

**Indian Housing Block Grant Formula Negotiated Rulemaking
Session 9
September 20, 2016**

Traditional Opening

Committee Co-Chair Annette Bryan also welcomed everyone and introduced Choogie Kingfisher from Cherokee Nation, who in turn introduced the traditional opening by the Seminole Nation Honor Guard with Medicine Eagle performing. This was followed by the opening prayer.

Committee Member Roll Call

Co-Chair Bryan called the roll. There was a quorum.

Welcome and Introduction of Deputy Assistant Secretary Heidi Frechette

Lourdes Castro Ramírez, Principal Deputy Assistant Secretary, welcomed everyone to Negotiated Rulemaking. She said that it is a great honor to serve this administration leading the Office of Public and Indian Housing, and that it's an honor to serve on this Committee. She commended and thanked the Committee Chairs for providing very steady leadership, and acknowledged the team from HUD. Ms. Castro Ramírez said that Oklahoma City is significant for this country and to the HUD family, and that they continue to be touched by the memory of those who were lost in the bombing of the Federal Building on April 19, 1995. She asked for a moment of silence to remember them.

Ms. Castro Ramírez stated that during the last nine months they have made significant progress on their shared goals of providing further housing opportunities. During that time, she and Secretary Castro attended the Northern Plains Housing Summit. Also in the last nine months they continued to make significant progress on a number of key initiatives: housing homeless veterans and providing supportive services using the \$6 million Tribal HUD-Veterans Affairs Supportive Housing (VASH) funding awarded to 26 tribes; HUD's Tribal Intergovernmental Advisory Committee, a first for HUD; the Housing Needs Study, which "will inform and shape not just housing policy in Indian Country, but also the priorities that you all have as it relates to where we need to invest"; and HUD's Native Youth Leadership Summit for 120 youth from across the country.

Ms. Castro Ramírez introduced Heidi Frechette, the new Deputy Assistant Secretary. She said that Ms. Frechette has very extensive experience working for Indian Country and working on Capitol Hill, and stated that she is pleased that the Office of Native American Programs (ONAP) is in good hands. Ms. Frechette said that she is honored to be part of this Committee.

Logistics and Housekeeping Items

Lauren Lim with FirstPic went over the hotel and logistics.

Facilitator Introduction and Approval

Sara Fiala from FirstPic will facilitate as she did at the last Negotiated Rulemaking meeting held at HUD in January 2016. The Committee approved Ms. Fiala as facilitator by consensus.

Action Items for Full Committee

Committee Review and Approval of the Proposed Agenda

The Committee approved the proposed agenda by consensus.

Committee Review and Approval of the Minutes from January 2016

The Committee approved the minutes from January 2016 by consensus.

Procedure Overview

Aaron Santa Anna, Assistant General Counsel for Regulations, gave the Committee an overview of the procedure for getting the final rule published. Mr. Santa Anna emphasized that they have had a lot of support to get to a final rule published in the Federal Register before the end of the calendar year. He said that the important part of rulemaking is to make the rule available to the public and get public comments, and to review the comments and respond to them.

Review of Public Comments and Approval of Final Rule Language

Mr. Santa Anna took the Committee through the public comments. He stated that the Committee needs to accept the responses to the public comments by consensus.

Other Issues and Comments

Comment: There is a need for a Federally conducted National Tribal Survey.

Mr. Santa Anna stated that this comment will have absolutely no impact on regulatory text. He said he tried to anticipate what the Committee would think when he drafted the proposed response. The Committee discussed HUD's proposed response. Several Committee members said that they wanted to add positive comments about the National Tribal Survey so that the record shows the full Committee discussion on the issue, and Mr. Santa Anna agreed. There was consensus to table this issue for now to give HUD time to add positive comments.

Other Issues and Comments

Comment: Impact on other organizations that use the IHBG factors or data.

Mr. Santa Anna stated that this comment will not affect the regulatory text of the rule. The Committee supported HUD's proposed response by consensus:

The Committee is aware that some organizations, such as the U.S. Department of Transportation, use the IHBG formula for various reasons. Nevertheless, the Committee agrees with the commenter that the effect of IHBG formula on these outside stakeholders should have no

bearing on whether such changes are implemented. As stated by the commenter, section 302 of NAHASDA delineates the factors that the Committee must consider in determining the formula. HUD is not authorized to consider in the course of negotiating the IHBG formula how elements of the formula might impact entities that are not IHBG recipients.

Minimum Total Grant Allocation of Carryover Funds (§ 1000.329)

Comment: Minimum total allocation of carryover funds is inconsistent with NAHASDA.

The public comment stated that this decision is arbitrary and not based on need, and that it would be better to use the carryover funds for drug treatment grants. HUD proposed the following response:

The Committee considered this comment and disagrees that § 1000.329 is arbitrary and not based on Need. In considering the provision, the Committee sought to augment the minimum allocation amount already provided under the Need component in § 1000.328 in the event there are funds voluntarily returned or not accepted by other tribes in the prior year (“carryover”). Just as § 1000.328 recognized that allocations in minimum amounts are needed if there exist eligible households below 80 percent of median income in the tribe’s formula area, proposed § 1000.329 simply recalibrates the minimum if there are carryover funds. The Committee also notes that HUD does not have the statutory authority to award funds specifically to fund drug control/elimination grants, however, grantees may choose to spend their Indian Housing Block Grant (IHBG) funds to remediate units as doing so is an eligible activity in the IHBG program.

Mr. Santa Anna said that this comment does have an impact on the regulatory text. There was a call for consensus on the proposed response and there was one dissent. The dissenter said that she is not opposed, but that she doesn’t want to rush through this process. After a break, the Committee approved the proposed response by consensus.

Comment: Minimum total grant allocation of carryover funds should be clarified.

One commenter recommended that § 1000.329 be clarified to read:

(c) To be eligible, a tribe must certify in its Indian Housing Plan the presence of any eligible households at or below 80 percent of median income.

HUD agreed with the comment in its response:

The Committee considered this comment and agrees that § 1000.329(c) be clarified to parallel § 1000.328.

Mr. Santa Anna clarified that this is a conforming change to the regulations. There was a question about using the word “eligible” because they want the carryover section to parallel the current regulation in 1000.328. The following revision to § 1000.329 was proposed:

(c) To be eligible, certify in its Indian Housing Plan the presence of any households at or below 80 percent of median income;

The Committee approved the revision above by consensus.

Data Sources for the Need Variables (§ 1000.330)

Comment: The term “Indian Lands” is ambiguous and needs to be clarified in the undercount adjustment to the U.S. Decennial Census.

A Committee member yielded to Mr. Ed Goodman, who stated that he wants to use language that ties the term into Formula Areas in Alaska. He said that using the term “Indian lands” is not necessary. Mr. Goodman proposed the following language:

For the purposes of this paragraph, the term “Indian Lands” means Alaska formula areas described in the definition of formula area in paragraph (4) of the definition of formula area set out in section 1000.302.

A Committee member asked how statistical areas relate to Service Areas, and how this language will affect the Need variables in the formula. It was clarified that the proposed new term will be consistent with the geographies in Alaska that are used today, and that it won’t change the intent. Another Committee member wanted to go on record with his concern that they need to clarify that the Census Bureau only defines the term “Remote Alaska” but not the term “Formula Areas in Remote Alaska.”

The full revised response is as follows:

The Committee agreed with the commenters on the ambiguity of the term “Indian Lands,” and clarified the regulation at § 1000.330 by changing “Indian Lands in Remote Alaska” to “For Remote Alaska as defined by the U.S. Census Bureau, Alaska Formula Areas in Remote Alaska shall be” treated as Reservation and Trust Lands for purposes of this paragraph.

The Committee approved the above revision by consensus.

Comment: Require HUD to issue a report on the data source and update the data source if necessary.

HUD proposed the following response:

The Committee considered this comment and agreed not to add the language proposed by the commenter. In reaching this decision, the Committee notes that the language recommended is ambiguous. Additionally, the IHBG Negotiated Rulemaking Data Study Group extensively evaluated all data sources used in the formula during negotiated rulemaking. The resulting report outlining the Committee’s Data Study Group’s process and final recommendations to the Committee was published with the proposed rule.

The Committee approved the proposed response by consensus.

Comment: Counting and averaging of the U.S. Decennial Census data.

One commenter recommended adjusting the U.S. Decennial Census data for both over and under-count. The commenter also asked for clarification on who determines “significance.” HUD’s proposed response agreed that the regulation should adjust for statistically significant under and over-counts as determined by the U.S. Census Bureau. A Committee member

proposed that they adjust for actual undercounts on each reservation, rather than use an average undercount for the adjustment. Mr. Richardson, Office of Policy Development and Research, explained that the sample size is not large enough to do estimates for any specific tribes with 90 percent confidence in the results.

Committee members expressed concern about including overcounts in the proposed response, since they think the Committee only discussed what to do about undercounts. A Committee member said that, since the Committee didn't deal with overcounts, they should change HUD's proposed language to say that the regulation should not adjust for any statistically significant overcount.

Other Committee members brought up the issue of significance. One Committee member said that the author of the report defines significance. She thinks it should be up to the tribes to determine what is statistically significant. Mr. Richardson said that in the study we are dealing with, they used the 90 percent confidence interval, which is commonly used for this kind of sample survey research. There will be a new study around the 2020 Census, and these regulations would require changes after the 2020 Census if there were a significant undercount and/or overcount. A Committee member asked if they could define statistical significance at 90 percent confidence. Mr. Santa Anna said that they may be going beyond the scope of the proposed rule by setting out a specific level of significance. Mr. Richardson said that the Census has lots of discussions about significance and sets the appropriate standard, and that the Committee should rely on their judgment.

After much discussion, the Committee approved the following response by consensus. It does not change the regulatory language:

The Committee considered these comments and agreed that the regulation should not make adjustments to add for any statistically significant overcount. The Committee during its eighth session considered how to address undercounts and overcounts reported by the U.S. Census Bureau. The Committee, by consensus, determined that adjustments to data should be made for statistically significant undercounts. The Committee did not reach consensus on any adjustments to data based upon overcounts. The Census reports reviewed during the convening of the Committee did not indicate any statistically significant overcounts. The U.S. Census Bureau determines whether overcounts or undercounts are statistically significant. Currently there is no way to determine actual undercounts or overcounts on a reservation-by-reservation basis.

Demolition and Rebuilding of Formula Current Assisted Stock (FCAS) Units (§ 1000.318(d))

Revisions to Language on demolition and rebuilding.

Mr. Santa Anna stated that this was the one issue that HUD could not get through the departmental clearance process because of the Office of Inspector General's (OIG) legal concerns about the amount of time they gave recipients to rebuild units. The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) provision states that "A unit that is demolished has to be rebuilt in one year." Using public input, HUD developed a response which has been approved by the OIG:

A unit that is demolished pursuant to a planned demolition may be considered eligible as a FCAS unit if, after demolition is completed, the unit is rebuilt within one year. Demolition is completed when the site of the demolished unit is ready for rebuilding. If the unit cannot be rebuilt within one year because of geographic location, the Indian tribe, TDHE or IHA may request approval for a one-time, one-year extension. Requests must be submitted in writing and include a justification for the request.

Jad Atallah, HUD attorney, explained that they get the additional year under the authority of section 302(c) of NAHASDA:

In establishing the formula, the Secretary shall consider the relative administrative capacities and other challenges faced by the recipient, including, but not limited to, geographic distribution within the Indian area and technical capacity.

Committee members discussed adding barriers in addition to geographic location, including legal impediments and administrative capacity, which could trigger the one-year extension on rebuilding a demolished unit. HUD said they can't guarantee that they can get an expanded provision through OIG. The Committee asked discussed if the same rule applies to disasters and environmental considerations. Mr. Atallah responded that, as written, this regulation applies when a tribe decides to demolish a unit voluntarily. Since under the statute they can only fund low income housing dwelling units, at some point after a natural disaster a tribe has to plan demolition and rebuilding of units so HUD can continue funding the units. HUD thinks that the proposed language is a good compromise because it gives tribes some flexibility while also ensuring that units are rebuilt quickly and people are housed quickly.

A Committee member asked if they could reference section 302(c) above instead of the specific geographic location. This triggered additional discussion of how to broaden the conditions under which a tribe could get a one-year extension. After more discussion, HUD and Committee members came up with the following proposed revisions using language from the statute:
A unit that is demolished pursuant to a planned demolition may be considered eligible as a FCAS unit if, after demolition is completed, the unit is rebuilt within one year. Demolition is completed when the site of the demolished unit is ready for rebuilding. If the unit cannot be rebuilt within one year because of relative administrative capacities and other challenges faced by the recipient, including, but not limited to geographic distribution within the Indian area and technical capacity, the Indian tribe, TDHE or IHA may request approval for a one-time, one-year extension. Requests must be submitted in writing and include a justification for the request.

If the revised proposal does not get through the OIG, the underlined language would be removed and they would revert back to the original proposal. The revised proposal passed by consensus.

Responses to Comments on Demolition and Rebuilding

Comment: Recommended language for demolition and rebuilding

A commenter recommended that demolished FCAS units continue to be eligible as FCAS if (1) construction of a replacement unit begins one year after voluntary demolition and (2) the replacement unit is completed within 24 months (or 36 months for more than five units).

The Committee approved HUD's proposed response by consensus:

The Committee appreciates the recommendation submitted by the commenter on the demolition provision pursuant to § 1000.318(d). The Committee considered the proposed language but ultimately concluded that the statute requires that rebuilding be completed within one year of the demolition. The Committee agreed by consensus, however, to a revised § 1000.318(d) that provides that the one-year clock does not begin until demolition is complete.

Comment: Recommended language for demolition and rebuilding

The commenter proposed that the Committee define the terms “demolish” and “rebuild” using a standard dictionary definition. HUD's proposed response included a sentence stating that one year is a “reasonable period of time” to rebuild for tribes who live in remote communities. A Committee member asked to strike this sentence and leave the rest of HUD's proposed response. HUD made several revisions to this friendly amendment. There was a call for the question and there was consensus on the following response:

The Committee appreciates the commenter's thoughtful responses on the demolition issue posed in the proposed rule. Specifically, the comments regarding the past and present tense of the terms “demolish” and “rebuilds” respectively, as used in the statute, offered the Committee a useful starting point for developing a revised section addressing demolition. The Committee also agrees that the purpose of the statute is to create an incentive for tribes to expeditiously rebuild housing units. The revised demolition regulation agreed to by consensus at § 1000.318(d) incorporates and builds on the comments provided.

Comment: Recommended language for demolition and rebuilding

A commenter supported the definition of demolition “as occurring only when a recipient voluntarily demolished units in order to clear a site for a replacement unit,” and recommended that the Committee define “demolition” in a way that provides maximum flexibility to tribes. The commenter further stated that tribes should not lose their FCAS funds if homes in areas with short construction seasons are not rebuilt within one year.

HUD proposed the following response:

The Committee appreciates the commenter's recommendation to define demolition in a way that maximizes flexibility for tribes. As stated, the intent of § 1000.318(d) is to incentivize tribes to rebuild expeditiously within a reasonable time period. The Committee understands the unique construction constraints faced by some IHBG recipients due to short building seasons, remote locations and high construction costs and has considered these factors in the structuring of the demolition provision.

The Committee discussed the proposed response. One Committee member said they should drop the last sentence from HUD's proposed comment to be consistent with other changes the Committee made to the demolition and rebuilding policy (see strike-through text above).

Another Committee member wanted to add a reference to methamphetamine contamination. After some discussion, the Committee came up with the following proposed additional language:
... units contaminated by methamphetamines or other contaminants.

There was a call for the question on the proposal with the above addition. There was one dissenter, who had a problem identifying a drug that they expect residents to use to contaminate their homes. He proposed that they change the language to read:
... units damaged by contaminants.

The Committee discussed the proposed new language. Several Committee members want to explicitly refer to methamphetamine to shed light on this issue and to acknowledge that the commenter mentioned this drug. One Committee member stated that drugs aren't the only problem confronting tribes, and that mentioning methamphetamines sounds like they expect residents to use this and contaminate houses. There was a call for the question on the above revised language and there was a lot of dissent. The Committee continued to discuss whether or not to specifically refer to methamphetamine contaminants. The dissenter said he would support the revised language if that would lead to consensus. The Committee approved the following response by consensus:

The Committee appreciates the commenter's recommendation to define demolition in a way that maximizes flexibility for tribes. As stated, the intent of § 1000.318(d) is to incentivize tribes to rebuild expeditiously within a reasonable time period. The Committee understands the unique construction constraints faced by some IHBG recipients due to short building seasons, units contaminated by methamphetamine or other contaminants, remote locations and high construction costs and has considered these factors in the structuring of the demolition provision.

Other Issues and Comments

Continuation of Discussion on Comment: There is a need for a Federally conducted National Tribal Survey

Mr. Santa Anna went back to the Study Group report and added language that addressed the positive aspects of a National Tribal Survey. HUD's revised proposed response includes positive comments about a National Tribal Survey:

HUD recognizes, however, that a National Tribal Survey, if adequately funded, could have a sample size in excess of the ACS, that sample survey questions would be sensitive to tribal areas, and a sampling frame more reflective of the eligible population for NAHASDA funding.

A Committee member proposed an amendment to HUD's revised response which she said was developed by several individuals:

The Committee emphasizes that IHBG Negotiated Rulemaking Data Study Group examined the development of a National Tribal Survey that would rely on tribally driven data sources. The pros and cons of the Committee's analysis are presented in the final Data Study Group report and, more particularly, the individual data source evaluations in the appendices. No consensus could be reached on using any alternative to ACS data, including a National Tribal Survey.

HUD does not have the resources to either design or administer a National Tribal Survey or to audit data collection efforts to ensure that the data from tribal sources is being collected in a fair and equitable manner and, thus, unusable in the IHBG formula. However, HUD will continue to work with the American Indian and Alaska Native Data Improvement Workgroup, National Advisory Committee, and other consultation efforts, working to design 2020's Decennial Census to improve collection in tribal communities.

Ms. Frechette proposed the changes indicated above. A Committee member asked HUD to identify the AIAN Native Data Improvement Workgroup. Mr. Richardson said it consists mostly of career Federal employees who work with Census data in various agencies. The Committee member said: "I don't know how I can come up with a consensus on a group that we don't know who they are and what their role is and so forth." Mr. Richardson said they can delete this line from the response if the Committee wants to. Another Committee member said that he disagrees with the whole last line in the above suggested response because he believes that "the U.S. Census should not tell us what our tribal information should look like."

A Committee member wanted to change the sentence "HUD does not have the resources etc." by adding back "HUD has stated," because he said that HUD made that statement, not the Committee.

HUD has stated that they do not have the resources

The Committee discussed the language for the response. There was a call for the question and the Committee reached consensus on the following language:

The Committee emphasizes that the IHBG Negotiated Rulemaking Data Study Group examined the development of a National Tribal Survey that would rely on tribally driven data sources. The pros and cons of the Committee's analysis are presented in the Final Data Study Group Report and, more particularly, the individual data source evaluations in the appendices. No consensus could be reached on using any alternative to ACS data, including a National Tribal Survey. HUD has stated that it does not have the resources to design or administer a National Tribal Survey, or to audit data collection efforts to ensure that data from tribal sources is being collected in a fair and equitable manner, and thus unusable in the IHBG formula.

Non-Consensus Items

Comment: Control weights within the ACS not a valid measure of other variables

Several commenters stated that it is not reasonable to assume that an undercount of one variable, American Indian and Alaska Native (AIAN) persons, should be applied to other Need variables.

HUD proposed the following response:

HUD appreciates the comment. HUD proposed the adjustment to reduce some of the likely error in the ACS for small areas caused by county based sampling in the ACS and to address the undercount in the base Decennial Census that is used as a core component of the weighting of ACS data. After careful consideration, HUD has decided not to move forward with the

adjustment. HUD has determined that it does not do enough to address volatility associated with small areas to warrant its introduction as a non-consensus adjustment.

Mr. Santa Anna said they would “make the appropriate revision to the regulatory text as well.” The language that the Committee previously had approved, with the language that should be deleted in strike-through, is as follows:

§ 1000.330 What are the data sources for the need variables?

(ii) Beginning Fiscal Year 2018, the data source used to determine the variables described in paragraphs (a)-(f) of § 1000.324 shall initially be the American Community Survey (ACS) 5-year Estimates.

Ms. Frechette asked if there were any comments in support of making the adjustment and was told that there was one comment in favor, but that the majority of comments were not supportive of the adjustment.

Several Committee members questioned the need to vote because the decision is HUD’s, not the Committee’s, and HUD will take action regardless of what they think. One Committee member expressed concern about the proposed change because the adjustment worked well for some of the tribes with undercounts, “and by changing their action, it just means that the undercounts are unfair and that you have to live with it...” There was a call for the question and one Committee member dissented. He said that he’s not voting because “HUD has already made the decision.” Another Committee member suggested that they capture the Committee’s dissension in the response to the non-consensus decision. After more discussion, including several proposed revisions, the Committee reached consensus on the following:

The Committee acknowledges this was a non-consensus decision taken by HUD. HUD appreciates the comment. HUD proposed the adjustment to reduce some of the likely error in the ACS for small areas caused by county based sampling in the ACS and to address the undercount in the base Decennial Census that is used as a core component of the weighting of ACS data. After careful consideration, HUD has decided not to move forward with the adjustment. HUD has determined that it does not do enough to address volatility associated with small areas to warrant its introduction as a non-consensus adjustment.

Comment: The ACS data is unreliable.

Several commenters did not support using ACS because they question the accuracy and representativeness of the ACS data. A Committee member said she doesn’t believe that the ACS provides accurate estimates for the larger tribes because she doesn’t think the data for Navajo is correct. She asked that they strike the following language from HUD’s proposed response:

Furthermore, as a mandatory survey with a full time survey staff, the response rates exceed 90 percent for most tribal areas and quality control is high. For the larger tribes that represent the majority of housing need in tribal areas, the sample sizes are large enough to have accurate estimates. The Department recognizes that the ACS data does have some limitations. Similar to the 2000 Census, tribes with fewer people in their service area have larger sampling error.

Ms. Frechette asked Mr. Richardson to respond to the friendly amendment. He stated that the Study Group report states the pros and cons of the ACS, and that HUD included those findings in its response. He suggested that they substitute the following for the language that was omitted: *HUD has determined the ACS is the most current and accurate data available for measuring the needs for funding under IHBG as discussed in the final Data Study Group report.*

Committee members discussed how to revise the response to make it clear, and offered several friendly amendments. One Committee member asked that they also delete the following, including the new sentence that Mr. Richardson proposed:

The underlying weights are county based, causing additional error for smaller areas. In addition, the 4.88 percent undercount of the 2010 Decennial Census for Reservation and Trust Lands is potentially present in the ACS because the ACS uses the Decennial Census, adjusted for post Census population growth, as its base data for weighting the ACS.

For the smallest tribal service areas, the minimum grant provisions and overlapping service areas alleviate the majority of the concerns about small sample sizes and small area weights. In regards to the Decennial Census undercount, HUD is committed to work with the Census Bureau to improve the accuracy of the counts.

There was a call for the question, and the Committee reached consensus on the following:

The Committee's Data Study Group did a thorough review of the ACS as a data source. Although consensus was not achieved on using the ACS as a data source, HUD has determined that the ACS is the most current and accurate data available for measuring the need for funding under the IHBG. The ACS data are more current than the data currently being used in the formula and are available for all eligible tribes, as discussed in the final Data Study Group Report. HUD recognizes that the ACS data does have some limitations. In addition, the 4.88 percent undercount of the 2010 Decennial Census for Reservation and Trust Lands is potentially present in the ACS because the ACS uses the Decennial Census, adjusted for post Census population growth, as its base data for weighting the ACS.

HUD is committed to work with the Census Bureau to improve the accuracy of the counts. Tribes may still challenge the ACS data.

Comment: Opposition to implementing a non-consensus adjustment to the ACS data

HUD said that they wanted to revise their original proposed response by cutting out some of the text to make the response as straightforward as possible while still addressing the issues that the commenters' raised. The Committee agreed by consensus on the following response:

HUD appreciates the concerns of the commenters but disagrees with the suggestion that moving forward unilaterally with this non-consensus item reflects a lack of good faith or detracts from the government-to-government relationship that HUD has with the tribes. HUD has agreed to remove the ACS adjustment (control total weights within the ACS).

Public Comments

There were no public comments. There will be time tomorrow for public comments as well.

Mr. Santa Anna stated that the Committee accomplished a huge amount of work. At this point, there are only a few things left to consider: volatility control with regard to § 1000.331, and negotiated rulemaking was successful. He said that they will take time tomorrow to talk about the process regarding the final rule and the steps it needs to go through for final approval.

The session ended with a closing prayer.