S. HRG. 106–13

NATIVE AMERICAN HOUSING ASSISTANCE LEGISLATION

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING TO CLARIFY THE 1996 NATIVE AMERICAN HOUSING ASSISTANCE AND DETERMINATION ACT

MARCH 17, 1999
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

55–488 CC WASHINGTON : 1999

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-058332-2

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CONTENTS

NATIVE AMERICAN HOUSING ASSISTANCE AND SELF-DETERMINATION ACT AMENDMENTS OF 1999

WEDNESDAY, MARCH 17, 1999

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:31 a.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, and Dorgan.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. The committee will come to order.

This morning we will hear testimony on legislation that Senator Inouye and I introduced to clarify the 1996 Native American Housing Assistance and Self-Determination Act. This act became effective on October 2, 1997. Since then, the tribes and the Department of Housing and Urban Development have begun the transition from the old, federally-dominated housing system to one where the tribes have more local control over programs to build houses for their citizens.

At this committee's budget hearing in February, we received the bad news that the Clinton administration requested no increase for NAHASDA block grants, despite Secretary Cuomo's declaration that the Indian housing crisis is the worst in the country. This is even more curious, given the fact that the administration is asking for an increase in funding for non-Indian housing of about 10 percent. This is not the first time, of course, that the administration's actions have not matched the rhetoric about Indian country.

This act in itself contains a number of provisions that need to be clarified by Congress, and that is what we will be hearing today. Among other things, the amendments would eliminate a number of waivers, require full reviews of Indian housing plans by the Secretary, and clarify the Secretary's enforcement authority under the act.

We have heard from many tribes that are very concerned with the overall implementation of the act. This committee will likely hold oversight hearings throughout this year, at least later in the year.

And with that—we may be the only ones here this morning, Senator Inouye. We have a number of hearings all going on at the same time, and we will try to move this as expeditiously as we can.

Do you have any comments at all, Senator Inouye?

Senator INOUYE. I am prepared to work with you.

The CHAIRMAN. Thank you.

We will proceed with Jacqueline Johnson of the Office of Native American Programs within HUD. Ms. Johnson, if you would like to come to the front, we will go ahead and proceed, and your complete testimony will be included in the record, if you would like to abbreviate.

STATEMENT OF JACQUELINE JOHNSON, DEPUTY ASSISTANT SECRETARY, PUBLIC AND INDIAN HOUSING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, WASHINGTON, DC

Ms. JOHNSON. Once again it is a pleasure to be here today, and I thank you for the committee's continuing interest in Native American programs and Native American housing programs in particular. I would like to reiterate to you on behalf of the Secretary his commitment to Native American programs within the Department of Housing and Urban Development.

As you know—you have my complete testimony for the record, so I would just like to hit upon a couple of the highlights in the interest of your time.

One of the things that I would like to make sure that you know is that some of the recommendations in S. 400 clearly are very similar to things that were done under negotiated rulemaking. Negotiated rulemaking, I think, was one of the most successful efforts that has happened within Department of HUD as far as changing the relationship between tribes and the Department itself, and certainly it is the first step, and we continue to look for ways to increase that relationship and to develop an ongoing policy of dealing with tribal consultation within the Department.

In addition to that, if I could go through some of the recommendations very quickly and highlight some of them.

The restriction on waiver authority is very similar to what we've done under negotiated rulemaking. We would further suggest that the standard be changed from the word "extreme" to "exigent" because "extreme" was too high a standard to meet for the exercise of the Secretary's discretionary authority.

Organizational capacity, assistance to families that are not low-income—in section 3(b) it is asked that we require in the IHP evidence about serving non-low-income families and negotiated rulemaking. We debated that heavily and we determined that it was very difficult for us at the time of submitting an IHP to know whether a high-income family would need to have access to that program. So that creates a higher standard than may be practical in implementation.

In elimination of the waiver authority for small tribes, the Department has no objection to repealing this subsection of NAHASDA because the regulations impose the same requirements on and small tribes.

Expanded authority to review Indian housing plans—we do not read the amendment as expanding our authority to review an IHP,

because we do not view the current statutory language as a limitation of our review to begin with. Regulations spell out what the review needs to be.

Oversight, section 6, contains proposed amendments to section 405 of NAHASDA regarding audits. We believe it is unnecessary because it is covered under the Single Audit Act, which applies by its own terms.

The allocation formula—we concur with your recommendation.

The hearing requirement, the only concern that we have on the hearing requirement is that to change the hearing requirement under NAHASDA may not provide sufficient time for respondent to conduct adequate related pre-hearing actions.

The performance agreement time limit—we believe that the statutory and regulatory framework is adequate and it comports with the decisions reached by the negotiated rulemaking committee.

Block grants and guarantees, not Federal subsidies for low-income housing credit—of course, you know that the HOME Program used to allow for the ability to do this program, and the continuing ability of the tax credit under the HOME Program provisions would be of benefit to tribes.

Technical and conforming amendments—for emergency and disaster relief, that was also something that was debated at negotiated rulemaking. The tribes at negotiated rulemaking made a decision not to put $10 million aside for this particular activity, and felt that tribes should deal with that within their own areas, or that the Government should look to making sure that tribes had access to other emergency and disaster relief programs, available to the general public.

The amendment about the section 8 program, once again, we considered the section 8 program as being a viable option, or a program like that in Indian country, and the negotiated rulemaking committee accommodated for that within its structure of the formula.

So those are basically the highlights of some of the technical amendments that are being proposed within the Department.

I do want to tell you about one other thing that the Department is doing at this particular time. We are having our home ownership summit at the end of March, and we would invite you to come to that. I know that we have extended an invitation to Paul Moorehead and Patricia Zell, but we would personally like to invite you to come to that summit.

One of the things that we're doing at the summit is having a listening conference on NAHASDA, and this whole track is going to deal with all of the issues that are out there on NAHASDA, to get the tribal input on corrections. Sometimes it is inadequate information that the tribes may have; sometimes it's misunderstandings; sometimes it's also that it just plain needs to be changed or to be fixed, either regulatorily, administratively, or statutorily. And I would like to submit to you, because we're going to be doing a report at the end of the conference on those issues—I would like to submit to you that report for your further deliberations on how NAHASDA is being implemented.

[Referenced report may be found in Ms. Johnson's prepared statement which appears in appendix.]

Ms. JOHNSON. Thank you very much for this time.

The CHAIRMAN. Thank you.

Before we go to our next witness, let me ask you a couple questions. Senator Inouye may have some, too.

There appears to be some dissatisfaction with HUD's performance in implementing the act. Particularly, the question of lack of consultation to title 6 has come up.

Does HUD object to enabling tribes to develop their own housing, as provided in the act?

Ms. JOHNSON. Does HUD object to——

The CHAIRMAN. To tribes developing their own housing, as provided in the act?

Ms. JOHNSON. Of course not. The most important part of the act was to allow the tribes to determine what kind of housing they needed to develop, and what kind of program, and to have the flexibility to design that.

The CHAIRMAN. We have also heard that environmental reviews aren't being conducted by HUD, and some tribes therefore are losing housing money because of that. Would you like to comment on that?

Ms. JOHNSON. Yes; I would.

In NAHASDA, part 50 or part 58, it allows for the tribe to do their own environmental review under self-determination, or for HUD to do the environmental review, and it's at the discretion of the tribe. If the tribe chooses to have HUD do that, I have canvassed all of my Area Offices and there has been no tribe that I know of that HUD has not been able to do their review, that has requested or wanted us to do it.

For those that have chosen to do that, there are very strict guidelines for taking on the environmental review responsibility, and we know that there is a problem with tribes right now dealing with the capacity issues of taking on that responsibility and technical training to be able to perform those adequately. But this is not a new requirement. This requirement has been there for several years and has always been part of the way that tribes have done Indian Housing Community Development Block Grant Programs, in addition to the housing programs.

Out of the research and analysis that I have done, only 2 percent of the tribes have made errors. As you know, HUD—and particularly the Office of Native American Programs—is being watched. We are very careful that we are complying with the regulations, and it is my responsibility to ensure that we properly monitor those issues and circumstances.

But because we know that this is a problem, we have done what I believe is the most important part, which is preventive actions. Certainly, they can't take care of the 2 percent who have already made errors, and the statutory authority does not allow us to fix those after they come to a certain point.

But on preventive actions, we have trained our staff, the HUD staff, in each one of the Area Offices on the environmental review requirements. We have developed a handbook, which is being printed this week. We have come up with new guidance pieces to help the tribes. The handbook will go to all the tribes. We have provided training to 300 tribal members thus far this year. We have held 9

sessions in all parts of the country, and we have committed to 12 more sessions in all of the regions that we do, and we have committed to training on environmental review for the next two years.

So I think preventive actions are really important for the tribes to understand when they take on that responsibility.

The CHAIRMAN. Okay, I thank you.

Senator Inouye, did you have questions?

Senator INOUYE. Thank you, Mr. Chairman.

I will not be able to remain at this hearing for very long.

May I just ask a couple questions in general.

I have listened to your statement and read your statement. Is HUD against this measure? What would happen if this committee reported out the measure as is?

Ms. JOHNSON. I think in most of the areas, we felt that they were already in the regulation. So if you report it out as is, it doesn't change the way we do business. It's just putting a higher statutory authority on things that may not allow for the flexibility or the discretion in administering certain things that the tribes may deem necessary at particular points.

But the majority of the bill itself is very consistent with what negotiated rulemaking already committed to.

Senator INOUYE. So you would not be opposed to the measure?

Ms. JOHNSON. I, personally? Or HUD? At this point, no, I don't believe that we would be.

Senator INOUYE. Second, I am certain all of us present here will agree that housing for Native Americans is in a dismal state. In fact, I would consider that to be in an emergency state. I know that the administration has been very careful in parceling out funding, but don't you think that Native American housing deserves a little better treatment than what has come out in the budget request?

Ms. JOHNSON. Well, I always think Native American funding is critical, particularly to the job that we have to do. And I want you to know that even though the President's budget did not include an increase for this year, it continued the increase that was given last year to Native American programs. And the Secretary is also committed to that effort. In fact, in every meeting that I've had with him, when we are talking about other new programs within HUD, he always says, "Jackie, are the tribes going to be eligible for this program? Make sure that they are."

We are seeking to make sure that within all the programs of HUD, tribes are eligible. The welfare-to-work reform—even though we don't do section 8 any more because of NAHASDA, we now get welfare-to-work vouchers because we made sure that they were included into that.

In the APIC Program, we are now looking at that as a viable option for tribes and making sure that they are included in that. In the rural development housing money, the $25 million that we requested and received last year, tribes received a substantial amount last year. In fact, out of last year's allocation, tribes received more moneys than anybody else in the country, of rural housing money.

So we have designed the NOFA to make sure that tribes are very eligible and can compete very competitively for those kinds of dollars. I view it as my responsibility within the Department to look

at every one of the Department's programs and to see where tribes can be eligible. Lead-based paint—we are now eligible for lead-based paint programs.

So we may not have won in the budget battle, but we are definitely winning and making sure that we have access to a lot more programs.

Senator INOUYE. Were the funds requested by the Department similar to those submitted in the budget request of the administration? Or were they more, or less?

Ms. JOHNSON. More.

Senator INOUYE. More? So if we were successful in appropriating more, you would be happy?

Ms. JOHNSON. Yes; we would.

Senator INOUYE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Jackie, can you stay around in case we have some further questions after the next witness?

Ms. JOHNSON. No problem.

The CHAIRMAN. If you would, I would appreciate it.

With that, we will go to Chester Carl, Chairman of the National American Indian Housing Council.

Chester, if you would like to proceed? And you are accompanied by Mr. Williamson?

Go ahead and proceed, Chester. Your complete testimony will be included in the record, by the way.

STATEMENT OF CHESTER CARL, CHAIRMAN, NATIONAL AMERICAN INDIAN HOUSING COUNCIL, WASHINGTON, DC

Mr. CARL. On behalf of the Indian nations, we come before you here in Washington. Chairman Campbell and Vice Chairman Inouye and distinguished members of this committee, I thank you for the opportunity to speak to you, to discuss some of the issues with the Native American Housing Assistance and Self-Determination Act of 1996.

As you have stated previously, S. 400 was meant as a beginning of discussion for NAHASDA. I am here to provide two comments on the specific issue with NAHASDA. First, is S. 400, and second, is the specific problems we have on behalf of Indian nations with implementation of NAHASDA.

Let me go back to the term NAHASDA. While it is widely known as an acronym here in Washington, it is widely known in our Navajo Nation that the NAHASDA acronym is very similar to a Navajo term which means, "one who has gone to war." I believe through negotiated rulemaking, we felt like we had gone to war; it was very difficult, it was often filled with conflicts. We had to argue and educate the departmental people from Washington about what the real situation out in Indian land was like.

On the other hand, NAHASDA is very similar to [native word], meaning "someone who patiently waits." In this case we are patiently waiting for the implementation of NAHASDA in the true form of self-determination and the government-to-government relationship.

So based on those similar wordings in the Navajo language, I come before you.

It is important for you to know that although we felt, on behalf of Indian people—we won many battles in negotiated rulemaking, the battles that we have won are not being practiced in the implementation of NAHASDA. Although President Clinton signed an Executive order over 1 year ago requiring consultation policy to be implemented in every Department, HUD does not have a formal consultation policy.

We are finding that the flexibility that was intended in NAHASDA is not being implemented, that interpretation of the rules or the regulations is being implemented the way HUD sees it being interpreted. For that reason, the tribes have become very concerned, and just recently were joined by members of NCAI, National Congress of American Indians, to reconstitute negotiated rulemaking. They feel that without any type of formal consultation process by HUD, that negotiated rulemaking is the only way they can have their concerns addressed in order to have that flexibility and to have the intent of the NAHASDA carried out by HUD.

It is also very important for you to know that implementation of the HUD block program is very restrictive compared to Indian Health Service, and also BIA.

Also, discussion on the environmental review—as my colleague here, John Williamson, who is Vice Chairman of the National American Indian Housing Council will point out, this is a very serious issue. Ms. Johnson pointed out that environmental review has always been required under the 1937 Housing Act. That is true, that that regulation has always been there. However, you will find in prior reviews under the 1937 Housing Act, that environmental reviews that HUD conducted were only two pages. Now HUD has become very restrictive in enforcing environmental reviews. So any time tribes do environmental reviews, the packets are at least two or three inches thick.

Also, there is a problem with environmental review. Under HUD review, it is done under CFR part 50. In those cases, if HUD doesn't make a mistake, then it is able to waive its own mistake. But where a tribe does its own environmental review, then a tribe by statute cannot waive its own mistakes, or the Secretary cannot waive those mistakes. HUD has interpreted that the mistake, no matter how small—then those funds that were directed to that project become ineligible, and those projects then also become ineligible for future funding.

Also under CFR part 58, the regulations also require a waiver of sovereign immunity. So if a tribe doesn't make a mistake, then it is subject to Appellate Court jurisdiction.

On the issue of Indian housing plan reviews, as you are well aware by now, HUD took a long time before they approved the regulations. But we also found, in surveys conducted by our organization, over two-thirds of TDHEs have to deplete their operating reserves to keep operating until the housing plans are reviewed. In this case, we also found that HUD consistently has violated the statutory 60-day requirement. In their review, when HUD asked for clarification of the housing plan, they have stopped the clock and restarted the clock. Just for example, at Navajo, we submitted

our housing plan for review in April, and did not get approval until late August of last year.

One of the other issues that we find that are very important to this committee is Davis-Bacon. We find that HUD's determination that if a project uses $1 of NAHASDA funds, then the entire project is subject to Davis-Bacon, has already created problems. We find that by doing so, it loses a lot of creativity. It loses a lot of opportunity to use other types of funding, State and tribal funds, to leverage with NAHASDA dollars.

The other issue that I would like to bring to this committee is the goal of NAHASDA, to spur development of private mortgages. As a member of the Fannie Mae Impact Advisory Council, I recently chaired a meeting with the Fannie Mae committee and urged the officials their commitment to stamp out redlining on Indian reservations.

Our recommendation is to amend the 1992 Housing and Community Development Act to include additional housing targets for Fannie Mae, and also Freddie Mac. I believe that by doing so, we can only assure private lenders to have that guarantee that Fannie Mae will stand behind them to provide mortgage lending in Indian country.

Then going to the section-by-section analysis of S. 400, as far as section 1 is concerned, we have no comments. Section 2, restriction on waiver authority, it does not substantially alter the act, and we do not anticipate any hardship by this provision.

Section 3, we believe that reordering the subsections will not affect the legal implications, but we are; also very concerned that the undefined terms "management structure" and "financial control mechanisms" could allow for broad interpretation by HUD. We are a little bit concerned that HUD would make its own interpretation.

Assistance to families that are not low-income, this should not affect current reporting requirement in the housing plan.

Section 4, elimination of waiver authority for small tribes, we believe that we were able to provide a fix in negotiated rulemaking. We don't have any comments on this at this point.

Section 5, expanded authority to review Indian housing plans, we are afraid that by striking the word "limited" —we had anticipated the word "limited" being part of the negotiated rulemaking review on how HUD is supposed to do reviews on Indian housing plans— that HUD may, again, be overzealous in interpretation of this particular provision by striking the word "limited."

[Prepared statement of Mr. Carl appears in appendix.]

The CHAIRMAN. Okay. Mr. Carl, we're not going to have time to have you go through every section because we have a very short timeframe for our hearing, but we will make sure that these are on the record and we will study them very carefully.

Did you have some comments, Mr. Williamson? Were you going to make any statement?

Mr. WILLIAMSON. Yes, sir; I was going to show an example of an environmental assessment.

The CHAIRMAN. Why don't you go ahead?

STATEMENT OF JOHN WILLIAMSON, VICE CHAIRMAN, NATIONAL AMERICAN INDIAN HOUSING COUNCIL, WASHINGTON, DC

Mr. WILLIAMSON. Chairman Campbell and other distinguished members of the committee, I really want to thank you for the opportunity to speak on this subject of extreme importance to Indian tribes, but especially small tribes. I want to talk about the environmental requirements under NAHASDA and will use my own situation as an example.

The Lower Elwha Klallam Tribe is 650 members. We are located in Washington State, at the top of Olympic Peninsula. We bought 9.45 acres in 1997; we completed an environmental assessment, and we published those results in the local paper. We did not use HUD funds for this purpose, and therefore did not complete a "Request for Funds and Certification," HUD Form 7015.15. Later, we received two grants for 10 houses. We had included these 10 houses in this environmental assessment.

We received approval from HUD to begin the project, and started building the 10 units in August 1998. We have drawn down over $1 million, and at this point we are 90 percent complete with the project. We have rugs, vinyl septic tanks put in, and we're complete with the project.

Two weeks ago I received a call from the Seattle Office of Native American Programs, telling me that because one form was missing from my file, the development funds were disallowed; and furthermore, the tribe owes HUD the $1 million, and it had to be paid back in non-Federal dollars. Nothing was said about HUD allowing these funds to be distributed without the required paperwork. This will effectively bankrupt my tribe and put the housing authority out of business.

My tribe does not have the wherewithal to pay back this amount. Also, the 10 units which I mentioned as being 90 percent complete, will not be completed, and the very low income tribal members will not be receiving their housing units.

I am certain that the Congressional intent was not to waste Federal funds in this manner.

Nationwide, I am informed that there are 16 tribes having problems meeting the environmental requirements, and I believe this is just the tip of the iceberg. This has the potential to affect an enormous number of tribes nationwide.

Previous to NAHASDA, HUD provided these environmental assessments. Under NAHASDA, tribes can either perform that environmental assessment and provide HUD with a certification, or have HUD provide the assessment. However, HUD has told tribes that there are not enough resources within HUD to provide these assessments, and the tribes must do them themselves.

Tribes, especially small tribes, do not have this capacity to perform these assessments; and if you make a mistake, HUD will inform you that your funding has been disallowed.

HUD has not provided training to the tribes. My first training was approximately December 10, 1998, and for that matter, if you call HUD and ask a question on environmental assessments, you get a different answer from every person you talk to. They have not been trained either.

I believe these actions by HUD will only result in another round of embarrassing publicity, like we had before, and I think the agency will be hard-put to defend their position, even though they are bureaucratically correct.

I would suggest a fairly straight-forward solution would be a technical amendment to NAHASDA. Title 4, section 401 could read,

If the Secretary finds that the failure to comply is substantial, but that the noncompliance is primarily procedural and does not cause the recipient of assistance to violate the policies or particular provision of the chapter, the Secretary need not take actions prescribed in the previous paragraphs 1, 2, or 3, but instead may require the recipient to take other corrective actions as is appropriate under the circumstances.

I also believe there is another area that is coming up beside environmental assessments that will put emphasis on HUD to disallow grants, and these will probably be local cooperation agreements. As I understand that, if a tribe does not have a local cooperation agreement and builds on fee-simple land, funds will also be disallowed.

In closing, I would really like to thank the committee for their time and attention to these matters.

[Prepared statement of Mr. Williamson appears in appendix.]

The CHAIRMAN. Mr. Williamson, could you provide the committee with some documentation about this problem you're having, with HUD wanting you to repay $1 million?

Mr. WILLIAMSON. Yes, sir; I certainly will.

The CHAIRMAN. The letters that the tribe has written, who has responded to those letters, the demand from HUD, give us a packet of all that, will you?

Mr. WILLIAMSON. Yes, sir; I have that with my attorney at this time.

The CHAIRMAN. Okay.

We will look into that.

Let me ask a couple of questions before we go back to Ms. Johnson.

By the way, welcome to Senator Dorgan, sitting in today.

Did you have any opening statement?

Senator DORGAN. Mr. Chairman, I have the same hearing that Senator Inouye had to leave to be present at, a Defense matter, but I did want to stop by and thank the witnesses.

I know that this is a new act and it's too soon to know exactly how it's working, but some of the information that you have provided will be very helpful to us, and I am very anxious to have the larger hearings that we will be holding on Indian housing. I think that we have a crisis and an emergency in these areas.

So, Mr. Chairman, thank you for your attention to these issues.

The CHAIRMAN. Frankly, it appears to me, just from hearing the testimony, that if nothing else, HUD is kind of dragging their feet and are reluctant to turn over some of the controls to the tribes, even though the Executive order does require some consultation. It just simply hasn't been done, and I will ask you about that in 1 minute, Jackie.

But let me ask Mr. Carl a couple things first.

Your written statement suggests that HUD has rather been AWOL in implementing the act. How has that affected construction and delivery of housing to your members?

Mr. CARL. Could I have that question again, please?

The CHAIRMAN. In your statement you suggest that HUD has not been very forthcoming in implementing the act. How has that affected construction within the tribes?

Mr. CARL. I believe, using the environmental review as an example, we are doing a comprehensive renovation on dwelling units that have been dwelling units 20 or 30 years ago. In those situations, HUD is going back and having us perform environmental reviews.

In an organization where there is organizational capacity, meaning there is timely construction—in this case we have timely construction—we have performed construction at 90 percent complete, and HUD comes in with their environmental reviews or performance reviews, and basically provides a finding that we have not complied with the environmental review.

The CHAIRMAN. Does that hold up construction? Have you had to just stop it until you complete that environmental review?

Mr. CARL. Fortunately, we did not have to stop it. However, we are in noncompliance. We have been provided by HUD with information that we are in noncompliance. But once the formal review by HUD has taken place, I believe that we were probably out of compliance by somewhere around $9 million to $10 million.

The CHAIRMAN. Meaning that the tribe will have to repay that?

Mr. CARL. The tribe will have to repay that.

The CHAIRMAN. With regard to that environmental review, is it the tribe's position that you can conduct the reviews based on the already agreed-to criteria without going any further into it?

Mr. CARL. As far as tribal reviews under part 58, HUD has established criteria and guidelines that they have just recently started to distribute—"recently" meaning about 1½ years ago—and the tribes are now having to follow that. Previously, we did not have to follow such strict criteria.

Also, HUD has expanded environmental review to what we had defined as routine-type maintenance, meaning when you renovate a home up to satisfactory condition for the next occupant. Those are now also under strict requirements of environmental reviews.

The CHAIRMAN. I think that's all the questions I had for you. Senator Inouye did say he had some that he would ask you to return in writing, however. So I thank you for your appearance.

Jackie, if you would come back to the table for just 1 minute, let me ask you a couple of things, too.

When you explained to the committee that the Executive order didn't give a timeframe, but you said that you would develop a consultation policy with the tribes. It's been over 1 year. When can the tribes expect that to be finished?

Ms. JOHNSON. The Executive order requires consultation; it doesn't require the Department to develop a policy. And the Department has been doing consultation with the tribes on all of the issues. We are developing a policy, however, and have been coordinating with Indian Health, BIA, and other agencies on that. We expect our policy to be out by the end of this month, at our conference, as one of the consultation pieces. But as far as the policy of HUD, the unwritten policy, we continue to do consultations. I can give you some good examples.

One of the first issues that happened after I took this job this last year was that we recognized that there was an issue with DC&E issues, and we immediately called—when we realized that it was going to affect how tribes could develop their housing products because of the cap, it's basically the cap on the funds, we called together a group of regional representatives from all the areas of the country who were knowledgeable on this area to help HUD design and develop a new proposed solution to that, and then we sent it out to all the tribes and their representatives to see whether or not this met the fix that was designed by the tribes, and then we published it in the Federal Register for further comment. So tribes actually had at least three opportunities. We also took advantage of other meetings that were happening at the time, regionally and nationally, to talk about this new DC&E change that was beneficial to the tribes.

It is my policy in ONAHP that as many times as possible, and wherever possible, we continue to always include the tribes in developing the solution to an issue, and then we send it out for the tribes to be able to respond to those things. And we've done it more than just in DC&E; we've done it with other kinds of activities.

The CHAIRMAN. Well, I'll tell you, this confuses me a little bit, because as I understand the Executive order dealing with consultation with the tribes, it meant that you would develop some kind of a written policy so that they would have some prior notification so that they wouldn't get in trouble, as Mr. Williamson has stated.

If you don't have a written policy, if you have sort of an unwritten method of consulting, how do the tribes have enough lead time so that they don't end up with the problems that we're hearing about today?

Ms. JOHNSON. Well, the problems that you're hearing about today are environmental review; and as I stated before, the rule hasn't changed on environmental review. It is consistent with how it was prior to NAHASDA. What was probably different was maybe the consistent enforcement in all regions, which may not have been evident in the past by ONAHP.

So what we are trying to do, as I told you, are preventive measures, but any time that we're looking toward a change in the way that we do business, a regulation that needs to be changed because in negotiated rulemaking we didn't clearly understand or there were issues brought up by the tribe, we are always seeking tribal input, tribal consultation to all of those issues, and to make sure that they help us design the solution.

That's the policy that we have been taking; that's the policy that we are putting in place, and we expect to have it out shortly. Clearance on those kinds of items is a little more difficult.

The CHAIRMAN. Okay. Well, just from general testimony it appears to me that HUD is not particularly supportive of our bill, S. 400, and the tribes, at least from the testimony I've heard today, tend to be supportive of it. They tend to think we need some changes. Mr. Williamson did suggest some technical changes, and I would be interested in knowing how HUD is going to react to those.

We'll go on, because I also have a conflict and have to leave, but we will be submitting some additional questions to you, all of you, if you could get back to us.

All right. I appreciate that. The record will stay open 2 weeks for additional comments.

With that, this hearing is adjourned.

[Whereupon, at 10:12 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

55-488 - 99 - 2

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Opening Statement
Senator Kent Conrad
Hearing on S. 399
Native American Housing Assistance and Self-Determination Act
March 17, 1999

Mr. Chairman, thank you for holding this hearing to discuss legislation to make technical corrections to a very important piece of legislation: the Native American Housing Assistance and Self-Determination Act, commonly known as NAHASDA.

Native Americans face some of the worst housing conditions in the United States, and overcrowding is common. In North Dakota, where winter daytime temperatures generally do not rise above freezing — and in fact are often sub-zero — a person who lacks solid, well-insulated housing is at risk of serious injury and possibly even death. Yet we are asking many Indian people in North Dakota and throughout the United States to make due with substandard housing.

I am pleased that in 1996, Congress passed NAHASDA, which allows tribal housing authorities greater autonomy to design housing plans that suit their needs. NAHASDA block grants are a more efficient way of providing funding for housing in Indian country. As the title of the 1996 act indicates, self-determination is a core principle of the law. NAHASDA points to local control and local solutions to address the housing crisis facing so many in Indian country.

We are all aware that drafting legislation and implementing legislation are two different things: what works on paper doesn't always work quite right in practice. There are often some glitches that need to be addressed. For example, I am a cosponsor of a provision introduced by Senator Johnson that provides a technical correction with respect to the ability of tribes to access Low Income Housing Tax Credits (LIHTCs).

Before NAHASDA, Indian tribes receiving HOME block grant funds could use those funds to leverage Low Income Housing Tax Credits for housing development. However, in implementing NAHASDA, we have found that block grants to tribes under NAHASDA are considered "federal funds" and cannot be used to access these tax credits. Senator Johnson's bill restores tribal eligibility for the Low Income Housing Tax Credits by putting NAHASDA funds on the same footing as HOME funds; I am pleased that the Committee has incorporated this fix into S. 400.

It is my hope that we can address some of the problems that have become apparent as NAHASDA has been implemented and make this good law even better. I look forward to the testimony of today's witnesses, and thank them for being here.

STATEMENT BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

WASHINGTON, DC

March 17, 1999

by
Jacqueline Johnson
Deputy Assistant Secretary for Native American Programs
Office of Public and Indian Housing
U.S. Department of Housing and Urban Development

Mr. Chairman, Mr. Vice Chairman, and Members of the Committee, on behalf of Secretary Cuomo, thank you for inviting us to provide our comments on S. 400, "the Native American Housing Assistance and Self-Determination Act Amendments of 1999."

It is a pleasure to appear before you once again, and I reiterate my appreciation for your continuing efforts to improve the housing conditions of American Indian and Alaska Native peoples. Although progress is being made to eradicate the housing problems experienced by Native American families residing on Indian reservations, on trust or restricted Indian lands and in Alaska Native villages, much more needs to be done.

At the outset, let me reaffirm the Department of Housing and Urban Development's strong support for the principle of government-to-government relations with Indian tribes. In the Executive Order on Consultation and Coordination with Indian Tribal Governments, President Clinton explained:

"Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights."

HUD is strongly committed to honoring these fundamental precepts in our work with American Indians and Alaska Natives.

Before I begin describing our analysis of S. 400, I would like to provide you with some background information on how the Department finalized the regulations implementing the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Pursuant to section 106(b)(2) of NAHASDA, Secretary Cuomo convened a negotiated rule-making committee, which was comprised of 58 members, 48 of them tribal leaders representing a geographically diverse cross-section of small, medium and large Federally-recognized Indian tribes from all areas of Indian Country. There were also 10 Federal Government representatives. That Committee reached consensus, through a series of meetings during 1997, on all aspects of the regulations. I represented my tribe at these sessions and I can honestly say that it was one of the most exciting -- and most challenging -- experiences of my life. When we reached final consensus we felt that we had accomplished a historic undertaking, and I continue to believe that to this day.

As I began reviewing S. 400, I recognized that a number of its provisions were either substantially similar or identical to certain regulatory provisions that are currently contained in the NAHASDA final

regulations (24 CFR Part 1000). Generally, in these instances it is the Department's position that there is no need to seek statutory revisions to existing law when the precise provisions, often in language identical to that of the regulations, already exists and represents both Departmental policy and the agreements reached by the negotiated rule-making committee. In these cases I will cross-reference the regulatory cite to assist the Committee in its subsequent deliberations.

Sec. 2. RESTRICTION ON WAIVER AUTHORITY.

The amendment would limit the Secretary's time, which is unrestricted under current law, to 90 days for waiver of the requirement to submit an Indian Housing Plan (IHP). To date, the Department has not waived this submission requirement for any recipient. We have no objection to changing the basis for the waiver from "circumstances beyond the control of the tribe" to "extreme circumstances beyond the control of the tribe," but the Department believes the current provision provides the appropriate time frame for the Secretary to exercise his discretion when making these decisions. We would further suggest that the standard be changed from "extreme" to "exigent," because "extreme" is too high a standard to meet for the exercise of the Secretary's discretionary authority.

Sec. 3. ORGANIZATIONAL CAPACITY; ASSISTANCE TO FAMILIES THAT ARE NOT LOW-INCOME.

Section 3(a) would require that an IHP contain additional information regarding the organization, management and financial controls of the recipient. This is important information that the Department already receives pursuant to section 102(c)(4)(K), with the exception of the key personnel and financial controls requirement. Accordingly, we suggest that subparagraph (K) be amended to add these provisions, rather than adding a new subparagraph (A).

Section 3(b) would require that an IHP contain evidence about the need to serve non low-income families with NAHASDA funds. The test for serving such families is already contained in section 201(b)(2) of NAHASDA and embodied in the regulation at 24 CFR 1000.110. The regulation, at 24 CFR 1000.110(a) - (f), provides a comprehensive frame work and specific guidance on the limits and conditions for serving such families. It also imposes additional restrictions on the amount of grant funds that can be used for this purpose. Evidence about the need to serve each particular non low-income Indian family is not usually available at IHP submission. To require it by statute is impractical and does not comport with our experience in reviewing IHPs.

Sec. 4. ELIMINATION OF WAIVER AUTHORITY FOR SMALL TRIBES.

This section would eliminate the authority of the Department to establish any separate IHP requirements for small tribes. The regulation, at 24 CFR 1000.222, imposes the same requirements on large and small tribes. The Department has no objection to repealing this subsection of NAHASDA.

Sec. 5. EXPANDED AUTHORITY TO REVIEW INDIAN HOUSING PLANS.

The amendment strikes the word "limited" ("The Secretary shall conduct a limited review") and also strikes the following sentence: "The Secretary shall have the discretion to review a plan only to the extent that the Secretary considers review is necessary." The Department does not read the amendment as expanding our authority to review an IHP because we do not view the current statutory language as a limitation of our review authority under section 103(c).

Sec. 6. OVERSIGHT.

Subsection (a) is an improvement over the current statutory provision. It would give the Department more flexibility in determining the appropriate remedies if the recipient failed to meet the requirements of section 205(a)(2).

Subsection (b), which contains proposed amendments to section 405 of NAHASDA regarding audits, is unnecessary because it is covered under the Single Audit Act, which applies by its own terms.

Sec. 7. ALLOCATION FORMULA.

The Department supports this amendment, which would change the existing single-year (fiscal year 1996) provision to the more equitable five-year average of modernization and operating subsidies previously allocated under the United States Housing Act of 1937, and exempt emergency modernization from that calculation.

Sec. 8. HEARING REQUIREMENT.

This section would provide new hearing requirements that essentially duplicate the existing regulatory provisions in 24 CFR 1000.538(b), but add a new hearing requirement with a time frame that is in contravention of the Department's uniform hearing requirements found at 24 CFR Part 26, subpart B. In 24 CFR 26.44 there is a requirement that a hearing be conducted within 90 days. To change the hearing requirement under NAHASDA to 60 days may not provide sufficient time for a respondent to conduct adequate discovery and related pre-hearing actions.

Sec. 9. PERFORMANCE AGREEMENT TIME LIMIT.

This section would alter the current regulatory provisions found in 24 CFR 1000.530 by mandating a statutory performance agreement, a remedy which is currently available to the Department, although not specified in statute. We believe the current statutory and regulatory framework is adequate, and it comports with the decisions reached by the negotiated rule-making committee.

Sec. 10. BLOCK GRANTS AND GUARANTEES NOT FEDERAL SUBSIDIES FOR LOW-INCOME HOUSING CREDIT.

This section would provide the same eligibility under the Internal Revenue Code for the use of NAHASDA funds as federally-subsidized funds for low-income housing tax credit purposes that is currently available under HUD's HOME Program. Indian tribes were formerly eligible to participate in the Indian HOME Program, which was repealed by NAHASDA. Former Indian HOME Program funding is considered when the Department calculates its annual budget request under NAHASDA for the Indian Housing Block Grant Program.

Sec. 11. TECHNICAL AND CONFORMING AMENDMENTS.

Subsection (b) provides for a four-year annual authorization of appropriations in the amount of $10 million for emergencies and disasters. The negotiated rule-making committee addressed this issue and decided that it did not have the statutory authority to do so, and therefore did not wish to provide set-asides of NAHASDA funding for this purpose. To the extent that such funding would reduce NAHASDA funds in any given fiscal year, we believe that this provision would contravene the Committee's decision.

Subsection (c) would repeal the subsidy layering requirement that NAHASDA grant recipients must certify to. NAHASDA originally designated the Department as the certifying entity, but this was changed to require a certification by the grant recipient in the NAHASDA technical amendments that were enacted as part of the Fiscal Year 1999 HUD Appropriations Act (see section 595(a) of Public Law 105-276, approved Oct. 21, 1998). We believe that amendment fixed the problem and this provision should not be repealed.

Subsection (d) deals with the counting of Indian housing units formerly assisted under the Section 8 Program. The amendment would make statutory the requirement that these units be counted under the

NAHASDA Indian Housing Block Grant allocation formula as formula current assisted stock, regardless of whether the recipient was operating a program similar to Section 8 with NAHASDA funds. The NAHASDA regulation, at 24 CFR 1000.318, provides a much more comprehensive allocation system that takes into account whether the grant recipient is now operating a program similar to the Section 8 Program. We consider it a better method for accounting for these units. It also represents the consensus of the negotiated rule-making committee.

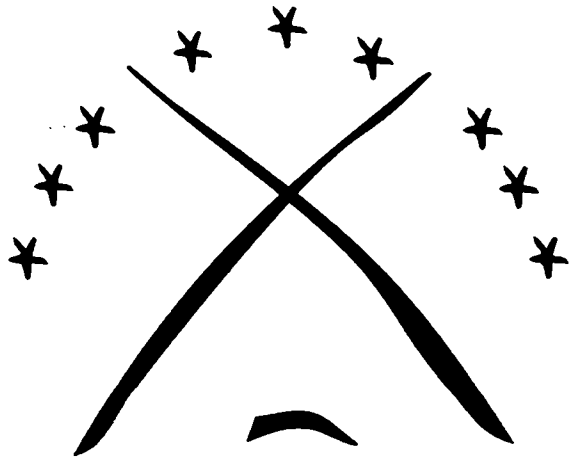
This concludes my specific comments on the amendments. I would like to share with you information about another activity that is occurring in the near future. On March 30, 1999, Secretary Cuomo will address Indian leaders at HUD's annual Native American Homeownership, Legal and Economic Development Summit. The Department will also conduct Listening Sessions on NAHASDA and consult with tribes on the issues that concern them, to include legislative matters. We would be pleased to provide the Committee with a report on the results of the Summit.

This concludes my prepared remarks. I would be happy to answer any questions you may have.

Testimony of

Chester Carl,
Chairman

National American Indian Housing Council



Before the
SENATE COMMITTEE ON INDIAN AFFAIRS

Hearing on NAHASDA Implementation and S. 400

March 17, 1999

Chairman Campbell, Vice Chairman Inouye, distinguished members of the Indian Affairs Committee, thank you for this opportunity to address you regarding the Native American Housing Assistance and Self-Determination Act of 1996. As you have stated previously, S. 400 was meant to be a beginning for discussions on NAHASDA, therefore my testimony today will cover two main topics: first, problems with the implementation of the law and possible remedies and second, specific comments regarding the NAHASDA amendments bill, S. 400.

Unbeknownst to the authors of NAHASDA, the title of the Act, while widely considered to be just another Washington acronym, is very similar to a Navajo word meaning "one who has gone to war." Often, that is the way we in Indian Country feel. The process of implementing the law, of drafting rules under negotiated rulemaking, has been arduous, time consuming, and often full of conflict. On many occasions, it has become obvious that the support tribes need exists within the Department of Housing and Urban Development, but the pace of change has been faster than the capacity of those implementing the law can adapt to.

NAHASDA is also similar to another Navajo word that means "one who sits and patiently waits." We are now waiting for our chance to be treated on a government-to-government basis by the Department, but our patience is being tested. This is not a typical HUD program – NAHASDA is about self-determination and tribal empowerment. The old bureaucratic way of thinking should be gone, but all too often, it is not.

CONSULTATION:

Almost a year ago, President Clinton signed an Executive Order requiring that every Federal Department have a formal consultation policy for their interaction with tribal governments. This is an affirmation of the government-to-government relationship of tribes and the federal government.

HUD's failure to produce such a consultation policy is clearly alarming, especially after the long and largely successful process of negotiated rulemaking that concluded last year. The progress we made in educating the Department should not be lost. As representatives of NAIHC have stated before this committee recently, the phrase "self-determination" was not supposed to be removed from the title of NAHASDA once regulations were published. There must be an on-going formal process for tribal consultation or we can expect continuing dissatisfaction on the part of the tribes concerning HUD's unwillingness to adequately include the concerns of tribes in their implementation of NAHASDA or any other program.

NAIHC's members were recently joined by the members of the National Congress of American Indians to reconstitute the Negotiated Rulemaking Committee to fill this role. Unfortunately, letters from both NAIHC and NCAI requesting a meeting with the Secretary to discuss these matters have been entirely ignored. We hope that this committee will intervene before the situation deteriorates further. Tribes should not be

ignored by a cabinet secretary unless the Administration is willing to admit that its own policy of the government to government relationship is no longer in force.

Consultation is clearly the only way that we can ensure an effective, tribally based program. The current implementation of the HUD block grant program in comparison to other tribal block grant programs, such as Indian Health Service and Bureau of Indian Affairs, is very restrictive and its implementation is not in accordance with the tribal self-determination policy.

ENVIRONMENTAL REVIEW:

As my colleague, NAIHC Vice-Chairman John Williamson of the Lower Elwha Housing Authority will point out, environmental review concerns may be the most serious issue we face in NAHASDA implementation.

The environmental review provisions under NAHASDA outline very specific requirements tribes or TDHEs must follow. HUD has advised if a mistake is made in complying with these requirements, no matter how small, the entire project becomes ineligible for any federal funding. Any money received from HUD for that project shall be reclaimed by the Department and no future HUD funds may go to the project.

This is of special concern because these environmental regulations state that tribes may have HUD perform the environmental assessments, but HUD asserts it does not have the resources to perform environmental assessments. This forces tribes to perform the environmental assessment with its own limited resources. This unfunded mandate shifts a federal responsibility to Indian tribes and unfairly penalizes Indian tribes for minor technical mistakes. It is critical you know that prior to the enactment of NAHASDA, HUD did not require tribes to strictly follow the environmental review procedures under the 1937 Housing Act assistance. Only recently has the Department begun requiring strict compliance. We appreciate your assistance by requesting HUD Secretary Andrew Cuomo for a waiver and reconsideration of HUD's new position on strict enforcement of the statutory environmental provision, yet to date this issue remains unresolved.

Our recommendations to ensure the block grant funds are not jeopardized and comply with environmental requirements are that HUD:

1) train its staff and provide training to Indian tribes on the environmental review requirements;

2) provide a Guidance Notice to tribes on how HUD will enforce the environmental review provisions and provide a transition period to the new HUD enforcement policy; and

3) request that Congress eliminate the outdated, paternalistic federal relationship with Indian tribes and replace it with a new one emphasizing tribal self-determination.

This recommended policy would be consistent with the congressional findings of the NAHASDA legislation.

Currently, the 24 CFR Part 50 environmental regulations by which HUD performs environmental reviews are regulatory in nature; thus HUD is able to waive its own mistakes. In HUD's view, the 24 CFR Part 58 environmental regulations that govern tribal review is statutory, so a tribal mistake, no matter how small, becomes detrimental to the tribe and cannot be waived. 24 CFR Part 58 regulations also require the tribes to waive their sovereign immunity before they can receive federal funds. Tribes can be sued in federal courts for non-compliance with environmental requirements.

INDIAN HOUSING PLANS:

The first problem was clearly the late approval for the plans to go into effect. It was only after six months of constant nagging by tribes and the threat of a lawsuit by NAIHC on behalf of its members that the regulations were published allowing NAHASDA to go forward, despite glaringly clear language in the law. In a survey conducted by NAIHC of IHPs, we discovered that two-thirds of TDHEs reviewed actually had to deplete their reserve accounts just to keep operating in the time between when the old program ceased to exist and the eventual implementation of NAHASDA.

In one instance, an Indian housing plan (IHP) submitted by a tribe included the statement that a regional housing authority would visit villages within its jurisdiction on an annual basis to check on the condition of units. HUD staff, in reviewing the plan, actually asked to see on which dates these visits would take place. That HUD staffer failed to recognize the fundamental point of the IHP: it is not for HUD to approve and to be used to dictate policies, it is only for HUD staff to ensure it does not violate the law or regulations – the rest is up to the tribes.

Other problems tribes have with the IHP include HUD's violation of the statutory 60-day review and approval deadline for a plan. HUD asked for clarification and more information on an item in a tribe's IHP and then restarted the 60-day clock. No goals or activities were changed, just formatting and clarification. Another tribe actually had HUD revoke a prior approval of a plan six months after it had gone into effect in order to change a program listed in the statute as an eligible affordable housing activity to a "model program" needing separate approval.

TITLE VI LOAN GUARANTEE IMPLEMENTATION:

The Title VI program provides a loan guarantee when the long-term aspects of housing development collide with the short-term realities of grant administration. Title VI is crucial to the success of Indian housing programs. Under the old system, tribes could apply for development grants, allowing for competitive applications for additional money. Under NAHASDA, all money is distributed through the formula, meaning tribes and TDHEs with smaller allocations must have some other means to undertake major constructions projects. Title VI is the means to accomplish this: tribes can borrow or

issue bonded debt for up to five times their annual allocation in order to secure substantial funding for large scale housing projects. It is patterned closely on the highly successful Section 108 program that operates with the Community Development Block Grant system.

Well into the second year of NAHASDA the program is still not in place. A demonstration program is being introduced by HUD with several unexpected strings and quite possibly a fatal flaw introduced by OMB. Some of the unexpected strings include:

- An additional construction standard of "visitability". This may be a good idea in some circumstances, but it is not a requirement of the law, the regulations, the ADA, or common to the building industry. HUD just decided to add this requirement to the Title VI program without basis in law or following the benefit of tribal consultation.

- A requirement for additional security for every guarantee. The law provides that the Secretary may deem additional security necessary for a guarantee -- HUD has determined that every guarantee requires additional security.

- NAHASDA recipients that wish to participate in the Title VI demonstration program must have "experience with complex financial transactions". When asked if this meant that a recipient which had never borrowed before could not participate in the demonstration program the response was that "it is likely that tribes/TDHEs without experience would be denied a Title VI demonstration program loan." There are many Tribes and NAHASDA recipients with the experience and skill to benefit from the Title VI program which have never had to borrow a dime.

- The affordable housing activities for which the guarantee may be used have been pared down from those specifically established by law for the purposes of the demonstration program.

- Finally, the fatal flaw is the OMB requirement to provide only an 80% guarantee. Our Association was advised last week that such a limitation will, for all practical purposes, rule out participation in the domestic bond market. Title VI must be a 100% guarantee.

DAVIS - BACON & HUD DETERMINED WAGES

The per project threshold of $2,000 and the HUD determination that if a project uses one dollar of NAHASDA funds, then the entire project is subject to Davis-Bacon Act (DBA) requirements is already creating problems. The benefit and promise of NAHASDA to leverage and coordinate funding is being adversely impacted and even having the opposite results.

Projects using other federal and state funds which could complement each other are being avoided because of this wage standard. It seems that this "one dollar" interpretation is extreme. The original drafts of NAHASDA included a 12-unit exemption from DBA

requirements, making it equivalent to the HOME block grant at HUD. NAIHC supports this exemption because it will allow for greater coordination and decrease the cost of housing. Ultimately, the wage rates paid for Indian housing should be determined by Indian tribes.

HUD PROJECT REVIEW:

A twist on the continuing need for tribal consultation, HUD/ONAP has a need to expand their thinking about affordable housing activities. Although we have not seen or heard of a wide-spread practice of HUD "denial" of proposed activities by the Tribes, there is a sense of discouragement offered by some HUD staff. HUD needs to include Tribal participation in the continuous (and healthy) discussions over what constitutes an affordable housing activity. In addition, there is a need to promote those activities and to "spread the word" about the innovative and creative uses of NAHASDA funds throughout Indian Country.

MORTGAGE LENDING:

Because one of the goals of NAHASDA is to spur the development of private mortgage markets in Indian Country, we would like to work with the Committee to include additional provisions in S. 400 dealing with this issue.

As a member of the Fannie Mae Impact Advisory Council, I recently chaired a meeting and urged the company officials to continue its commitment to stamp out redlining on Indian reservations. Only 91 conventional mortgages were made in Indian country between 1992-1996, yet over forty percent of tribal housing is considered substandard and twenty-one percent of homes in tribal lands are overcrowded, which is ten times more than the national average. One of the keys to getting lenders involved in greater activity on trust-held land is to amend the 1992 Housing and Community Development Act to include additional affordable housing targets for Fannie Mae and Freddie Mac. These two federally chartered entities have unique access to the federal treasury and in return agree to meet Congressionally mandated goals for affordable housing. There should be no question as to the fact that Indian Country is more in need of Congress' support in this area than in any other community in the United States. Once Fannie Mae and Freddie Mac have a target, they will work to meet it, meaning that lenders know these entities will buy their mortgages. Fannie Mae and Freddie Mac's commitment will allow lenders to finally accept Indian Country as a viable market.

SECTION BY SECTION ANALYSIS OF S. 400:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS

No comments.

SECTION 2. RESTRICTIONS ON WAIVER AUTHORITY

This provisions does not substantially alter the act and NAIHC does not anticipate it will cause any undue hardships.

SECTION 3. ORGANIZATIONAL CAPACITY; ASSISTANCE TO FAMILIES THAT ARE NOT LOW-INCOME

(a) Organizational Capacity

NAIHC believes that the re-ordering of the subsections will not affect the legal implications, but we are concerned that the undefined terms "management structure" and "financial control mechanisms" could allow for broad interpretation by HUD in the IHP, which is already burdensome in many respects.

(b) Assistance to Families that are not Low Income

This provision should not affect current reporting requirements in the IHP.

SECTION 4. ELIMINATION OF WAIVER AUTHORITY FOR SMALL TRIBES

The NAHASDA regulation already makes it clear that there is no distinction and therefore this provision will not affect the current program.

SECTION 5. EXPANDED AUTHORITY TO REVIEW INDIAN HOUSING PLANS

While striking the word "limited" and the second sentence may not seem to alter the enforcement of the law, NAIHC is very concerned that HUD is already over-zealous in their interpretation of what constitutes review. This could send a message to HUD that they should take an even more active role in the IHP process, which is clearly contrary, both to good policy-making and the intentions of Congress.

Section 6. Oversight

(a) Repayment

NAIHC strongly agrees with the intent of this section. HUD has proven all too willing to avoid the reporting and remedy opportunities provided tribes in Section 401 of the law by simply claiming it is not taking action under that provision, but under others. The authors of NAHASDA believed strongly that HUD should be governed by Section 401 of NAHASDA in any situation in which HUD's actions could be considered adverse to a NAHASDA recipient.

(b) Audits and Reviews

While the intention of this subsection would seem to clear up perceived inconsistencies within the audit requirements of the law, it would also appear to

give the Secretary unlimited authority to conduct audits at any time HUD staff see fit. While the Congress clearly wants to allow the Secretary to conduct necessary audits, the protection of the single audit act should be that tribes do not spend all of their time on audits as opposed to providing housing for their members. NAIHC would be happy to work with Committee staff to clear up this concern.

SECTION 7. ALLOCATION FORMULA

The NAHASDA regulation agreed upon by all parties who originally expressed concern over the formula provisions of the law, would seem to have taken care of the problem this section attempts to solve. NAIHC would ask the committee to focus its attention on making sure enough funding is provided to the NAHASDA block grant in appropriations so that there is enough money in the program to avoid the need for such protection measures. The basic concept of this provision appears fair if we are faced with a less than sufficient appropriations level.

SECTION 8. HEARING REQUIREMENT

NAIHC does not oppose this provision if, as Congress intends, it is used only in the most extreme of circumstances. Our support, however, also depends on whether the Committee will apply the protections offered to tribes and TDHEs to all actions taken by the Secretary that could adversely affect tribes (see comments on Section 6(a)).

SECTION 9. PERFORMANCE AGREEMENT TIME LIMIT

The intent of this section would appear to be good, but it is rather confusing. Simply put, performance agreements, if they include restrictions on a tribe or TDHE, should not be allowed to continue *ad infinitum* simply as a way of giving control over a tribal program to federal bureaucrats. A performance agreement should be a way of assisting a tribe or TDHE in order to get the program functioning without placing harmful penalties on a program whose principal concern could be a lack of expertise or training, not theft or flagrant mismanagement. Performance agreements exist in the current regulation.

SECTION 10. BLOCK GRANTS AND GUARANTEES NOT FEDERAL SUBSIDIES FOR LOW-INCOME HOUSING TAX CREDIT

This section is very important to the availability to the Low-Income Housing Tax Credit program in Indian Country. Already included in legislation introduced independently by Senator Johnson (D-SD) and Congressman J.D. Hayworth (R-Arizona), NAIHC strongly endorses this provision.

SECTION 11. TECHNICAL AND CONFORMING AMENDMENTS

(a) Table of Contents

No comments.

(b) Authorization of Appropriations

The Department already has funds available for disasters, but NAIHC does not strongly oppose this provision if it does not negatively affect appropriations levels for Indian housing programs.

(c) Certification of Compliance with Subsidy Layering Requirements

NAIHC recognizes eliminating this provision of NAHASDA will not change reporting requirements, merely remove a duplicative provision of law that could complicate matters if the underlying statute of the provision were itself amended or repealed. NAIHC supports this provision.

(d) Terminations

Section 8 vouchers, while not widely used by Indian tribes or TDHEs, are important parts of the housing strategies of some tribes. As in other areas where the Congress and Department are working together to prevent needless dislocation of families receiving section 8 assistance, terminating these contracts without providing funding to continue the assistance to these families could force families onto the streets. The underlying principle of the formula, that families served today should be able to be served tomorrow, is fundamentally sound and should be maintained. This provision allows that to happen, but may have already been dealt with more effectively in the regulatory negotiations.

CONCLUSION:

As you now know, the few months of NAHASDA have not been easy for tribes and those that support tribal self-sufficiency, self-determination and sovereign immunity. Unfortunately, these battles are not over. NAHASDA creates new opportunities and roles for both the tribes and the federal government because it creates a partnership that recognizes the importance of tribal responsibility and eliminates federal involvement in tribal programs. We all have much hard work ahead. In the coming months and years, we will continue to actively assert our voices into the debate that we are sure will continue. We hope that the information we provide of the successes we achieve as well as the challenges we face will assist your committee in its continuing work improve the communities and lives of Native families.

Questions submitted to the National American Indian Housing Council
March 19, 1999

1. Is the Council supportive of the technical proposal discussed at the hearing regarding environmental reviews whereby the Act would be changed to permit tribes to commit "technical" or "procedural" errors without being in jeopardy of losing housing funds? Can you propose language that would accomplish that goal?

2. Does the Council support the provision of this bill that provides for a full review of Indian Housing Plans by the Secretary?

3. Will S.400 ensure a smoother transition for tribes to where they can assume greater control over housing matters, but still give HUD the oversight and enforcement authority it needs?

4. Your statement suggests that HUD has been "AWOL" in implementing the Act. How has this affected the actual construction and delivery of housing to your members?

5. With regard to environmental review, is it the Council's position that tribes be *exempt* from environmental reviews? As a way of furthering tribal self determination, would your Council or member tribes be interested in developing a mechanism whereby a tribe or a consortium of tribes contract for such a function and carry out these reviews across Indian country?

6. As Chairman of the NAIHC, you know of the technical and logistical obstacles that frustrate tribes as they assume control over Indian housing. Although there is a good faith allowance for tribal non-compliance, what results do you foresee from the implementation of the compliance enforcement mechanisms included in the proposed NAHASDA amendment?

7. Is the Council opposed to streamlining the hearing time frame from the current 90 days to an expedited framework of 60 days as is proposed in S.400?

8. Of the following, which options would the Council be supportive of whereby if satisfied, the provisions of the federal Davis-Bacon Act would not apply to housing development in Indian country:

   a. A "unit-based" threshold, say of 8-12 units of housing;
   b. A "dollar-based" threshold, say of $50,000; and/or
   c. A "tribal opt-in" threshold whereby each tribal government decides whether the Davis-Bacon Act would apply to housing constructed on its lands.

9. Local cooperation agreements continue to be an issue for the tribes and local governments. Would the Council support a change in the law to allow construction to proceed if the tribe involved had made "best efforts" to negotiate and reach such a cooperation agreement?

10. What are the top three items the Council sees lacking in either the statute, available appropriations, or other factors that are preventing NAHASDA from being implemented properly?

Responses from Chester Carl, Chairman, NAIHC
To Senator Ben Nighthorse Campbell, Chairman, SCIA

1. The Council has considered options for remedying the current problems in environmental reviews two ways: by amending Section 105 of NAHASDA to include a "de minimis enforcement" provision or by establishing a threshold within Section 401 of NAHASDA. We would prefer to work with SCIA staff, however, to review the proposals before making a final recommendation. In either case, we strongly urge the Committee to pursue this correction.

2. NAIHC believes that a full review already exists of the Indian Housing Plans. In fact, in many cases, HUD field staff have been excessively involved in drafting of plans. The removal of the word "limited" from the review portion of the IHP provisions of NAHASDA will have no specific legal effect, but it could have serious implications. The review is intended to ensure compliance with laws, but all too often it is being used to manipulate tribal priorities when that responsibility exists exclusively within the tribe, not HUD field offices.

3. We believe so. We all want the same thing: an effective Indian housing program free from abuse but also free from the restraints that prevent creativity and accomplishment. S. 400, as amended per our recommendations, would make a tremendous difference in clarifying the respective roles of tribes and HUD in this collaborative process.

4. There have been numerous factors that have delayed construction. The first was clearly HUD's failure to produce regulations in the time frame required by the law. HUD's publication of final rules was six months late, meaning that there were six months where the only housing construction taking place was in projects under the 1937 Housing Act. HUD staff's confusion about their role in reviewing plans also lead to many delays as tribes rewrote portions that were perfectly appropriate originally. Also, a staff that is being drained away by a Departmental hiring freeze, with the exception of Community Builders, is less capable of providing needed services to tribes.

   The fear of negative actions resulting from environmental assessments has also had a chilling effect on new housing construction. If a tribe believes that they can be halted in the middle of a construction project and asked to pay back large sums of money out of their own pocket, why would they start building now?

   Finally, tribes have still not been able to draw down funds for investment purposes. While the investments would not immediately produce housing units, over just a few years the return on those investments could have a major impact on the number of units built. A delay now means a delay in housing construction two years from now.

5. NAIHC believes that tribes should have the right to act as their own environmental agency. As stewards of the land for eons before the arrival of U.S. government agencies, and as sovereign governments themselves, tribes have the right to manage their own resources. As for whether a consortium of tribes could carry out reviews, it is unclear as to whether it would solve the fundamental underlying problem of intrusion into sovereignty.

6. OF significant concern would be provisions dealing with audit requirements. The goal of the Single Audit Act is to ensure that tribes are responsible, but that they also spend most of their time providing decent homes instead of filling out paperwork. A single, independent audit should be the primary focus of the annual review because it prevents interpretations or other influences that can intrude on Departmental audits that are for more than simple assessments of technical assistance needs.

7. The Council does not oppose streamlining the hearing time frame from 90 days to 60 days.

8. As was stated previously in the question under environmental assessments (question #5), tribes have rights under their status as sovereign governments that should include basic functions of protection and support. The concept of Davis-Bacon, while lauded by many for its effect in the rest of the United States, does not make a good match with Indian Country. Tribal governments face unique challenges, unlike any faced in the rest of the country. Tribes rightfully should be allowed to set their own standards for wage levels, as is proposed in your option "c." The idea that tribes face even more restrictive requirements than non-Indian communities who have a 12-unit exemption under the HOME block grant is troubling.

9. Yes. Communities who simply do not want low-income families in their area can in some instances use local Cooperation Agreements. This problem, called NIMBYism for its rallying cry of "Not In My Back Yard," is not unique to Indian Country. While relief is possible under the Fair Housing Act, that process is time-consuming and complicated, meaning that native families can suffer in the meantime. A "best effort" would be tremendously helpful in supporting low-income Native families.

10. Number one is appropriations. The President's budget, while including a $2.5 billion increase for HUD overall, included no increase for Indian housing. This is preposterous and should be rectified by the Congress. The statistics showing the need for Indian hosing resources are well know so it will do no good to repeat them here. Sufficed to say $620 million is not enough for Indian housing. NAICH requests $972 million, in part to combat the effects of welfare reform.

    The second priority is remedy for environmental review concerns. We should not discourage the development of Indian housing units, nor should we unnecessarily

punish tribes for minor violations.

The third priority is in regard to lump sum draw down of funds. The Negotiated Rulemaking Committee debated for months on this issue and NAIHC still believes that tribes should have the right to draw down their money as soon as it is made available in appropriations and through the formula process.

Chairman Campbell and other distinguished members of the Committee, I want to thank you for the opportunity to speak to you today on a subject of extreme importance to all Indian Tribes, but especially small Tribes.

The subject I want to talk about today is the environmental requirements under NAHASDA, and I will use my own situation as an example. The Lower Elwha Klallam Tribe (650 enrolled members) is located in Washington State at the top of the Olympic Peninsula. We bought 9.45 acres in 1997, completed an environmental assessment and published the results in the local paper. We did not use HUD funds for this purpose and therefore did not complete a Request for Funds and Certification (HUD form 7015.15). One year later, we received two grants for 10 houses, which were included in the Environmental Assessment; these were the last grants given out under the 1937 Housing Act. Lower Elwha Housing Authority (LEHA) received approval from HUD to begin the project and started building the 10 units in August 1998. LEHA has drawn down over a million dollars, and we are 90% complete. Two weeks ago, I received a call from the Seattle Office of Native American Programs office telling me that because a form was missing from the file, the development funds were disallowed and furthermore that the Tribe owes HUD one million dollars, payable only in non-federal dollars. Nothing was said about HUD allowing these funds to be distributed without the required paperwork. This will bankrupt my Tribe and effectively put the Housing Authority out of business. My Tribe does not have the wherewithal to pay back this amount. Also the ten units, which are 90% complete, will not be completed, and the very low-income Tribal members will not receive their housing units. I am certain that congressional intent was not to waste Federal funds in this manner. Nationwide, there are a total of 16 Tribes having problems meeting environmental requirements, and this is just the tip of the iceberg. This has the potential to effect an enormous number of Tribes nationwide.

Previous to NAHASDA, HUD provided the environmental assessments. Now, under NAHASDA, Tribes can either perform an environmental assessment themselves and provide HUD with the certification, or have HUD perform the assessment. However, HUD has told tribes that it does not have enough resources to perform these assessments, and Tribes must do them themselves. Tribes, especially small Tribes, do not have the capacity to perform these assessments. If they make a mistake, HUD will disallow their funding and make them pay it back, even though the environmental law and regulations never mention such punitive measures. These measures come from a HUD General Council opinion paper, which has not been distributed to Tribes. HUD also has not provided training to the Tribes—our first training was in December—or, for that matter, to their own people to ensure compliance with environmental laws.

These actions by HUD will only result in another round of embarrassing publicity. The agency will be hard pressed to defend itself, even if it is bureaucratically correct.

I would suggest that a fairly straightforward solution would be a technical amendment to NAHASDA, Title IV Section 401, which would read:

If the Secretary finds that the failure to comply is substantial, but that noncompliance is primarily procedural and does not cause the recipient of assistance to violate the policies or a particular provision of this chapter, the Secretary need not take the actions described in the paragraphs (1), (2), or (3), but instead may require the recipient to take other corrective action as is appropriate under the circumstances.

Next, HUD will start disallowing grants because of local cooperation agreements. As I understand it, if a tribe does not have a local cooperation agreement and builds on fee simple land, the tribe's funds will be disallowed.

In closing, I would like to thank the Committee for their time and attention to these matters.

COMMENTS OF JOEL M. FRANK, SR. REGARDING AMENDMENTS TO NAHASDA (TECHNICAL CORRECTIONS) S. 400

In general, NAHASDA was intended to be implemented with emphasis on the principles of P.L. 93-638, Indian Self-Determination; however, this does not appear to be the trend.

Section 3 - Organizational Capacity.

(3) (a) The same standards should apply to HUD personnel as the Act and regulations impose on tribes. Tribes are evaluated on information provided about key personnel, administrative capacity, and other management criteria. In addition, HUD receives information, i.e., findings and recommendations of auditors together with responses of tribes, in the audited financial report package required under the Single Audit Act Amendments of 1996, as implemented by OMB A-133. HUD personnel need training in NAHASDA, and they do not always provide accurate and/or complete information or interpretations to tribes whose management performance will be evaluated based on the use of such information in its decisions.

(3) (b) Additional conditions, i.e., requiring evidence (which is not adequately described) in the Indian Housing Plan is not practical, and there are already sufficient restrictions embodied in existing regulations regarding non low-income families. It is not clear why there is a trend to impose increased regulations and requirements on tribes, while previous housing authorities operated within more reasonable parameters. Tribes are spending a significant amount of time in preparing Indian Housing Plans, and in addition, are required to have written policies available to HUD and the public.

Section 5 – Expanded Authority to Review Indian Housing Plans.

It is suggested that deletion of the word "limited" (before review) with regard to review of IHPs by the Secretary is not necessary. HUD conducts thorough reviews of IHPs, and sometimes excessive review procedures are undertaken according to several tribes. In addition, the Annual Performance Report provides sufficient information for HUD to identify a tribe that may need assistance in accomplishing its objectives, and provides HUD with notice for review of subsequent IHPs.

Section 6 – Oversight.

(a) Tribes should not be denied the due process afforded under Section 401 of NAHASDA in any situation.

(b) Although on-site reviews or audits by HUD may at times be deemed necessary, or even requested by a tribe, the Single Audit Act should not be disregarded. The audited financial report package required under

COMMENTS OF JOEL M. FRANK, SR. REGARDING AMENDMENTS TO NAHASDA (TECHNICAL CORRECTIONS) S. 400
PAGE 2

OMB A-133 provides HUD with financial condition, operating results, auditor findings and recommendations, as well as responses by tribes. These reports are prepared by independent auditors who test compliance as well as substantive transactions. Tribes should not be spending a significant amount of time on additional audits.

(d) It is noted that the original language of NAHASDA has been deleted relevant to: "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." Was this omission intentional or inadvertent?

Section 8 – Hearing Requirement.

Tribes need sufficient time to respond to HUD findings, and 60 days may not be sufficient in some cases. If a tribe is out of compliance with policy, the tribe should be given at least a 30-day period in which to correct the default before payments are stopped, i.e., an interim solution. In addition, alternative dispute resolution, such as mediation, should be made available before a tribe takes civil action to contest actions of the Secretary.

Section 9 – Performance Agreement/Time Limit.

It is suggested that HUD should be required to provide assistance to tribes needing technical assistance rather than the permissive: may provide assistance (NAHASDA). With regard to an additional Performance Agreement for a second year term, if a tribe has made a good faith effort during the first year, that period should reflect whether such tribe has made sufficient progress and has undertaken steps to become technically and administratively capable of complying with NAHASDA. HUD should not exercise excessive oversight for extended periods.

Section 11 (b):

Sec. 108 Authorization of Appropriations.

As long as the $10,000,000. set aside of disaster funds does not affect appropriation levels for Indian Housing Programs, this provision is not objectionable.

Section 11 (d) - Terminations.

If this provision does not reduce the level of required funding, i.e., equal to or greater than fiscal year 1996 (or the alternative proposed average amount for fiscal years 1992-1997), this provision is not objectionable.

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ISBN 0-16-058332-2