

**January 11, 2000**  
**PRELIMINARY DRAFT - DISCUSSION PAPER ONLY**

**Note: This document is the result of a joint tribal-HUD work group and is provided only as a nonbinding preliminary discussion paper for tribal review and comment. This document is based on recommendations received from tribal representatives in recent regional tribal consultation meetings held throughout the United States. Certain provisions labeled as “options” (previously termed “alternatives”) represent different recommendations made based on tribal or HUD positions. Because some of the options were discussed on the second day of the meeting after some work group members had departed, not all options were addressed by the full work group body. This document will be submitted for HUD internal Departmental clearance, concurrent with submission to tribal governments, and does not represent the official or final Departmental position on any provision contained therein.**

**Tribal Coordination and Negotiated Rulemaking Policy**

**I. INTRODUCTION**

The United States Government has a unique legal relationship with American Indian governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. These legal instruments establish an ethical foundation and create a trust responsibility by the federal government for Indian Tribes in the exercise of their inalienable right to self-government. In fact, Indian Nations have practiced self-governance and self-determination since time immemorial.

On April 29, 1994, a Presidential Memorandum was issued reaffirming the Federal Government’s commitment to operate within a government-to-government relationship with Federally recognized American Indian and Alaska Native tribes, and to advance self-governance for such tribes. The Presidential Memorandum directs each executive department and agency to consult with tribal governments prior to taking actions that affect Federally recognized tribal governments. In order to ensure that the rights of sovereign tribal governments are fully respected, all such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of

relevant proposals. In addition, on May 14, 1998, the President issued Executive Order 13084, “Consultation and Coordination With Indian Tribal Governments,” which directs all Federal agencies to “establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities; to reduce the imposition of unfunded mandates upon Indian tribal governments; and to streamline the application process for and increase the availability of waivers to Indian tribal governments.”

The United States Constitution recognizes Indian sovereignty by classifying Indian treaties among the “supreme law of the land,” and establishes Indian affairs as a unique area of federal concern. The above principles, and the policy principles enunciated below, are consistent with the Congressional Findings enumerated in section 2 of the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330) and with the principles of Indian Law and tribal sovereignty. Among its other findings, the Congress found that: “there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;” and “...through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people.”

## **II. DEFINITIONS**

- A. “Federally Recognized Tribe” or “Tribe” means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Education Assistance Act of 1975. **[option:** “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.]
- B. In furtherance of mutual trust and respect, “Consultation and Coordination” is the active, affirmative, advisory and collaborative process used as an integral part of the joint decision-making process.
- C. “Emergency Situation” means an unforeseen combination of circumstances or the resulting state that call for immediate action. (e.g. A situation encountered by a tribe or HUD that does not fall within the timeframes outlined by regulation, tribal coordination or negotiated rulemaking.)

III. PRINCIPLES

- A. *HUD recognizes and commits to a government-to-government relationship with American Indian and Alaska Native tribes.*
- B. *HUD recognizes Tribes as the appropriate non-federal parties for making policy decisions and managing programs for their constituents.*
- C. *HUD will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribes on housing and community development programs administered by HUD ONAP.*
- D. *HUD acknowledges the unique legal relationship between the federal government and tribes, and, therefore, will consider tribal concerns and interests.*
- E. *HUD encourages cooperation between tribal, state, and local governments to resolve problems of mutual concern.*
- F. *HUD will work with other Federal agencies which have related responsibilities to enlist their interest and support in cooperative efforts to assist tribes within the context of all HUD programs.*
- G. *HUD will incorporate these policy principles into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.*
- H. *Where there is ambiguity, this policy shall be interpreted in favor of tribal self-determination.*

IV. TRIBAL COORDINATION [**option:** TRIBAL CONSULTATION]

- A. Tribal Coordination [**option:** Consultation] is an advisory mechanism.
- B. Matters Subject to this Process are:
  - 1. Internal policy-making and guidance impacting tribes.
  - 2. External policy-making and guidance not addressed by Negotiated Rulemaking. [**option as alternative to B(1) and (2) above:** This process applies when proposed ONAP plans, projects, programs or activities are identified as having a unique or significant affect on a Federally recognized tribal government(s).]

C. Procedures [**option:** Individual tribal, Regional, and National Consultation]

1. Based on a government-to-government relationship and in recognition of the uniqueness of each tribe, a primary focus for consultation activities is with individual tribal governments. The use of tribal advisory organizations/committees will be in coordination with, and not to the exclusion of, consultation with individual tribal governments. When proposed ONAP plans, projects, programs or activities are identified as having a unique or significant affect on a particular tribe, HUD will notify the affected tribe and take affirmative steps to consult directly with the tribe, unless the tribe elects to consult through an advisory organization/committee. Tribes at any time may exercise their right to request consultation with HUD based on their unique structure and circumstances. Coordination partners shall be individuals, offices, or organizations who are authorized to speak for the tribe or HUD. Each tribe may, at its discretion, appoint a “Tribally-Designated HUD Liaison.”
2. Tribes are encouraged to exercise their option to convene regional tribal meetings to identify and address issues. Tribes may schedule quarterly regional meetings with HUD representatives to address issues relevant to HUD policies, regulations, and statutes.
3. Two national tribal consultation and coordination meetings will be held each year. One meeting shall be held in Washington DC and the other in Indian country.

[**option:** To reduce costs and conserve resources, to the extent feasible, Tribes and HUD will coordinate consultation meetings to be held before or after other regularly scheduled meetings such as multi-agency and association meetings.]

[**option:** Additional consultation and coordination may occur with national tribal organizations, including but not limited to NCAI and NAIHC. These meetings shall be open to tribes.]

V. [OPTIONAL ALTERNATIVE TO PARAGRAPH NUMBER 3 ABOVE:  
“TRIBAL ADVISORY ORGANIZATIONS/COMMITTEES”.]

The principal focus for consultation activities of the HUD ONAP is with individual tribal governments. However, it is frequently necessary that the ONAP have organizations/committees in place from which to solicit tribal advice and recommendations, and to involve tribes in decision-making and policy development. In consultation with elected tribal governments, ONAP identifies and assists in the support of tribal advisory organizations/committees.

1. **Headquarters.** The National Congress of American Indians (NCAI), in coordination with the National American Indian Housing Council, or any subcommittee, work group or other organization designated by NCAI, serves as the national advisory organization and a major source of consultation and advice on issues of national importance. Meetings between Headquarters ONAP and the Board of Directors of the national advisory organization are scheduled to be held at least two times a year, with all Federally recognized tribes invited to attend and participate.
2. **Area Offices.** Each Area ONAP Administrator, in consultation with tribal governments, must designate an organization(s)/committee(s) representative of all tribal governments served by the Area ONAP. The designated organization(s)/committee(s) shall provide advice and consultation to the Area ONAP Administrator and staff. Meetings between the designated tribal organization(s) and Area ONAP shall occur at least annually, or more frequently when there is a need.
3. **National/Area Coordination.** To promote coordination in addressing issues arising from tribal consultation events at both the national and local level, a summary record of the comments made during national and area consultations will be distributed to tribes. To reduce costs and conserve resources, to the extent feasible, Tribes and HUD will coordinate consultation meetings to be held before or after other regularly scheduled meetings.

**VI. [OPTIONAL ADDED PROVISION: “PROCESS FOR ESTABLISHING JOINT FEDERAL/TRIBAL WORK GROUPS AND/OR TASK FORCES”.]**

It may become necessary for the ONAP Deputy Assistant Secretary to establish or select a work group or task force to develop recommendations on certain issues. The work group or task force may conduct its activities through conventional (e.g. telephone and mail), as well as innovative (e.g. e-mail and video conferences) means of communication. In those cases when meetings are appropriate, the following process should be followed:

- A. Membership and Meeting Notices:
  1. Solicitation for tribal membership for work groups shall be publicized widely, with the purpose, charge, time frame and other specific tasks clearly identified.
  2. Membership on each work group should be evenly divided between tribal and HUD, whenever possible.

3. Tribal representation should be consistent with the established standard of geographically diverse small, medium and large tribes, whenever possible.
4. Meetings should be publicized widely and open to the public.

**B. Participation:**

1. Attendance: Work group members shall make good-faith attempts to attend all meetings. They may be accompanied by other individuals to advise them as they deem necessary.
2. Appointment of Alternates: Alternate work group members may be appointed by written notification signed by the member. Such alternates shall possess the authority of the work group member to make decisions on their behalf if such authority is so delegated to them in writing.

**C. Work Group Protocols that May be Established:**

1. Roles of the work group members
2. Process for decision-making
3. Process for creating written products and other decisional documents
4. Other items as deemed necessary by the work group

**D. Work Group Final Products and Recommendations:**

All final recommendations will be given serious consideration by the ONAP Deputy Assistant Secretary. Whenever possible, all final decisions should be publicized widely and circulated to tribal leaders for review and comment.

**VII. NEGOTIATED RULEMAKING**

A. Negotiated Rulemaking Committee, as an advisory committee, considers and discusses issues for the purpose of reaching a consensus in the development of proposed rules and selected policy-making.

**B. HUD Native American Program Matters Subject to this Process are:**

1. All formal rules and policy-making, such as regulations, regulation amendments, and all other matters required to be published in the Federal Register.

2. Selected external policy-making and guidance. [**option:** Issues may be brought before the committee by HUD, a majority of committee members present, the tribal chairman of the committee, or by a petition of any tribe or regional or national organization accepted by a majority of the committee].

[**option- alternative to paragraphs B(1) and (2) above:** HUD will address to the Committee the development and amendment of all regulations and significant rules designed to implement, interpret, or prescribe law or policy relating to ONAP programs.]

- C. A Negotiated Rulemaking Committee shall be established as a standing committee.

1. Composition: 58 members, including 10 HUD representatives and 48 tribal representatives selected through a tribally-directed process with the intent of diversity.

[**options for determining Committee membership:** See following proposals 1 through 5. Any other options devised shall be considered for adoption. Composition shall be determined by the tribes by consensus, by vote, or any other acceptable method, and will be addressed during the February 23, 2000, national consultation meeting in Washington D.C. The proposals are not listed in order of priority.]

- a) **Proposal #1:** Representatives shall be derived from HUD Regions (2 tribal representatives from each regional office), BIA Area Offices (2 tribal representatives from each regional office), NAIHC Region (1 representative from each regional office), NCAI (2 representatives), NAIHC (1 representatives), and 10 HUD representatives equaling 58 members.
- b) **Proposal #2:** The Committee shall be made up of 48 tribal representatives, and ten HUD representatives. Tribes will nominate individuals in response to a widely publicized invitation, which will also be announced in the Federal Register. The invitation will list qualifications and criteria by which the Secretary of HUD will make the selections, in consultation with the National Congress of American Indians and the National American Indian Housing Council. Committee membership shall reflect small, medium and large, geographically diverse tribes. There shall be one tribal and one HUD Committee Co-Chairpersons. Procedures will be established by the Committee for alternate representatives, removal of representatives, and reappointment of representatives.

- c) **Proposal #3:** The Committee shall be made up of 48 representatives of Native American governments and governmental agencies eligible for NAHASDA funding with the exact same diversity of membership as the original Negotiated Rule Making Committee formed in 1996. Any member of the original Negotiated Rule Making Committee who is still elected, appointed or employed by the same tribe as at the time he or she sat on the original Committee shall be re-appointed. All other appointments shall be made by the Secretary only after consulting with regional and tribal organizations. Ten additional members shall be HUD officials appointed by the Secretary. There shall be two tribal and one HUD Committee Co-Chairpersons.
  - d) **Proposal #4:** The Committee shall be made up of representatives based on the proportional number of tribes in a each HUD region.
  - e) **Proposal #5:** The Committee shall be made up of representatives based on the proportional number of tribes in a each HUD region, also taking into account the number of tribal members in the respective tribes.
2. Roles and Responsibilities: This Negotiated Rulemaking Process shall serve as a method for HUD to collaborate with tribes and other Native American governments on the Department's Native American programs. This process will compliment HUD's rulemaking procedures in accordance with the Department's regulations at 24 CFR Part 10. [**option - alternative to paragraphs B(1) and B(2) above**]: HUD will address to the Committee the development and amendment of all regulations and significant rules designed to implement, interpret, or prescribe law or policy relating to the Department's Native American programs.)
3. Number of Meetings. A minimum of two meetings annually.
- D. Procedures. [**option:** Adopt procedures based on the Committee Endorsed Organizational Protocols as defined in the NAHASDA Negotiated Rulemaking used to develop the Indian Housing Block Grant Program final rule 24 CFR Part 1000.
- 1. PARTICIPATION
    - a. Attendance at Meetings. Committee Members for each party must make a good faith effort to attend all full negotiating sessions. In the event a committee member or their designated alternate fail to attend three consecutive full negotiating sessions, the Secretary may remove the member from the Committee and designate a replacement member. Committee Members may be accompanied by such other individuals as that Member believes is appropriate to represent his/her interest.



- b. Designated Alternates. To the greatest extent possible, future Committee alternates (those not previously designated as of the date of these protocols) should be recommended in a timely manner by resolution from the tribal leaders in the

**PRELIMINARY DRAFT - DISCUSSION PAPER ONLY**

geographic area represented by the committee member, or other methods acceptable to the area, so as to allow effective participation in Committee activities. Designated Alternates must present written designation, endorsed by the Committee Member they are replacing, of their appointment as an Alternate Member prior to participation in negotiating sessions with the rights of Committee Member.

- c. Constituents' Interests. Committee Members are expected to represent the concerns and interests of their constituents.

**2. MEETINGS**

- a. Quorum. A quorum of the full committee shall consist of 2/3 of the members (or properly designated alternates) of the Committee consisting of tribal and Departmental representatives who are present during a call of the roll taken at the start of a negotiated rulemaking committee meeting.
- b. Open Meetings. Negotiating sessions will be announced in the Federal Register prior to the meeting and will be open to the public. Members of the public will be given opportunities at various times throughout each meeting to make comments, raise questions, or submit materials for the record.
- d. Minutes. The Committee shall observe the requirement of the Charter regarding minutes, records, and documents. In addition, approved minutes will be maintained and distributed to the Committee and Tribes by the representatives of Housing and Urban Development (HUD).
- e. Agenda. Meeting agendas will be developed by HUD and Tribal Committee Co-Chairs.
- f. Caucus. A break can be declared at any time by any party. Parties will be asked for an estimate of the time needed for the caucus. Internal procedures will be determined by each respective caucus.

**3. DECISION MAKING**

- a. Consensus. Consensus means general agreement as shown by the absence of expressed disagreement by a committee member in regards to a particular issue. [**option: Majority Vote**. Decisions of the Committee may be made by majority vote.]
- b. Work Groups. Smaller Work Groups may be formed by the Committee to address specific issues and to make recommendations to the Committee. Work Groups are not authorized to make decisions for the Committee as a whole. All Committee Members will be notified of all work Group meetings by the Committee Co-Chairs.

**PRELIMINARY DRAFT - DISCUSSION PAPER ONLY**

**4. AGREEMENT**

- a. Product of Negotiations. The intended product of the negotiations is a preliminary report and proposed regulations or rule in the form of a written statement developed by the Committee Members to the Secretary of Housing and Urban Development
- b. Final Rule. The Committee will review all comments received in response to the NPRM and will submit a final report with recommendations to the Secretary of Housing and Urban Development for promulgation of a final rule.

**5. COMMUNICATION**

- a. Good Faith. All Members agree to act in a good faith effort to reach agreement or consensus in all aspects of negotiations by encouraging the free and open exchange of ideas, views, and information.

**6. CO-CHAIRS**

There will be one HUD and one tribal Co-Chairperson for the Committee.

- E. [option] Expenses & Costs.** Subject to the availability of funds and resources, HUD will pay for meeting room space, note taking, and related accommodations for national consultation meetings. HUD will not pay travel or lodging for participants in the national consultation meetings. Every effort will be made to conduct consultation in an efficient and cost effective manner.

**[option: Advisory Committee for Emergency Situations]** An Advisory group or subcommittee derived from the Negotiated Rulemaking Committee will be available to address emergency issues on an expedited basis.

**VIII. Implementation**

- A. All committees shall be chaired by at least one tribal and one HUD representative.

B. Excluded from this policy are exclusively internal policy and guidance making decisions, such as personnel, salaries, staffing, office management. **[option:** This policy applies when proposed ONAP plans, projects, programs or activities are identified as having a unique or significant affect on a Federally recognized tribal government(s).]

**PRELIMINARY DRAFT - DISCUSSION PAPER ONLY**

C. **[option]** Time frames for consultation outreach will depend on the need to act quickly. Suggested guidelines are not less than 60 days for significant new matters of national scale, 30 days for routine proposed actions, and 2-3 weeks with expanded tribal outreach effort for proposed actions which must be “fast tracked” to respond to critical deadlines. **[option:** timeframes could be put under each category of consultation, coordination and negotiated rulemaking].

D. Methods of Communication. **[option]** Each tribe shall determine the method of communication that they are most comfortable with to receive information **[option]** The following are examples of communication means by which consultation can be accomplished. The method(s) of communication used will be determined by the significance of the consultation matter, the need to act quickly, and other relevant factors:  
Internet; Broadcast fax; U.S. Postal Service; Telephone - conference calls; Multimedia; Direct contact; and Formal meetings.

E. Reporting Mechanisms. **[option]** In all cases the Native American tribes which have been involved in the consultation process the tribe(s) shall be given due notice of the HUD decision by one or more of the communication method(s) identified by the tribe **[option:** This sentence could end by referring to the communication methods identified in the above paragraph.] This notification shall specifically include a discussion of the basis for the HUD decision, including public comments received, relationship to the concerns raised in consultation, and any avenues available for further discussion, protest or appeal of the decisions.

**IX. GENERAL PROVISIONS.**

This document has been adopted for the purpose of enhancing government-to-government relationships, communications, and mutual cooperation between the U.S. Department of Housing and Urban Development and tribes and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons. The provisions of the Federal Advisory Committee Act are not applicable to this policy. This document is effective on the date it is signed by the Secretary of HUD.



