near-elderly families*,″ ″*Elderly person*,″ ″*Grant beneficiary*,″ ″*Indian*,″ ″*Indian housing plan (IHP)*,″ ″*Indian tribe*,″ ″*Low-income family*,″ ″*Near-elderly persons*,″ ″*Nonprofit*,″ ″*Recipient*,″ *Secretary*,″ ″*State*,″ and ″*Tribally designated housing entity (TDHE)*″ are defined in section 4 of NAHASDA.

(b) In addition to the definitions set forth in paragraph (a) of this section, the following definitions apply to this part:

Affordable housing activities are those activities identified in section 202 of NAHASDA.

Annual Contributions Contract (ACC) means a contract under the 1937 Act between HUD and an IHA containing the terms and conditions under which HUD assists the IHA in providing decent, safe, and sanitary housing for low-income families.

Annual income has one of the following meanings, as determined by the Indian tribe:

(1) ″Annual income″ as defined for HUD's Section 8 programs in 24 CFR part 5, subpart F (except when determining the income of a homebuyer for an owner-occupied rehabilitation project, the value of the homeowner's principal residence may be excluded from the calculation of Net Family assets); or

(2) Annual income as reported under the Census long-form for the most recent available decennial Census. This definition includes:

(i) Wages, salaries, tips, commissions, etc.;

(ii) Self-employment income;

(iii) Farm self-employment income;

(iv) Interest, dividends, net rental income, or income from estates or trusts;

(v) Social security or railroad retirement; **[*12353]**

(vi) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs;

(vii) Retirement, survivor, or disability pensions; and

(viii) Any other sources of income received regularly, including Veterans' (VA) payments, unemployment compensation, and alimony; or

(3) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

Assistant Secretary means the Assistant Secretary for Public and Indian Housing.

Department or HUD means the Department of Housing and Urban Development.

Family includes, but is not limited to, a family with or without children, an elderly family, a near-elderly family, a disabled family, a single person, as determined by the Indian tribe.

Homebuyer payment means the payment of a family purchasing a home pursuant to a lease purchase agreement.

Homeless family means a family who is without safe, sanitary and affordable housing even though it may have temporary shelter provided by the community, or a family who is homeless as determined by the Indian tribe.

IHBG means Indian Housing Block Grant.

Income means annual income as defined in this subpart.

Indian Area means the area within which an Indian tribe operates affordable housing programs or the area in which a TDHE is authorized by one or more Indian tribes to operate affordable housing programs. Whenever the term ″jurisdiction″ is used in NAHASDA it shall mean ″Indian Area″ except where specific reference is made to the jurisdiction of a court.

Indian Housing Authority (IHA) means an entity that:

(1) Is authorized to engage or assist in the development or operation of low-income housing for Indians under the 1937 Act; and

(2) Is established:

(i) By exercise of the power of self government of an Indian tribe independent of state law; or

(ii) By operation of state law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Median income for an Indian area is the greater of:

(1) The median income for the counties, previous counties, or their equivalent in which the Indian area is located; or

(2) The median income for the United States.

NAHASDA means the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*).

***1937 Act* means the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*).** *Office of Native American Programs (ONAP)* means the office of HUD which has been delegated authority to administer programs under this part. An ″Area ONAP″ is an ONAP field office.

Person with Disabilities means a person who -

(1) Has a disability as defined in section 223 of the Social Security Act;

(2) Has a developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act;

(3) Has a physical, mental, or emotional impairment which-

(i) Is expected to be of long-continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that such ability could be improved by more suitable housing conditions.

(4) The term "person with disabilities" includes persons who have the disease of acquired immunodeficiency syndrome or any condition arising from the etiologic agent for acquired immunodeficiency syndrome.

(5) Notwithstanding any other provision of law, no individual shall be considered a person with disabilities, for purposes of eligibility for housing assisted under this part, solely on the basis of any drug or alcohol dependence. The Secretary shall consult with Indian tribes and appropriate Federal agencies to implement this paragraph.

(6) For purposes of this definition, the term " *physical, mental or emotional impairment* " includes, but is not limited to:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological condition, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) The term " *physical, mental, or emotional impairment* " includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, and emotional illness.

§ 1000.12 -- What nondiscrimination requirements are applicable?

(a) The requirements of the Age Discrimination Act of 1975 *(42 U.S.C. 6101*-6107) and HUD's implementing regulations in 24 CFR part 146.

(b) Section 504 of the Rehabilitation Act of 1973 *(29 U.S.C. 794)* and HUD's regulations at 24 CFR part 8 apply.

(c) The Indian Civil Rights Act (Title II of the Civil Rights Act of 1968; *25 U.S.C. 1301*-1303), applies to Federally recognized Indian tribes that exercise powers of self-government.

(d) Title VI of the Civil Rights Act of 1964 *(42 U.S.C. 2000d)* and title VIII of the Civil Rights Act of 1968 *(42 U.S.C. 3601 et seq.*) apply to Indian tribes that are not covered by the Indian Civil Rights Act. However, the Title VI and Title VIII requirements do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

§ 1000.14 -- What relocation and real property acquisition policies are applicable?

The following relocation and real property acquisition policies are applicable to programs developed or operated under NAHASDA:

(a) ***Real Property acquisition requirements.*** The acquisition of real property for an assisted activity is subject to 49 CFR part 24, subpart B. Whenever the recipient does not have the authority to acquire the real property through condemnation, it shall:

(1) Before discussing the purchase price, inform the owner:

(i) Of the amount it believes to be the fair market value of the property. Such amount shall be based upon one or more appraisals prepared by a qualified appraiser. However, this provision does not prevent the recipient from accepting a donation or purchasing the real property at less than its fair market value.

(ii) That it will be unable to acquire the property if negotiations fail to result in an amicable agreement.

(2) Request HUD approval of the proposed acquisition price before executing a firm commitment to purchase the property if the proposed acquisition payment exceeds the fair market value. The recipient shall **[*12354]** include with its request a copy of the appraisal(s) and a justification for the proposed acquisition payment. HUD will promptly review the proposal and inform the recipient of its approval or disapproval.

(b) ***Minimize displacement.*** Consistent with the other goals and objectives of this part, recipients shall assure that they have taken all reasonable steps to minimize the displacement of persons (households, businesses, nonprofit organizations, and farms) as a result of a project assisted under this part.

(c) ***Temporary relocation.*** The following policies cover residential tenants and homebuyers who will not be required to move permanently but who must relocate temporarily for the project. Such residential tenants and homebuyers shall be provided:

(1) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly housing costs (e.g., rent/utility costs).

(2) Appropriate advisory services, including reasonable advance written notice of:

(i) The date and approximate duration of the temporary relocation;

(ii) The location of the suitable, decent, safe and sanitary dwelling to be made available for the temporary period;

(iii) The terms and conditions under which the tenant may occupy a suitable, decent, safe, and sanitary dwelling in the building/complex following completion of the repairs; and

(iv) The provisions of paragraph (c)(1) of this section.

(d) ***Relocation assistance for displaced persons.*** A displaced person (defined in paragraph (g) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) *(42 U.S.C. 4601*-4655) and implementing regulations at 49 CFR part 24.

(e) ***Appeals to the recipient.*** A person who disagrees with the recipient's determination concerning whether the person qualifies as a "displaced person," or the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the recipient.

(f) ***Responsibility of recipient.***

(1) The recipient shall certify that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section. The recipient shall ensure such compliance notwithstanding any third party's contractual obligation to the recipient to comply with the provisions in this section.

(2) The cost of required relocation assistance is an eligible project cost in the same manner and to the same extent as other project costs. However, such assistance may also be paid for with funds available to the recipient from any other source.

(3) The recipient shall maintain records in sufficient detail to demonstrate compliance with this section.

(g) ***Definition of displaced person.***

(1) For purposes of this section, the term ″displaced person″ means any person (household, business, nonprofit organization, or farm) that moves from real property, or moves his or her personal property from real property, permanently, as a direct result of rehabilitation, demolition, or acquisition for a project assisted under this part. The term ″displaced person″ includes, but is not limited to:

(i) A tenant-occupant of a dwelling unit who moves from the building/complex permanently after the submission to HUD of an IHP that is later approved.

(ii) Any person, including a person who moves before the date described in paragraph (g)(1)(i) of this section, that the recipient determines was displaced as a direct result of acquisition, rehabilitation, or demolition for the assisted project.

(iii) A tenant-occupant of a dwelling unit who moves from the building/complex permanently after the execution of the agreement between the recipient and HUD, if the move occurs before the tenant is provided written notice offering him or her the opportunity to lease and occupy a suitable, decent, safe and sanitary dwelling in the same building/complex, under reasonable terms and conditions, upon completion of the project. Such reasonable terms and conditions include a monthly rent and estimated average monthly utility costs that do not exceed the greater of:

(A) The tenant-occupant's monthly rent and estimated average monthly utility costs before the agreement; or

(B) 30 percent of gross household income.

(iv) A tenant-occupant of a dwelling who is required to relocate temporarily, but does not return to the building/complex, if either:

(A) The tenant-occupant is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied unit, any increased housing costs and incidental expenses; or

(B) Other conditions of the temporary relocation are not reasonable.

(v) A tenant-occupant of a dwelling who moves from the building/complex after he or she has been required to move to another dwelling unit in the same building/complex in order to carry out the project, if either:

(A) The tenant-occupant is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move; or

(B) Other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of paragraph (g)(1) of this section, a person does not qualify as a ″displaced person″ (and is not eligible for relocation assistance under the URA or this section), if:

(i) The person moved into the property after the submission of the IHP to HUD, but, before signing a lease or commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated or suffer a rent increase) and the fact that the person would not qualify as a ″displaced person″ or for any assistance provided under this section as a result of the project.

(ii) The person is ineligible under *49 CFR 24.2(g)(2)*.

(iii) The recipient determines the person is not displaced as a direct result of acquisition, rehabilitation, or demolition for an assisted project. To exclude a person on this basis, HUD must concur in that determination.

(3) A recipient may at any time ask HUD to determine whether a specific displacement is or would be covered under this section.

(h) ***Definition of initiation of negotiations.*** For purposes of determining the formula for computing the replacement housing assistance to be provided to a person displaced as a direct result of rehabilitation or demolition of the real property, the term ″initiation of negotiations″ means the execution of the agreement covering the rehabilitation or demolition (See 49 CFR part 24).

§ 1000.16 -- What labor standards are applicable?

(a) ***Davis-Bacon wage rates.***

(1) As described in section 104(b) of NAHASDA, contracts and agreements for assistance, sale or lease under NAHASDA must require prevailing wage rates determined by the Secretary of Labor under the Davis-Bacon Act *(40 U.S.C. 276a*-276a-5) to be paid to **[*12355]** laborers and mechanics employed in the development of affordable housing.

(2) When NAHASDA assistance is only used to assist homebuyers to acquire single family housing, the Davis-Bacon wage rates apply to the construction of the housing if there is a written agreement with the owner or developer of the housing that NAHASDA assistance will be used to assist homebuyers to buy the housing.

(3) Prime contracts not in excess of $ 2000 are exempt from Davis-Bacon wage rates.

(b) ***HUD-determined wage rates.*** Section 104(b) also mandates that contracts and agreements for assistance, sale or lease under NAHASDA require that prevailing wages determined or adopted (subsequent to a determination under applicable state, tribal or local law) by HUD shall be paid to maintenance laborers and mechanics employed in the operation, and to architects, technical engineers, draftsmen and technicians employed in the development, of affordable housing.

(c) ***Contract Work Hours and Safety Standards Act.*** Contracts in excess of $ 100,000 to which Davis-Bacon or HUD-determined wage rates apply are subject by law to the overtime provisions of the Contract Work Hours and Safety Standards Act *(40 U.S.C. 327).*

(d) ***Volunteers.*** The requirements in 24 CFR part 70 concerning exemptions for the use of volunteers on projects subject to Davis-Bacon and HUD-determined wage rates are applicable.

(e) ***Other laws and issuances.*** Recipients, contractors, subcontractors, and other participants must comply with regulations issued under the labor standards provisions cited in this section, other applicable Federal laws and regulations pertaining to labor standards, and HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs).

§ 1000.18 -- What environmental review requirements apply?

The environmental effects of each activity carried out with assistance under this part must be evaluated in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) *(42 U.S.C. 4321)* and the related authorities listed in HUD's implementing regulations at 24 CFR parts 50 and 58. An environmental review does not have to be completed prior to HUD approval of an IHP.

§ 1000.20 -- Is an Indian tribe required to assume environmental review responsibilities?

(a) No. It is an option an Indian tribe may choose. If an Indian tribe declines to assume the environmental review responsibilities, HUD will perform the environmental review in accordance with 24 CFR part 50. The timing of HUD undertaking the environmental review will be subject to the availability of resources. A HUD environmental review must be completed for any NAHASDA assisted activities not excluded from review under *24 CFR 50.19(b)* before a recipient may acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD or local funds used in conjunction with such NAHASDA assisted activities with respect to the property.

(b) If an Indian tribe assumes environmental review responsibilities:

(1) Its certifying officer must certify that he/she is authorized and consents on behalf of the Indian tribe and such officer to accept the jurisdiction of the Federal courts for the purpose of enforcement of the responsibilities of the certifying officer as set forth in section 105(c) of NAHASDA; and

(2) The Indian tribe must follow the requirements of 24 CFR part 58.

(3) No funds may be committed to a grant activity or project before the completion of the environmental review and approval of the request for release of funds and related certification required by sections 105(b) and 105(c) of NAHASDA, except as authorized by 24 CFR part 58 such as for the costs of environmental reviews and other planning and administrative expenses.

(c) Where an environmental assessment (EA) is appropriate under 24 CFR part 50, instead of an Indian tribe assuming environmental review responsibilities under paragraph (b) of this section or HUD preparing the EA itself under paragraph (a) of this section, an Indian tribe or TDHE may prepare an EA for HUD review. In addition to complying with the requirements of *40 CFR 1506.5(a)*, HUD shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA in accordance with *40 CFR 1506.5(b)*.

§ 1000.22 -- Are the costs of the environmental review an eligible cost?

Yes, costs of completing the environmental review are eligible.

§ 1000.24 -- If an Indian tribe assumes environmental review responsibility, how will HUD assist the Indian tribe in performing the environmental review?

As set forth in section 105(a)(2)(B) of NAHASDA and *24 CFR 58.77*, HUD will provide for monitoring of environmental reviews and will also facilitate training for the performance for such reviews by Indian tribes.

§ 1000.26 -- What are the administrative requirements under NAHASDA?

(a) Except as addressed in § 1000.28, recipients shall comply with the requirements and standards of OMB Circular No. A-87, ″Principles for Determining Costs Applicable to Grants and Contracts with State, Local and Federally recognized Indian Tribal Governments,″ and with the following sections of 24 CFR part 85 ″Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.″ For purposes of this part, ″grantee″ as defined in 24 CFR part 85 has the same meaning as ″recipient.″

(1) Section 85.3, ″Definitions.″

(2) Section 85.6, ″Exceptions.″

(3) Section 85.12, ″Special grant or subgrant conditions for high risk' grantees.″

(4) Section 85.20, ″Standards for financial management systems,″ except paragraph (a).

(5) Section 85.21, ″Payment.″

(6) Section 85.22, ″Allowable costs.″

(7) Section 85.26, ″Non-federal audits.″

(8) Section 85.32, ″Equipment,″ except in all cases in which the equipment is sold, the proceeds shall be program income.

(9) Section 85.33, ″Supplies.″

(10) Section 85.35, ″Subawards to debarred and suspended parties.″

(11) Section 85.36, ″Procurement,″ except paragraph (a). There may be circumstances under which the bonding requirements of § 85.36(h) are inconsistent with other responsibilities and obligations of the recipient. In such circumstances, acceptable methods to provide performance and payment assurance may include:

(i) Deposit with the recipient of a cash escrow of not less than 20 percent of the total contract price, subject to reduction during the warranty period, commensurate with potential risk;

(ii) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the recipient, subject to reduction during any warranty period commensurate with potential risk; or

(iii) Letter of credit for 10 percent of the total contract price unconditionally payable upon demand of the recipient subject to reduction during any warranty period commensurate with potential risk, and compliance with the procedures for monitoring of disbursements by the contractor.

(12) Section 85.37, ″Subgrants.″

(13) Section 85.40, ″Monitoring and reporting program performance,″ except paragraphs (b) through (d) and paragraph (f). **[*12356]**

(14) Section 85.41, ″Financial reporting,″ except paragraphs (a), (b), and (e).

(15) Section 85.44, ″Termination for convenience.″

(16) Section 85.51 ″Later disallowances and adjustments.″

(17) Section 85.52, ″Collection of amounts due.″

(b)

(1) With respect to the applicability of cost principles, all items of cost listed in Attachment B of OMB Circular A-87 which require prior Federal agency approval are allowable without the prior approval of HUD to the extent that they comply with the general policies and principles stated in Attachment A of this circular and are otherwise eligible under this part, except for the following:

(i) Depreciation methods for fixed assets shall not be changed without specific approval of HUD or, if charged through a cost allocation plan, the Federal cognizant agency.

(ii) Fines and penalties are unallowable costs to the IHBG program.

(2) In addition, no person providing consultant services in an employer-employee type of relationship shall receive more than a reasonable rate of compensation for personal services paid with IHBG funds. In no event, however, shall such compensation exceed the equivalent of the daily rate paid for Level IV of the Executive Schedule.

§ 1000.28 -- May a self-governance Indian tribe be exempted from the applicability of § 1000.26?

Yes. A self-governance Indian tribe shall certify that its administrative requirements, standards and systems meet or exceed the comparable requirements of § 1000.26. For purposes of this section, a self-governance Indian tribe is an Indian tribe that participates in tribal self-governance as authorized under Public Law 93-638, as amended (25 U.S.C. 450 *et seq.*).

§ 1000.30 -- What prohibitions regarding conflict of interest are applicable?

(a) ***Applicability.*** In the procurement of supplies, equipment, other property, construction and services by recipients and subrecipients, the conflict of interest provisions of 24 CFR 85.36 shall apply. In all cases not governed by 24 CFR 85.36, the following provisions of this section shall apply.

(b) ***Conflicts prohibited.*** No person who participates in the decision-making process or who gains inside information with regard to NAHASDA assisted activities may obtain a personal or financial interest or benefit from such activities, except for the use of NAHASDA funds to pay salaries or other related administrative costs. Such persons include anyone with an interest in any contract, subcontract or agreement or proceeds thereunder, either for themselves or others with whom they have business or immediate family ties. Immediate family ties are determined by the Indian tribe or TDHE in its operating policies.

(c) The conflict of interest provision does not apply in instances where a person who might otherwise be included under the conflict provision is low-income and is selected for assistance in accordance with the recipient's written policies for eligibility, admission and occupancy of families for housing assistance with IHBG funds, provided that there is no conflict of interest under applicable tribal or state law. The recipient must make a public disclosure of the nature of assistance to be provided and the specific basis for the selection of the person. The recipient shall provide the appropriate Area ONAP with a copy of the disclosure before the assistance is provided to the person.

§ 1000.32 -- May exceptions be made to the conflict of interest provisions?

(a) Yes. HUD may make exceptions to the conflict of interest provisions set forth in § 1000.30(b) on a case-by-case basis when it determines that such an exception would further the primary objective of NAHASDA and the effective and efficient implementation of the recipient's program, activity, or project.

(b) A public disclosure of the conflict must be made and a determination that the exception would not violate tribal laws on conflict of interest (or any applicable state laws) must also be made.

§ 1000.34 -- What factors must be considered in making an exception to the conflict of interest provisions?

In determining whether or not to make an exception to the conflict of interest provisions, HUD must consider whether undue hardship will result, either to the recipient or to the person affected, when weighed against the public interest served by avoiding the prohibited conflict.

§ 1000.36 -- How long must a recipient retain records regarding exceptions made to the conflict of interest provisions?

A recipient must maintain all such records for a period of at least 3 years after an exception is made.

§ 1000.38 -- What flood insurance requirements are applicable?

Under the Flood Disaster Protection Act of 1973, as amended *(42 U.S.C. 4001*-4128), a recipient may not permit the use of Federal financial assistance for acquisition and construction purposes (including rehabilitation) in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the following conditions are met:

(a) The community in which the area is situated is participating in the National Flood Insurance Program in accord with section 202(a) of the Flood Disaster Protection Act of 1973 *(42 U.S.C. 4106*(a)), or less than a year has passed since FEMA notification regarding such flood hazards. For this purpose, the ″community″ is the governmental entity, such as an Indian tribe or authorized tribal organization, an Alaska Native village, or authorized Native organization, or a municipality or county, that has authority to adopt and enforce flood plain management regulations for the area; and

(b) Where the community is participating in the National Flood Insurance Program, flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 *(42 U.S.C. 4012*(a)); provided, that if the financial assistance is in the form of a loan or an insurance or guaranty of a loan, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the term of the loan.

§ 1000.40 -- Do lead-based paint poisoning prevention requirements apply to affordable housing activities under NAHASDA?

Yes, lead-based paint requirements apply to housing activities assisted under NAHASDA. The applicable requirements for NAHASDA are:

(a) ***Purpose and applicability.***

(1) The purpose of this section is to implement section 302 of the Lead-Based Paint Poisoning Prevention Act *(42 U.S.C. 4822)* by establishing procedures to eliminate as far as practicable the

hazards of lead-based paint poisoning for rental and homeownership units owned or operated by a recipient. This section is issued under 24 CFR 35.24(b)(4). The requirements of subpart C of 24 CFR part 35 do not apply to the housing covered under this section. Other provisions of part 35 apply, including subpart H, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property.

(2) The requirements of this section do not apply to housing built after 1977, 0-bedroom units, units that are certified by a qualified inspector to be free of lead-based paint, or units designated exclusively for the elderly or the handicapped unless a child of less than **[*12357]** six years of age resides or is expected to reside in the unit.

(3) Further information on identifying and reducing lead-based paint hazards can be found in the HUD publication, ″Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing.″

(b) ***Definitions.*** *Chewable surface.* Protruding painted surfaces that are readily accessible to children under six years of age; for example, protruding corners, window sills and frames, doors and frames, and other protruding woodwork. Hard metal surfaces are not considered chewable surfaces.

Component. An element of a residential structure identified by type and location, such as a bedroom wall, an exterior window sill, a baseboard in a living room, a kitchen floor, an interior window sill in a bathroom, a porch floor, stair treads in a common stairwell, or an exterior wall.

Defective paint surface. A surface on which the paint is cracking, scaling, chipping, peeling, or loose.

Elevated blood lead level (EBL). Excessive absorption of lead. Excessive absorption is a confirmed concentration of lead in whole blood of 20 [mu]g/dl (micrograms of lead per deciliter) or more for a single test or of 15-19 [mu]g/dl in two consecutive tests 3-4 months apart.

HEPA means a high efficiency particle accumulator as used in lead abatement vacuum cleaners.

Lead-based paint. A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 milligram per centimeter squared (mg/cm<SUP>2), or 0.5 percent by weight or 5000 parts per million by weight (PPM).

(c) ***Requirements for pre-1978 units.***

(1) If a dwelling unit was constructed before 1978, it must be visually inspected for defective paint surfaces. If defective paint surfaces are found, such surfaces must be treated in accordance with this section.

(2) Defective paint surfaces that are found in a report by a qualified lead-based paint inspector not to be lead-based paint, as defined in this section, may be exempted from treatment. For purposes of this section, a qualified lead-based paint inspector is a lead-based paint inspector certified, licensed or regulated by a State or Tribal government, the U.S. Environmental Protection Agency, a local health or housing agency, or an organization recognized by HUD.

(3) Treatment of defective paint surfaces required under this section must be completed within 30 calendar days of the visual evaluation. When weather conditions prevent treatment of the defective paint conditions on exterior surfaces within the 30 day period, treatment as required by this section may be delayed for a reasonable time.

(4) The requirements in this paragraph apply to:

(i) All painted interior surfaces within the unit (including ceilings but excluding furniture that is not built in or attached to the property);

(ii) The entrance and hallway providing ingress or egress to a unit in a multi-unit building, and other common areas that are readily accessible to children less than six years of age; and

(iii) Exterior surfaces that are readily accessible to children under six years of age (including walls, stairs, decks, porches, railings, windows and doors, and outbuildings such as garages and sheds that are readily accessible to children of less than six years of age).

(d) ***Additional requirements for pre-1978 units with children under six with an EBL.***

(1) In addition to the requirements of this section, for a dwelling unit constructed before 1978 that is occupied by a family with a child under the age of six years with an identified EBL condition, chewable surfaces must be tested for lead-based paint. Testing is not required if previous testing of chewable surfaces is negative for lead-based paint or if the chewable surfaces have already been treated.

(2) Testing must be conducted by a qualified lead-based paint inspector, as explained in paragraph (c)(2) of this section. Lead content must be tested by using an X-ray fluorescence analyzer (XRF) or by laboratory analysis of paint samples. Where lead-based paint on chewable surfaces is identified, treatment of the paint surface in accordance with this section is required, and treatment shall be completed within 30 days of the paint testing report.

(3) The requirements of paragraph (d) in this section apply to chewable surfaces:

(i) Within the unit;

(ii) The entrance and hallway providing access to a unit in a multi-unit building; and

(iii) Exterior surfaces (including walls, stairs, decks, porches, railings, windows and doors, and outbuildings such as garages and sheds that are accessible to children of less than six years of age).

(e) ***Treatment of chewable surfaces without testing.*** The recipient may, at its discretion, waive the testing requirement and require the owner to treat all interior and exterior chewable surfaces in accordance with the methods set out in this section.

(f) ***Treatment methods and requirements.*** Treatment of defective paint surfaces and chewable surfaces must consist of covering or removal of the paint in accordance with the following requirements:

(1) Surfaces must be covered with durable materials with joints and edges sealed and caulked as needed to prevent the escape of lead contaminated dust. The following are acceptable methods of treatment:

(i) Removal by wet scraping, wet sanding, chemical stripping on or off site;

(ii) Replacing painted components;

(iii) Scraping with infra-red or coil type heat gun with temperatures below 1100 degrees;

(iv) HEPA vacuum sanding;

(v) HEPA vacuum needle gun;

(vi) Contained hydroblasting or high pressure wash with HEPA vacuum; and

(vii) Abrasive sandblasting with HEPA vacuum.

(2) Prohibited methods of removal are: open flame burning or torching; machine sanding or grinding without a HEPA exhaust; uncontained hydroblasting or high pressure wash; and dry scraping except around electrical outlets or except when treating defective paint spots no more than two square feet in any one interior room or space (hallway, pantry, etc.) or totaling no more than 20 square feet on exterior surfaces.

(3) During exterior treatment soil and playground equipment must be protected from contamination.

(4) All treatment procedures must be concluded with a thorough cleaning of all surfaces in the room or area of treatment to remove fine dust particles. Cleanup must be accomplished by wet washing

surfaces with a lead solubilizing detergent such as trisodium phosphate or an equivalent solution. Dust clearance testing by a qualified inspector may be done at the discretion of the recipient to ensure that the unit has been cleaned adequately.

(5) Waste and debris must be disposed of in accordance with all applicable Federal, tribal, state and local laws.

(g) ***Tenant protection.*** The owner must take appropriate action to protect residents and their belongings from hazards associated with treatment procedures. Residents must not enter spaces undergoing treatment until cleanup is completed. Personal belongings that are in work areas must be relocated or otherwise protected from contamination. **[*12358]**

§ 1000.42 -- Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?

(a) ***General.*** Yes. Recipients shall comply with section 3 of the Housing and Urban Development Act of 1968 *(12 U.S.C. 1701u)* and HUD's implementing regulations in 24 CFR part 135, to the maximum extent feasible and consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act *(25 U.S.C. 450e*(b)). Section 3 provides job training, employment, and contracting opportunities for low-income individuals.

(b) ***Threshold requirement.*** The requirements of section 3 apply only to those section 3 covered projects or activities for which the amount of assistance exceeds $ 200,000.

§ 1000.44 -- What prohibitions on the use of debarred, suspended or ineligible contractors apply?

In addition to any tribal requirements, the prohibitions in 24 CFR part 24 on the use of debarred, suspended or ineligible contractors apply.

§ 1000.46 -- Do drug-free workplace requirements apply?

Yes. In addition to any tribal requirements, the Drug-Free Workplace Act of 1988 *(41 U.S.C. 701* *et seq.*) and HUD's implementing regulations in 24 CFR part 24 apply.

§ 1000.48 -- Are Indian preference requirements applicable to IHBG activities?

(a) ***Applicability.*** Grants under this part are subject to section 7(b) of the Indian Self-Determination and Education Assistance Act *(25 U.S.C. 450e*(b). Section 7(b) provides that any contract, subcontract, grant or subgrant pursuant to an act authorizing grants to Indian organizations or for the benefit of Indians shall require that, to the greatest extent feasible:

(1) Preference and opportunities for training and employment shall be given to Indians, and

(2) Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 *(25 U.S.C. 1452).*

(b) ***Definitions.***

(1) The Indian Self-Determination and Education Assistance Act defines ″Indian″ to mean a person who is a member of an Indian tribe and defines ″Indian tribe″ to mean any Indian tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village corporation as defined or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(2) In section 3 of the Indian Financing Act of 1974 ″economic enterprise″ is defined as any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that Indian ownership must constitute not less than 51 percent of the enterprise. This

act defines "Indian organization" to mean the governing body of any Indian tribe or entity established or recognized by such governing body.

§ 1000.50 -- What Indian preference requirements apply to IHBG administration activities?

To the greatest extent feasible, preference and opportunities for training and employment in connection with the administration of grants awarded under this part shall be given to Indians.

§ 1000.52 -- What Indian preference requirements apply to IHBG procurement?

To the greatest extent feasible, recipients shall give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises.

(a) Each recipient shall:

(1) Certify to HUD that the polices and procedures adopted by the recipient will provide preference in procurement activities consistent with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (*25 U.S.C.450e(b)*) (An Indian preference policy which was previously approved by HUD for a recipient will meet the requirements of this section); or

(2) Advertise for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or

(3) Use a two-stage preference procedure, as follows:

(i) ***Stage 1.*** Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement or request for proposals limited to Indian-owned firms.

(ii) ***Stage 2.*** If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises.

(b) If the recipient selects a method of providing preference that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid or a proposal to perform the contract at a reasonable cost, then the recipient shall:

(1) Re-advertise the contract, using any of the methods described in paragraph (a) of this section; or

(2) Re-advertise the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or

(3) If one approvable bid or proposal is received, request Area ONAP review and approval of the proposed contract and related procurement documents, in accordance with *24 CFR 85.36*, in order to award the contract to the single bidder or offeror.

(c) Procurements that are within the dollar limitations established for small purchases under *24 CFR 85.36* need not follow the formal bid or proposal procedures of paragraph (a) of this section, since these procurements are governed by the small purchase procedures of *24 CFR 85.36*. However, a recipient's small purchase procurement shall, to the greatest extent feasible, provide Indian preference in the award of contracts.

(d) All preferences shall be publicly announced in the advertisement and bidding or proposal solicitation documents and the bidding and proposal documents.

(e) A recipient, at its discretion, may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. Recipients may require prospective contractors to provide the following information before submitting a bid or proposal, or at the time of submission:

(1) Evidence showing fully the extent of Indian ownership and interest;

(2) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; and management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest; and

(3) Evidence sufficient to demonstrate to the satisfaction of the recipient that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

(f) The recipient shall incorporate the following clause (referred to as the section 7(b) clause) in each contract awarded in connection with a project funded under this part: **[*12359]**

(1) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act *(25 U.S.C. 450e*(b)) (the Indian Act). Section 7(b) requires that to the greatest extent feasible:

(i) Preferences and opportunities for training and employment shall be given to Indians; and

(ii) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(2) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Act.

(3) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians.

(4) The contractor shall include this section 7(b) clause in every subcontract in connection with the project, and shall, at the direction of the recipient, take appropriate action pursuant to the subcontract upon a finding by the recipient or HUD that the subcontractor has violated the section 7(b) clause of the Indian Act.

§ 1000.54 -- What procedures apply to complaints arising out of any of the methods of providing for Indian preference?

The following procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this part, including alternate methods. Tribal policies that meet or exceed the requirements of this section shall apply.

(a) Each complaint shall be in writing, signed, and filed with the recipient.

(b) A complaint must be filed with the recipient no later than 20 calendar days from the date of the action (or omission) upon which the complaint is based.

(c) Upon receipt of a complaint, the recipient shall promptly stamp the date and time of receipt upon the complaint, and immediately acknowledge its receipt.

(d) Within 20 calendar days of receipt of a complaint, the recipient shall either meet, or communicate by mail or telephone, with the complainant in an effort to resolve the matter. The recipient shall make a determination on a complaint and notify the complainant, in writing, within 30 calendar days of the submittal of the complaint to the recipient. The decision of the recipient shall constitute final administrative action on the complaint.

§ 1000.56 -- How are NAHASDA funds paid by HUD to recipients?

(a) 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.

(b) Payments shall be made as expeditiously as practicable.

§ 1000.58 -- Are there limitations on the investment of IHBG funds?

(a) A recipient may invest IHBG funds for the purposes of carrying out affordable housing activities in investment securities and other obligations as provided in this section.

(b) The recipient may invest IHBG funds so long as it demonstrates to HUD:

(1) That there are no unresolved significant and material audit findings or exceptions in the most recent annual audit completed under the Single Audit Act or in an independent financial audit prepared in accordance with generally accepted auditing principles; and

(2) That it is a self-governance Indian tribe or that it has the administrative capacity and controls to responsibly manage the investment. For purposes of this section, a self-governance Indian tribe is an Indian tribe that participates in tribal self-governance as authorized under *Public Law 93-638*, as amended *(25 U.S.C. 450 et seq.*).

(c) Recipients shall invest IHBG funds only in:

(1) Obligations of the United States; obligations issued by Government sponsored agencies; securities that are guaranteed or insured by the United States; mutual (or other) funds registered with the Securities and Exchange Commission and which invest only in obligations of the United States or securities that are guaranteed or insured by the United States; or

(2) Accounts that are insured by an agency or instrumentality of the United States or fully collateralized to ensure protection of the funds, even in the event of bank failure.

(d) IHBG funds shall be held in one or more accounts separate from other funds of the recipient. Each of these accounts shall be subject to an agreement in a form prescribed by HUD sufficient to implement the regulations in this part and permit HUD to exercise its rights under § 1000.60.

(e) Expenditure of funds for affordable housing activities under section 204(a) of NAHASDA shall not be considered investment.

(f) A recipient may invest its IHBG annual grant in an amount equal to the annual formula grant amount less any formula grant amounts allocated for the operating subsidy element of the Formula Current Assisted Housing Stock (FCAS) component of the formula (see §§ 1000.316(a) and 1000.320) multiplied by the following percentages, as appropriate:

(1) 50% in Fiscal Years 1998 and 1999;

(2) 75% in Fiscal Year 2000; and

(3) 100% in Fiscal Years 2001 and thereafter.

(g) Investments under this section may be for a period no longer than two years.

§ 1000.60 -- Can HUD prevent improper expenditure of funds already disbursed to a recipient?

Yes. In accordance with the standards and remedies contained in § 1000.538 relating to substantial noncompliance, HUD will use its powers under a depository agreement and take such other actions as may be legally necessary to suspend funds disbursed to the recipient until the substantial noncompliance has been remedied. In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.

§ 1000.62 -- What is considered program income and what restrictions are there on its use?

(a) Program income is defined as any income that is realized from the disbursement of grant amounts. Program income does not include any amounts generated from the operation of 1937 Act units unless the units are assisted with grant amounts and the income is attributable to such assistance. Program income

includes income from fees for services performed from the use of real or rental of real or personal property acquired with grant funds, from the sale of commodities or items developed, acquired, etc. with grant funds, and from payments of principal and interest earned on grant funds prior to disbursement.

(b) Any program income can be retained by a recipient provided it is used for affordable housing activities in accordance with section 202 of NAHASDA. If the amount of income received in a single year by a recipient and all its subrecipients, which would otherwise be considered program income, does not exceed $ 25,000, such funds may be retained but will not be considered to be or treated as program income.

(c) If program income is realized from an eligible activity funded with both grant funds as well as other funds (i.e., **[*12360]** funds that are not grant funds), then the amount of program income realized will be based on a percentage calculation that represents the proportional share of funds provided for the activity generating the program income.

(d) Costs incident to the generation of program income shall be deducted from gross income to determine program income.

Subpart B-- Affordable Housing Activities

§ 1000.101 -- What is affordable housing?

Eligible affordable housing is defined in section 4(2) of NAHASDA and is described in title II of NAHASDA.

§ 1000.102 -- What are eligible affordable housing activities?

Eligible affordable housing activities are those described in section 202 of NAHASDA.

§ 1000.104 -- What families are eligible for affordable housing activities?

The following families are eligible for affordable housing activities:

(a) Low income Indian families on a reservation or Indian area.

(b) A non-low income Indian family may receive housing assistance in accordance with § 1000.110, except that non low-income Indian families residing in housing assisted under the 1937 Act do not have to meet the requirements of § 1000.110 for continued occupancy.

(c) A non-Indian family may receive housing assistance on a reservation or Indian area if the non-Indian family's housing needs cannot be reasonably met without such assistance and the recipient determines that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families, except that non-Indian families residing in housing assisted under the 1937 Act do not have to meet these requirements for continued occupancy.

§ 1000.106 -- What families receiving assistance under title II of NAHASDA require HUD approval?

(a) Housing assistance for non low-income Indian families requires HUD approval only as required in §§ 1000.108 and 1000.110.

(b) Assistance under section 201(b)(3) of NAHASDA for non-Indian families does not require HUD approval but only requires that the recipient determine that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families and the non-Indian family's housing needs cannot be reasonably met without such assistance.

§ 1000.108 -- How is HUD approval obtained by a recipient for housing for non low-income Indian families and model activities?

Recipients are required to submit proposals to operate model housing activities as defined in section 202(6) of NAHASDA and to provide assistance to non low-income Indian families in accordance with section 201(b)(2) of

NAHASDA. Assistance to non low-income Indian families must be in accordance with § 1000.110. Proposals may be submitted in the recipient's IHP or at any time by amendment of the IHP, or by special request to HUD at any time. HUD may approve the remainder of an IHP notwithstanding disapproval of a model activity or assistance to non low-income Indian families.

§ 1000.110 -- Under what conditions may non low-income Indian families participate in the program?

(a) A family who is purchasing housing under a lease purchase agreement and who was low income at the time the lease was signed is eligible without further conditions.

(b) A recipient may provide the following types of assistance to non low-income Indian families under the conditions specified in paragraphs (c), (d) and (e) of this section:

(1) Homeownership activities under section 202(2) of NAHASDA, which may include assistance in conjunction with loan guarantees under the Section 184 program (see 24 CFR part 1005);

(2) Model activities under section 202(6) of NAHASDA; and

(3) Loan guarantee activities under title VI of NAHASDA.

(c) A recipient must determine and document that there is a need for housing for each family which cannot reasonably be met without such assistance.

(d) A recipient may use up to 10 percent of its annual grant amount for families whose income falls within 80 to 100 percent of the median income without HUD approval. HUD approval is required if a recipient plans to use more than 10 percent of its annual grant amount for such assistance or to provide housing for families with income over 100 percent of median income.

(e) Non low-income Indian families cannot receive the same benefits provided low-income Indian families. The amount of assistance non low-income Indian families may receive will be determined as follows:

(1) The rent (including homebuyer payments under a lease purchase agreement) to be paid by a non low-income Indian family cannot be less than: (Income of non low-income family/Income of family at 80 percent of median income) x (Rental payment of family at 80 percent of median income), but need not exceed the fair market rent or value of the unit.

(2) Other assistance, including down payment assistance, to non low-income Indian families, cannot exceed: (Income of family at 80 percent of median income/Income of non low-income family) x (Present value of the assistance provided to family at 80 percent of median income).

(f) The requirements set forth in paragraph (e) of this section do not apply to non low-income Indian families which the recipient has determined to be essential to the well-being of the Indian families residing in the housing area.

§ 1000.112 -- How will HUD determine whether to approve model housing activities?

HUD will review all proposals with the goal of approving the activities and encouraging the flexibility, discretion, and self-determination granted to Indian tribes under NAHASDA to formulate and operate innovative housing programs that meet the intent of NAHASDA.

§ 1000.114 -- How long does HUD have to review and act on a proposal to provide assistance to non low-income Indian families or a model housing activity?

Whether submitted in the IHP or at any other time, HUD will have sixty calendar days after receiving the proposal to notify the recipient in writing that the proposal to provide assistance to non low-income Indian families or for model activities is approved or disapproved. If no decision is made by HUD within sixty calendar days of receiving the proposal, the proposal is deemed to have been approved by HUD.

§ 1000.116 -- What should HUD do before declining a proposal to provide assistance to non low-income Indian families or a model housing activity ?

HUD shall consult with a recipient regarding the recipient's proposal to provide assistance to non low-income Indian families or a model housing activity. To the extent resources are available, HUD shall provide technical assistance to the recipient in amending and modifying the proposal if necessary. In case of a denial, HUD shall give the specific reasons for the denial.

§ 1000.118 -- What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income Indian families or a model housing activity?

(a) Within thirty calendar days of receiving HUD's denial of a proposal to **[*12361]** provide assistance to non low-income Indian families or a model housing activity, the recipient may request reconsideration of the denial in writing. The request shall set forth justification for the reconsideration.

(b) Within twenty calendar days of receiving the request, HUD shall reconsider the recipient's request and either affirm or reverse its initial decision in writing, setting forth its reasons for the decision. If the decision was made by the Assistant Secretary, the decision will constitute final agency action. If the decision was made at a lower level, then paragraphs (c) and (d) of this section will apply.

(c) The recipient may appeal any denial of reconsideration by filing an appeal with the Assistant Secretary within twenty calendar days of receiving the denial. The appeal shall set forth the reasons why the recipient does not agree with HUD's decision and set forth justification for the reconsideration.

(d) Within twenty calendar days of receipt of the appeal, the Assistant Secretary shall review the recipient's appeal and act on the appeal, setting forth the reasons for the decision.

§ 1000.120 -- May a recipient use Indian preference or tribal preference in selecting families for housing assistance?

Yes. The IHP may set out a preference for the provision of housing assistance to Indian families who are members of the Indian tribe or to other Indian families if the recipient has adopted the preference in its admissions policy. The recipient shall ensure that housing activities funded under NAHASDA are subject to the preference.

§ 1000.122 -- May NAHASDA grant funds be used as matching funds to obtain and leverage funding, including any Federal or state program and still be considered an affordable housing activity?

There is no prohibition in NAHASDA against using grant funds as matching funds.

§ 1000.124 -- What maximum and minimum rent or homebuyer payment can a recipient charge a low-income rental tenant or homebuyer residing in housing units assisted with NAHASDA grant amounts?

A recipient can charge a low-income rental tenant or homebuyer rent or homebuyer payments not to exceed 30 percent of the adjusted income of the family. The recipient may also decide to compute its rental and homebuyer payments on any lesser percentage of adjusted income of the family. This requirement applies only to units assisted with NAHASDA grant amounts. NAHASDA does not set minimum rents or homebuyer payments; however, a recipient may do so.

§ 1000.126 -- May a recipient charge flat or income-adjusted rents?

Yes, providing the rental or homebuyer payment of the low-income family does not exceed 30 percent of the family's adjusted income.

§ 1000.128 -- Is income verification required for assistance under NAHASDA?

(a) Yes, the recipient must verify that the family is income eligible based on anticipated annual income. The family is required to provide documentation to verify this determination. The recipient is required to maintain the documentation on which the determination of eligibility is based.

(b) The recipient may require a family to periodically verify its income in order to determine housing payments or continued occupancy consistent with locally adopted policies. When income verification is

required, the family must provide documentation which verifies its income, and this documentation must be retained by the recipient.

§ 1000.130 -- May a recipient charge a non low-income family rents or homebuyer payments which are more than 30 percent of the family's adjusted income?

Yes. A recipient may charge a non low-income family rents or homebuyer payments which are more than 30 percent of the family's adjusted income.

§ 1000.132 -- Are utilities considered a part of rent or homebuyer payments?

Utilities may be considered a part of rent or homebuyer payments if a recipient decides to define rent or homebuyer payments to include utilities in its written policies on rents and homebuyer payments required by section 203(a)(1) of NAHASDA. A recipient may define rents and homebuyer payments to exclude utilities.

§ 1000.134 -- When may a recipient (or entity funded by a recipient) demolish or dispose of current assisted stock?

(a) A recipient (or entity funded by a recipient) may undertake a planned demolition or disposal of current assisted stock owned by the recipient or an entity funded by the recipient when:

(1) A financial analysis demonstrates that it is more cost-effective or housing program-effective for the recipient to demolish or dispose of the unit than to continue to operate or own it; or

(2) The housing unit has been condemned by the government which has authority over the unit; or

(3) The housing unit is an imminent threat to the health and safety of housing residents; or

(4) Continued habitation of a housing unit is inadvisable due to cultural or historical considerations.

(b) No action to demolish or dispose of the property other than performing the analysis cited in paragraph (a) of this section can be taken until HUD has been notified in writing of the recipient's intent to demolish or dispose of the housing units consistent with section 102(c)(4)(H) of NAHASDA. The written notification must set out the analysis used to arrive at the decision to demolish or dispose of the property and may be set out in a recipient's IHP or in a separate submission to HUD.

(c) In any disposition sale of a housing unit, a sale process designed to maximize the sale price will be used. However, where the sale is to a low-income Indian family, the home may be disposed of without maximizing the sale price so long as such price is consistent with a recipient's IHP. The sale proceeds from the disposition of any housing unit are program income under NAHASDA and must be used in accordance with the requirements of NAHASDA and these regulations.

§ 1000.136 -- What insurance requirements apply to housing units assisted with NAHASDA grants?

(a) The recipient shall provide adequate insurance either by purchasing insurance or by indemnification against casualty loss by providing insurance in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims for all housing units owned or operated by the recipient.

(b) The recipients shall not require insurance on units assisted by grants to families for privately owned housing if there is no risk of loss or exposure to the recipient or if the assistance is in an amount less than $ 5000, but will require insurance when repayment of all or part of the assistance is part of the assistance agreement.

(c) The recipient shall require contractors and subcontractors to either provide insurance covering their activities or negotiate adequate indemnification coverage to be provided by the recipient in the contract.

(d) These requirements are in addition to applicable flood insurance requirements under § 1000.38.

§ 1000.138 -- What constitutes adequate insurance?

Insurance is adequate if it is a purchased insurance policy from an insurance provider or a plan of self-insurance in an amount that will protect the financial stability of the recipient's IHBG program. Recipients may purchase the

required insurance without regard to **[*12362]** competitive selection procedures from nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD.

§ 1000.140 -- May a recipient use grant funds to purchase insurance for privately owned housing to protect NAHASDA grant amounts spent on that housing?

Yes. All purchases of insurance must be in accordance with §§ 1000.136 and 1000.138.

§ 1000.142 -- What is the "useful life" during which low-income rental housing and low-income homebuyer housing must remain affordable as required in sections 205(a)(2) and 209 of NAHASDA?

Each recipient shall describe in its IHP its determination of the useful life of each assisted housing unit in each of its developments in accordance with the local conditions of the Indian area of the recipient. By approving the plan, HUD determines the useful life in accordance with section 205(a)(2) of NAHASDA and for purposes of section 209.

§ 1000.144 -- Are Mutual Help homes developed under the 1937 Act subject to the useful life provisions of section 205(a)(2)?

No.

§ 1000.146 -- Are homebuyers required to remain low-income throughout the term of their participation in a housing program funded under NAHASDA?

No. The low-income eligibility requirement applies only at the time of purchase. However, families purchasing housing under a lease purchase agreement who are not low-income at the time of purchase are eligible under § 1000.110.

§ 1000.150 -- How may Indian tribes and TDHEs receive criminal conviction information on adult applicants or tenants?

(a) As required by section 208 of NAHASDA, the National Crime Information Center, police departments, and other law enforcement agencies shall provide criminal conviction information to Indian tribes and TDHEs upon request. Information regarding juveniles shall only be released to the extent such release is authorized by the law of the applicable state, Indian tribe or locality.

(b) For purposes of this section, the term " *tenants* " includes homebuyers who are purchasing a home pursuant to a lease purchase agreement.

§ 1000.152 -- How is the recipient to use criminal conviction information?

The recipient shall use the criminal conviction information described in § 1000.150 only for applicant screening, lease enforcement and eviction actions. The information may be disclosed only to any person who has a job related need for the information and who is an authorized officer, employee, or representative of the recipient or the owner of housing assisted under NAHASDA.

§ 1000.154 -- How is the recipient to keep criminal conviction information confidential?

(a) The recipient will keep all the criminal conviction record information it receives from the official law enforcement agencies listed in § 1000.150 in files separate from all other housing records.

(b) These criminal conviction records will be kept under lock and key and be under the custody and control of the recipient's housing executive director/lead official and/or his designee for such records.

(c) These criminal conviction records may only be accessed with the written permission of the Indian tribe's or TDHE's housing executive director/lead official and/or his designee and are only to be used for the purposes stated in section 208 of NAHASDA and these regulations.

§ 1000.156 -- Is there a per unit limit on the amount of IHBG funds that may be used for dwelling construction and dwelling equipment?

(a) Yes. The per unit amount of IHBG funds that may be used for dwelling construction and dwelling equipment cannot exceed the limit established by HUD except as allowed in the definition below. Other costs associated with developing a project, including all undertakings necessary for administration, planning, site acquisition, water and sewer, demolition, and financing may be eligible NAHASDA costs but are not subject to this limit.

(b) Dwelling construction and equipment (DC&E) costs include all construction costs of an individual dwelling within five feet of the foundation. Excluded from the DC&E are any administrative, planning, financing, site acquisition, site development more than five feet from the foundation, and utility development or connection costs. HUD will publish and update on a regular basis DC&E amounts for appropriate geographic areas.

(c) DC&E amounts will be based on a moderately designed house or multi-family structure and will be determined by averaging the current construction costs, as listed in not less than two nationally recognized residential construction cost indices, for publicly bid construction of a good and sound quality. If a recipient determines that published DC&E amounts are not representative of construction costs in its area, it may request a re-evaluation of DC&E amounts and provide HUD with relevant information for this re-evaluation.

Subpart C-- Indian Housing Plan (IHP)

§ 1000.201 -- How are funds made available under NAHASDA?

Every fiscal year HUD will make grants under the IHBG program to recipients who have submitted to HUD for that fiscal year an IHP in accordance with § 1000.220 to carry out affordable housing activities.

§ 1000.202 -- Who are eligible recipients?

Eligible recipients are Indian tribes, or TDHEs when authorized by one or more Indian tribes.

§ 1000.204 -- How does an Indian tribe designate itself as recipient of the grant?

(a) By resolution of the Indian tribe; or

(b) When such authority has been delegated by an Indian tribe's governing body to a tribal committee(s), by resolution or other written form used by such committee(s) to memorialize the decisions of that body, if applicable.

§ 1000.206 -- How is a TDHE designated?

(a)

(1) By resolution of the Indian tribe or Indian tribes to be served; or

(2) When such authority has been delegated by an Indian tribe's governing body to a tribal committee(s), by resolution or other written form used by such committee(s) to memorialize the decisions of that body, if applicable.

(b) In the absence of a designation by the Indian tribe, the default designation as provided in section 4(21) of NAHASDA shall apply.

§ 1000.208 -- What happens if an Indian tribe had two IHAs as of September 30, 1996?

Indian tribes which had established and were operating two IHAs as of September 30, 1996, under the 1937 Act shall be allowed to form and operate two TDHEs under NAHASDA. Nothing in this section shall affect the allocation of funds otherwise due to an Indian tribe under the formula.

§ 1000.210 -- What happens to existing 1937 Act units in those jurisdictions for which Indian tribes do not or cannot submit an IHP?

NAHASDA does not provide the statutory authority for HUD to grant NAHASDA grant funds to an Indian housing authority, Indian tribe or to a default TDHE which cannot obtain a tribal certification, if the requisite IHP is not submitted by an Indian tribe or is determined to be out of compliance by **[*12363]** HUD. There may be circumstances where this may happen, and in those cases, other methods of tribal, Federal, or private market support may have to be sought to maintain and operate those 1937 Act units.

§ 1000.212 -- Is submission of an IHP required?

Yes. An Indian tribe or, with the consent of its Indian tribe(s), the TDHE, must submit an IHP to HUD to receive funding under NAHASDA, except as provided in section 101(b)(2) of NAHASDA. If a TDHE has been designated by more than one Indian tribe, the TDHE can submit a separate IHP for each Indian tribe or it may submit a single IHP based on the requirements of § 1000.220 with the approval of the Indian tribes.

§ 1000.214 -- What is the deadline for submission of an IHP?

IHPs must be initially sent by the recipient to the Area ONAP no later than July 1. Grant funds cannot be provided until the plan is submitted and determined to be in compliance with section 102 of NAHASDA and funds are available.

§ 1000.216 -- What happens if the recipient does not submit the IHP to the Area ONAP by July 1?

If the IHP is not initially sent by July 1, the recipient will not be eligible for IHBG funds for that fiscal year. Any funds not obligated because an IHP was not received before the deadline has passed shall be distributed by formula in the following year.

§ 1000.218 -- Who prepares and submits an IHP?

An Indian tribe, or with the authorization of a Indian tribe, in accordance with section 102(d) of NAHASDA a TDHE may prepare and submit a plan to HUD.

§ 1000.220 -- What are the minimum requirements for the IHP?

The minimum IHP requirements are set forth in sections 102(b) and 102(c) of NAHASDA. In addition, §§ 1000.56, 1000.108, 1000.120, 1000.134, 1000.142, 1000.238, 1000.328, and 1000.504 require or permit additional items to be set forth in the IHP for HUD determinations required by those sections. Recipients are only required to provide IHPs that contain these minimum elements in a form prescribed by HUD. If a TDHE is submitting a single IHP that covers two or more Indian tribes, the IHP must contain a separate certification in accordance with section 102(d) of NAHASDA and IHP Tables for each Indian tribe when requested by such Indian tribes. However, Indian tribes are encouraged to perform comprehensive housing needs assessments and develop comprehensive IHPs and not limit their planning process to only those housing efforts funded by NAHASDA. An IHP should be locally driven.

§ 1000.222 -- Are there separate IHP requirements for small Indian tribes and small TDHEs?

No. HUD requirements for IHPs are reasonable.

§ 1000.224 -- Can any part of the IHP be waived?

Yes. HUD has general authority under section 101(b)(2) of NAHASDA to waive any IHP requirements when an Indian tribe cannot comply with IHP requirements due to circumstances beyond its control. The waiver authority under section 101(b)(2) of NAHASDA provides flexibility to address the needs of every Indian tribe, including

small Indian tribes. The waiver may be requested by the Indian tribe or its TDHE (if such authority is delegated by the Indian tribe).

§ 1000.226 -- Can the certification requirements of section 102(c)(5) of NAHASDA be waived by HUD?

Yes. HUD may waive these certification requirements as provided in section 101(b)(2) of NAHASDA.

§ 1000.228 -- If HUD changes its IHP format will Indian tribes be involved?

Yes. HUD will first consult with Indian tribes before making any substantial changes to HUD's IHP format.

§ 1000.230 -- What is the process for HUD review of IHPs and IHP amendments?

HUD will conduct the IHP review in the following manner:

(a) HUD will conduct a limited review of the IHP to ensure that its contents:

(1) Comply with the requirements of section 102 of NAHASDA which outlines the IHP submission requirements;

(2) Are consistent with information and data available to HUD;

(3) Are not prohibited by or inconsistent with any provision of NAHASDA or other applicable law; and

(4) Include the appropriate certifications.

(b) If the IHP complies with the provisions of paragraphs (a)(1), (a)(2), and (a)(3) of this section, HUD will notify the recipient of IHP compliance within 60 days after receiving the IHP. If HUD fails to notify the recipient, the IHP shall be considered to be in compliance with the requirements of section 102 of NAHASDA and the IHP is approved.

(c) If the submitted IHP does not comply with the provisions of paragraphs (a)(1), and (a)(3) of this section, HUD will notify the recipient of the determination of non-compliance. HUD will provide this notice no later than 60 days after receiving the IHP. This notice will set forth:

(1) The reasons for noncompliance;

(2) The modifications necessary for the IHP to meet the submission requirements; and

(3) The date by which the revised IHP must be submitted.

(d) If the recipient does not submit a revised IHP by the date indicated in the notice provided under paragraph (c) of this section, the IHP will be determined by HUD to be in non-compliance unless a waiver is requested and approved under section 101(b)(2) of NAHASDA. If the IHP is determined by HUD to be in non-compliance and no waiver is granted, the recipient may appeal this determination following the appeal process in § 1000.234.

(e)

(1) If the IHP does not contain the certifications identified in paragraph (a)(4) of this section, the recipient will be notified within 60 days of submission of the IHP that the plan is incomplete. The notification will include a date by which the certification must be submitted.

(2) If the recipient has not complied or cannot comply with the certification requirements due to circumstances beyond the control of the Indian tribe(s), within the timeframe established, the recipient can request a waiver in accordance with section 101(b)(2) of NAHASDA. If the waiver is approved, the recipient is eligible to receive its grant in accordance with any conditions of the waiver.

§ 1000.232 -- Can an Indian tribe or TDHE amend its IHP?

Yes. Section 103(c) of NAHASDA specifically provides that a recipient may submit modifications or revisions of its IHP to HUD. Unless the initial IHP certification provided by an Indian tribe allowed for the submission of IHP

amendments without further tribal certifications, a tribal certification must accompany submission of IHP amendments by a TDHE to HUD. HUD's review of an amendment and determination of compliance will be limited to modifications of an IHP which adds new activities or involve a decrease in the amount of funds provided to protect and maintain the viability of housing assisted under the 1937 Act. HUD will consider these modifications to the IHP in accordance **[*12364]** with § 1000.230. HUD will act on amended IHPs within 30 days.

§ 1000.234 -- Can HUD's determination regarding the non-compliance of an IHP or a modification to an IHP be appealed?

(a) Yes. Within 30 days of receiving HUD's disapproval of an IHP or of a modification to an IHP, the recipient may submit a written request for reconsideration of the determination. The request shall include the justification for the reconsideration.

(b) Within 21 days of receiving the request, HUD shall reconsider its initial determination and provide the recipient with written notice of its decision to affirm, modify, or reverse its initial determination. This notice will also contain the reasons for HUD's decision.

(c) The recipient may appeal any denial of reconsideration by filing an appeal with the Assistant Secretary within 21 days of receiving the denial. The appeal shall set forth the reasons why the recipient does not agree with HUD's decision and include justification for the reconsideration.

(d) Within 21 days of receipt of the appeal, the Assistant Secretary shall review the recipient's appeal and act on the appeal. The Assistant Secretary will provide written notice to the recipient setting forth the reasons for the decision. The Assistant Secretary's decision constitutes final agency action.

§ 1000.236 -- What are eligible administrative and planning expenses?

(a) Eligible administrative and planning expenses of the IHBG program include, but are not limited to:

(1) Costs of overall program and/or administrative management;

(2) Coordination monitoring and evaluation;

(3) Preparation of the IHP including data collection and transition costs;

(4) Preparation of the annual performance report; and

(5) Challenge to and collection of data for purposes of challenging the formula.

(b) Staff and overhead costs directly related to carrying out affordable housing activities can be determined to be eligible costs of the affordable housing activity or considered administration or planning at the discretion of the recipient.

§ 1000.238 -- What percentage of the IHBG funds can be used for administrative and planning expenses?

The recipient can use up to 20 percent of its annual grant amount for administration and planning. The recipient shall identify the percentage of grant funds which will be used in the IHP. HUD approval is required if a higher percentage is requested by the recipient. When HUD approval is required, HUD must take into consideration any cost of preparing the IHP, challenges to and collection of data, the recipient's grant amount, approved cost allocation plans, and any other relevant information with special consideration given to the circumstances of recipients receiving minimal funding.

§ 1000.240 -- When is a local cooperation agreement required for affordable housing activities?

The requirement for a local cooperation agreement applies only to rental and lease-purchase homeownership units assisted with IHBG funds which are owned by the Indian tribe or TDHE.

§ 1000.242 -- When does the requirement for exemption from taxation apply to affordable housing activities?

The requirement for exemption from taxation applies only to rental and lease-purchase homeownership units assisted with IHBG funds which are owned by the Indian tribe or TDHE.

Subpart D-- Allocation Formula

§ 1000.301 -- What is the purpose of the IHBG formula?

The IHBG formula is used to allocate equitably and fairly funds made available through NAHASDA among eligible Indian tribes. A TDHE may be a recipient on behalf of an Indian tribe.

§ 1000.302 -- What are the definitions applicable for the IHBG formula?

Allowable Expense Level (AEL) factor. In rental projects, AEL is the per-unit per-month dollar amount of expenses which was used to compute the amount of operating subsidy used prior to October 1, 1997 for the Low Rent units developed under the 1937 Act. The ″AEL factor″ is the relative difference between a local area AEL and the national weighted average for AEL.

Date of Full Availability (DOFA) means the last day of the month in which substantially all the units in a housing development are available for occupancy.

Fair Market Rent (FMR) factors are gross rent estimates; they include shelter rent plus the cost of all utilities, except telephones. HUD estimates FMRs on an annual basis for 354 metropolitan FMR areas and 2,355 non-metropolitan county FMR areas. The ″FMR factor″ is the relative difference between a local area FMR and the national weighted average for FMR.

Formula Annual Income. For purposes of the IHBG formula, annual income is a household's total income as currently defined by the U.S. Census Bureau.

Formula area. (1) Formula area is the geographic area over which an Indian tribe could exercise court jurisdiction or is providing substantial housing services and, where applicable, the Indian tribe or TDHE has agreed to provide housing services pursuant to a Memorandum of Agreement with the governing entity or entities (including Indian tribes) of the area, including but not limited to:

- **(i)** A reservation;
- **(ii)** Trust land;
- **(iii)** Alaska Native Village Statistical Area;
- **(iv)** Alaska Native Claims Settlement Act Corporation Service Area;
- **(v)** Department of the Interior Near-Reservation Service Area;
- **(vi)** Former Indian Reservation Areas in Oklahoma as defined by the Census as Tribal Jurisdictional Statistical Area;
- **(vii)** Congressionally Mandated Service Area; and
- **(viii)** State legislatively defined Tribal Areas as defined by the Census as Tribal Designated Statistical Areas.

(2) For additional areas beyond those identified in the above list of eight, the Indian tribe must submit on the Formula Response Form the area that it wishes to include in its Formula Area and what previous and planned investment it has made in the area. HUD will review this submission and determine whether or not to include this area. HUD will make its judgment using as its guide whether this addition is fair and equitable for all Indian tribes in the formula.

(3) In some cases the population data for an Indian tribe within its formula area is greater than its tribal enrollment. In general, for those cases to maintain fairness for all Indian tribes, the population data will not be allowed to exceed twice an Indian tribe's enrolled population. However, an Indian tribe subject to this cap may receive an allocation based on more than twice its total enrollment if it can show that it is providing housing assistance to substantially more non-member Indians and Alaska Natives who are members of another Federally recognized Indian tribe than it is to members.

(4) In cases where an Indian tribe is seeking to receive an allocation more than twice its total enrollment, the tribal enrollment multiplier will be determined by the total number of Indians and Alaska Natives the Indian tribe is providing housing assistance (on July 30 of the year before funding is sought) divided by the number of members the Indian tribe is providing housing assistance. For example, an **[*12365]** Indian tribe which provides housing to 300 Indians and Alaska Natives, of which 100 are members, would then be able to receive an allocation for up to three times its tribal enrollment if the Indian and Alaska Native population in the area is three or more times the tribal enrollment.

Formula Median Income. For purposes of the formula median income is determined in accordance with section 567 of the Housing and Community Development Act of 1987 *(42 U.S.C. 1437a* note).

Formula Response Form is the form recipients use to report changes to their Formula Current Assisted stock, formula area, and other formula related information before each year's formula allocation.

Indian Housing Authority (IHA) financed means a homeownership program where title rests with the homebuyer and a security interest rests with the IHA.

Mutual Help Occupancy Agreement (MHOA) means a lease with option to purchase contract between an IHA and a homebuyer under the 1937 Act.

Overcrowded means households with more than 1.01 persons per room as defined by the U.S. Decennial Census.

Section 8 means the making of housing assistance payments to eligible families leasing existing housing pursuant to the provisions of the 1937 Act.

***Section 8 unit* means the contract annualized housing assistance payments (certificates, vouchers, and project based) under the Section 8 program.** *Total Development Cost (TDC)* is the sum of all costs for a project including all undertakings necessary for administration, planning, site acquisition, demolition, construction or equipment and financing (including payment of carrying charges) and for otherwise carrying out the development of the project, excluding off site water and sewer. Total Development Cost amounts will be based on a moderately designed house and will be determined by averaging the current construction costs as listed in not less than two nationally recognized residential construction cost indices.

Without kitchen or plumbing means, as defined by the U.S. Decennial Census, an occupied house without one or more of the following items:

(1) Hot and cold piped water;

(2) A flush toilet;

(3) A bathtub or shower;

(4) A sink with piped water;

(5) A range or cookstove; or

(6) A refrigerator.

§ 1000.304 -- May the IHBG formula be modified?

Yes, as long as any modification does not conflict with the requirements of NAHASDA.

§ 1000.306 -- How can the IHBG formula be modified?

(a) The IHBG formula can be modified upon development of a set of measurable and verifiable data directly related to Indian and Alaska Native housing need. Any data set developed shall be compiled with the

consultation and involvement of Indian tribes and examined and/or implemented not later than 5 years from the date of issuance of these regulations and periodically thereafter.

(b) Furthermore, the IHBG formula shall be reviewed within five years to determine if subsidy is needed to operate and maintain NAHASDA units or any other changes are needed in respect to funding under the Formula Current Assisted Stock component of the formula.

(c) During the five year review of housing stock for formula purposes, the Section 8 units shall be reduced by the same percentage as the current assisted rental stock has diminished since September 30, 1999.

§ 1000.308 -- Who can make modifications to the IHBG formula?

HUD can make modifications in accordance with § 1000.304 and § 1000.306 provided that any changes proposed by HUD are published and made available for public comment in accordance with applicable law before their implementation.

§ 1000.310 -- What are the components of the IHBG formula?

The IHBG formula consists of two components:

(a) Formula Current Assisted Housing Stock (FCAS); and

(b) Need.

§ 1000.312 -- What is current assisted stock?

Current assisted stock consists of housing units owned or operated pursuant to an ACC. This includes all low rent, Mutual Help, and Turnkey III housing units under management as of September 30, 1997, as indicated in the Formula Response Form.

§ 1000.314 -- What is formula current assisted stock?

Formula current assisted stock is current assisted stock as described in § 1000.312 plus 1937 Act units in the development pipeline when they become owned or operated by the recipient and are under management as indicated in the Formula Response Form. Formula current assisted stock also includes Section 8 units when their current contract expires and the Indian tribe continues to manage the assistance in a manner similar to the Section 8 program, as reported on the Formula Response Form.

§ 1000.316 -- How is the Formula Current Assisted Stock (FCAS) Component developed?

The Formula Current Assisted Stock component consists of two elements. They are:

(a) ***Operating subsidy.*** The operating subsidy consists of three variables which are:

(1) The number of low-rent FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation;

(2) The number of Section 8 units whose contract has expired but had been under contract on September 30, 1997, multiplied by the FY 1996 national per unit subsidy adjusted for inflation; and

(3) The number of Mutual Help and Turnkey III FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.

(b) ***Modernization allocation.*** Modernization allocation consists of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation.

§ 1000.317 -- Who is the recipient for funds for current assisted stock which is owned by state-created Regional Native Housing Authorities in Alaska?

If housing units developed under the 1937 Act are owned by a state-created Regional Native Housing Authority in Alaska, and are not located on an Indian reservation, then the recipient for funds allocated for the current assisted stock portion of NAHASDA funds for the units is the regional Indian tribe.

§ 1000.318 -- When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?

(a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:

(1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as **[*12366]** practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and

(2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

(b) Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units by the Indian tribe, TDHE, or IHA.

(c) Expired contract Section 8 units shall continue as rental units and be included in the formula as long as they are operated as low income rental units as included in the Indian tribe's or TDHE's Formula Response Form.

§ 1000.320 -- How is Formula Current Assisted Stock adjusted for local area costs?

There are two adjustment factors that are used to adjust the allocation of funds for the Current Assisted Stock portion of the formula. They are:

(a) Operating Subsidy as adjusted by the greater of the AEL factor or FMR factor (AELFMR); and

(b) Modernization as adjusted by TDC.

§ 1000.322 -- Are IHA financed units included in the determination of Formula Current Assisted Stock?

No. If these units are not owned or operated at the time (September 30, 1997) pursuant to an ACC then they are not included in the determination of Formula Current Assisted Stock.

§ 1000.324 -- How is the need component developed?

After determining the FCAS allocation, remaining funds are allocated by need component. The need component consists of seven criteria. They are:

(a) American Indian and Alaskan Native (AIAN) Households with housing cost burden greater than 50 percent of formula annual income weighted at 22 percent;

(b) AIAN Households which are overcrowded or without kitchen or plumbing weighted at 25 percent;

(c) Housing Shortage which is the number of AIAN households with an annual income less than or equal to 80 percent of formula median income reduced by the combination of current assisted stock and units developed under NAHASDA weighted at 15 percent;

(d) AIAN households with annual income less than or equal to 30 percent of formula median income weighted at 13 percent;

(e) AIAN households with annual income between 30 percent and 50 percent of formula median income weighted at 7 percent;

(f) AIAN households with annual income between 50 percent and 80 percent of formula median income weighted at 7 percent;

(g) AIAN persons weighted at 11 percent.

§ 1000.325 -- How is the need component adjusted for local area costs?

The need component is adjusted by the TDC.

§ 1000.326 -- What if a formula area is served by more than one Indian tribe?

(a) If an Indian tribe's formula area overlaps with the formula area of one or more other Indian tribes, the funds allocated to that Indian tribe for the geographic area in which the formula areas overlap will be divided based on:

(1) The Indian tribe's proportional share of the population in the overlapping geographic area; and

(2) The Indian tribe's commitment to serve that proportional share of the population in such geographic area.

(3) In cases where a State recognized Indian tribe's formula area overlaps with a Federally recognized Indian tribe, the Federally recognized Indian tribe receives the allocation for the overlapping area.

(b) Tribal membership in the geographic area (not to include dually enrolled tribal members) will be based on data that all Indian tribes involved agree to use. Suggested data sources include tribal enrollment lists, Indian Health Service User Data, and Bureau of Indian Affairs data.

(c) If the Indian tribes involved cannot agree on what data source to use, HUD will make the decision on what data will be used to divide the funds between the Indian tribes by August 1.

§ 1000.327 -- What is the order of preference for allocating the IHBG formula needs data for Indian tribes in Alaska not located on reservations due to the unique circumstances in Alaska?

(a) Data in areas without reservations. The data on population and housing within an Alaska Native Village is credited to the Alaska Native Village. Accordingly, the village corporation for the Alaska Native Village has no needs data and no formula allocation. The data on population and housing outside the Alaska Native Village is credited to the regional Indian tribe, and if there is no regional Indian tribe, the data will be credited to the regional corporation.

(b) Deadline for notification on whether an IHP will be submitted. By September 15 of each year, each Indian tribe in Alaska not located on a reservation, including each Alaska Native village, regional Indian tribe, and regional corporation, or its TDHE must notify HUD in writing whether it or its TDHE intends to submit an IHP. If an Alaska Native village notifies HUD that it does not intend either to submit an IHP or to designate a TDHE to do so, or if HUD receives no response from the Alaska Native village or its TDHE, the formula data which would have been credited to the Alaska Native village will be credited to the regional Indian tribe, or if there is no regional Indian tribe, to the regional corporation.

§ 1000.328 -- What is the minimum amount an Indian tribe can receive under the need component of the formula?

In the first year of NAHASDA participation, an Indian tribe whose allocation is less than $ 50,000 under the need component of the formula shall have its need component of the grant adjusted to $ 50,000. An Indian tribe's IHP shall contain a certification of the need for the $ 50,000 funding. In subsequent years, but not to extend beyond Federal Fiscal Year 2002, an Indian tribe whose allocation is less than $ 25,000 under the need component of the formula shall have its need component of the grant adjusted to $ 25,000. The need for § 1000.328 will be reviewed in accordance with § 1000.306.

§ 1000.330 -- What are data sources for the need variables?

The sources of data for the need variables shall be data available that is collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area. Initially, the data used are U.S. Decennial Census data.

§ 1000.332 -- Will data used by HUD to determine an Indian tribe's or TDHE's formula allocation be provided to the Indian tribe or TDHE before the allocation?

Yes. HUD shall provide notice to the Indian tribe or TDHE of the data to be used for the formula and projected allocation amount by August 1.

§ 1000.334 -- May Indian tribes, TDHEs, or HUD challenge the data from the U.S. Decennial Census or provide an alternative source of data?

Yes. Provided that the data are gathered, evaluated, and presented in a manner acceptable to HUD and that the standards for acceptability are consistently applied throughout the Country. **[*12367]**

§ 1000.336 -- How may an Indian tribe, TDHE, or HUD challenge data?

(a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG formula. The challenge and collection of data for this purpose is an allowable cost for IHBG funds.

(b) An Indian tribe or TDHE that has data in its possession that it contends are more accurate than data contained in the U.S. Decennial Census, and the data were collected in a manner acceptable to HUD, may submit the data and proper documentation to HUD. Beginning with the Fiscal Year 1999 allocation, in order for the challenge to be considered for the upcoming Fiscal Year allocation, documentation must be submitted by June 15. HUD shall respond to such data submittal not later than 45 days after receipt of the data and either approve or challenge the validity of such data. Pursuant to HUD's action, the following shall apply:

(1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in formula allocation. Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy by the date of formula allocation, the dispute shall be carried forward to the next funding year and resolved in accordance with the dispute resolution procedures set forth in this part for model housing activities (§ 1000.118).

(2) Pursuant to resolution of the dispute:

(i) If the Indian tribe or TDHE prevails, an adjustment to the Indian tribe's or TDHE's subsequent allocation for the subsequent year shall be made retroactive to include only the disputed Fiscal Year(s); or

(ii) If HUD prevails, no further action shall be required.

(c) In the event HUD questions that the data contained in the formula does not accurately represent the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and provide a commitment to serve the population indicated in the geographic area.

§ 1000.340 -- What if an Indian tribe is allocated less funding under the block grant formula than it received in Fiscal Year 1996 for operating subsidy and modernization?

If an Indian tribe is allocated less funding under the formula than an IHA received on its behalf in Fiscal Year 1996 for operating subsidy and modernization, its grant is increased to the amount received in Fiscal Year 1996 for operating subsidy and modernization. The remaining grants are adjusted to keep the allocation within available appropriations.

Subpart E-- Federal Guarantees for Financing of Tribal Housing Activities

§ 1000.401 -- What terms are used throughout this subpart?

As used throughout title VI of NAHASDA and in this subpart:

Applicant means the entity that requests a HUD guarantee under the provisions of this subpart.

Borrower means an Indian tribe or TDHE that receives funds in the form of a loan with the obligation to repay in full, with interest, and has executed notes or other obligations that evidence that transaction.

Issuer means an Indian tribe or TDHE that issues or executes notes or other obligations. An issuer can also be a borrower.

§ 1000.402 -- Are State recognized Indian tribes eligible for guarantees under title VI of NAHASDA?

Those State recognized Indian tribes that meet the definition set forth in section 4(12)(C) of NAHASDA are eligible for guarantees under title VI of NAHASDA.

§ 1000.404 -- What lenders are eligible for participation?

Eligible lenders are those approved under and meeting the qualifications established in this subpart, except that loans otherwise insured or guaranteed by an agency of the United States, or made by an organization of Indians from amounts borrowed from the United States, shall not be eligible for guarantee under this part. The following lenders are deemed to be eligible under this subpart:

- **(a)** Any mortgagee approved by HUD for participation in the single family mortgage insurance program under title II of the National Housing Act;
- **(b)** Any lender whose housing loans under chapter 37 of title 38, United States Code, are automatically guaranteed pursuant to section 1802(d) of such title;
- **(c)** Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949;
- **(d)** Any other lender that is supervised, approved, regulated, or insured by any agency of the United States; and
- **(e)** Any other lender approved by the Secretary.

§ 1000.406 -- What constitutes tribal approval to issue notes or other obligations under title VI of NAHASDA?

Tribal approval is evidenced by a written tribal resolution that authorizes the issuance of notes or obligations by the Indian tribe or a TDHE on behalf of the Indian tribe.

§ 1000.408 -- How does an Indian tribe or TDHE show that it has made efforts to obtain financing without a guarantee and cannot complete such financing in a timely manner?

The Indian tribe or TDHE shall submit a certification that states that the Indian tribe has attempted to obtain financing and cannot complete such financing consistent with the timely execution of the program plans without such guarantee. Written documentation shall be maintained by the Indian tribe or TDHE to support the certification.

§ 1000.410 -- What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

HUD shall provide that:

- **(a)** Any loan, note or other obligation guaranteed under title VI of NAHASDA may be sold or assigned by the lender to any financial institution that is subject to examination and supervision by an agency of the Federal government, any State, or the District of Columbia without destroying or otherwise negatively affecting the guarantee; and

(b) Indian tribes and housing entities are encouraged to explore creative financing mechanisms and in so doing shall not be limited in obtaining a guarantee. These creative financing mechanisms include but are not limited to:

(1) Borrowing from private or public sources or partnerships;

(2) Issuing tax exempt and taxable bonds where permitted; and

(3) Establishing consortiums or trusts for borrowing or lending, or for pooling loans.

(c) The repayment period may exceed twenty years and the length of the repayment period cannot be the sole basis for HUD disapproval; and

(d) Lender and issuer/borrower must certify that they acknowledge and agree to comply with all applicable tribal laws.

§ 1000.412 -- Can an issuer obtain a guarantee for more than one note or other obligation at a time?

Yes. To obtain multiple guarantees, the issuer shall demonstrate that:

(a) The issuer will not exceed a total for all notes or other obligations in an amount equal to five times its grant amount, excluding any amount no **[*12368]** longer owed on existing notes or other obligations; and

(b) Issuance of additional notes or other obligations is within the financial capacity of the issuer.

§ 1000.414 -- How is an issuer's financial capacity demonstrated?

An issuer must demonstrate its financial capacity to:

(a) Meet its obligations; and

(b) Protect and maintain the viability of housing developed or operated pursuant to the 1937 Act.

§ 1000.416 -- What is a repayment contract in a form acceptable to HUD?

(a) The Secretary's signature on a contract shall signify HUD's acceptance of the form, terms and conditions of the contract.

(b) In loans under title VI of NAHASDA, involving a contract between an issuer and a lender other than HUD, HUD's approval of the loan documents and guarantee of the loan shall be deemed to be HUD's acceptance of the sufficiency of the security furnished. No other security can or will be required by HUD at a later date.

§ 1000.418 -- Can grant funds be used to pay costs incurred when issuing notes or other obligations?

Yes. Other costs that can be paid using grant funds include but are not limited to the costs of servicing and trust administration, and other costs associated with financing of debt obligations.

§ 1000.420 -- May grants made by HUD under section 603 of NAHASDA be used to pay net interest costs incurred when issuing notes or other obligations?

Yes. Other costs that can be paid using grant funds include but are not limited to the costs of servicing and trust administration, and other costs associated with financing of debt obligations, not to exceed 30 percent of the net interest cost.

§ 1000.422 -- What are the procedures for applying for loan guarantees under title VI of NAHASDA?

(a) The borrower applies to the lender for a loan using a guarantee application form prescribed by HUD.

(b) The lender provides the loan application to HUD to determine if funds are available for the guarantee. HUD will reserve these funds for a period of 90 days if the funds are available and the applicant is

otherwise eligible under this subpart. HUD may extend this reservation period for an extra 90 days if additional documentation is necessary.

(c) The borrower and lender negotiate the terms and conditions of the loan in consultation with HUD.

(d) The borrower and lender execute documents.

(e) The lender formally applies for the guarantee.

(f) HUD reviews and provides a written decision on the guarantee.

§ 1000.424 -- What are the application requirements for guarantee assistance under title VI of NAHASDA?

The application for a guarantee must include the following:

(a) An identification of each of the activities to be carried out with the guaranteed funds and a description of how each activity qualifies as an affordable housing activity as defined in section 202 of NAHASDA.

(b) A schedule for the repayment of the notes or other obligations to be guaranteed that identifies the sources of repayment, together with a statement identifying the entity that will act as the borrower.

(c) A copy of the executed loan documents, if applicable, including, but not limited to, any contract or agreement between the borrower and the lender.

(d) Certifications by the borrower that:

(1) The borrower possesses the legal authority to pledge and that it will, if approved, make the pledge of grants required by section 602(a)(2) of NAHASDA.

(2) The borrower has made efforts to obtain financing for the activities described in the application without use of the guarantee; the borrower will maintain documentation of such efforts for the term of the guarantee; and the borrower cannot complete such financing consistent with the timely execution of the program plans without such guarantee.

(3) It possesses the legal authority to borrow or issue obligations and to use the guaranteed funds in accordance with the requirements of this subpart.

(4) Its governing body has duly adopted or passed as an official act a resolution, motion, or similar official action that:

(i) Identifies the official representative of the borrower, and directs and authorizes that person to provide such additional information as may be required; and

(ii) Authorizes such official representative to issue the obligation or to execute the loan or other documents, as applicable.

(5) The borrower has complied with section 602(a) of NAHASDA.

(6) The borrower will comply with the requirements described in subpart A of this part and other applicable laws.

§ 1000.426 -- How does HUD review a guarantee application?

The procedure for review of a guarantee application includes the following steps:

(a) HUD will review the application for compliance with title VI of NAHASDA and these implementing regulations.

(b) HUD will accept the certifications submitted with the application. HUD may, however, consider relevant information that challenges the certifications and require additional information or assurances from the applicant as warranted by such information.

§ 1000.428 -- For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?

HUD may disapprove an application or approve a lesser amount for any of the following reasons:

(a) HUD determines that the guarantee constitutes an unacceptable risk. Factors that will be considered in assessing financial risk shall include, but not be limited to, the following:

(1) The ratio of the expected annual debt service requirements to the expected available annual grant amount, taking into consideration the obligations of the borrower under the provisions of section 203(b) of NAHASDA;

(2) Evidence that the borrower will not continue to receive grant assistance under this part during the proposed repayment period;

(3) The borrower's inability to furnish adequate security pursuant to section 602(a) of NAHASDA; and

(4) The amount of program income the proposed activities are reasonably estimated to contribute toward repayment of the guaranteed loan or other obligations.

(b) The loan or other obligation for which the guarantee is requested exceeds any of the limitations specified in sections 601(d) or section 605(d) of NAHASDA.

(c) Funds are not available in the amount requested.

(d) Evidence that the performance of the borrower under this part has been determined to be unacceptable pursuant to the requirements of subpart F of this part, and that the borrower has failed to take reasonable steps to correct performance.

(e) The activities to be undertaken are not eligible under section 202 of NAHASDA.

(f) The loan or other obligation documents for which a guarantee is requested do not meet the requirements of this subpart. **[*12369]**

§ 1000.430 -- When will HUD issue notice to the applicant if the application is approved at the requested or reduced amount?

(a) HUD shall make every effort to approve a guarantee within 30 days of receipt of a completed application including executed documents and, if unable to do so, will notify the applicant within the 30 day timeframe of the need for additional time and/or if additional information is required.

(b) HUD shall notify the applicant in writing that the guarantee has either been approved, reduced, or disapproved. If the request is reduced or disapproved, the applicant will be informed of the specific reasons for reduction or disapproval.

(c) HUD shall issue a certificate to guarantee the debt obligation of the issuer subject to compliance with NAHASDA including but not limited to sections 105, 601(a), and 602(c) of NAHASDA, and such other reasonable conditions as HUD may specify in the commitment documents in a particular case.

§ 1000.432 -- Can an amendment to an approved guarantee be made?

(a) Yes. An amendment to an approved guarantee can occur if an applicant wishes to allow a borrower/issuer to carry out an activity not described in the loan or other obligation documents, or substantially to change the purpose, scope, location, or beneficiaries of an activity.

(b) Any changes to an approved guarantee must be approved by HUD.

§ 1000.434 -- How will HUD allocate the availability of loan guarantee assistance?

(a) Each fiscal year HUD may allocate a percentage of the total available loan guarantee assistance to each Area ONAP equal to the percentage of the total NAHASDA grant funds allocated to the Indian tribes in the geographic area of operation of that office.

(b) These allocated amounts shall remain exclusively available for loan guarantee assistance for Indian tribes or TDHEs in the area of operation of that office until committed by HUD for loan guarantees or until the

end of the second quarter of the fiscal year. At the beginning of the third quarter of the fiscal year, any residual loan guarantee commitment amount shall be made available to guarantee loans for Indian tribes or TDHEs regardless of their location. Applications for residual loan guarantee money must be submitted on or after April 1.

(c) In approving applications for loan guarantee assistance, HUD shall seek to maximize the availability of such assistance to all interested Indian tribes or TDHEs. HUD may limit the proportional share approved to any one Indian tribe or TDHE to its proportional share of the block grant allocation based upon the annual plan submitted by the Indian tribe or TDHE indicating intent to participate in the loan guarantee allocation process.

§ 1000.436 -- How will HUD monitor the use of funds guaranteed under this subpart?

HUD will monitor the use of funds guaranteed under this subpart as set forth in section 403 of NAHASDA, and the lender is responsible for monitoring performance with the documents.

Subpart F-- Recipient Monitoring, Oversight and Accountability

§ 1000.501 -- Who is involved in monitoring activities under NAHASDA?

The recipient, the grant beneficiary and HUD are involved in monitoring activities under NAHASDA.

§ 1000.502 -- What are the monitoring responsibilities of the recipient, the grant beneficiary and HUD under NAHASDA?

(a) The recipient is responsible for monitoring grant activities, ensuring compliance with applicable Federal requirements and monitoring performance goals under the IHP. The recipient is responsible for preparing at least annually: a compliance assessment in accordance with section 403(b) of NAHASDA; a performance report covering the assessment of program progress and goal attainment under the IHP; and an audit in accordance with the Single Audit Act, as applicable. The recipient's monitoring should also include an evaluation of the recipient's performance in accordance with performance objectives and measures. At the request of a recipient, other Indian tribes and/or TDHEs may provide assistance to aid the recipient in meeting its performance goals or compliance requirements under NAHASDA.

(b) Where the recipient is a TDHE, the grant beneficiary (Indian tribe) is responsible for monitoring programmatic and compliance requirements of the IHP and NAHASDA by requiring the TDHE to prepare periodic progress reports including the annual compliance assessment, performance and audit reports.

(c) HUD is responsible for reviewing the recipient as set forth in § 1000.520.

(d) HUD monitoring will consist of on-site as well as off-site review of records, reports and audits. To the extent funding is available, HUD or its designee will provide technical assistance and training, or funds to the recipient to obtain technical assistance and training. In the absence of funds, HUD shall make best efforts to provide technical assistance and training.

§ 1000.504 -- What are the recipient performance objectives?

Performance objectives are developed by each recipient. Performance objectives are criteria by which the recipient will monitor and evaluate its performance. For example, if in the IHP the recipient indicates it will build new houses, the performance objective may be the completion of the homes within a certain time period and within a certain budgeted amount.

§ 1000.506 -- If the TDHE is the recipient, must it submit its monitoring evaluation/results to the Indian tribe?

Yes. The Indian tribe as the grant beneficiary must receive a copy of the monitoring evaluation/results so that it can fully carry out its oversight responsibilities under NAHASDA.

§ 1000.508 -- If the recipient monitoring identifies programmatic concerns, what happens?

If the recipient's monitoring activities identify areas of concerns, the recipient will take corrective actions which may include but are not limited to one or more of the following actions:

(a) Depending upon the nature of the concern, the recipient may obtain additional training or technical assistance from HUD, other Indian tribes or TDHEs, or other entities.

(b) The recipient may develop and/or revise policies, or ensure that existing policies are better enforced.

(c) The recipient may take appropriate administrative action to remedy the situation.

(d) The recipient may refer the concern to an auditor or to HUD for additional corrective action.

§ 1000.510 -- What happens if tribal monitoring identifies compliance concerns?

The Indian tribe shall have the responsibility to ensure that appropriate corrective action is taken.

§ 1000.512 -- Are performance reports required?

Yes. An annual report shall be submitted by the recipient to HUD and the Indian tribe being served in a format acceptable by HUD. Annual performance reports shall contain:

(a) The information required by sections 403(b) and 404(b) of NAHASDA;

(b) Brief information on the following:

(1) A comparison of actual accomplishments to the objectives established for the period;

(2) The reasons for slippage if established objectives were not met; and **[*12370]**

(3) Analysis and explanation of cost overruns or high unit costs; and

(c) Any information regarding the recipient's performance in accordance with HUD's performance measures, as set forth in section § 1000.524.

§ 1000.514 -- When must the annual performance report be submitted?

The annual performance report must be submitted within 60 days of the end of the recipient's program year. If a justified request is submitted by the recipient, the Area ONAP may extend the due date for submission of the performance report.

§ 1000.516 -- What reporting period is covered by the annual performance report?

For the first year of NAHASDA, the period to be covered by the annual performance report will be October 1, 1997 through September 30, 1998. Subsequent reporting periods will coincide with the recipient's program year.

§ 1000.518 -- When must a recipient obtain public comment on its annual performance report?

The recipient must make its report publicly available to tribal members, non-Indians served under NAHASDA, and other citizens in the Indian area, in sufficient time to permit comment before submission of the report to HUD. The recipient determines the manner and times for making the report available.

The recipient shall include a summary of any comments received by the grant beneficiary or recipient from tribal members, non-Indians served under NAHASDA, and other citizens in the Indian area.

§ 1000.520 -- What are the purposes of HUD review?

At least annually, HUD will review each recipient's performance to determine whether the recipient:

(a) Has carried out its eligible activities in a timely manner, has carried out its eligible activities and certifications in accordance with the requirements and the primary objective of NAHASDA and with other applicable laws and has a continuing capacity to carry out those activities in a timely manner;

(b) Has complied with the IHP of the grant beneficiary; and

(c) Whether the performance reports of the recipient are accurate.

§ 1000.521 -- After the receipt of the recipient's performance report, how long does HUD have to make recommendations under section 404(c) of NAHASDA?

60 days.

§ 1000.522 -- How will HUD give notice of on-site reviews?

HUD shall generally provide a 30 day written notice of an impending on-site review to the Indian tribe and TDHE. Prior written notice will not be required in emergency situations. All notices shall state the general nature of the review.

§ 1000.524 -- What are HUD's performance measures for the review?

HUD has the authority to develop performance measures which the recipient must meet as a condition for compliance under NAHASDA. The performance measures are:

(a) Within 2 years of grant award under NAHASDA, no less than 90 percent of the grant must be obligated.

(b) The recipient has complied with the required certifications in its IHP and all policies and the IHP have been made available to the public.

(c) Fiscal audits have been conducted on a timely basis and in accordance with the requirements of the Single Audit Act, as applicable. Any deficiencies identified in audit reports have been addressed within the prescribed time period.

(d) Accurate annual performance reports were submitted to HUD within 60 days after the completion of the recipient's program year.

(e) The recipient has met the IHP goals and objectives in the 1-year plan and demonstrated progress on the 5-year plan goals and objectives.

(f) The recipient has substantially complied with the requirements of 24 CFR part 1000 and all other applicable Federal statutes and regulations.

§ 1000.526 -- What information will HUD use for its review?

In reviewing each recipient's performance, HUD may consider the following:

(a) The approved IHP and any amendments thereto;

(b) Reports prepared by the recipient;

(c) Records maintained by the recipient;

(d) Results of HUD's monitoring of the recipient's performance, including on-site evaluation of the quality of the work performed;

(e) Audit reports;

(f) Records of drawdown(s) of grant funds;

(g) Records of comments and complaints by citizens and organizations within the Indian area;

(h) Litigation; and

(i) Any other reliable relevant information which relates to the performance measures under § 1000.524.

§ 1000.528 -- What are the procedures for the recipient to comment on the result of HUD's review when HUD issues a report under section 405(b) of NAHASDA?

HUD will issue a draft report to the recipient and Indian tribe within thirty (30) days of the completion of HUD's review. The recipient will have at least thirty (30) days to review and comment on the draft report as well as provide any additional information relating to the draft report. HUD shall consider the comments and any additional information provided by the recipient. HUD may also revise the draft report based on the comments and any additional information provided by the recipient. HUD shall make the recipient's comments and a final report readily available to the recipient, grant beneficiary, and the public not later than thirty (30) days after receipt of the recipient's comments and additional information.

§ 1000.530 -- What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under §§ 1000.532 or 1000.538?

(a) The following actions are designed, first, to prevent the continuance of the performance problem(s); second, to mitigate any adverse effects or consequences of the performance problem(s); and third, to prevent a recurrence of the same or similar performance problem. The following actions, at least one of which must be taken prior to a sanction under paragraph (b), may be taken by HUD singly or in combination, as appropriate for the circumstances:

(1) Issue a letter of warning advising the recipient of the performance problem(s), describing the corrective actions that HUD believes should be taken, establishing a completion date for corrective actions, and notifying the recipient that more serious actions may be taken if the performance problem(s) is not corrected or is repeated;

(2) Request the recipient to submit progress schedules for completing activities or complying with the requirements of this part;

(3) Recommend that the recipient suspend, discontinue, or not incur costs for the affected activity;

(4) Recommend that the recipient redirect funds from affected activities to other eligible activities;

(5) Recommend that the recipient reimburse the recipient's program account in the amount improperly expended; and

(6) Recommend that the recipient obtain appropriate technical assistance using existing grant funds or other **[*12371]** available resources to overcome the performance problem(s).

(b) Failure of a recipient to address performance problems specified in paragraph (a) above may result in the imposition of sanctions as prescribed in § 1000.532 (providing for adjustment, reduction, or withdrawal of future grant funds, or other appropriate actions), or § 1000.538 (providing for termination, reduction, or limited availability of payments, or replacement of the TDHE).

§ 1000.532 -- What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?

(a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.

(b) Before undertaking any action in accordance with paragraphs (a) and (c) of this section, HUD will notify the recipient in writing of the actions it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. In the event the deficiency is not resolved, HUD may take any

of the actions available under paragraphs (a) and (c) of this section. However, the recipient may request, within 30 days of notice of the action, a hearing in accordance with § 1000.540. The amount in question shall not be reallocated under the provisions of § 1000.536, until 15 days after the hearing has been held and HUD has rendered a final decision.

(c) Absent circumstances beyond the recipient's control, when a recipient is not complying significantly with a major activity of its IHP, HUD shall make appropriate adjustment, reduction, or withdrawal of some or all of the recipient's subsequent year grant in accordance with this section.

§ 1000.534 -- What constitutes substantial noncompliance?

HUD will review the circumstances of each noncompliance with NAHASDA and the regulations on a case-by-case basis to determine if the noncompliance is substantial. This review is a two step process. First, there must be a noncompliance with NAHASDA or these regulations. Second, the noncompliance must be substantial. A noncompliance is substantial if:

(a) The noncompliance has a material effect on the recipient meeting its major goals and objectives as described in its Indian Housing Plan;

(b) The noncompliance represents a material pattern or practice of activities constituting willful noncompliance with a particular provision of NAHASDA or the regulations, even if a single instance of noncompliance would not be substantial;

(c) The noncompliance involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted by the recipient for a material activity; or

(d) The noncompliance places the housing program at substantial risk of fraud, waste or abuse.

§ 1000.536 -- What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under § 1000.532 or § 1000.538?

Such NAHASDA grant funds shall be distributed by HUD in accordance with the next NAHASDA formula allocation.

§ 1000.538 -- What remedies are available for substantial noncompliance?

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provisions of NAHASDA, HUD shall:

(1) Terminate payments under NAHASDA to the recipient;

(2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA;

(3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or

(4) In the case of noncompliance described in § 1000.542, provide a replacement TDHE for the recipient.

(b) HUD may, upon due notice, suspend payments at any time after the issuance of the opportunity for hearing pending such hearing and final decision, to the extent HUD determines such action necessary to preclude the further expenditure of funds for activities affected by such failure to comply.

(c) If HUD determines that the failure to comply substantially with the provisions of NAHASDA is not a pattern or practice of activities constituting willful noncompliance, and is a result of the limited capability or capacity of the recipient, HUD may provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA.

(d) In lieu of, or in addition to, any action described in this section, if HUD has reason to believe that the recipient has failed to comply substantially with any provisions of NAHASDA, HUD may refer the matter to the Attorney General of the United States, with a recommendation that appropriate civil action be instituted.

§ 1000.540 -- What hearing procedures will be used under NAHASDA?

The hearing procedures in 24 CFR part 26 shall be used.

§ 1000.542 -- When may HUD require replacement of a recipient?

(a) In accordance with section 402 of NAHASDA, as a condition of HUD making a grant on behalf of an Indian tribe, the Indian tribe shall agree that, notwithstanding any other provisions of law, HUD may, only in the circumstances discussed below, require that a replacement TDHE serve as the recipient for the Indian tribe.

(b) HUD may require a replacement TDHE for an Indian tribe only upon a determination by HUD on the record after opportunity for hearing that the recipient for the Indian tribe has engaged in a pattern or practice of activities that constitute substantial or willful noncompliance with the requirements of NAHASDA.

§ 1000.544 -- What audits are required?

The recipient must comply with the requirements of the Single Audit Act and OMB Circular A-133 which require annual audits of recipients that expend Federal funds equal to or in excess of an amount specified by the U.S. Office of Management and Budget, which is currently set at $ 300,000.

§ 1000.546 -- Are audit costs eligible program or administrative expenses?

Yes, audit costs are an eligible program or administrative expense. If the Indian tribe is the recipient then program funds can be used to pay a prorated share of the tribal audit or financial review cost that is attributable to NAHASDA funded activities. For a recipient not covered by the Single Audit Act, but which chooses to obtain a periodic financial review, the cost of such a review would be an eligible program expense. **[*12372]**

§ 1000.548 -- Must a copy of the recipient's audit pursuant to the Single Audit Act relating to NAHASDA activities be submitted to HUD?

Yes. A copy of the latest recipient audit under the Single Audit Act relating to NAHASDA activities must be submitted with the Annual Performance Report.

§ 1000.550 -- If the TDHE is the recipient, does it have to submit a copy of its audit to the Indian tribe?

Yes. The Indian tribe as the grant beneficiary must receive a copy of the audit report so that it can fully carry out its oversight responsibilities with NAHASDA.

§ 1000.552 -- How long must the recipient maintain program records?

(a) This section applies to all financial and programmatic records, supporting documents, and statistical records of the recipient which are required to be maintained by the statute, regulation, or grant agreement.

(b) Except as otherwise provided herein, records must be retained for three years from the date the recipient submits to HUD the annual performance report that covers the last expenditure of grant funds under a particular grant.

(c) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

§ 1000.554 -- Which agencies have right of access to the recipient's records relating to activities carried out under NAHASDA?

(a) HUD and the Comptroller General of the United States, and any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of recipients which are pertinent to NAHASDA assistance, in order to make audits, examinations, excerpts, and transcripts.

(b) The right of access in this section lasts as long as the records are maintained.

§ 1000.556 -- Does the Freedom of Information Act (FOIA) apply to recipient records?

FOIA does not apply to recipient records. However, there may be other applicable State and tribal access laws or recipient policies which may apply.

§ 1000.558 -- Does the Federal Privacy Act apply to recipient records?

The Federal Privacy Act does not apply to recipient records. However, there may be other applicable State and tribal access laws or recipient policies which may apply.

PART 1005-- LOAN GUARANTEES FOR INDIAN HOUSING

4. The authority citation for newly designated 24 CFR part 1005 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 1715z-13a and 3535(d).

5. Newly designated § 1005.101 is revised to read as follows:

§ 1005.101 -- What is the applicability and scope of these regulations?

Under the provisions of section 184 of the Housing and Community Development Act of 1992, as amended by the Native American Housing Assistance and Self-Determination Act of 1996 (12 U.S.C. 1515z-13a), the Department of Housing and Urban Development (the Department or HUD) has the authority to guarantee loans for the construction, acquisition, or rehabilitation of 1- to 4-family homes that are standard housing located on trust land or land located in an Indian or Alaska Native area, and for which an Indian Housing Plan has been submitted and approved under 24 CFR part 1000. This part provides requirements that are in addition to those in section 184.

6. Newly designated § 1005.103 is amended by revising the section heading and by adding the definitions of the terms ″Holder″ and ″Mortgagee″ in alphabetical order, to read as follows:

§ 1005.103 -- What definitions are applicable to this program?

* * * * *

Holder means the holder of the guarantee certificate and in this program is variously referred to as the lender holder, the holder of the certificate, the holder of the guarantee, and the mortgagee.

* * * * *

Mortgagee means the same as ″Holder.″

* * * * *

7. A new § 1005.104 is added to read as follows:

§ 1005.104 -- What lenders are eligible for participation?

Eligible lenders are those approved under and meeting the qualifications established in this subpart, except that loans otherwise insured or guaranteed by an agency of the United States, or made by an organization of Indians

from amounts borrowed from the United States, shall not be eligible for guarantee under this part. The following lenders are deemed to be eligible under this part:

(a) Any mortgagee approved by HUD for participation in the single family mortgage insurance program under title II of the National Housing Act;

(b) Any lender whose housing loans under chapter 37 of title 38, United States Code are automatically guaranteed pursuant to section 1802(d) of such title;

(c) Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949;

(d) Any other lender that is supervised, approved, regulated, or insured by any agency of the United States; or

(e) Any other lender approved by the Secretary.

8. Newly designated § 1005.105 is amended by:

a. Revising the section heading;

b. Revising paragraphs (b) and (d)(3); and

c. Adding a new paragraph (f), to read as follows:

§ 1005.105 -- What are eligible loans?

* * * * *

(b) ***Eligible borrowers.*** A loan guarantee under section 184 may be made to:

(1) An Indian family who will occupy the home as a principal residence and who is otherwise qualified under section 184;

(2) An Indian Housing Authority or Tribally Designated Housing Entity; or

(3) An Indian tribe.

* * * * *

(d) * * *

(3) The principal amount of the mortgage is held by the mortgagee in an interest bearing account, trust, or escrow for the benefit of the mortgagor, pending advancement to the mortgagor's creditors as provided in the loan agreement; and

* * * * *

(f) ***Lack of access to private financial markets.*** In order to be eligible for a loan guarantee if the property is not on trust or restricted lands, the borrower must certify that the borrower lacks access to private financial markets. Borrower certification is the only certification required by HUD.

9. Newly designated § 1005.107 is amended by:

a. Revising the section heading;

b. Revising paragraph (a) introductory text;

c. Revising paragraph (a)(2);

d. Revising paragraph (b) introductory text;

e. Redesignating paragraphs (b)(3) and (b)(4) as paragraphs (b)(4) and (b)(5), respectively; and **[*12373]**

f. Adding a new paragraph (b)(3), to read as follows:

§ 1005.107 -- What is eligible collateral?

(a) A loan guaranteed under section 184 may be secured by any collateral authorized under and not prohibited by Federal, state, or tribal law and determined by the lender and approved by the Department to be sufficient to cover the amount of the loan, and may include, but is not limited to, the following:

* * * * *

(2) A first and/or second mortgage on property other than trust land;

* * * * *

(b) If trust land or restricted Indian land is used as collateral or security for the loan, the following additional provisions apply:

* * * * *

(3) The mortgagee or HUD shall only pursue liquidation after offering to transfer the account to an eligible tribal member, the Indian tribe, or the Indian housing authority servicing the Indian tribe or the TDHE servicing the Indian tribe. The mortgagee or HUD shall not sell, transfer, or otherwise dispose of or alienate the property except to one of these three entities.

* * * * *

§ 1005.109 -- [Amended].

10. Newly designated § 1005.109 is amended by revising the section heading to read " *§ 1005.109 What is a guarantee fee?*"

§ 1005.111 -- [Amended].

11. Newly designated § 1005.111 is amended by revising the section heading to read " *§ 1005.111 What safety and quality standards apply?*"

12. Newly designated § 1005.112 is added to read as follows:

§ 1005.112 -- How do eligible lenders and eligible borrowers demonstrate compliance with applicable tribal laws?

The lender/borrower will certify that they acknowledge and agree to comply with all applicable tribal laws. An Indian tribe with jurisdiction over the dwelling unit does not have to be notified of individual section 184 loans unless required by applicable tribal law.

13. Section 1005.113 is added to read as follows:

§ 1005.113 -- How does HUD enforce lender compliance with applicable tribal laws?

Failure of the lender to comply with applicable tribal law is considered to be a practice detrimental to the interest of the borrower and may be subject to enforcement action(s) under section 184(g) of the statute.

Appendix A TO PART 1000--Indian Housing Block Grant Formula Mechanics This appendix shows the different components of the IHBG formula. The following text explains how each component of the IHBG formula works.

1. The Indian Housing Block Grant (IHBG) formula is calculated by initially determining the amount a tribe receives for Formula Current Assisted Stock (FCAS) (See §§ 1000.310 and 1000.312. FCAS funding is comprised of two components, operating subsidy (§ 1000.316(a)) and modernization (§ 1000.316(b)).

The operating subsidy component is calculated based on the national per unit subsidy provided in FY 1996 (adjusted to a 100 percent funding level) for each of the following types of programs-Low Rent, Homeownership (Mutual Help and Turnkey III), and Section 8. A tribe's total units in each of the above categories is multiplied times the relevant national per unit subsidy amount. That amount is summed and multiplied times a local area cost adjustment factor for management.

2. The local area cost adjustment factor for management is called AELFMR. AELFMR is the greater of a tribe's Allowable Expense Level (AEL) or Fair Market Rent (FMR) factor, where the AEL and FMR factors are determined by dividing each tribe's AEL and FMR by their respective national weighted average (weighted on the unadjusted allocation under FCAS operating subsidy). The adjustment made to the FCAS component of the IHBG formula is then the new AELFMR factor divided by the national weighted average of the AELFMR (See § 1000.320).

3. The modernization component of FCAS is based on the national per unit modernization funding provided in FY 1996 to Indian Housing Authorities (IHAs). The per unit amount is determined by dividing the modernization funds by the total Low Rent, Mutual Help, and Turnkey III units operated by IHAs in 1996. A tribe's total Low Rent, Mutual Help, and Turnkey III units are multiplied times the per unit modernization amount. That amount is then multiplied times a local area cost adjustment factor for construction (e.g. the Total Development Cost) (See § 1000.320).

4. The construction adjustment factor is Total Development Cost (TDC) for the area divided by the weighted national average for TDC (weighted on the unadjusted allocation for modernization) (See § 1000.320).

5. After determining the total amount allocated under FCAS for each tribe, it is summed for every tribe. The national total amount for FCAS is subtracted from the Fiscal Year appropriation to determine the total amount to be allocated under the Need component of the IHBG formula.

6. The Need component of the IHBG formula is calculated using seven factors weighted as set forth in § 1000.324 as follows: 22 percent of the allocated funds will be allocated by a tribe's share of the total Native American households paying more than 50 percent of their income for housing living in the Indian tribe's formula area, 25 percent of the funds allocated under Need will be allocated by a tribe's share of the total Native American households overcrowded and or without kitchen or plumbing living in their formula area, and so on. The current national totals for each of the need variables will be distributed annually by HUD with the Formula Response Form (See § 1000.332). The national totals will change as tribes update information about their formula area and data for individual areas are challenged (See §§ 1000.334 and 1000.336). The Need component is then calculated by multiplying a tribe's share of housing need by a local area cost adjustment factor for construction (the Total Development Cost) (See § 1000.338).

7. No tribe in its first year of funding will receive less than $ 50,000 under the Need component of the formula. In subsequent allocations to a tribe, it will receive no less than $ 25,000 under the Need component of the formula. This increase in funding for the tribes receiving the minimum Need allocation is funded by a reallocation from all tribes receiving more than $ 50,000 under their Need component. This is necessary in order to keep the total allocation within the appropriation level. Such minimum Need allocations will only continue through FY 2002 (See § 1000.328).

8. A tribe's total grant is calculated by summing the FCAS and Need allocations. This preliminary grant is compared to how much a tribe received in FY 1996 for operating subsidy and modernization. If a tribe received more in FY 1996 for operating subsidy and modernization than they do under the IHBG formula, their grant is adjusted up to the FY 1996 level (See § 1000.340). Indian tribes receiving more under the IHBG formula than in FY 1996 ″pay″ for the upward adjustment for the other tribes by having their grants adjusted downward. Because many more Indian tribes have grant amounts above the FY 1996 level than those with grants below the FY 1996 level, each tribe contributes very little relative to their total grant to fund the adjustment.

Appendix B to Part 1000--IHBG Block Grant Formula Mechanisms

1. The Indian Housing Block Grant Formula consists of two components, the Formula Current Assisted Stock (FCAS) and Need. Therefore, the formula allocation before adjusting for the statutory requirement that a tribe's minimum grant will not be less than the tribe's FY 1996 Operating Subsidy and Modernization funding, can be represented by:

unadjGRANT = FCAS + NEED.

2. NAHASDA requires the current assisted stock be provided for before allocating funds based on need. Therefore, FCAS must be calculated first. FCAS consists to two components, Operating Subsidy (OPSUB) and Modernization (MOD) such that:

FCAS = OPSUB + MOD.

3. OPSUB consists of three main parts: Number of Low-Rent units; Number of Section 8 units; and Number of Mutual Help and Turnkey III units. Each of these main parts are adjusted by the FY 1996 national per unit subsidy, an inflation factor, and local area costs as reflected by the greater of the AEL factor or FMR factor. The AEL factor **[*12374]** as defined in § 1000.302 as the difference between a local area Allowable Expense Level (AEL) and the national weighted average for AEL. The FMR factor is also defined in § 1000.302 as the difference between a local area Fair Market Rent (FMR) and the national weighted average for FMR. So, expanding OPSUB gives:

OPSUB = [LR * LRSUB + (MH+TK) * HOSUB + S8 * S8SUB] * INF * AELFMR

Where:

LR = number of Low-Rent units.

LRSUB = FY 1996 national per unit average subsidy for Low-Rent units = $ 2,440.

MH+TK = number of Mutual Help and Turnkey III units.

HOSUB = FY 1996 national per unit average subsidy for Homeownership units = $ 528.

S8 = number of Section 8 units.

S8SUB = FY 1996 national per unit average subsidy for Section 8 units = $ 3,625.

INF = inflation adjustment determined by the Consumer Price Index for housing.

AELFMR = greater of AEL Factor or FMR Factor weighted by national average of AEL Factor and FRM Factor.

AEL FACTOR = AEL/NAAEL.

AEL = local Allowable Expense Level.

NAAEL = national weighted average for AEL.

FMR FACTOR = FMR/NAFMR.

FMR = local Fair Market Rent.

NAFMR = national weighted average for FMR.

NAAELFMR = national weighted average for greater of AEL Factor or FMR factor.

For estimating FY 1998 allocations:

NAAEL = 240.224.

NAFMR = 459.437.

NAAELFMR = 1.144.

4. MOD considers only the number of Low-Rent, and Mutual Help and Turnkey III units. Each of these are adjusted by the FY 1996 national per unit subsidy for modernization, an inflation factor and the local Total Development Costs relative to the weighted national average for TDC. So, expanding MOD gives us:

MOD = [LR + (MH+TK)] * SUB * INF * TDC/NATDC.

Where:

LR = number of Low-Rent units.

MH+TK = number of Mutual Help and Turnkey III units.

SUB = FY 1996 national per unit average subsidy for modernization.

INF = inflation adjustment determined by the Consumer Price Index for housing.

TDC = Local Total Development Costs defined in § 1000.302.

NATDC = weighted national average for TDC.

For estimating FY 1998 allocations:

SUB = $ 1,974.

NATDC = $ 103,828.

5. Now that calculation for FCAS is complete, we can determine how many funds will be available to allocate over the NEED component of the formula by calculating:

NEED FUNDS = APPROPRIATION-NATCAS.

Where:

APPROPRIATION = dollars provided by Congress for distribution by the IHBG formula.

NATCAS = summation of CAS allocations for all tribes.

For estimating FY 1998 allocations:

APPROPRIATION = $ 590 million.

NATCAS = $ 236,147,110.

6. Two iterations are necessary to compute the final Need allocation. The first iteration consists of seven weighted criteria that allocate need funds based on a tribe's population and housing data. This allocation is then adjusted for local area cost differences based on TDC relative to the national weighted average. This can be represented by:

NEED1 = [(0.11 * PER / NPER) + (0.13 * HHLE30 / NHHLE30)

+ (0.07 * HH30T50 / NHH30T50) + (0.07 * HH50T80 / NHH50T80)

+ (0.25 * OCRPR / NOCRPR) + (0.22 * SCBTOT / NSCBTOT)

+ (0.15 * HOUSHOR / NHOUSHOR)] * NEED FUNDS * (TDC/NATDC).

Where:

PER = American Indian and Alaskan Native (AIAN) persons.

NPER = national total of PER.

HHLE30 = AIAN households less than 30% of median income.

NHHLE30 = national total of HHLE30.

HH30T50 = AIAN households 30% to 50% of median income.

NHH30T50 = national total of HH30T50.

HH50T80 = AIAN households 50% to 80% of median income.

NHH50TO80 = national total of HH50T80.

OCRPR = AIAN households crowded or without complete kitchen or plumbing.

NOCRPR = national total of OCRPR.

SCBTOT = AIAN households paying more than 50% of their income for housing.

NSCBTOT = national total SCBTOT.

HOUSHOR = AIAN households with an annual income less than or equal to 80% of formula median income reduced by the combination of current assisted stock and units developed under NAHASDA.

NHOUSHOR = national total of HOUSHOR.

TDC = Local Total Development Costs defined in § 1000.302.

NATDC = weighted national average for TDC.

For estimating FY 1998 allocations:

NPER = 953,254.

Page 81 of 82

NHHLE30 = 78,496.

NHH30T50 = 52,514.

NHH50T80 = 59,793.

NOCPR = 80,581.

NSCBTOT = 34,080.

NHOUSHOR = 23,840.

NEEDFUNDS = $ 353,852,890.

NATDC = $ 104,956.

7. The second iteration in computing Need allocation consists of adjusting the Need allocation computed above to take into account the $ 50,000 baseline funding for the first year only and then $ 25,000 per year for each year thereafter through FY 2002. So, if in the first Need computation you have less than the minimum Needs funding level, your Need allocation will go up. But, if you have more than the minimum Needs funding level, your Need allocation will go down to adjust for the other Need allocations going up. We can represent this by:

If NEED1 is less than MINFUNDING, then NEED = MINFUNDING.

If NEED1 is greater than or equal to MINFUNDING, then NEED = NEED1- UNDERMIN$ * [(NEED1-MINFUNDING) / OVERMIN$] --.

Where:

MINFUNDING = minimum needs funding level.

UNDERMIN$ = for all tribes with NEED1 less than MINFUNDING, sum of the differences between MINFUNDING and NEED1.

OVERMIN$ = for all tribes with NEED1 greater than or equal to

MINFUNDING, sum of the difference between NEED1 and MINFUNDING.

For estimating FY 1998 allocations:

MINFUNDING = $ 50,000.

UNDERMIN$ = $ 4,919,224.

OVERMIN$ = $ 335,022,114.

8. Now we have computed values for FCAS and NEED. This final step in computing the grant allocation is to adjust the sum of FCAS and NEED to reflect the statutory requirement that a tribe's minimum grant will not be less than that tribe's FY 1996 Operating Subsidy and Modernization funding. So, before adjusting for the minimum grant compute:

unadjGRANT = FCAS + NEED

Page 82 of 82

where both FCAS and NEED are calculated above.

9. Now, apply test to determine if the GRANT (unadjusted for FY 1996) levels is greater than or equal to FY 1996 Operating Subsidy and Modernization funding.

Let TEST = unadjGRANT-OPMOD96.

If TEST is less than 0, then GRANT = OPMOD96.

If TEST is greater than or equal to 0, then GRANT = unadjGRANT-[UNDER1996 * (TEST / OVER1996)].

Where:

OPMOD96 = funding received by tribe in FY 1996 for Operating Subsidy and Modernization

UNDER1996 = for all tribes with TEST less than 0, sum of the absolute value of TEST.

OVER1996 = for all tribes with TEST greater than or equal to 0, sum of TEST.

For estimating FY 1998 allocations:

UNDER1996 = $ 5,378,558.

OVER1996 = $ 326,095,837.

GRANT is the approximate grant amount in any given year for any given tribe.

Dated: March 6, 1998.

Kevin Emanuel Marchman,

Assistant Secretary for Public and Indian Housing.

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Dates

EFFECTIVE DATE: April 13, 1998.

Contacts

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equal to the average amount consumed per-unit per-month during the rolling base period.

Annual contributions contract (ACC). A contract under the Act between HUD and the IHA containing the terms and conditions under which the Department assists the IHA in providing decent, safe, and sanitary housing for low-income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization and/or operation of a low-income housing project under the Act, and the IHA agrees to develop, modernize and operate the project in compliance with all provisions of the ACC and the Act, and all HUD regulations and implementing requirements and procedures.

Annual income. Annual income is the anticipated total income from all sources received by the family head and spouse (even if temporarily absent) and by each additional member of the family, including all net income derived from assets, for the 12-month period following the effective date of the initial determination or reexamination of income, exclusive of certain types of income as provided in paragraph (2) of this definition.

(1) Annual income includes, but is not limited to:

(i) The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;

(ii) The net income from operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations. Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family;

(iii) Interest, dividends, and other net income of any kind from real or personal property. Expenditures for amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation is permitted only as authorized in paragraph (2) (ii) of this definition. Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family. Where the family has net family assets in excess of $5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate as determined by HUD;

(iv) The full amount of periodic payments received from social security, annuities, insurance policies, retirement funds, pensions, disability or death benefits and other similar types of periodic receipts, including a lump-sum payment for the delayed start of a periodic payment;

(v) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay (but see paragraph (2) (iii) of this definition);

(vi) Welfare assistance. If the welfare assistance payment includes an amount specifically designated for shelter and utilities that is subject to adjustment by the welfare assistance agency in accordance with the actual cost of shelter and utilities, the amount of welfare assistance income to be included as income shall consist of: (A) the amount of the allowance or grant exclusive of the amount specifically designated for shelter or utilities, plus (B) the maximum amount that the welfare assistance agency could, in fact, allow the family for shelter and utilities. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under this paragraph (1) (vi) (B) shall be the amount resulting from one application of the percentage;

(vii) Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the dwelling; and

(viii) All regular pay, special pay and allowances of a member of the Armed

62 FR 35718

Vol. 62, No. 127, Wednesday, July 2, 1997
Proposed Rules

Reporter
62 FR 35718

Federal Register* > *1997* > *July* > *Wednesday, July 2, 1997* > *Proposed Rules* > *DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) -- Office of the Assistant Secretary for Public and Indian Housing (OASPIH)

Title: Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Proposed Rule

Action: Proposed rule.

Agency

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) > Office of the Assistant Secretary for Public and Indian Housing (OASPIH)

Identifier: [Docket No. FR-4170-P-10] > RIN 2577-AB74

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24 CFR Parts 950, 953, 955, 1000, 1003 and 1005

Synopsis

[*35718] SUMMARY: This proposed rule would implement the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). NAHASDA reorganizes the system of Federal housing assistance to Native Americans by eliminating several separate programs of assistance and replacing them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance. As required by section 106(b)(2) of NAHASDA, HUD has developed this proposed rule with active tribal participation and using the procedures of the Negotiated Rulemaking Act.

Text

SUPPLEMENTARY INFORMATION:

I. Statutory Background

On October 26, 1996, President Clinton signed into law the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330) (NAHASDA). NAHASDA streamlines the process of providing housing assistance to Native Americans. Specifically, it eliminates several separate programs of assistance and replaces them with a single block grant program. Beginning on October 1, 1997, the first day of Fiscal Year (FY) 1998, a single block grant program will replace assistance previously authorized under:

1. The United States Housing Act of 1937 *(42 U.S.C. 1437 et seq.)* (1937 Act);
2. The Indian Housing Child Development Program under Section 519 of the Cranston-Gonzalez National Affordable Housing Act *(12 U.S.C. 1701z-6* note);

3. The Youthbuild Program under subtitle D of title IV of the Cranston-Gonzalez National Affordable Housing Act *(42 U.S.C. 12899* *et seq.*);

4. The Public Housing Youth Sports Program under section 520 of the Cranston-Gonzalez National Affordable Housing Act *(42 U.S.C. 11903a);*

5. The HOME Investment Partnerships Program under title II of the Cranston-Gonzalez National Affordable Housing Act *(42 U.S.C. 12721* *et seq.*); and

6. Housing assistance for the homeless under title IV of the Stewart B. McKinney Homeless Assistance Act *(42 U.S.C. 11361* *et seq.*) and the Innovative Homeless Demonstration Program under section 2(b) of the HUD Demonstration Act of 1993 *(42 U.S.C. 11301* note).

In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance.

Section 106 of NAHASDA sets out the general procedure for the implementation of the new Indian housing block grant (IHBG) program. The procedure described is a two-step process. First, section 106(a) requires the publication of a notice in the **Federal Register** not later than 90 days after enactment of NAHASDA. The purpose of the notice is to establish any requirements necessary for the transition from the provision of assistance for Indian tribes and Indian housing authorities under the 1937 Act and other related provisions of law to the provision of assistance in accordance with NAHASDA. Secondly, section 106(b) requires that HUD issue final regulations implementing NAHASDA no later than September 1, 1997. Section II of this preamble discusses the transition requirements established by HUD. The remainder of the preamble presents an overview of the development and contents of the proposed regulations.

II. Transition Requirements

On January 27, 1997 *(62 FR 3972),* HUD published the transition notice required by section 106(a) of NAHASDA. HUD subsequently amended the January 27, 1997 notice to extend the Indian Housing Plan (IHP) submission deadline to November 3, 1997 *(62 FR 8258,* February 24, 1997).

The January 27, 1997 notice focused on the information which must be included in an Indian tribe's IHP and the treatment of activities and funding under programs repealed by NAHASDA. Although section 106(b) of NAHASDA requires that HUD issue final regulations by September 1, 1997, the ″old″ system of funding expires on the first day of FY 1998 (October 1, 1997). The submission of an IHP and a determination by HUD that the IHP complies with NAHASDA is a prerequisite for funding under NAHASDA. Accordingly, the January 27, 1997 notice established IHP submission requirements in order to ensure that there is sufficient time for Indian tribes to prepare their IHPs, and for HUD to review them. Similarly, the January 27, 1997 notice provided guidance for the treatment of activities and funding under programs repealed by NAHASDA in order to permit Indian tribes to have the greatest time available under the new law to consider and prepare for the transition from the ″old″ programs to the new IHBG program.

The deadline for submission of an IHP is November 3, 1997. Indian tribes wishing to participate in the new IHBG program in FY 1998 should familiarize themselves with the transition requirements established in the **Federal Register** notices described above.

III. Negotiated Rulemaking

As described above, section 106(b) of NAHASDA requires that HUD issue final implementing regulations no later than September 1, 1997. Further, section 106(b)(2)(A) of NAHASDA provides that all regulations required under NAHASDA be issued according to the negotiated rulemaking procedure under subchapter III of chapter 5 of title 5, United States Code. The rulemaking procedure referenced is the Negotiated Rulemaking Act of 1990 *(5 U.S.C. 561*-570). Accordingly, the Secretary of HUD established the Native American Housing Assistance & Self-Determination Negotiated Rulemaking Committee (Committee) to negotiate and develop a proposed rule implementing NAHASDA.

Prior to the establishment of the Committee, HUD held a series of meetings with tribal representatives to discuss the regulatory implementation of NAHASDA. These meetings were preliminary to the formal negotiated rulemaking process required by NAHASDA. The preliminary meetings provided a valuable exchange of ideas that assisted in focusing the efforts of the Committee.

The Committee consists of 58 members. Forty-eight of these members represent geographically diverse small, medium, and large Indian tribes. There are ten HUD representatives on the Committee. Additionally, three individuals from the Federal Mediation and Conciliation Service served as facilitators. While the Committee is much larger than usually chartered under the Negotiated Rulemaking Act, its larger size was justified due to the diversity of tribal interests, as well as the number and complexity of the issues involved.

Tribal leaders recommended and the Committee agreed to operate based on consensus rulemaking and its approved charter. The protocols adopted by the Committee define ″consensus″ as general agreement demonstrated by the absence of expressed disagreement by a Committee member in regards to a particular issue. Procedures recommended by tribal leaders on the negotiated rulemaking process were also adopted by the Committee. HUD committed to using, to the maximum extent feasible consistent with its legal obligations, all consensus decisions as **[*35720]** the basis for the proposed rule. The Committee further agreed that any Committee member or his/her constituents could comment on this proposed rule. The Committee will consider all comments in drafting the final rule.

In order to complete the proposed regulations by the statutory deadline, the Committee divided itself into six workgroups. Each workgroup was charged with analyzing specified provisions of the statute and drafting any regulations it believed were necessary for implementing those provisions. The draft regulations developed by the workgroups were then brought before the full Committee for review, amendment, and approval. A seventh workgroup was assigned the task of reviewing the approved regulations for format, style, and consistent use of terminology. The seven workgroups were: (1) Preamble, Policy and Definitions; (2) IHP Preparation and Submission, Monitoring, Review and Compliance; (3) Allocation Formula; (4) Affordable Housing Activities; (5) Transition Requirements; (6) Alternative Financing; and (7) Drafting Coordination.

The first meeting of the Committee was in February of 1997. At that meeting the Committee established workgroups, a protocol for deliberations and a meeting schedule. During February, March and April 1997 the Committee met four times. The meetings were divided between workgroup sessions at which regulatory language was developed and full Committee sessions to discuss the draft regulations produced by the workgroups. Each of these meetings lasted between four and eight days. Tribal leaders were encouraged to attend the meetings and participate in the rulemaking process.

It was the Committee's policy to provide for public participation in the rulemaking. All of the Committee sessions were announced in the **Federal Register** and were open to the public.

IV. Summary of New 24 CFR Part 1000

The rule proposes to implement NAHASDA in a new 24 CFR part 1000. Part 1000 would be divided into six subparts (A through F), each describing the regulatory requirements for a different aspect of NAHASDA. For the convenience of readers, part 1000 is in Question and Answer format. Additionally, the rule will as much as practicable not repeat statutory language but rather make reference to specific provisions. A reader of the rule must therefore have the statute available while reading the rule.

The full Committee reached consensus on the individual subparts of this proposed rule. However, the Committee has yet to endorse an integrated proposed rule. The full Committee asks for public comment on the workgroup products, and suggestions regarding any modifications necessary to produce an integrated rule. The full Committee will meet to consider the public comments and to produce an integrated final rule.

The following is a brief description of the contents of each subpart:

Subpart A--General

A more explicit statutory provision is needed which authorizes the recipient to draw down grant funds in a lump sum and to retain any interest earned.

HUD construes section 204(b) of NAHASDA consistent with the above stated opinions of the Comptroller General. Accordingly, the statute permits recipients to invest grant amounts for the purposes of carrying out affordable housing activities, but this does not permit recipients to invest grant funds solely for the purpose of earning interest to augment the grant amount.

A workgroup of the Committee developed the following definition of ″Program Income″ but HUD could not agree on the underlined language:

(1) Program income is defined as any income that is realized from the disbursements of grant amounts. Program income includes income from fees for services performed from the use of real or rental of real or personal property acquired with grant funds, from the sale of commodities or items developed, acquired, etc. with grant funds, and from payments of principal and interest on loans made with grant funds. *Program income includes interest income earned on grant funds prior to disbursement.*

(2) Any program income over the amount of $ 250 per annum can be retained by a recipient provided it is used for affordable housing activities in accordance with section 202 of NAHASDA. Any program income realized that is less than $ 250 per annum shall be excluded from consideration as program income. Such funds may be retained but are not classified and treated as program income.

(3) If program income is realized from an eligible activity funded with both grant funds as well as other funds, i.e., funds that are not grant funds, then the amount of program income realized will be based on a percentage calculation that represents the proportional share of funds provided for the activity generating the program income that are grant funds.

(4) Costs incident to the generation of program income shall be deducted from gross income to determine program income.

3. Issue: Reducing Grant Amounts

Should HUD be allowed to reduce, adjust, or withdraw NAHASDA grant funds without giving notice and a hearing to a recipient?

Tribal Position: Tribal representatives felt that before the Secretary takes any actions to adjust, reduce, or withdraw grant amounts the Secretary must comply with the due process requirements set forth in section 401 of NAHASDA to give a recipient reasonable notice and an opportunity for a hearing.

HUD's Position: Section 405(c) of NAHASDA expressly permits HUD to adjust, reduce, or withdraw grant amounts in accordance with HUD's review and audits of recipients. This authority is in addition to the authority in section 401 to take actions based on the recipient's substantial noncompliance with the requirements of NAHASDA.

4. Issue: Substantial Noncompliance

How is substantial noncompliance defined under NAHASDA section 401(a) before the Secretary may terminate, reduce, or limit the availability of payments under NAHASDA or replace the TDHE?

Tribal Position: The tribal representatives proposed a definition for substantial noncompliance, as follows:

For HUD to conclude that a recipient has failed to comply substantially with any provision of NAHASDA, HUD must find:

(a) An act or omission or series of acts or omissions; or

(b) A pattern or practice or activities constituting willful noncompliance with the requirements under NAHASDA; or

(c) Criminal activity; or

(d) Such other activity or activities-

by the recipient which place the housing program at sufficient risk with the primary objectives of NAHASDA to warrant HUD taking the remedial actions set forth under sections 401 and 402 of NAHASDA.

HUD's Position: HUD disagrees with the tribal representatives' proposed definition for four reasons. First, the ″sufficient risk″ standard may prove to be essentially rudderless, leaving to HUD the question of whether actions pose such a sufficient risk, without any clear standard. Second, the standard is limited to such risk to the primary objectives of the law, which term will not necessarily cover ″any provision″ of NAHASDA, as section 401 compels. Third, subjecting *any* act or omission to the ″sufficient risk″ standard could have the unintended effect of converting minor actions to ″substantial″ ones. Fourth, the test ignores the statute's emphasis on *past* noncompliance. This statutory provision, like many others in NAHASDA, is patterned after the community development block grant (CDBG) legislation at title I of the Housing and Community Development Act of 1974, as amended *(42 U.S.C. 5301* *et seq.*). While little case law exists in this area, it is apparent that the CDBG provision in question is one which has been viewed with as much emphasis on its past nature as on substantiality (See *Kansas City v. HUD, 861 F.2d 739 (D.C.Cir. 1988)).* The proposed definition fails to take this aspect of the standard into account. HUD welcomes public comment on what would be an appropriate standard for this term or, for **[*35727]** that matter, whether the term should be defined in the regulation.

5. Issue: Performance Variable

Should a measure of performance be used as a variable within the allocation formula for NAHASDA Block Grant funds? This issue was not agreed to among tribal representatives.

Position Opposing the Use of a Performance Variable: Taking a stand against the use of a performance variable in the allocation formula does not mean taking a stand against quality performance; rather, it means taking a stand against the use of an unnecessary and penal method of evaluating how tribes serve their own people.

It is unnecessary because both the statute and the proposed compliance regulations already address how to deal with poor performance.

It is penal in that it disciplines a failing tribe, instead of focusing on assisting that tribe.

NAHASDA requires the development of a formula for the allocation of block grant funds based on need and maintenance of current housing stock. It does not mandate or even suggest that such a formula address an individual tribe's performance, presumably because NAHASDA itself deals adequately with the issue by requiring annual performance reports, providing for audits and monitoring, and specifying remedies for non-compliance with NAHASDA (including failure to expend monies on low-income activities).

The relief available to the Secretary allows him to make adjustments in future grant amounts, to require the repayment of misspent amounts, to seek civil remedies, and to appoint a replacement TDHE, among other things. If these remedies are not the same as the penalty imposed by the performance factor, then those who favor the performance factor essentially are opting for an additional penalty. If the remedies are the same, then by definition they are duplicative.

Those who favor a performance factor in the allocation formula skirt the fact that failure to perform to standard would absolutely result in the lowering of one tribe's subsequent allocations, thereby resulting in the raising of the allocation of other tribes whose performance was excellent. Such a position has merit at first blush, but fails in the final analysis, for Indian tribes do not need to raise themselves on the backs of their fallen brothers and sisters.

Technical assistance will be available to a tribe that performs poorly, but that is the case with or without the use of a performance variable, and the real trigger should come before failure, not in its wake. Supporters of the performance factor argue that the penalty comes only after the first full year of performance; they neglect to mention that it can continue to come each year, year after year, with each new application for a block grant. None of us has any experience with

Formula current assisted stock is current assisted stock as described in § 1000.324 plus housing units in the development pipeline as of September 30, 1997 when they are owned or operated by the Indian tribe or TDHE and are under management as indicated in the IHP.

§ 1000.328 -- How is the Formula Current Assisted Stock (FCAS) Component developed?

The Formula Current Assisted Stock component consists of two elements. They are:

(a) ***Operating subsidy.*** The operating subsidy consists of two variables which are:

(1) The number of low-rent FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation; and

(2) The number of Mutual Help and Turnkey III FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.

(b) ***Modernization allocation.*** Modernization allocation consists of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation.

§ 1000.330 -- How is the Section 8 criteria developed?

The Section 8 criteria includes one variable: The number of Section 8 units under contract on September 30, 1997 where the Section 8 contract has expired or is due to expire in any subsequent Fiscal Year (as shown in an Indian tribe's or TDHE's IHP) multiplied by the national per unit average for Section 8 subsidy adjusted for inflation.

§ 1000.332 -- How long will Section 8 units be counted for purposes of the formula?

Section 8 units shall continue as rental units and be included in the formula as long as they continue to be operated as low income rental units as included in the Indian tribe's or TDHE's IHP.

§ 1000.334 -- How will the formula allocation be affected if an Indian tribe or TDHE removes some or all of its Formula Current Assisted Stock from inventory?

The formula allocation will be reduced by the number of units removed from the inventory. Such information shall be indicated through the Annual Performance Report.

§ 1000.336 -- Do units under Formula Current Assisted Stock ever expire from inventory used for the formula?

Yes. Mutual Help and Turnkey III units shall be removed from the Formula Current Assisted Stock when the Indian tribe or TDHE no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise. Provided, that conveyance of each Mutual Help or Turnkey III unit occurs when a unit becomes eligible for conveyance by the terms of the MHOA and further provided that the Indian tribe or TDHE actively enforces strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment. Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units.

§ 1000.338 -- How are Formula Current Assisted Stock and Section 8 adjusted for local area costs?

There are two adjustment factors that are used to adjust the allocation of funds for the Current Assisted Stock portion of the formula. They are:

(a) Operating Subsidy as adjusted by the greater of the AEL factor or FMR factor (AELFMR); and

(b) Modernization as adjusted by the TDC factor.

§ 1000.340 -- Are IHA financed units included in the determination of Formula Current Assisted Stock?

No. If these units are not owned or operated at the time (September 30, 1997) pursuant to an ACC then they are not included in the determination of Formula Current Assisted Stock.

Subpart E-- Federal Guarantees for Financing of Tribal Housing Activities

§ 1000.401 -- What terms are used throughout this subpart?

As used throughout title VI of NAHASDA and in this subpart:

Applicant means the entity that requests a HUD guarantee under the provisions of this subpart.

Borrower means an Indian tribe or TDHE that receives funds in the form of a loan with the obligation to repay in full, with interest, and has executed notes or other obligations that evidence that transaction.

Issuer means an Indian tribe or TDHE that issues or executes notes or other obligations. An issuer can also be a borrower.

§ 1000.402 -- Are state recognized Indian tribes eligible for guarantees under title VI of NAHASDA?

Those state recognized Indian tribes that meet the definition set forth in section 4(12)(C) of NAHASDA are eligible for guarantees under title VI of NAHASDA.

§ 1000.404 -- What constitutes tribal approval to issue notes or other obligations under title VI of NAHASDA?

Tribal approval is evidenced by a written tribal resolution that authorizes the issuance of notes or obligations by the Indian tribe or a TDHE on behalf of the Indian tribe.

§ 1000.406 -- How does an Indian tribe or TDHE show that it has made efforts to obtain financing without a guarantee and cannot complete such financing in a timely manner?

The Indian tribe or TDHE shall submit a certification that states that the Indian **[*35744]** tribe has attempted to obtain financing and can not do so in a timely manner without a guarantee from the HUD. Written documentation shall be maintained by the Indian tribe or TDHE to support the certification.

§ 1000.408 -- What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

HUD shall provide that:

(a) Any loan, notes or other obligation guaranteed under title VI of NAHASDA, including the security given for the note or obligation, may be sold or assigned by the lender to any financial institution that is subject to examination and supervision by an agency of the Federal Government, any state, or the District of Columbia without destroying or otherwise negatively affecting the guarantee; and

(b) Indian tribes and housing entities are encouraged to explore creative financing mechanisms and in so doing shall not be limited in obtaining a guarantee. These creative financing mechanisms include but are not limited to:

(1) Borrowing from private or public sources or partnerships;

(2) Issuing tax exempt and taxable bonds where permitted; and

(3) Establishing consortiums or trusts for borrowing or lending, or for pooling loans.

Page 57 of 66

(a) Has carried out its eligible activities in a timely manner, has carried out its eligible activities and certifications in accordance with the requirements and the primary objective of NAHASDA and with other applicable laws and has a continuing capacity to carry out those activities in a timely manner;

(b) Whether the recipient has complied with the IHP of the grant beneficiary; and

(c) Whether the performance reports of the recipient are accurate.

§ 1000.522 -- How will HUD give notice of on-site reviews?

Whenever an on-site review is to be conducted, HUD shall give written notice to the Indian tribe and TDHE that a review will be commenced. Prior written notice will not be required in emergency situations. All notices shall state the general nature of the review.

§ 1000.524 -- What are HUD's performance measures for the review?

HUD has the authority to develop performance measures which the recipient must meet as a condition for compliance under NAHASDA. The performance measures are:

(a) Within 2 years of grant award under NAHASDA, no less than 90 percent of the grant must be obligated.

(b) The recipient has complied with the required certifications in its IHP and all policies and the IHP have been made available to the public.

(c) Fiscal audits have been conducted on a timely basis and in accordance with the requirements of the Single Audit Act, as applicable. Any deficiencies identified in the audit report have been addressed within the prescribed time period.

(d) Accurate annual performance reports were submitted to HUD within 45 days after the completion of the recipient's fiscal year.

(e) The recipient has met the IHP goals and objectives in the 1-year plan and demonstrated progress on the 5-year plan goals and objectives.

(f) The recipient has complied with the requirements of 24 CFR part 1000 and all other applicable Federal statutes and regulations.

§ 1000.526 -- What information will HUD use for its review?

In reviewing each recipient's performance, HUD may consider the following:

(a) The approved IHP and any amendments thereto;

(b) Reports prepared by the recipient;

(c) Records maintained by the recipient;

(d) Results of HUD's monitoring of the recipient's performance, including on-site evaluation of the quality of the work performed;

(e) Audit reports;

(f) Records of drawdowns of grant funds;

(g) Records of comments and complaints by citizens and organizations within the Indian area;

(h) Litigation; and

(i) Any other relevant information.

§ 1000.528 -- What adjustments may HUD make in the amount of NAHASDA annual grants under section 405 of NAHASDA?

HUD may make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe. **[*35747]**

§ 1000.530 -- What are remedies available for substantial noncompliance?

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provision of NAHASDA, HUD shall-

(1) Terminate payments under NAHASDA to the recipient;

(2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA;

(3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or

(4) In the case of noncompliance described in § 1000.534, provide a replacement TDHE for the recipient.

(b) HUD may on due notice suspend payments at any time after the issuance of the opportunity for hearing pending such hearing and final decision, to the extent HUD determines such action necessary to preclude the further expenditure of funds for activities affected by such failure to comply.

(c) If HUD determines that the failure to comply substantially with the provisions of NAHASDA is not a pattern or practice of activities constituting willful noncompliance and is a result of the limited capability or capacity of the recipient, HUD may provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA.

(d) In lieu of, or in addition to, any action described in this section, if HUD has reason to believe that the recipient has failed to comply substantially with any provision of NAHASDA, HUD may refer the matter to the Attorney General of the United States with a recommendation that appropriate civil action be instituted.

§ 1000.532 -- What hearing procedures will be used?

(a) The hearing procedures in 24 CFR part 26 shall be used.

(b) For hearings under section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act of 1975, the procedures at 24 CFR part 180 shall be used.

§ 1000.534 -- When may HUD require replacement of a TDHE?

(a) In accordance with section 402 of NAHASDA, as a condition of HUD making a grant on behalf of an Indian tribe, the Indian tribe shall agree that, notwithstanding any other provisions of law, HUD may, only in the circumstances discussed in paragraph (b) of this section, require that a replacement TDHE serve as the recipient for the Indian tribe.

(b) HUD may require a replacement TDHE for an Indian tribe only upon a determination by HUD on the record after opportunity for hearing that the recipient has engaged in a pattern or practice of activities that constitute substantial or willful noncompliance with the requirements of NAHASDA.

§ 1000.536 -- When does failure to comply substantially cease?

HUD shall confirm the existence of certain conditions regarding the recipient's compliance. Such conditions shall have been described in HUD's finding of substantial noncompliance. A recipient may request HUD to review its situation to determine if it is now in compliance.

§ 1000.336 How may an Indian tribe, TDHE, or HUD challenge data?

(a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG formula. The challenge and collection of data for this purpose is an allowable cost for IHBG funds.

(b) An Indian tribe or TDHE that has data in its possession that it contends are more accurate than data contained in the U.S. Decennial Census, and the data were collected in a manner acceptable to HUD, may submit the data and proper documentation to HUD. Beginning with the Fiscal Year 1999 allocation, in order for the challenge to be considered for the upcoming Fiscal Year allocation, documentation must be submitted by June 15. HUD shall respond to such data submittal not later than 45 days after receipt of the data and either approve or challenge the validity of such data. Pursuant to HUD's action, the following shall apply:

(1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in formula allocation. Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy by the date of formula allocation, the dispute shall be carried forward to the next funding year and resolved in accordance with the dispute resolution procedures set forth in this part for model housing activities (§ 1000.118).

(2) Pursuant to resolution of the dispute:

(i) If the Indian tribe or TDHE prevails, an adjustment to the Indian tribe's or TDHE's subsequent allocation for the subsequent year shall be made retroactive to include only the disputed Fiscal Year(s); or

(ii) If HUD prevails, no further action shall be required.

(c) In the event HUD questions that the data contained in the formula does not accurately represent the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and provide a commitment to serve the population indicated in the geographic area.

HeinOnline -- CFR 849 1998

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 226

§ 1000.118 What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income Indian families or a model housing activity?

(a) Within thirty calendar days of receiving HUD's denial of a proposal to provide assistance to non low-income Indian families or a model housing activity, the recipient may request reconsideration of the denial in writing. The request shall set forth justification for the reconsideration.

(b) Within twenty calendar days of receiving the request, HUD shall reconsider the recipient's request and either affirm or reverse its initial decision in writing, setting forth its reasons for the decision. If the decision was made by the Assistant Secretary, the decision will constitute final agency action. If the decision was made at a lower level, then paragraphs (c) and (d) of this section will apply.

(c) The recipient may appeal any denial of reconsideration by filing an appeal with the Assistant Secretary within twenty calendar days of receiving the denial. The appeal shall set forth the reasons why the recipient does not agree with HUD's decision and set forth justification for the reconsideration.

(d) Within twenty calendar days of receipt of the appeal, the Assistant Secretary shall review the recipient's appeal and act on the appeal, setting forth the reasons for the decision.

HeinOnline -- CFR 838 1998

tribes involved agree to use. The current regulation lists several suggested data sources, including tribal enrollment lists, Indian Health Service User Data, and Bureau of Indian Affairs data. This list is not exclusive, and the data used for this purpose has sometimes included U.S. Census data. For purposes of clarity, the proposed rule expanded the list of suggested data sources to explicitly include data from the U.S. Census. Five commenters objected to the use of Census data, suggesting that HUD instead utilize official enrollment data from the tribe.

Response: The change clarifies that the U.S. Census data is one of several data sources that may be used to determine tribal population. The Committee notes that the regulation does not require the use of Census data and does not preclude the use of other data, including the tribal enrollment figures recommended by the commenters. Accordingly, the Committee determined that a change to the rule was not necessary.

Comments regarding the required use of the Formula Response Form for reporting changes to FCAS. The February 25, 2005, rule proposed to add a new § 1000.315 and § 1000.319, both clarifying policies and procedures relating to the reporting of changes to FCAS. New § 1000.315 clarifies that the Formula Response Form is the only mechanism a recipient may use to report changes to the FCAS. New § 1000.319 provides that if a recipient receives an overpayment of funds because it failed to report changes on the Formula Response Form in a timely manner, the recipient must repay the funds within 5 fiscal years. Conversely, HUD has agreed to provide back funding for any undercount of units that occurred and was reported or challenged prior to October 30, 2003. In their comments, 34 tribes offered support for these rule changes. The commenters supported the change on over- and under-counting of FCAS, as well as the formula response form change at § 1000.319.

Response: The Committee appreciates the support of the comments. The final rule adopts the provisions of proposed §§ 1000.315 and 1000.319 without change.

Comments regarding the calculation of the operating subsidy component of FCAS. For clarity, the February 25, 2005, rule proposed to make a minor, non-substantive modification to § 1000.316(a)(1). The current language of the regulation provides that the first of the three variables comprising the operating subsidy component of FCAS is ″the number of low-rent FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.″ The proposed provision would simplify this provision by establishing a separate definition of the term ″national per unit subsidy″ in § 1000.302, which contains the definitions applicable to the IHBG program.

Twenty-eight commenters wrote in support of the change. However, one of the commenters identified a typographical inconsistency between § 1000.316(a)(1) and paragraphs (a)(2) and (a)(3) of § 1000.316. Specifically, the proposed rule inadvertently failed to include the same changes to paragraphs (a)(2) and (a)(3) as were proposed for paragraph (a)(1). The commenter requested that the final rule correct this error. Two other commenters submitted comments related to § 1000.316, but that were outside the scope of the proposed rule and therefore not appropriate for inclusion at this final rule stage. Specifically, one commenter advocated the participation of all Indian tribes in the Section 8 voucher program, while the other commenter advocated for increased IHBG funding.

Response: The Committee appreciates the support expressed by the commenters on the clarifying change. As noted above in this preamble, the final rule makes the necessary correction to paragraphs (a)(2) and (a)(3) of § 1000.316.

Comments regarding the FCAS modernization allocation for small Indian tribes. The February 25, 2005, rule proposed to implement a statutory amendment to NAHASDA by making various conforming changes to the IHBG regulations. Section 1003(g) of the Omnibus Indian Advancement Act (Pub. L. 106-568, approved December 27, 2000) added a new subsection **[*20021]** 302(d)(1)(B) to NAHASDA regarding operating and modernization funding for Indian tribes with Indian Housing Authorities (IHAs) that owned or operated fewer than 250 units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act). The proposed rule contained conforming changes to § 1000.316 and § 1000.340 to codify this statutory requirement.

Twenty-nine commenters offered support for the proposed regulatory changes to accommodate the statutory amendment to NAHASDA regarding operating and modernization funding for tribes that owned or operated fewer than 250 units. Five commenters, although acknowledging that the regulatory changes were statutorily based, wrote that the statutory

(a) Subject to the eligibility criteria described in paragraph (b) of this section, the minimum allocation in any fiscal year to an Indian tribe under the need component of the IHBG Formula shall equal 0.007826 percent of the available appropriations for that fiscal year after set asides.

(b) To be eligible for the minimum allocation described in paragraph (a) of this section, an Indian tribe must:

(1) Receive less than $ 200,000 under the FCAS component of the IHBG Formula for the fiscal year; and

(2) Demonstrate the presence of any households at or below 80 percent of median income.

9. In § 1000.330, revise the heading and designate the existing text of paragraph (a) and add new paragraphs (b) and (c) to read as follows:

§ 1000.330 What are the data sources for the need variables?

* * * * *

(b) The data for the need variables shall be adjusted annually beginning the year after the need data is collected, using Indian Health Service projections based upon birth and death rate data as provided by the National Center for Health Statistics.

(c) Indian tribes may challenge the data described in paragraphs (a) and (b) of this section pursuant to § 1000.336.

10. Revise § 1000.336 to read as follows:

§ 1000.336 How may an Indian tribe, TDHE, or HUD challenge data or appeal HUD formula determinations?

(a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG Formula and HUD formula determinations regarding:

(1) U.S. Census data;

(2) Tribal enrollment;

(3) Formula area;

(4) Formula Current Assisted Stock (FCAS);

(5) Total Development Cost (TDC);

(6) Fair Market Rents (FMRs); and

(7) Indian Health Service projections based upon birth and death rate data provided by the National Center for Health Statistics.

(b) An Indian tribe or TDHE may not challenge data or HUD formula determinations regarding Allowable Expense Level (AEL) and the inflation factor.

(c) The challenge and the collection of data and the appeal of HUD formula determinations is an allowable cost for IHBG funds.

(d) An Indian tribe or TDHE that seeks to appeal data or a HUD formula determination, and has data in its possession that are acceptable to HUD, may submit the data and proper documentation to HUD. Data used to challenge data contained in the U.S. Census must meet the requirements described in § 1000.330(a). Further, in order for a census challenge to be considered for the upcoming fiscal year allocation, documentation must be submitted by March 30th. **[*20026]**

(e) HUD shall respond to all challenges or appeals not later than 45 days after receipt and either approve or deny the validity of such data or challenge to a HUD formula determination in writing, setting forth the reasons for its decision. Pursuant to HUD's action, the following shall apply:

(1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in the formula allocation.

(2) Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy within 30 calendar days of receipt of HUD's denial, the Indian tribe or TDHE may request reconsideration of HUD's denial in writing. The request shall set forth justification for reconsideration.

(3) Within 20 calendar days of receiving the request, HUD shall reconsider the Indian tribe or TDHE's submission and either affirm or reverse its initial decision in writing, setting forth HUD's reasons for the decision.

(4) Pursuant to resolution of the dispute:

(i) If the Indian tribe or TDHE prevails, an adjustment to the Indian tribe's or TDHE's subsequent allocation for the subsequent year shall be made retroactive to include only the disputed fiscal year(s); or

(ii) If HUD prevails, it shall issue a written decision denying the Indian tribe or TDHE's petition for reconsideration, which shall constitute final agency action.

(f) In the event HUD questions that the data contained in the formula does not accurately represent the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and to provide a commitment to serve the population indicated in the geographic area.

11. Revise § 1000.340 to read as follows:

§ 1000.340 What if an Indian tribe is allocated less funding under the IHBG Formula than it received in Fiscal Year (FY) 1996 for operating subsidy and modernization?

(a) If an Indian tribe is allocated less funding under the modernization allocation of the formula pursuant to § 1000.316(b)(2) than the calculation of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per-unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation, the Indian tribe's modernization allocation is calculated under § 1000.316(b)(1). The remaining grants are adjusted to keep the allocation within available appropriations.

(b) If an Indian tribe is allocated less funding under the formula than an IHA received on its behalf in FY 1996 for operating subsidy and modernization, its grant is increased to the amount received in FY 1996 for operating subsidy and modernization. The remaining grants are adjusted to keep the allocation within available appropriations.

12. Revise Appendices A and B to part 1000 to read as follows:

Appendix A TO PART 1000--INDIAN HOUSING BLOCK GRANT FORMULA MECHANICS

This appendix shows the different components of the IHBG formula. The following text explains how each component of the IHBG formula is calculated.

1. The Indian Housing Block Grant (IHBG) formula is calculated by initially determining the amount a tribe receives for Formula Current Assisted Stock (FCAS) (See §§ 1000.310 and 1000.312). FCAS funding is comprised of two components, Operating subsidy (§ 1000.316(a)) and Modernization (§ 1000.316(b)).

2. The operating subsidy component is calculated based on the national per unit subsidy (§ 1000.302 National Per Unit Subsidy) for operations for each of the following types of programs--Low Rent, Homeownership (Mutual Help and Turnkey III), and Section 8. A tribe's total count of units in each of the above categories is multiplied by the relevant national per unit subsidy. That amount is summed and multiplied by a local area cost adjustment factor for management.

3. The local area cost adjustment factor for management is called AELFMR. AELFMR is the greater of a tribe's Allowable Expense Level (AEL) or Fair Market Rent (FMR) factor, where the AEL and FMR factors are

§1000.521 After the receipt of the recipient's performance report, how long does HUD have to make recommendations under section 404(c) of NAHASDA?

60 days.

§1000.522 How will HUD give notice of on-site reviews?

HUD shall generally provide a 30 day written notice of an impending on-site review to the Indian tribe and TDHE. Prior written notice will not be required in emergency situations. All notices shall state the general nature of the review.

§1000.524 What are HUD's performance measures for the review?

HUD has the authority to develop performance measures which the recipient must meet as a condition for compliance under NAHASDA. The performance measures are:

(a) Within 2 years of grant award under NAHASDA, no less than 90 percent of the grant must be obligated.

(b) The recipient has complied with the required certifications in its IHP and all policies and the IHP have been made available to the public.

(c) Fiscal audits have been conducted on a timely basis and in accordance with the requirements of the Single Audit Act, as applicable. Any deficiencies identified in audit reports have been addressed within the prescribed time period.

(d) Accurate annual performance reports were submitted to HUD within 60 days after the completion of the recipient's program year.

(e) The recipient has met the IHP goals and objectives in the 1-year plan and demonstrated progress on the 5-year plan goals and objectives.

(f) The recipient has substantially complied with the requirements of 24 CFR part 1000 and all other applicable Federal statutes and regulations.

§1000.526 What information will HUD use for its review?

In reviewing each recipient's performance, HUD may consider the following:

(a) The approved IHP and any amendments thereto;

(b) Reports prepared by the recipient;

(c) Records maintained by the recipient;

(d) Results of HUD's monitoring of the recipient's performance, including on-site evaluation of the quality of the work performed;

(e) Audit reports;

(f) Records of drawdown(s) of grant funds;

(g) Records of comments and complaints by citizens and organizations within the Indian area;

(h) Litigation; and

(i) Any other reliable relevant information which relates to the performance measures under §1000.524.

§1000.528 What are the procedures for the recipient to comment on the result of HUD's review when HUD issues a report under section 405(b) of NAHASDA?

HUD will issue a draft report to the recipient and Indian tribe within thirty (30) days of the completion of HUD's review. The recipient will have at least thirty (30) days to review and comment on the draft report as well as provide any additional information relating to the draft report. HUD shall consider the comments and any additional information provided by the recipient. HUD may also revise the draft report based on the comments and any additional information provided by the recipient. HUD shall make the recipient's comments and a final report readily available to the recipient, grant beneficiary, and the public not later than thirty (30) days after receipt of the recipient's comments and additional information.

§1000.530 What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under §1000.532 or §1000.538?

(a) The following actions are designed, first, to prevent the continuance of the performance problem(s); second, to mitigate any adverse effects or consequences of the performance problem(s); and third, to prevent a recurrence of the same or similar performance problem. The following actions, at least one of which must be taken prior to a sanction under paragraph (b), may be taken by HUD singly

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 231

or in combination, as appropriate for the circumstances:

(1) Issue a letter of warning advising the recipient of the performance problem(s), describing the corrective actions that HUD believes should be taken, establishing a completion date for corrective actions, and notifying the recipient that more serious actions may be taken if the performance problem(s) is not corrected or is repeated;

(2) Request the recipient to submit progress schedules for completing activities or complying with the requirements of this part;

(3) Recommend that the recipient suspend, discontinue, or not incur costs for the affected activity;

(4) Recommend that the recipient redirect funds from affected activities to other eligible activities;

(5) Recommend that the recipient reimburse the recipient's program account in the amount improperly expended; and

(6) Recommend that the recipient obtain appropriate technical assistance using existing grant funds or other available resources to overcome the performance problem(s).

(b) Failure of a recipient to address performance problems specified in paragraph (a) above may result in the imposition of sanctions as prescribed in §1000.532 (providing for adjustment, reduction, or withdrawal of future grant funds, or other appropriate actions), or §1000.538 (providing for termination, reduction, or limited availability of payments, or replacement of the TDHE).

§ 1000.532 What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?

(a) HUD may, subject to the procedures in paragraph (b) below, make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.

(b) Before undertaking any action in accordance with paragraphs (a) and (c) of this section, HUD will notify the recipient in writing of the actions it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. In the event the deficiency is not resolved, HUD may take any of the actions available under paragraphs (a) and (c) of this section. However, the recipient may request, within 30 days of notice of the action, a hearing in accordance with §1000.540. The amount in question shall not be reallocated under the provisions of §1000.536, until 15 days after the hearing has been held and HUD has rendered a final decision.

(c) Absent circumstances beyond the recipient's control, when a recipient is not complying significantly with a major activity of its IHP, HUD shall make appropriate adjustment, reduction, or withdrawal of some or all of the recipient's subsequent year grant in accordance with this section.

§ 1000.534 What constitutes substantial noncompliance?

HUD will review the circumstances of each noncompliance with NAHASDA and the regulations on a case-by-case basis to determine if the noncompliance is substantial. This review is a two step process. First, there must be a noncompliance with NAHASDA or these regulations. Second, the noncompliance must be substantial. A noncompliance is substantial if:

(a) The noncompliance has a material effect on the recipient meeting its major goals and objectives as described in its Indian Housing Plan;

(b) The noncompliance represents a material pattern or practice of activities constituting willful noncompliance with a particular provision of NAHASDA or the regulations, even if a single instance of noncompliance would not be substantial;

(c) The noncompliance involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted by the recipient for a material activity; or

Appellate Case: 14-1331 Document: 01019547945 Date Filed: 01/04/2016 Page: 232

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Principles of Federal Appropriations Law

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Volume I

This volume supersedes the Volume I, Second Edition of the Principles of Federal Appropriations Law, 1991.

On August 6, 2010, the web versions of the Third Edition of the Principles of Federal Appropriation Law, Volumes I, II and III, were reposted to include updated active electronic links to GAO decisions. Additionally, the Third Edition's web based Index/Table of Authorities (Index/TOA) was replaced by an Index/TOA that incorporated information from Volume I, II and III. These four documents can be used independently or interactively. To use the documents interactively, click on http://www.gao.gov/special.pubs/redbook1.html and you will be directed to brief instructions regarding interactive use.

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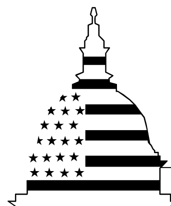

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included funds for emergency energy assistance grants. Since the program was intended to provide assistance for increased heating fuel costs, and Congress did not want the funds to be used to buy air conditioners, the appropriation specified that awards could not be made after June 30, 1980.[2] Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

Finally, Congress may pass a law to rescind the unobligated balance of a fixed (annual or multiple year) appropriation at any time prior to the accounts closing.[3] The law may be passed at the initiation of the President pursuant to the impoundment procedures (see discussion in Chapter 1, section D.3) or by Congress as part of its regular legislative process.

b. Multiple Year Appropriations

Multiple year appropriations are available for obligation for a definite period in excess of one fiscal year. 37 Comp. Gen. 861, 863 (1958). For example, if a fiscal year 2005 appropriation act includes an appropriation account that specifies that it shall remain available until September 30, 2006, it is a 2-year appropriation. As a more specific illustration, the appropriation accounts for military construction are typically 5-year appropriations.[4]

Apart from the extended period of availability, multiple year appropriations are subject to the same principles applicable to annual appropriations and do not present any special problems.

c. No-Year Appropriations

A no-year appropriation is available for obligation without fiscal year limitation. For an appropriation to be considered a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 1301(c). The standard language used to make a no-year appropriation is "to remain available until expended." 40 Comp. Gen. 694, 696 (1961); 3 Comp. Dec. 623, 628 (1897); B-279886, Apr. 28, 1998; B-271607, June 3, 1996.

[2] Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (Nov. 27, 1979). Due to a severe heat wave in the summer of 1980, the program was expanded to include fans and the appropriation was subsequently extended to the full fiscal year Pub. L. No. 96-321, 94 Stat. 1001 (Aug. 4, 1980).

[3] *E.g.*, Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559, 571, 591–593 (Apr. 16, 2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 106, 107 (Feb. 20, 2003).

[4] *See*, *e.g.*, the Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (Nov. 5, 2001).

U. S. Department of Housing and Urban Development
Public and Indian Housing

Special Attention of: ONAP Administrators; Tribes; and Tribally Designated Housing Entities	**Notice** PIH 2009 - 50 (ONAP) Issued: December 3, 2009 Expires: December 31, 2010 Cross Reference(s): 24 CFR PART 1000

Subject: Statutory Changes to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)

1. Purpose

The purpose of this Notice is to provide information on how HUD will address amendments made to the Native American Housing Assistance and Self-Determination Act (NAHASDA) by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, and earlier statutory amendments to NAHASDA.

2. Introduction and Background

On October 14, 2008, the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Public Law 110-411) (NAHASDA Reauthorization Act or NRA) became law. In 1998, 2000, 2002, 2004, and 2005, other amendments to NAHASDA also became law.

Compliance with these statutory provisions was required upon enactment. In this Notice, HUD is highlighting certain amendments that may be the subject of upcoming negotiated rulemaking.

Rulemaking is required whenever the Department determines it is necessary for HUD to establish binding requirements or definitions in the course of implementing a statutory provision. Conforming regulations are required when NAHASDA regulations need to be updated to align the regulatory language to the statutory language.

The Department has identified those provisions of the NRA and the earlier statutory amendments that require a conforming regulation, and those provisions that the Department has determined require rulemaking.

3. Consultation with Tribal Governments

In accordance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," the Department's Government-to-Government Tribal Consultation Policy

(published in the *Federal Register* on September 28, 2001), and section 105 of the NAHASDA Reauthorization Act, the Secretary shall establish a negotiated rulemaking committee to make recommendations for proposed regulations to implement the NRA's provisions, as well as certain earlier NAHASDA statutory amendments. In addition, HUD received comments from the National American Indian Housing Council and other organizations on how certain statutory provisions should be addressed. All comments received were given serious consideration.

4. Process

A negotiated rulemaking committee is being established through a series of *Federal Register* notices, and will meet periodically. The dates and places of such meetings will be announced to the public through *Federal Register* notices.

5. Structure of this Notice

Amendments to NAHASDA are listed below in reverse chronological order, and by Public Law number and year of passage. Many of the earlier NAHASDA amendments have been addressed by other Public and Indian Housing (PIH) notices. Examples are Notices PIH 2003-2, PIH 2003-3, and, more recently, PIH 2009-14. If a statutory provision requires that additional guidance be issued, that information has been noted. An index to the amendments is listed in Appendix A of the Notice.

6. Amendments to NAHASDA

a. **NAHASDA Reauthorization Act Amendments to NAHASDA**: The following discusses the implementation of the 2008 statutory amendments to NAHASDA. New language in each section is **bolded**.

1. The NRA amends paragraphs (6) and (7) of section 2 of NAHASDA, "Congressional Findings," by striking "should" and replacing it with "shall" in both paragraphs. The sentences now read:

   (6) the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal Government **shall** work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members; and
   (7) Federal assistance to meet these responsibilities **shall** 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 or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.).

   A conforming regulation is required at 24 CFR 1000.2.

2. The NRA amends section 4 of NAHASDA by adding a new paragraph (8) entitled "Housing Related Community Development" and redesignating paragraphs (8) through (21) as (9) through (22).
   The new paragraph states:

   (A) IN GENERAL – The term 'housing related community development' means any facility, community building, business, activity, or infrastructure that –
   (i) Is owned by an Indian tribe or a tribally designated housing entity;
   (ii) Is necessary to the provision of housing in an Indian area; and
   (iii)
   (I) would help an Indian tribe or tribally designated housing entity to reduce the cost of construction of Indian housing;
   (II) would make housing more affordable, accessible, or practicable in an Indian area; or
   (III) would otherwise advance the purposes of this Act.
   (B) EXCLUSION – The term 'housing and community development' does not include any activity conducted by any Indian tribe under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)'.

   A conforming regulation is required at 24 CFR 1000.10.

   TITLE I—BLOCK GRANTS AND GRANT REQUIREMENTS

3. The NRA amends section 101(a) of NAHASDA which now reads as follows:

   (a) AUTHORITY –
   (1) **IN GENERAL – For each** fiscal year, the Secretary shall (to the extent amounts are made available to carry out this Act) make grants under this section on behalf of Indian tribes—
   (A) To carry out affordable housing activities under subtitle A of title II; and
   (B) To carry out self-determined housing activities for tribal communities programs under subtitle B of that title.
   (2) PROVISION OF AMOUNTS- Under such a grant on behalf of an Indian tribe, the Secretary shall provide the grant amounts for the tribe directly to the recipient for the tribe.

   No conforming regulation is required.

4. The NRA amends section 101 of NAHASDA by adding a new (j), which now reads as follows:

   (j) FEDERAL SUPPLY SOURCES- For purposes of section 501 of title 40, United States Code, on election by the applicable Indian tribe--

(1) Each Indian tribe or tribally designated housing entity shall be considered to be an Executive agency in carrying out any program, service, or other activity under this Act; and
(2) **Each Indian tribe or tribally designated housing entity and each employee of the Indian tribe or tribally designated housing entity shall have access to sources of supply on the same basis as employees of an Executive agency**.

Tribes and tribally designated housing entities should consult with the General Services Administration for information on the Federal Supply program. Information on the GSA Schedules Program (also referred to as Multiple Award Schedules and Federal Supply Schedules) can be obtained on the GSA website. Go to www.gsa.gov and select the GSA Schedules link under the Purchasing Program tab.

Note that the administrative requirements under 24 CFR Part 85 apply. The Indian Preference requirements outlined in 24 CFR 1000.52 continue to apply. Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises. HUD will issue general guidance to assist tribes on how the GSA schedule can work in the Indian Housing Block Grant program.

5. The NRA amends section 101 of NAHASDA to add a new (k), which now reads as follows:

(k) Tribal Preference in Employment and Contracting- Notwithstanding any other provision of law, with respect to any grant (or portion of a grant) made on behalf of an Indian tribe under this Act that is intended to benefit 1 Indian tribe, the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives the benefit shall apply with respect to the administration of the grant (or portion of a grant).

Rulemaking is required to define the scope of this provision.

6. The NRA amends section 102(a)(1) of NAHASDA, to read as follows:

(1)(A) for an Indian tribe to submit to the Secretary, by not later than 75 days before the beginning of each tribal program year, a 1-year housing plan for the Indian tribe; or

This provision will require the issuance of a PIH Notice that will provide additional information on the cumulative changes to the Indian Housing Plan (IHP) process. Consultation has and is being conducted on this process. Conforming regulations are required at 24 CFR 1000.201, 24 CFR 1000.214, and 24 CFR 1000.216.

7. The NRA amends section 102(b) of NAHASDA by striking the requirement for a 5-YEAR PLAN.

This provision will require the issuance of a PIH Notice that will include a revised IHP and provide additional information on the cumulative changes to the IHP process. Consultation has and is being conducted on this process. Conforming regulations are required at 24 CFR 1000.220 and 24 CFR 1000.524(e).

8. The NRA amends section 102 of NAHASDA by revising and renumbering the 1-Year Plan Requirement as subsection 102(b), which now reads as follows:

(b) 1-YEAR PLAN REQUIREMENT-
(1) IN GENERAL- A housing plan of an Indian tribe under this section shall--
(A) be in such form as the Secretary may prescribe; and
(B) contain the information described in paragraph (2).
(2) REQUIRED INFORMATION- A housing plan shall include the following information with respect to the tribal program year for which assistance under this Act is made available:
(A) DESCRIPTION OF PLANNED ACTIVITIES- A statement of planned activities, including--
(i) the types of household to receive assistance;
(ii) the types and levels of assistance to be provided;
(iii) the number of units planned to be produced;
(iv) a description of any housing to be demolished or disposed of;
(v) a timetable for the demolition or disposition; and
(vi) any other information required by the Secretary with respect to the demolition or disposition;
(vii) a description of the manner in which the recipient will protect and maintain the viability of housing owned and operated by the recipient that was developed under a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.); and
(viii) outcomes anticipated to be achieved by the recipient.
(B) STATEMENT OF NEEDS- A statement of the housing needs of the low-income Indian families residing in the jurisdiction of the Indian tribe, and the means by which those needs will be addressed during the applicable period, including--
(i) a description of the estimated housing needs and the need for assistance for the low-income Indian families in the jurisdiction, including a description of the manner in which the geographical distribution of assistance is consistent with the geographical needs and needs for various categories of housing assistance; and
(ii) a description of the estimated housing needs for all Indian families in the jurisdiction.
(C) FINANCIAL RESOURCES- An operating budget for the recipient, in such form as the Secretary may prescribe, that includes--
(i) an identification and description of the financial resources reasonably available to the recipient to carry out the purposes of this Act,

including an explanation of the manner in which amounts made available will leverage additional resources; and

(ii) the uses to which those resources will be committed, including eligible and required affordable housing activities under title II and administrative expenses.

(D) CERTIFICATION OF COMPLIANCE- Evidence of compliance with the requirements of this Act, including, as appropriate--

(i) a certification that, in carrying out this Act, the recipient will comply with the applicable provisions of title II of the Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.) and other applicable Federal laws and regulations;

(ii) a certification that the recipient will maintain adequate insurance coverage for housing units that are owned and operated or assisted with grant amounts provided under this Act, in compliance with such requirements as the Secretary may establish;

(iii) a certification that policies are in effect and are available for review by the Secretary and the public governing the eligibility, admission, and occupancy of families for housing assisted with grant amounts provided under this Act;

(iv) a certification that policies are in effect and are available for review by the Secretary and the public governing rents and homebuyer payments charged, including the methods by which the rents or homebuyer payments are determined, for housing assisted with grant amounts provided under this Act;

(v) a certification that policies are in effect and are available for review by the Secretary and the public governing the management and maintenance of housing assisted with grant amounts provided under this Act; and

(vi) a certification that the recipient will comply with section 104(b).

This provision will require the issuance of a PIH Notice that will include a revised IHP and provide additional information on the cumulative changes to the IHP process. Consultation has and is being conducted on this process. No conforming regulation is required. The revisions to section 102(b)(2)(D) require no changes in the nondiscrimination requirements at 24 CFR 1000.12, which include but are not limited to compliance with section 504 of the Rehabilitation Act of 1973.

9. The NRA amends section 103(d), “REVIEW OF PLANS,” of NAHASDA to change the requirements from fiscal year to tribal program year, and to remove the references to the five-year plan. It now reads as follows:

(d) UPDATES TO PLAN- After a plan under section 102 has been submitted for an Indian tribe for any **tribal program** year, the tribe may comply with the provisions of such section for any succeeding **tribal program** year by submitting only such information regarding such changes as may be necessary to update the plan previously submitted.

This provision will require the issuance of a PIH Notice that will include a revised IHP and provide additional information on the cumulative changes to the IHP process. Consultation has and is being conducted on this process. No conforming regulation is required.

10. The NRA amends section 103 of NAHASDA by striking subsection (e), and replacing it with a new (e), "SELF-DETERMINED ACTIVITIES PROGRAM," which reads as follows:

(e) SELF-DETERMINED ACTIVITIES PROGRAM- Notwithstanding any other provision of this section, the Secretary—
(1) shall review the information included in an Indian housing plan pursuant to subsections (b)(4) and (c)(7) only to determine whether the information is included for purposes of compliance with the requirement under section 232(b)(2); and
(2) may not approve or disapprove an Indian housing plan based on the content of the particular benefits, activities, or results included pursuant to subsections (b)(4) and (c)(7).

This provision concerns review of information in a recipient's IHP on self-determined activities. Recipients are not required to include this information in their IHP. A technical correction is needed to strike this provision from the statute.

11. The NRA amends section 104(a), "TREATMENT OF PROGRAM INCOME AND LABOR STANDARDS," by adding a new paragraph (4), which reads as follows:

(4) EXCLUSION FROM PROGRAM INCOME OF REGULAR DEVELOPER'S FEES FOR LOW-INCOME HOUSING TAX CREDIT PROJECTS- Notwithstanding any other provision of this Act, any income derived from a regular and customary developer's fee for any project that receives a low-income housing tax credit under section 42 of the Internal Revenue Code of 1986, and that is initially funded using a grant provided under this Act, shall not be considered to be program income if the developer's fee is approved by the State housing credit agency.

No conforming regulation is required.

12. The NRA amends section 106, "REGULATIONS," of NAHASDA at (b)(2)(B)(i), and adds 2 new provisions, at 106(b)(2)(C) and (D), which read as follows:

(B) COMMITTEE-
(i) IN GENERAL- **Not later than 180 days after the date of enactment of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 and any other Act to reauthorize this Act, the Secretary** shall establish a negotiated rulemaking committee, in accordance with the procedures

under that subchapter, for the development of proposed regulations under subparagraph (A).

(C) SUBSEQUENT NEGOTIATED RULEMAKING- The Secretary shall—

(i) initiate a negotiated rulemaking in accordance with this section by not later than 90 days after the date of enactment of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 and any other Act to reauthorize this Act; and

(ii) promulgate regulations pursuant to this section by not later than 2 years after the date of enactment of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 and any other Act to reauthorize this Act.

(D) REVIEW- Not less frequently than once every 7 years, the Secretary, in consultation with Indian tribes, shall review the regulations promulgated pursuant to this section in effect on the date on which the review is conducted.

No conforming regulation is required.

TITLE II---AFFORDABLE HOUSING ACTIVITIES

13. The NRA amends section 201(b) of NAHASDA, "ELIGIBLE FAMILIES," at paragraphs (1), (2), (3) and (4) to read as follows:

(1) IN GENERAL- Except as provided under paragraphs (2) and (4), **and except with respect to loan guarantees under the demonstration program under title VI**, assistance under eligible housing activities under this Act shall be limited to low-income Indian families on Indian reservations and other Indian areas.

(2) EXCEPTION TO LOW-INCOME REQUIREMENT-

(A) EXCEPTION TO REQUIREMENT- Notwithstanding paragraph (1), a recipient may provide housing or housing assistance through affordable housing activities for which a grant is provided under this Act to any family that is not a low-income family, to the extent that the Secretary approves the activities due to a need for housing for those families that cannot reasonably be met without that assistance.

(B) **LIMITS- The Secretary** shall establish limits on the amount of assistance that may be provided under this Act for activities for families who are not low-income families.

(3) **ESSENTIAL** FAMILIES- Notwithstanding paragraph (1), a recipient may provide housing or housing assistance provided though affordable housing activities assisted with grant amounts under this Act for a family on an Indian reservation or other Indian area if the recipient determines that the presence of the family on the Indian reservation or other Indian area is essential to the well-being of Indian families and the need for housing for the family cannot reasonably be met without such assistance.

(4) LAW ENFORCEMENT OFFICERS-

(A) The officer-

(i) Is employed on a full-time basis by the Federal Government or a State, county, **or other unit of local government**, or lawfully recognized tribal government; and

Over-income essential families can now include both Indian and non-Indian families. Over-income families under the loan guarantees demonstration program under title VI are eligible. In addition, these families are eligible for any housing or housing assistance eligible under NAHASDA and approved by the Secretary based on a need for housing for those families that cannot be met without the assistance. Previously, assistance was limited to homeownership activities, model activities and loan guarantee activities.

Law enforcement officers can be provided housing or housing assistance if they are employed on a full-time basis by any other unit of local government. Previously, there was a limitation to the Federal Government, or a state, county or lawfully recognized tribal government. Conforming regulations are required at 24 CFR 1000.104, 1000.106, 1000.108 and 1000.110.

14. The NRA amends section 202 of NAHASDA, “ELIGIBLE AFFORDABLE HOUSING ACTIVITIES,” in the matter preceding paragraph (1), in paragraph (2), “DEVELOPMENT,” in paragraph (4), “HOUSING MANAGEMENT SERVICES,” and by adding a new paragraph (9), RESERVE ACCOUNTS.” The section now reads as follows:

Affordable housing activities under this title are activities, in accordance with the requirements of this title, **to develop, operate, maintain, or support** affordable housing for rental or homeownership, or to provide housing services with respect to affordable housing, through the following activities:

(2) DEVELOPMENT- The acquisition, new construction, reconstruction, or moderate or substantial rehabilitation of affordable housing, which may include real property acquisition, site improvement, **development and rehabilitation of utilities, necessary infrastructure**, and utility services, conversion, demolition, financing, administration and planning, improvement to achieve greater energy efficiency, **mold remediation**, and other related activities.

(4) HOUSING MANAGEMENT SERVICES- The provision of management services for affordable housing, including preparation of work specifications, **the costs of operation and maintenance of units developed with funds provided under this Act,** and management of affordable housing projects.

(9) RESERVE ACCOUNTS-

(A) IN GENERAL- Subject to subparagraph (B), the deposit of amounts, including grant amounts under section 101, in a reserve account established for an Indian tribe only for the purpose of accumulating amounts for administration and planning relating to affordable housing activities under this section, in accordance with the Indian housing plan of the Indian tribe.

(B) MAXIMUM AMOUNT- A reserve account established under subparagraph (A) shall consist of not more than an amount equal to ¼ of the 5-year average

of the annual amount used by a recipient for administration and planning under paragraph (2).

The provisions of the introduction and (2) DEVELOPMENT and (4) HOUSING MANAGEMENT SERVICES do not require conforming regulations. The new provision on reserves will require rulemaking to determine the requirements for reserve accounts.

15. The NRA amends section 203 of NAHASDA, "PROGRAM REQUIREMENTS," by adding new paragraphs (f) and (g), which read as follows:

(f) USE OF GRANT AMOUNTS OVER EXTENDED PERIODS-
(1) IN GENERAL- To the extent that the Indian housing plan for an Indian tribe provides for the use of amounts of a grant under section 101 for a period of more than 1 fiscal year, or for affordable housing activities for which the amounts will be committed for use or expended during a subsequent fiscal year, the Secretary shall not require those amounts to be used or committed for use at any time earlier than otherwise provided for in the Indian housing plan.
(2) CARRYOVER- Any amount of a grant provided to an Indian tribe under section 101 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.
(g) DE MINIMIS EXEMPTION FOR PROCUREMENT OF GOODS AND SERVICES- Notwithstanding any other provision of law, a recipient shall not be required to act in accordance with any otherwise applicable competitive procurement rule or procedure with respect to the procurement, using a grant provided under this Act, of goods and services the value of which is less than $5,000.

Section 203(f) requires a conforming regulation to remove 24 CFR 1000.524(a). Section 203(g) does not require a conforming regulation. PIH Notice 2009-14, dated May 18, 2009, has been issued. It provides additional information on the de minimis exemption.

16. The NRA amends section 205 of NAHASDA, "LOW-INCOME REQUIREMENT AND INCOME TARGETING," by adding a new subsection (c), which reads as follows:

(c) APPLICABILITY- The provisions of paragraph (2) of subsection (a) regarding binding commitments for the remaining useful life of property shall not apply to a family or household member who subsequently takes ownership of a homeownership unit.

Binding commitments no longer apply to a family or household member who subsequently takes ownership of a homeownership unit. Section 205(c) requires a conforming regulation to amend 24 CFR 1000.142. The NAHASDA Guidance on useful life and binding commitments will also be revised.

17. The NRA amends section 208(a) of NAHASDA, "AVAILABILITY OF RECORDS," to read as follows:

    (a) PROVISION OF INFORMATION- Notwithstanding any other provision of law, except as provided in subsection (b), the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to Indian tribes or tribally designated housing entities regarding the criminal conviction records of **applicants for employment, and of** adult applicants for, or tenants of, housing assisted with grant amounts provided to such tribe or entity under this Act for purposes of applicant screening, lease enforcement, and eviction.

    A conforming regulation is required to amend 24 CFR 1000.150.

18. The NRA creates a new Subtitle B under Title II of NAHASDA, "Self-Determined Housing Activities for Tribal Communities," which reads as follows:

    SEC. 231. PURPOSE.
    The purpose of this subtitle is to establish a program for self-determined housing activities for the tribal communities to provide Indian tribes with the flexibility to use a portion of the grant amounts under section 101 for the Indian tribe in manners that are wholly self-determined by the Indian tribe for housing activities involving construction, acquisition, rehabilitation, or infrastructure relating to housing activities or housing that will benefit the community served by the Indian tribe.

    SEC. 232. PROGRAM AUTHORITY.
    (a) DEFINITION OF QUALIFYING INDIAN TRIBE- In this section, the term "qualifying Indian tribe" means, with respect to a fiscal year, an Indian tribe or tribally designated housing entity--
    (1) to or on behalf of which a grant is made under section 101;
    (2) that has complied with the requirements of section 102(b)(6); and
    (3) that, during the preceding 3-fiscal-year period, has no unresolved significant and material audit findings or exceptions, as demonstrated in--
    (A) the annual audits of that period completed under chapter 75 of title 31, United States Code (commonly known as the 'Single Audit Act'); or
    (B) an independent financial audit prepared in accordance with generally accepted auditing principles.
    (b) AUTHORITY- Under the program under this subtitle, for each of fiscal years 2009 through 2013, the recipient for each qualifying Indian tribe may use the amounts specified in subsection (c) in accordance with this subtitle.
    (c) AMOUNTS- With respect to a fiscal year and a recipient, the amounts referred to in subsection (b) are amounts from any grant provided under section 101 to the recipient for the fiscal year, as determined by the recipient, but in no case exceeding the lesser of--

(1) an amount equal to 20 percent of the total grant amount for the recipient for that fiscal year; and
(2) $2,000,000.

SEC. 233. USE OF AMOUNTS FOR HOUSING ACTIVITIES.

(a) ELIGIBLE HOUSING ACTIVITIES.—Any amounts made available for use under this subtitle by a recipient for an Indian tribe shall be used only for housing activities, as selected at the discretion of the recipient and described in the Indian housing plan for the Indian tribe pursuant to section 102(b)(6), for the construction, acquisition, or rehabilitation of housing or infrastructure in accordance with section 202 to provide a benefit to families described in section 201(b)(1).
(b) PROHIBITION ON CERTAIN ACTIVITIES.—Amounts made available for use under this subtitle may not be used for commercial or economic development.

SEC. 234. INAPPLICABILITY OF OTHER PROVISIONS.

(a) IN GENERAL.—Except as otherwise specifically provided in this Act, title I, subtitle A of title II, and titles III through VIII shall not apply to—
(1) the program under this subtitle; or
(2) amounts made available in accordance with this subtitle.
(b) APPLICABLE PROVISIONS.—The following provisions of titles I through VIII shall apply to the program under this subtitle and amounts made available in accordance with the subtitle:
(1) Section 101(c) (relating to local cooperation agreements).
(2) Subsections (d) and (e) of section 101 (relating to tax exemption).
(3) Section 101(j) (relating to Federal supply sources).
(4) Section 101(k) (relating to tribal preference in employment and contracting).
(5) Section 102(b)(4) (relating to certification of compliance).
(6) Section 104 (relating to treatment of program income and labor standards).
(7) Section 105 (relating to environmental review).
(8) Section 201(b) (relating to eligible families).
(9) Section 203(c) (relating to insurance coverage).
(10) Section 203(g) (relating to a de minimis exemption for procurement of goods and services).
(11) Section 206 (relating to treatment of funds).
(12) Section 209 (relating to noncompliance with affordable housing requirement).
(13) Section 401 (relating to remedies for noncompliance).
(14) Section 408 (relating to public availability of information).
(15) Section 702 (relating to 50-year leasehold interests in trust or restricted lands for housing purposes).

SEC. 235. REVIEW AND REPORT

(a) REVIEW.—During calendar year 2011, the Secretary shall conduct a review of the results achieved by the program under this subtitle to determine—

(1) the housing constructed, acquired or rehabilitated under the program;

(2) the effects of the housing described in paragraph (1) on costs to low-income families of affordable housing;

(3) the effectiveness of each recipient in achieving the results intended to be achieved, as described in the Indian housing plan for the Indian tribe; and

(4) the need for, and effectiveness of, extending the duration of the program and increasing the amount of grants under section 101 that may be used under the program.

(b) REPORT.—Not later than December 31, 2011, the Secretary shall submit to Congress a report describing the information obtained pursuant to the review under subsection (a) (including any conclusions and recommendations of the Secretary with respect to the program under this subtitle), including—

(1) recommendations regarding extension of the program for subsequent fiscal years and increasing the amounts under section 232(c) that may be used under the program; and

(2) recommendations for—

(A)

(i) specific Indian tribes or recipients that should be prohibited from participating in the program for failure to achieve results; and

(ii) the period for which such a prohibition should remain in effect; or

(B) standards and procedures by which Indian tribes or recipients may be prohibited from participating in the program for failure to achieve results.

(c) PROVISION OF INFORMATION TO SECRETARY.—Notwithstanding any other provision of this Act, recipients participating in the program under this subtitle shall provide such information to the Secretary as the Secretary may request, in sufficient detail and in a timely manner sufficient to ensure that the review and report required by this section is accomplished in a timely manner.

No conforming regulation is required. A PIH notice will be issued that provides additional information regarding the new demonstration program. HUD will develop a notice providing guidance on the demonstration program and consult with tribes on its content.

Sections 232 and 233 require technical corrections because the cross-references to 102(b)(6) do not exist. The proper cross-reference is 102(b)(2)(D).

Section 234 requires two technical corrections: the cross reference in paragraph (5) to 102(b)(4) does not exist, nor does the provision referenced at paragraph (11). The proper cross-reference is 102(b)(2)(D). Section 234(b)(11) should be struck, which will require re-numbering of paragraphs 234(b)(12)-(15).

Section 235 will require notice under the Paperwork Reduction Act to advise recipients of the reporting requirements. A technical correction is also needed in Section 235 to clarify the reporting deadline date, as the program is authorized through 2013.

TITLE III---ALLOCATION OF GRANT AMOUNTS

19. The NRA amends section 302(a) and (b) of NAHASDA, "ALLOCATION FORMULA," to read as follows:

(a) ESTABLISHMENT-

(1) IN GENERAL.—The Secretary shall, by regulations issued not later than the expiration of the 12-month period beginning on the date of the enactment of this Act, in the manner provided under section 106, establish a formula to provide for allocating amounts available for a fiscal year for block grants under this Act among Indian tribes in accordance with the requirements of this section.

(2) STUDY OF NEED DATA.—

(A) IN GENERAL.—The Secretary shall enter into a contract with an organization with expertise in housing and other demographic data collection methodologies under which the organization, in consultation with Indian tribes and Indian organizations, shall—

(i) assess existing data sources, including alternatives to the decennial census, for use in evaluating the factors for determination of need described in subsection (b); and

(ii) develop and recommend methodologies for collecting data on any of those factors, including formula area, in any case in which existing data is determined to be insufficient or inadequate, or fails to satisfy the requirements of this Act.

(B) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as are necessary to carry out this section, to remain available until expended.

(b) FACTORS FOR DETERMINATION OF NEED- The formula shall be based on factors that reflect the need of the Indian tribes and the Indian areas of the tribes for assistance for affordable housing activities, including the following factors:

(1)

(A) The number of low-income housing dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), pursuant to a contract between an Indian housing authority for the tribe and the Secretary, that are owned or operated by a recipient on the October 1 of the calendar year immediately preceding the year for which funds are provided, subject to the condition that such a unit shall not be considered to be a low-income housing dwelling unit for purposes of this section if—

(i) the recipient ceases to possess the legal right to own, operate, or maintain the unit; or

(ii) the unit is lost to the recipient by conveyance, demolition, or other means.

(B) If the unit is a homeownership unit not conveyed within 25 years from the date of full availability, the recipient shall not be considered to have lost the legal right to own, operate, or maintain the unit if the unit has not been conveyed to the homebuyer for reasons beyond the control of the recipient.
(C) If the unit is demolished and the recipient rebuilds the unit within 1 year of demolition of the unit, the unit may continue to be considered a low-income housing dwelling unit for the purposes of this paragraph.
(D) In this paragraph, the term 'reasons beyond the control of the recipient' means, after making reasonable efforts, there remain—
(i) delays in obtaining or the absence of title status reports;
(ii) incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance;
(iii) clouds on title due to probate or intestacy or other court proceedings; or
(iv) any other legal impediment.
(E) Subparagraphs (A) through (D) shall not apply to any claim arising from a formula current assisted stock calculation or count involving an Indian housing block grant allocation for any fiscal year through fiscal year 2008, if a civil action relating to the claim is filed by not later than 45 days after the date of enactment of this subparagraph.

Section 302(a) does not require a conforming regulation. A conforming regulation is required to implement section 302(b). Conforming regulations are required at 24 CFR 1000.312, 24 CFR 1000.318, and 24 CFR 1000.322. Pursuant to 24 CFR 1000.306(b), not later than May 21, 2012, the IHBG Formula will be reviewed and any necessary changes will be made with respect to funding under the Formula Current Assisted Stock component.

TITLE IV---COMPLIANCE, AUDITS, AND REPORTS

20. The NRA amends section 401(a) of NAHASDA by adding a new number (2), "SUBSTANTIAL NONCOMPLIANCE," and by redesignating paragraphs (2) and (3) as (3) and (4). Paragraph (2) now reads as follows:

(2) SUBSTANTIAL NONCOMPLIANCE- The failure of a recipient to comply with the requirements of section 302(b)(1) regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for purposes of this title.

A conforming regulation is required at 24 CFR 1000.534.

21. The NRA amends section 403(b) of NAHASDA, "MONITORING OF COMPLIANCE," by adding in the second sentence "an appropriate level." It now reads as follows:

(b) PERIODIC MONITORING. Not less frequently than annually, each recipient shall review the activities conducted and housing assisted under this Act to assess compliance with the requirements of this Act. Such review shall include **an appropriate level of** onsite inspection of housing to determine compliance with applicable requirements. The results of each review shall be included in the performance report of the recipient submitted to the Secretary under section 404 and made available to the public.

Rulemaking is required to determine the appropriate level of onsite inspections.

22. The NRA amends section 404(b) of NAHASDA, "PERFORMANCE REPORTS," to change the language in paragraphs (2) and (3), and by striking paragraph (4). This subsection now reads as follows:

(c) CONTENT---Each report under this section for a fiscal year shall---
(1) describe the use of grant amounts provided to the recipient for such fiscal year;
(2) assess the relationship of such use to the **planned activities** identified in the Indian housing plan of the grant beneficiary; and
(3) indicate the programmatic accomplishments of the recipient**.**

This provision will require the issuance of a PIH Notice that will include a revised Annual Performance Report (APR) and provide additional information on the cumulative changes to the APR process. Consultation has and is being conducted on this process. No conforming regulation is required.

TITLE V---TERMINATION OF ASSISTANCE FOR INDIAN TRIBES UNDER INCORPORATED PROGRAMS

23. The NRA amends Title V of NAHASDA by adding a new section 509, "EFFECT ON HOME INVESTMENTS PARTNERSHIP ACT," which reads as follows:

Sec. 509. EFFECT ON HOME INVESTMENT PARTNERSHIPS ACT. Nothing in this Act or an amendment made by this Act prohibits or prevents any participating jurisdiction (within the meaning of the HOME Investment Partnerships Act (42 U.S.C. 1272l et seq.)) from providing any amounts made available to the participating jurisdiction under that Act (42 U.S.C. 1272l et seq.) to an Indian tribe or a tribally designated housing entity for use in accordance with that Act (42 U.S.C. 1272l et seq.).

No conforming regulation is required.

TITLE VI---GUARANTEED LOANS TO FINANCE TRIBAL COMMUNITY AND ECONOMIC DEVELOPMENT ACTIVITIES

24. The NRA amends Title VI of NAHASDA by adding a new section 606, "DEMONSTRATION PROGRAM FOR GUARANTEED LOANS TO FINANCE TRIBAL COMMUNITY AND ECONOMIC DEVELOPMENT ACTIVITIES." The new Title VI Demonstration Program reads as follows:

SEC. 606. DEMONSTRATION PROGRAM FOR GUARANTEED LOANS TO FINANCE TRIBAL COMMUNITY AND ECONOMIC DEVELOPMENT ACTIVITIES.
(a) AUTHORITY-
(1) IN GENERAL- Subject to paragraph (2), to the extent and in such amounts as are provided in appropriation Acts, subject to the requirements of this section, and in accordance with such terms and conditions as the Secretary may prescribe, the Secretary may guarantee and make commitments to guarantee the notes and obligations issued by Indian tribes or tribally designated housing entities with tribal approval, for the purposes of financing activities carried out on Indian reservations and in other Indian areas that, under the first sentence of section 108(a) of the Housing and Community Development Act of 1974 (42 U.S.C. 5308), are eligible for financing with notes and other obligations guaranteed pursuant to that section.
(2) LIMITATION- The Secretary may guarantee, or make commitments to guarantee, under paragraph (1) the notes or obligations of not more than 4 Indian tribes or tribally designated housing entities located in each Department of Housing and Urban Development Office of Native American Programs region.
(b) LOW-INCOME BENEFIT REQUIREMENT - Not less than 70 percent of the aggregate amount received by an Indian tribe or tribally designated housing entity as a result of a guarantee under this section shall be used for the support of activities that benefit low-income families on Indian reservations and other Indian areas.
(c) FINANCIAL SOUNDNESS-
(1) IN GENERAL- The Secretary shall establish underwriting criteria for guarantees under this section, including fees for the guarantees, as the Secretary determines to be necessary to ensure that the program under this section is financially sound.
(2) AMOUNTS OF FEES- Fees for guarantees established under paragraph (1) shall be established in amounts that are sufficient, but do not exceed the minimum amounts necessary, to maintain a negative credit subsidy for the program under this section, as determined based on the risk to the Federal Government under the underwriting requirements established under paragraph (1).
(d) TERMS OF OBLIGATIONS-
(1) IN GENERAL- Each note or other obligation guaranteed pursuant to this section shall be in such form and denomination, have such maturity, and be subject to such conditions as the Secretary may prescribe, by regulation.

(2) LIMITATION- The Secretary may not deny a guarantee under this section on the basis of the proposed repayment period for the note or other obligation, unless--
(A) the period is more than 20 years; or
(B) the Secretary determines that the period would cause the guarantee to constitute an unacceptable financial risk.

(e) LIMITATION ON PERCENTAGE- A guarantee made under this section shall guarantee repayment of 95 percent of the unpaid principal and interest due on the note or other obligation guaranteed.

(f) SECURITY AND REPAYMENT-

(1) REQUIREMENTS ON ISSUER- To ensure the repayment of notes and other obligations and charges incurred under this section and as a condition for receiving the guarantees, the Secretary shall require the Indian tribe or housing entity issuing the notes or obligations--
(A) to enter into a contract, in a form acceptable to the Secretary, for repayment of notes or other obligations guaranteed under this section;
(B) to demonstrate that the extent of each issuance and guarantee under this section is within the financial capacity of the Indian tribe; and
(C) to furnish, at the discretion of the Secretary, such security as the Secretary determines to be appropriate in making the guarantees, including increments in local tax receipts generated by the activities assisted by a guarantee under this section or disposition proceeds from the sale of land or rehabilitated property, except that the security may not include any grant amounts received or for which the issuer may be eligible under title I.

(2) FULL FAITH AND CREDIT-
(A) IN GENERAL- The full faith and credit of the United States is pledged to the payment of all guarantees made under this section.
(B) TREATMENT OF GUARANTEES-
(i) IN GENERAL- Any guarantee made by the Secretary under this section shall be conclusive evidence of the eligibility of the obligations for the guarantee with respect to principal and interest.
(ii) INCONTESTABLE NATURE- The validity of any such a guarantee shall be incontestable in the hands of a holder of the guaranteed obligations.

(g) TRAINING AND INFORMATION- The Secretary, in cooperation with Indian tribes and tribally designated housing entities, may carry out training and information activities with respect to the guarantee program under this section.

(h) LIMITATIONS ON AMOUNT OF GUARANTEES-

(1) AGGREGATE FISCAL YEAR LIMITATION- Notwithstanding any other provision of law, subject only to the absence of qualified applicants or proposed activities and to the authority provided in this section, and to the extent approved or provided for in appropriations Acts, the Secretary may enter into commitments to guarantee notes and obligations under this section

with an aggregate principal amount not to exceed $200,000,000 for each of fiscal years 2009 through 2013.

(2) AUTHORIZATION OF APPROPRIATIONS FOR CREDIT SUBSIDY- There are authorized to be appropriated to cover the costs (as defined in section 502 of the Congressional Budget Act of 1974 (2 U.S.C. 661a)) of guarantees under this section $1,000,000 for each of fiscal years 2009 through 2013.

(3) AGGREGATE OUTSTANDING LIMITATION- The total amount of outstanding obligations guaranteed on a cumulative basis by the Secretary pursuant to this section shall not at any time exceed $1,000,000,000 or such higher amount as may be authorized to be appropriated for this section for any fiscal year.

(4) FISCAL YEAR LIMITATIONS ON INDIAN TRIBES-

(A) IN GENERAL- The Secretary shall monitor the use of guarantees under this section by Indian tribes.

(B) MODIFICATIONS- If the Secretary determines that 50 percent of the aggregate guarantee authority under paragraph (3) has been committed, the Secretary may--

(i) impose limitations on the amount of guarantees pursuant to this section that any single Indian tribe may receive in any fiscal year of $25,000,000; or

(ii) request the enactment of legislation increasing the aggregate outstanding limitation on guarantees under this section.

(i) REPORT- Not later than 4 years after the date of enactment of this section, the Secretary shall submit to Congress a report describing the use of the authority under this section by Indian tribes and tribally designated housing entities, including--

(1) an identification of the extent of the use and the types of projects and activities financed using that authority; and

(2) an analysis of the effectiveness of the use in carrying out the purposes of this section.

(j) TERMINATION- The authority of the Secretary under this section to make new guarantees for notes and obligations shall terminate on October 1, 2013.

No conforming regulation is required. This provision will require the issuance of a PIH notice that will provide additional information regarding the new demonstration program. HUD will develop a notice providing guidance on the demonstration program and consult with tribes on its content.

TITLE VII---FUNDING

25. The NRA amends section 108, "AUTHORIZATION OF APPROPRIATIONS," of NAHASDA to change the authorization for appropriations for the Indian Housing Block Grant program from "1998 through 2007," to "2009 through 2013." It reads as follows:

SEC. 108. AUTHORIZATION OF APPROPRIATIONS. There are authorized to be appropriated for grants under this title such sums as may be necessary for each of fiscal years **2009 through 2013**. This section shall take effect on the date of the enactment of this Act.

No conforming regulation is required.

26. The NRA amends section 605 of NAHASDA to change the authorization for appropriations and aggregate fiscal year limitations for the Title VI program from 1997 through 2007, to 2009 through 2013. It now reads as follows:

(a) AGGREGATE FISCAL YEAR LIMITATION- Notwithstanding any other provision of law and subject only to the absence of qualified applicants or proposed activities and to the authority provided in this title, to the extent approved or provided in appropriations Acts, the Secretary may enter into commitments to guarantee notes and obligations under this title with an aggregate principal amount not to exceed $400,000,000 for each of fiscal years **2009 through 2013.**

(b) AUTHORIZATION OF APPROPRIATIONS FOR CREDIT SUBSIDY- There are authorized to be appropriated to cover the costs (as such term is defined in section 502 of the Congressional Budget Act of 1974) of guarantees under this title such sums as may be necessary for each of fiscal years **2009 through 2013**.

No conforming regulation is required.

27. The NRA amends section 703 of NAHASDA, “TRAINING AND TECHNICAL ASSISTANCE,” to change the authorization for appropriations from 1997 through 2007, to 2009 through 2013. It now reads as follows:

SEC. 703. TRAINING AND TECHNICAL ASSISTANCE.
There are authorized to be appropriated for assistance for a national organization representing Native American housing interests for providing training and technical assistance to Indian housing authorities and tribally designated housing entities such sums as may be necessary for each of fiscal years **2009 through 2013**.

No conforming regulation is required.

28. The following additional provisions of the NAHASDA Reauthorization Act did not amend NAHASDA.

SEC. 801. LIMITATION ON USE FOR CHEROKEE NATION.
No funds authorized under this Act, or the amendments made by this Act, or appropriated pursuant to an authorization under this Act or such amendments, shall be expended for the benefit of the Cherokee Nation; provided, that this limitation shall not be effective if the Temporary Order and Temporary Injunction issued on May 14, 2007, by the District Court of the Cherokee Nation remains in

effect during the pendency of litigation or there is a settlement agreement which effects the end of litigation among the adverse parties.

SEC. 802. LIMITATION ON USE OF FUNDS.
No amounts made available pursuant to any authorization of appropriations under this Act, or under the amendments made by this Act, may be used to employ workers described in section 274A(h)(3)) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(3)).

SEC. 803. GAO STUDY OF EFFECTIVENESS OF NAHASDA FOR TRIBES OF DIFFERENT SIZES.
(a) IN GENERAL- The Comptroller General of the United States shall conduct a study of the effectiveness of the Native American Housing Assistance and Self-Determination Act of 1996 in achieving its purposes of meeting the needs for affordable housing for low-income Indian families, as compared to the programs for housing and community development assistance for Indian tribes and families and Indian housing authorities that were terminated under title V of such Act and the amendments made by such title. The study shall compare such effectiveness with respect to Indian tribes of various sizes and types, and specifically with respect to smaller tribes for which grants of lesser or minimum amounts have been made under title I of such Act.
(b) REPORT- Not later than the expiration of the 12-month period beginning on the date of the enactment of this Act, the Comptroller General shall submit a report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate regarding the results and conclusions of the study conducted pursuant to subsection (a). Such report shall include recommendations regarding any changes appropriate to the Native American Housing Assistance and Self-Determination Act of 1996 to help ensure that the purposes of such Act are achieved by all Indian tribes, regardless of size or type.

No conforming regulations are required for sections 801 and 802. Section 803 is not applicable to HUD; it requires the Government Accountability Office to conduct a study of the effectiveness of NAHASDA.

b. **The following amendments to NAHASDA occurred between 1998 and 2005. They are identified by Public Law number and year of passage.**

Public Law 109-136 Amendment to NAHASDA: The following addresses the Public Law 109-136 (passed in 2005) statutory amendment to NAHASDA. New language is **bolded**.

29. P.L. 109-136 amended section 104(a)(2) of NAHASDA which now reads as follows:

(2) PROHIBITION OF RESTRICTED ACCESS OR REDUCTION OF GRANT- The Secretary may not **restrict access to or** reduce the grant amount for any Indian tribe based solely on--

(A) whether the recipient for the tribe retains program income under paragraph (1);
(B) the amount of any such program income retained;
(C) whether the recipient retains reserve amounts described in section 210, or
(D) whether the recipient has expended retained program income for housing-related activities.

No conforming regulation is required. Note further, however, that item #33 below also addresses other amendments to this provision and does require rulemaking.

Public Law 109-58 Amendment to NAHASDA: The following addresses the Public Law 109-58 (passed in 2005) statutory amendment to NAHASDA. New language is **bolded**.

30. P.L. 109-58 amended section 202(2) of NAHASDA[1] which now reads as follows:

(2) DEVELOPMENT- The acquisition, new construction, reconstruction, or moderate or substantial rehabilitation of affordable housing, which may include real property acquisition, site improvement, development and rehabilitation of utilities, necessary infrastructure, and utility services, conversion, demolition, financing, administration and planning, **improvement to achieve greater energy efficiency**, mold remediation, and other related activities.

No conforming regulation is required.

Public Law 108-393 Amendment to NAHASDA: The following addresses the Public Law 108-393 (passed in 2004) statutory amendment to NAHASDA. New language is **bolded**.

31. P.L. 108-393 amended section 601 of NAHASDA by adding the following new subsection:

(d) Limitation on Percentage- A guarantee made under this title shall guarantee repayment of 95 percent of the unpaid principal and interest due on the notes or other obligations guaranteed.

No conforming regulation is required.

Public Law 107-292 Amendments to NAHASDA: The following addresses the Public Law 107-292 (passed in 2002) statutory amendments to NAHASDA. New language pursuant to Public Law 107-292 in each section is **bolded**.

32. P.L. 107-292 amended section 101(h) of NAHASDA which now reads as follows:

(h) ADMINISTRATIVE **AND PLANNING EXPENSES**- The Secretary shall, by regulation, authorize each recipient to use a percentage of any grant amounts received under this Act **for comprehensive housing and community development planning**

[1] Section 202(2) of NAHASDA was also amended by the NRA. See NRA amendments above.

activities and for any reasonable administrative and planning expenses of the recipient relating to carrying out this Act and activities assisted with such amounts, which may include costs for salaries of individuals engaged in administering and managing affordable housing activities assisted with grant amounts provided under this Act and expenses of preparing an Indian housing plan under section 102.

Conforming regulations are required at 1000.236 and 1000.238.

33. P.L. 107-292 and P.L. 109-136 (passed in 2005) amended section 104(a) of NAHASDA[2] which now reads as follows:

(a) PROGRAM INCOME-
(1) AUTHORITY TO RETAIN- **Notwithstanding any other provision of this Act, a recipient** may retain any program income that is realized from any grant amounts under this Act 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 Act.
(2) PROHIBITION OF **RESTRICTED ACCESS OR** REDUCTION OF GRANT- The Secretary may not **restrict access to or** reduce the grant amount for any Indian tribe based solely on--
(A) whether the recipient for the tribe retains program income under paragraph (1);
(B) the amount of any such program income retained;
(C) whether the recipient retains reserve amounts described in section 210**, or**
(D) whether the recipient has expended retained program income for housing-related activities.

Rulemaking is required to implement these provisions.

34. P.L. 107-292 amended section 106(b)(2)(A) of NAHASDA which now reads as follows:

(2) NEGOTIATED RULEMAKING PROCEDURE-
(A) IN GENERAL- Notwithstanding sections 563(a) and 565(a) of title 5, United States Code, all regulations required under this Act, **including any regulations that may be required pursuant to amendments made to this Act after the date of enactment of this Act,** shall be issued according to a negotiated rulemaking procedure under subchapter III of chapter 5 of title 5, United States Code.

No conforming regulation is required.

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[2] Section 104(a) of NAHASDA was also amended by the NRA. See NRA amendments above.

35. P.L. 107-292 amended section 601 of NAHASDA which now reads as follows:

(a) AUTHORITY- To such extent or in such amounts as provided in appropriations Acts, the Secretary may, subject to the limitations of this title (including limitations designed to protect and maintain the viability of rental housing units owned or operated by the recipient that were developed under a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937), and upon such terms and conditions as the Secretary may prescribe, guarantee and make commitments to guarantee, the notes or other obligations issued by Indian tribes or tribally designated housing entities with tribal approval, for the purposes of financing affordable housing activities described in section 202 **and housing related community development activity as consistent with the purposes of this Act.**

A conforming regulation is required at 24 CFR 1000.424 and 24 CFR 1000.428.

Public Law 106-568 Amendments to NAHASDA: The following addresses the Public Law 106-568 (passed in 2000) statutory amendments to NAHASDA. HUD previously published Notice PIH 2003-2 and Notice PIH 2003-3 addressing many of these amendments. The following are amendments to NAHASDA pursuant to Public Law 106-568 that may require rulemaking. New language in each section is **bolded**.

36. P.L. 106-568 amended section 105 of NAHASDA to allow the Secretary to waive, under limited circumstances, procedural errors made by a recipient in complying with environmental review requirements under the Act. Section 105(d) was added to read:

(d) ENVIRONMENTAL COMPLIANCE. -- The Secretary may waive the requirements under this section if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section—
(1) will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) or any other provision of law that furthers the goals of that Act;
(2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
(3) is a result of inadvertent error, including an incorrect or incomplete certification provided under subsection (c)(1); and
(4) may be corrected through the sole action of the recipient.

Rulemaking is required to determine the process for requesting a waiver under 105(d).

37. P.L. 106-568 amended section 405 of NAHASDA by modifying several provisions of the section. Section 405 now reads:

Sec. 405. REVIEW AND AUDIT BY SECRETARY.

(a) REQUIREMENTS UNDER CHAPTER 75 OF TITLE 31, UNITED STATES CODE.-- An entity designated by an Indian tribe as a housing entity shall be

treated, for purposes of chapter 75 of title 31, United States Code, as a non-Federal entity that is subject to the audit requirements that apply to non-Federal entities under that chapter.

(b) ADDITIONAL REVIEWS AND AUDITS.—

(1) IN GENERAL.-- In addition to any audit or review under subsection (a), to the extent the Secretary determines such action to be appropriate, the Secretary may conduct an audit or review of a recipient in order to—

(A) determine whether the recipient—

(i) has carried out—

(I) eligible activities in a timely manner; and

(II) eligible activities and certification in accordance with this Act and other applicable law;

(ii) has a continuing capacity to carry out eligible activities in a timely manner; and

(iii) is in compliance with the Indian housing plan of the recipient; and

(B) verify the accuracy of information contained in any performance report submitted by the recipient under section 404.

(2) ON-SITE VISITS.-- To the extent practicable, the reviews and audits conducted under this subsection shall include on-site visits by the appropriate official of the Department of Housing and Urban Development.

(c) REVIEW OF REPORTS.—

(1) IN GENERAL.-- The Secretary shall provide each recipient that is the subject of a report made by the Secretary under this section notice that the recipient may review and comment on the report during a period of not less than 30 days after the date on which notice is issued under this paragraph.

(2) PUBLIC AVAILABILITY.-- After taking into consideration any comments of the recipient under paragraph (1), the Secretary—

(A) may revise the report; and

(B) not later than 30 days after the date on which those comments are received, shall make the comments and the report (with any revisions made under subparagraph (A)) readily available to the public.

(d) EFFECT OF REVIEWS.-- Subject to section 401(a), after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient under this Act in accordance with the findings of the Secretary with respect to those reports and audits.

Section 405(a) specifies that tribally designated housing entities are subject to the Single Audit Act requirements. Because the Single Audit Act applies by its own terms to tribally designated housing entities, this requirement is already set forth in the program regulations at §1000.544. The Department proposes no additional action.

Section 405(b)(1) no longer requires annual reviews and audits to be conducted by HUD. Instead, this paragraph now permits reviews and audits to the extent the Secretary determines such action to be appropriate. Rulemaking is required to implement the statutory changes.

Section 405(b)(2) requires a conforming regulation at 24 CFR 1000.520.

Section 405(c) requires a conforming regulation at 24 CFR 1000.528.

Section 405(d) modified the statute by removing the words "reduce, or withdraw grant amounts, or take other action as appropriate." Additionally, the revised statute no longer contains the following language: "except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe." Rulemaking is required to address the statutory changes.

38. P.L. 106-568 amended section 401(a) of NAHASDA[3] to expressly permit HUD to take certain actions before conducting a hearing, subject to procedural requirements. Section 401(a) now reads:

(a) ACTIONS BY SECRETARY AFFECTING GRANT AMOUNTS-

(1) IN GENERAL- Except as provided in subsection (b), if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this Act has failed to comply substantially with any provision of this Act, the Secretary shall--

(**A**) terminate payments under this Act to the recipient;

(**B**) reduce payments under this Act to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this Act;

(**C**) limit the availability of payments under this Act to programs, projects, or activities not affected by such failure to comply; or

(**D**) in the case of noncompliance described in section 402(b), provide a replacement tribally designated housing entity for the recipient, under section 402.

(2) SUBSTANTIAL NONCOMPLIANCE.—The failure of a recipient to comply with the requirements of section 302(b)(1) regarding the reporting of low-income dwelling units shall not, in itself, be considered to be substantial noncompliance for the purposes of this title.

(3) **CONTINUANCE OF ACTIONS- If the Secretary takes an action under subparagraph (A), (B), (C), of paragraph (1)**, the Secretary shall continue such action until the Secretary determines that the failure to comply has ceased.

(4) **EXCEPTION FOR CERTAIN ACTIONS-**

(A) IN GENERAL- Notwithstanding any other provision of this subsection, if the Secretary makes a determination that the failure of a recipient of assistance under this Act to comply substantially with any material provision (as that term is defined by the Secretary) of this Act is resulting, and would continue to result, in a continuing expenditure of Federal funds in a manner that is not authorized by law, the Secretary may take an action described in paragraph (1)(C) before conducting a hearing.

---

[3] Section 401(a) of NAHASDA was also amended by the NRA. See NRA amendments above.

(B) PROCEDURAL REQUIREMENT- If the Secretary takes an action described in subparagraph (A), the Secretary shall--
(i) provide notice to the recipient at the time that the Secretary takes that action; and
(ii) conduct a hearing not later than 60 days after the date on which the Secretary provides notice under clause (i).
(C) DETERMINATION- Upon completion of a hearing under this paragraph, the Secretary shall make a determination regarding whether to continue taking the action that is the subject of the hearing, or take another action under this subsection.

Rulemaking is required to address the bolded statutory changes. A conforming regulation is required at 24 CFR 1000.534.

39. P.L. 106-568 amended section 401(b) of NAHASDA to require a performance agreement should HUD determine that a failure to comply with the requirements of the Act is due to technical incapacity of the recipient not caused by a pattern or practice of activities constituting a willful noncompliance. Section 401(b) now reads:

(b) NONCOMPLIANCE BECAUSE OF TECHNICAL INCAPACITY-
(1) IN GENERAL- If the Secretary makes a finding under subsection (a), but determines that the failure to comply substantially with the provisions of this Act-
(A) is not a pattern or practice of activities constituting willful noncompliance, and
(B) is a result of the limited capability or capacity of the recipient,
the Secretary may provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability and capacity of the recipient to administer assistance provided under this Act in compliance with the requirements under this Act**, if the recipient enters into a performance agreement with the Secretary that specifies the compliance objectives that the recipient will be required to achieve by the termination date of the performance agreement.**
(2) PERFORMANCE AGREEMENT- The period of a performance agreement described in paragraph (1) shall be for 1 year.
(3) REVIEW- Upon the termination of a performance agreement entered into under paragraph (1), the Secretary shall review the performance of the recipient that is a party to the agreement.
(4) EFFECT OF REVIEW- If, on the basis of a review under paragraph (3), the Secretary determines that the recipient--
(A) has made a good faith effort to meet the compliance objectives specified in the agreement, the Secretary may enter into an additional performance agreement for the period specified in paragraph (2); and
(B) has failed to make a good faith effort to meet applicable compliance objectives, the Secretary shall determine the recipient to have failed to

comply substantially with this Act, and the recipient shall be subject to an action under subsection (a).

There is no relevant provision in the existing program regulations. This statutory amendment was previously addressed by Notice PIH 2003-2. A technical correction to the statute is required at 401(b)(4)(A) to change the word "and" to "or." Rulemaking is required to define the term "performance agreement."

Public Law 105-276 Amendments to NAHASDA: The following lists the Public Law 105-276 (passed in1998) statutory amendments to NAHASDA. Language added pursuant to Public Law 105-276 in each section is **bolded**.

40. P.L. 105-276 amended section 207(b) of NAHASDA which now reads as follows:

(b) **TENANT AND HOMEBUYER SELECTION**- The owner or manager of affordable rental housing assisted with grant amounts provided under this Act shall adopt and utilize written tenant **and homebuyer** selection policies and criteria that--
(1) are consistent with the purpose of providing housing for low-income families;
(2) are reasonably related to program eligibility and the ability of the applicant to perform the obligations of the lease; and provide for—
(A) the selection of tenants **and homebuyers** from a written waiting list in accordance with the policies and goals set forth in the Indian housing plan for the tribe that is the grant beneficiary of such grant amounts; and
(B) the prompt notification in writing **to any rejected applicant of that rejection and the grounds for that rejection**.

No conforming regulation is required.

41. P.L. 105-276 amended section 209 of NAHASDA by changing the cross-reference to "section 205(a)(2)." Section 209 now reads as follows:

SEC. 209. NONCOMPLIANCE WITH AFFORDABLE HOUSING REQUIREMENT

If a recipient uses grant amounts to provide affordable housing under this title, and at any time during the useful life of the housing the recipient does not comply with the requirement under section **205(a)(2)**, the Secretary shall take appropriate action under section 401(a).

This is a technical correction. No action is required.

42. P.L. 105-276 amended the definition of "INDIAN AREA" in section 4 of NAHASDA[4] which now reads as follows:

[4] Section 4 of NAHASDA was also amended by the NRA. See NRA amendments above.

(11) INDIAN AREA- The term `Indian area' means the area within which **an Indian tribe or** a tribally designated housing entity**, as** authorized by **1** or more Indian tribes**,** provide**s** assistance under this Act for affordable housing.

This is a technical correction. No action is required.

43. P.L. 105-276 amended the cross-reference in the definition of "STATE RECOGNIZED TRIBE" in section 4 of NAHASDA by deleting the previous reference to "section 107" and replacing it with a reference to "section 705." The provision now reads as follows:

(C) STATE RECOGNIZED TRIBE-
(i) IN GENERAL- The term `State recognized tribe' means any tribe, band, nation, pueblo, village, or community--
(I) that has been recognized as an Indian tribe by any State; and
(II) for which an Indian Housing Authority has, before the effective date under **section 705**, entered into a contract with the Secretary pursuant to the United States Housing Act of 1937 for housing for Indian families and has received funding pursuant to such contract within the 5-year period ending upon such effective date.

This is a technical correction. No action is required.

44. P.L. 105-276 amended section 101(c) of NAHASDA which now reads as follows:

(c) LOCAL COOPERATION AGREEMENT- **Notwithstanding any other provision of this Act, grant amounts provided under this Act on behalf of an Indian tribe may not be used for rental or lease-purchase homeownership units that are owned by the recipient for the tribe unless the governing body of the locality within which the property subject to the development activities to be assisted with the grant amounts is or will be situated has entered into an agreement with the recipient for the tribe providing for local cooperation required by the Secretary pursuant to this Act.** The Secretary may waive the requirements of this subsection and subsection (d) if the recipient has made a good faith effort to fulfill the requirements of this subsection and subsection (d) and agrees to make payments in lieu of taxes to the appropriate taxing authority in an amount consistent with the requirements of subsection (d)(2) until such time as the matter of making such payments has been resolved in accordance with subsection (d).

This is a clarification limiting the circumstances under which the Secretary would be prohibited from making a grant due to the lack of a cooperation agreement between a recipient and a local governing body. No conforming regulation is required.

45. P.L. 105-276 amended section 101(d) of NAHASDA which now reads as follows:

(d) **EXEMPTION FROM TAXATION- Notwithstanding any other provision of this Act, grant amounts provided under this Act on behalf of an Indian tribe may not be used for affordable housing activities under this Act for rental or lease-purchase dwelling units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) or with amounts provided under this Act that are owned by the recipient for the tribe unless—**

(1) such dwelling units (which, in the case of units in a multi-unit project, shall be exclusive of any portions of the project not developed under the United States Housing Act of 1937 or with amounts provided under this Act) are exempt from all real and personal property taxes levied or imposed by any State, tribe, city, county, or other political subdivision; and

(2) the recipient **for the tribe** makes annual payments of user fees to compensate such governments for the costs of providing governmental services, including police and fire protection, roads, water and sewerage systems, utilities systems and related facilities, or payments in lieu of taxes to such taxing authority, in an amount equal to the greater of $150 per dwelling unit or 10 percent of the difference between the shelter rent and the utility cost, or such lesser amount as--

(A) is prescribed by State, tribal, or local law;

(B) is agreed to by the local governing body in the agreement under subsection (c); or

(C) the recipient and the local governing body agree that such user fees or payments in lieu of taxes shall not be made.

This is a technical correction. No action is required.

46. P.L. 105-276 amended section 102(a) of NAHASDA which now reads as follows:

(a) PLAN SUBMISSION- The Secretary shall provide--

(1)

(A) for an Indian tribe to submit to the Secretary, by not later than 75 days before the beginning of each tribal program year, a 1-year housing plan for the Indian tribe; or

(B) for the tribally designated housing entity for the tribe to submit the plan as provided in subsection (c) for the tribe; and

(2) for the review of such plans.

This is a technical correction. No action is required.

47. P.L. 105-276 amended and clarified section 103(c)(3) of NAHASDA which now reads as follows:

(c) REVIEW- After submission of the Indian housing plan or any amendment or modification to the plan to the Secretary, to the extent that the Secretary considers such action to be necessary to make determinations under this subsection, the

Secretary shall review the plan (including any amendments or modifications thereto) to determine whether the contents of the plan--
(1) set forth the information required by section 102 to be contained in an Indian housing plan;
(2) are consistent with information and data available to the Secretary; and
(3) are **not** prohibited by or inconsistent with any provision of this Act or other applicable law.

This is a technical correction. No action is required.

48. P.L. 105-276 amended section 201(b)(6) of NAHASDA which now reads as follows:

(6) EXEMPTION- Title VI of the Civil Rights Act of 1964 and title VIII of the Civil Rights Act of 1968 shall not apply to actions by **federally recognized tribes and the tribally designated housing entities of those tribes under this Act**.

This is a technical correction. No action is required.

49. P.L. 105-276 amended section 205(a)(1) of NAHASDA which now reads as follows:

(a) IN GENERAL- Housing shall qualify as affordable housing for purposes of this Act only if--
(1) each dwelling unit in the housing--
(A) in the case of rental housing, is made available for occupancy only by a family that is a low-income family at the time of their initial occupancy of such unit;
(B) in the case of a contract to purchase existing housing, is made available for purchase only by a family that is a low-income family at the time of purchase;
(C) in the case of a lease-purchase agreement for existing housing or for housing to be constructed, is made available for lease-purchase only by a family that is a low-income family at the time the agreement is entered into; and
(D) in the case of a contract to purchase housing to be constructed, is made available for purchase only by a family that is a low-income family at the time the contract is entered into; and

This is a technical correction. No action is required.

50. P.L. 105-276 amended section 208 of NAHASDA[5] which now reads as follows:

(a) PROVISION OF INFORMATION- Notwithstanding any other provision of law, except as provided in **subsection (b)**, the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide

[5] Section 208 of NAHASDA was also amended by the NRA. See NRA amendments above.

information to Indian tribes or tribally designated housing entities regarding the criminal conviction records of applicants for employment, and of adult applicants for, or tenants of, housing assisted with grant amounts provided to such tribe or entity under this Act for purposes of applicant screening, lease enforcement, and eviction.

(b) EXCEPTION- A law enforcement agency described in **subsection (a)** shall provide information under this paragraph relating to any criminal conviction of a juvenile only to the extent that the release of such information is authorized under the law of the applicable State, tribe, or locality.

This is a technical correction. No action is required.

51. P.L. 105-276 amended Title IV of NAHASDA by adding at the end of Title IV the following provision:

    SEC. 408. PUBLIC AVAILABILITY OF INFORMATION.

    Each recipient shall make any housing plan, policy, or annual report prepared by the recipient available to the general public.

    No conforming regulation is required.

52. P.L. 105-276 amended the TABLE OF CONTENTS in section 1(b) of NAHASDA by inserting the following:

    Sec. 408 Public availability of information

    This is a technical correction. No action is required.

7. For Further Information

For further information, please contact the Office of Native American Programs at (202) 401-7914.

/s/
Sandra B. Henriquez, Assistant Secretary
for Public and Indian Housing

Appendix A. Index to Amendments

Amendment title/subject	Title of NAHASDA Affected	Reference	Year of Amendment	Discussed on Page #
Congressional Findings		Section 2 of NAHASDA (25 U.S.C. 4101)	2008	2
Definitions: definition of housing related community development		Section 4 of NAHASDA (25 U.S.C. 4103)	2008	3
Definitions: definition of Indian Area-technical correction		Section 4 of NAHASDA (25 U.S.C. 4103)	1998	28
Definition-State Recognized Tribe – correction of cross-reference		Section 4 of NAHASDA (25 U.S.C. 4103)	1998	28
Expansion of Authority:	I - Block Grants and Grant Requirements	Section 101(a) of NAHASDA (25 U.S.C. 4111)	2008	3
Local Cooperation Agreements – limits on agreements	I - Block Grants and Grant Requirements	Section 101(c) of NAHASDA (25 U.S.C. 4111)	1998	29
Exemption from Taxation-Technical correction	I- Block Grants and Grant Requirements	Section 101(d) of NAHASDA (25 U.S.C. 4111)	1998	29-30
Revisions to Definition of Administrative and Planning Expenses	I - Block Grants and Grant Requirements	Section 101(h) of NAHASDA (25 U.S.C. 4111)	2002	22
Definition of Federal Supply Sources	I - Block Grants and Grant Requirements	Section 101(j) of NAHASDA (25 U.S.C. 4111)	2008	3-4
Tribal Preference in Employment and Contracting	I - Block Grants and Grant Requirements	Section 101(k) of NAHASDA (25 U.S.C. 4111)	2008	4
Indian Housing Plans – revised requirements for 1-year plans	I - Block Grants and Grant Requirements	Section 102(a)-(b) of NAHASDA (25 U.S.C. 4112)	2008	4-7

Amendment title/subject	Title of NAHASDA Affected	Reference	Year of Amendment	Discussed on Page #
Indian Housing Plans – technical corrections	I - Block Grants and Grant Requirements	Section 102(a) of NAHASDA (25 U.S.C. 4112)	1998	30
Indian Housing Plans – removal of five year plan requirement	I - Block Grants and Grant Requirements	Sections 102(b) and 103(d) of NAHASDA (25 U.S.C. 4112 and 4113)	2008	4-7
Indian Housing Plans – technical correction	I - Block Grants and Grant Requirements	Section 103(c)(3) of NAHASDA (25 U.S.C. 4113)	1998	30
Indian Housing Plans – Reporting on the Self-Determined Activities Program-	I - Block Grants and Grant Requirements	Section 103(e) of NAHASDA (25 U.S.C. 4113)	2008	7
Treatment of Regular Development Fees for LIHTC Projects	I - Block Grants and Grant Requirements	Section 104(a) of NAHASDA (25 U.S.C. 4114)	2008	7
Expansion of Retention of Program Income	I - Block Grants and Grant Requirements	Section 104(a) of NAHASDA (25 U.S.C. 4114)	2005	22-23
Prohibition of Restricted Access to Grants	I - Block Grants and Grant Requirements	Section 104(a)(2) of NAHASDA (25 U.S.C. 4114)	2005	21
Waiver of Environmental Compliance Requirements	I - Block Grants and Grant Requirements	Section 105(d) of NAHASDA (25 U.S.C. 4115)	2000	24
Negotiated Rulemaking Procedure	I - Block Grants and Grant Requirements	Section 106 of NAHASDA (25 U.S.C. 4116)	2008	7-8
Negotiated Rulemaking Procedure	I - Block Grants and Grant Requirements	Section 106(b)(2)(A) of NAHASDA (25 U.S.C. 4116)	2002	23
Authorization of Appropriations	I - Block Grants and Grant Requirements	Section 108 of NAHASDA (25 U.S.C. 4117)	2008	19

Amendment title/subject	Title of NAHASDA Affected	Reference	Year of Amendment	Discussed on Page #
Exceptions to Low-income requirements	II – Affordable Housing Activities	Section 201(b) of NAHASDA (25 U.S.C. 4131)	2008	8-9
Exemption from Civil Rights Requirements – technical correction	II – Affordable Housing Activities	Section 201(b)(6) of NAHASDA (25 U.S.C. 4131)	1998	30
Reserve Accounts	II – Affordable Housing Activities	Section 202 of NAHASDA (25 U.S.C. 4132)	2008	9-10
Eligible Activities – expansion to include rehabilitation of infrastructure and utilities	II – Affordable Housing Activities	Section 202 of NAHASDA (25 U.S.C. 4132)	2008	9-10
Eligible Activities – expansion to include improvements to achieve energy efficiency	II – Affordable Housing Activities	Section 202 (2) of NAHASDA (25 U.S.C. 4132)	2005	21-22
Program Requirements – Use of grants over extended periods	II – Affordable Housing Activities	Section 203 of NAHASDA (25 U.S.C. 4133)	2008	10
Program Requirements-De Minimus procurement exceptions	II – Affordable Housing Activities	Section 203 of NAHASDA (25 U.S.C. 4133)	2008	10
Low-Income Requirement and Income Targeting – Binding requirements and family members	II – Affordable Housing Activities	Section 205 of NAHASDA (25 U.S.C. 4135)	2008	10
Definition of Affordable Housing – technical correction	II – Affordable Housing Activities	Section 205 of NAHASDA (25 U.S.C. 4135)	1998	31
Tenant and Homebuyer Selection – expansion of activities to include Homebuyers	II – Affordable Housing Activities	Section 207(b) of NAHASDA (25 U.S.C. 4137)	1998	27-28
Availability of Records- provision of background information on applicants for employment	II – Affordable Housing Activities	Section 208 of NAHASDA (25 U.S.C. 4138)	2008	10-11

Amendment title/subject	Title of NAHASDA Affected	Reference	Year of Amendment	Discussed on Page #
Availability of Records – technical correction	II – Affordable Housing Activities	Section 208 of NAHASDA (25 U.S.C. 4138)	1998	31
Non-compliance with Affordable Housing Requirement – Technical Correction	II – Affordable Housing Activities	Section 209 of NAHASDA (25 U.S.C. 4139)	1998	28
Self-Determined Housing Activities for Tribal Communities	II – Affordable Housing Activities	Section 231-235 of NAHASDA (25 U.S.C. 4145, 4145a, 4145b, 4145c, 4145d)	2008	11-13
Allocation Formula – Study of Need	III – Allocation of Grant Amounts	Section 302(a) and 302(b) of NAHASDA (25 U.S.C. 4152)	2008	13-15
Actions by Secretary Affecting Certain Grant Amounts – Exceptions for Certain Actions	IV - Compliance, Audits and Reports	Section 401(a) of NAHASDA (25 U.S.C. 4161)	2000	26-27
Definition of Substantial Non-Compliance	IV - Compliance, Audits and Reports	Section 401(a) of NAHASDA (25 U.S.C. 4161)	2008	15
Noncompliance Because of Technical Incapacity – Performance Agreements	IV - Compliance, Audits and Reports	Section 401(b) of NAHASDA (25 U.S.C. 4161)	2000	27
Periodic Monitoring –onsite inspections	IV - Compliance, Audits and Reports	Section 403(b) of NAHASDA (25 U.S.C. 4163)	2008	15
Performance Reports – reporting on planned activities	IV - Compliance, Audits and Reports	Section 404(b) of NAHASDA (25 U.S.C. 4164)	2008	16
Review and Audit by Secretary of HUD	IV - Compliance, Audits and Reports	Section 405 of NAHASDA (25 U.S.C. 4165)	2000	24-25
Public Availability of Information	IV - Compliance, Audits and Reports	Section 408 of NAHASDA (25 U.S.C. 4168); Section 1(b) of NAHASDA – Table of Contents	1998	31-32

Amendment title/subject	Title of NAHASDA Affected	Reference	Year of Amendment	Discussed on Page #
Effect on HOME Investment Partnership Acts	V - Termination of Assistance for Indian Tribes Under Incorporated Programs	Section 509 of NAHASDA (25 U.S.C. 4184)	2008	17
Limitation of Percentage of Guarantee	VI - Federal Guarantees for Financing for Tribal Housing Activities	Section 601 of NAHASDA (25 U.S.C. 4191)	2004	22
Expansion of eligible activities	VI - Federal Guarantees for Financing for Tribal Housing Activities	Section 601 of NAHASDA (25 U.S.C. 4191)	2002	22
Authorization of Appropriations for Federal Guarantee programs	VI - Federal Guarantees for Financing for Tribal Housing Activities	Section 605 of NAHASDA (25 U.S.C. 4195)	2008	19-20
Demonstration Program for Guaranteed Loans to Finance Tribal Community and Economic Development Activities	VI - Federal Guarantees for Financing for Tribal Housing Activities	Section 606 of NAHASDA (25 U.S.C. 4196)	2008	17-19
Authorization of Appropriations for Training and Technical Assistance	VII – Other Housing Assistance for Native Americans	Section 703 of NAHASDA (25 U.S.C 4212)	2008	20
Limitation on Use for Cherokee Nation	N/A	Section 801 of the NAHASDA Reauthorization Act (Public Law 110-441)	2008	20-21
Limitation on Use of Funds for employment of certain workers	N/A	Section 802 of the NAHASDA Reauthorization Act (Public Law 110-441)	2008	20-21
GAO Study of Effectiveness of NAHASDA for Tribes of Different Sizes	N/A	Section 803 of the NAHASDA Reauthorization Act (Public Law 110-441)	2008	20-21