

The 8th Native American
Homeownership Summit

Working Together to Build Programs and Opportunities

July 9–13, 2001 • St. Paul, MN



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Agenda July 9-13, 2001

Monday, July 9, 2001

4:00 p.m. – 6:00 p.m. **Registration (*Room: Mississippi Garden Court East*)**

Tuesday, July 10, 2001

9:00 a.m. – 12:00 p.m. **Opening Plenary (*Room: Great River Ballroom*)**

Yellow Horse Drum Group

Christopher D. Boesen, Special Assistant to the Secretary, Office of Legislation in Congressional and Intergovernmental Relations, U.S. Department of Housing and Urban Development

Ted Key, Acting Deputy Assistant Secretary, Office of Native American Programs, U.S. Department of Housing and Urban Development

Chester Carl, Executive Director, Navajo Housing Authority

12:00 p.m. – 1:30 p.m. **Lunch on Your Own**

1:30 p.m. – 3:00 p.m. **Concurrent Consultation Sessions (I)**

A. Other Federal Requirements: Environmental Review (*Room: Great River Ballroom I*)

Discussions will focus on the issues surrounding the environmental review process.

B. IHP/APR: IHP/APR Review Process (*Room: Great River Ballroom II*)

Discussions will cover the Indian Housing Plan and Annual Performance Report review process.

C. Development Issues: Cooperative Agreements (*Room: Minnesota East Ballroom*)

This session will cover cooperation agreements between tribes and local governments.

D. Eligibility and Income: Eligibility (*Room: Kellogg I, II*)

This session will discuss the eligibility of activities under NAHASDA.

E. NAHASDA – Administration: Current Assisted Stock (*Room: Capitol Ballroom*)

This session will cover the status of Current Assisted Stock (CAS).



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F. NAHASDA – Financial Issues: Lending Programs (Room: Minnesota West Ballroom)

Discussions will cover various issues surrounding lending programs.

3:00 p.m. – 3:30 p.m.

Break

3:30 p.m. – 5:00 p.m.

Concurrent Consultation Sessions (II)

A. Other Federal Requirements: Environmental Review (Room: Great River Ballroom I)

Continued from session before the break.

B. IHP/APR: IHP/APR Review Process (Room: Great River Ballroom II)

Continued from session before the break.

C. Development Issues: Cooperative Agreements (Room: Minnesota East Ballroom)

Continued from session before the break.

D. Eligibility and Income: Eligibility (Room: Kellogg I, II)

Continued from session before the break.

E. NAHASDA – Administration: Current Assisted Stock (Room: Capitol Ballroom)

Continued from session before the break.

F. NAHASDA – Financial Issues: Lending Programs (Room: Minnesota West Ballroom)

Continued from session before the break.

Wednesday, July 11, 2001

9:00 a.m. – 10:30 a.m.

Concurrent Consultation Sessions (III)

A. Other Federal Requirements: Labor Issues (Room: Great River Ballroom I)

Discussions will focus on the issues surrounding labor requirements.

B. IHP/APR: IHP/APR Compatibility and Forms (Room: Great River Ballroom II)

This track will cover Indian Housing Plan and Annual Performance Report compatibility and forms.



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C. Development Issues: Infrastructure (Room: Minnesota East Ballroom)

Discussions will cover infrastructure issues.

D. Eligibility and Income: Income (Room: Kellogg I, II)

This session will discuss the definition and levels of eligible income.

E. NAHASDA – Administration: Program Income (Room: Capitol Ballroom)

This session will cover program income definitions and requirements.

F. NAHASDA – Financial Issues: Obligation of Funds (Room: Minnesota West Ballroom)

Session discussions will cover the obligation of funds.

10:30 a.m. – 11:00 a.m. Break

11:00 a.m. – 12:00 p.m. Concurrent Consultation Sessions (IV)

A. Other Federal Requirements: Labor Issues (Room: Great River Ballroom I)

Continued from session before the break.

B. IHP/APR: IHP/APR Compatibility and Forms (Room: Great River Ballroom II)

Continued from session before the break.

C. Development Issues: Infrastructure (Room: Minnesota East Ballroom)

Continued from session before the break.

D. Eligibility and Income: Income (Room: Kellogg I, II)

Continued from session before the break.

E. NAHASDA – Program Income (Room: Capitol Ballroom)

Continued from session before the break.

F. NAHASDA – Financial Issues: Obligation of Funds (Room: Minnesota West Ballroom)

Continued from session before the break.

12:00 p.m. – 1:00 p.m. Lunch on Your Own



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1:00 p.m. – 3:00 p.m. **Final Consultation Plenary Discussion (Room: Great River Ballroom)**

Ted Key, Acting Deputy Assistant Secretary, Office of Native American Programs, U.S. Department of Housing and Urban Development

3:00 p.m. – 3:30 p.m. **Break**

3:30 p.m. – 5:30 p.m. **Final Consultation Plenary Discussions (continued) (Room: Great River Ballroom)**

Thursday, July 12, 2001

7:00 a.m. – 8:30 a.m. **Registration (Room: Mississippi Garden Court East)**

8:30 a.m. – 9:30 a.m. **Plenary (Room: Great River Ballroom)**

Ted Key, Acting Deputy Assistant Secretary, Office of Native American Programs, U.S. Department of Housing and Urban Development

Jay Marcus, Director of Housing Initiatives, The Enterprise Foundation

Sherry Salway Black, Vice President, First Nations Development Institute

Roberta Youmans, Federal Housing Finance Board

9:30 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 12:00 p.m. **Concurrent Training Sessions (I)**

A. Lending Essentials: Dreams, Indian Homes, and Mortgage Ordinances: The Basics on Creating and Implementing a Mortgage Ordinance (Room: Minnesota West Ballroom)

This session will focus on the nuts-and-bolts elements of creating and implementing mortgage ordinances in tribal communities.

Participants will leave the session with an understanding of the importance of such ordinances, and what needs to be incorporated in them.

Max Rice, Native American Program Specialist, Northwest Office of Native American Programs, U.S. Department of Housing and Urban Development

Catherine Baker Stetson, Owner/Attorney, Stetson Law Offices, P.C.

B. Tools in the New Economy: CDFI and Other Intermediaries: Investing and Lending for Community Development (Room: Kellogg I, II)

Increasing lending and investment activity in Indian Country is recognized as a necessary step toward establishing self-sustaining tribal economies. This session will address some of the barriers to capital and credit that Native American communities face and discuss Community Development Financial Institutions' (CDFIs) role in improving capital access and investments.



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Paul Jurkowski, Director, Office of Loan Guarantee, Denver Program
Office of Native American Programs, U.S. Department of Housing and
Urban Development

Rodger Boyd, Program Manager, Community Development Financial
Institutions Fund, U.S. Department of the Treasury

Jay Marcus, Director of Housing Initiatives, The Enterprise Foundation

C. Management Tools for Program Administration: Consortia Development: Evaluating the Effectiveness of Consortia Development (Room: Capitol Ballroom)

For small tribes, the challenge of applying for and administering IHBG funding is often made more manageable through the development of consortia. This session will help program managers assess the benefits and challenges of entering into, or moving out of a consortia. It will give tribes the tools to evaluate which organizations, or organizational types, will make the best partnership, if joining or leaving a consortia is a practical option, and what type of consortia should be developed. Participants in this session will leave with a stronger understanding of the options available to them, as well as take-home tools for evaluation.

Jennifer Bullough, Senior Contract Oversight Specialist, Office of
Native American Programs, U.S. Department of Housing and Urban
Development

James Wagenlander, Attorney at Law, Wagenlander & Heisterkamp,
LLC

Douglas Schroeder, Associate, Steven Winter Associates, Inc.

D. Federal Programs: Inter-Agency Update: Streamlining the Infrastructure Development Process: The New Interagency Agreement (Room: Minnesota East Ballroom)

HUD's Office of Native American Programs is leading the development of a new interagency agreement for agencies and tribes to build housing related infrastructure along with other federal agencies. This session will discuss the progress of the new agreement.

Dennis Daniels, Native American Program Specialist, Office of Native
American Programs, U.S. Department of Housing and Urban
Development

E. Crispin Kinney, Acting Director, Division of Sanitation Facilities
Construction, Office of Environmental and Engineering, Indian Health
Service

David Saffert, Native American Coordinator, Rural Development, U.S.
Department of Agriculture

Jose Aguto, Environmental Protection Specialist, American Indian
Environmental Office, Environmental Protection Agency

Herb Nelson, Regional Environmental Scientist/Acting Director, Midwest
Regional Office of the Bureau of Indian Affairs



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E. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 1 (Room: State I)

Building Native Communities is a self-contained curriculum intended to give you financial literacy skills to share with your home communities. Interested individuals must attend all four training sessions and pre-register for the Financial Literacy track.

Sherry Salway Black, Vice President, First Nations Development Institute

Rebecca Seib, Acting Director of Grantmaking, First Nations Development Institute

F. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 2 (Room: State II)

Building Native Communities is a self-contained curriculum intended to give you financial literacy skills to share with your home communities. Interested individuals must attend all four training sessions and pre-register for the Financial Literacy track.

Natasha Shulman, Principal, Shulman Consulting

G. TA Roundtables (Room: Governors Hall)

These in-depth technical assistance sessions are an opportunity for participants to meet in small groups with representatives from various Federal and private organizations to discuss their specific concerns on a number of issues. See attached grid for specific topics and timeslots. One organization may register for each hour-long TA session.

Grace Cooper, Loan Production Officer, Department of Veterans Affairs

Dennis Daniels, Native American Program Specialist, Office of Native American Programs, U.S. Department of Housing and Urban Development

Barbara Gallegos, Grants Management Specialist, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Jerry Gardner, Esq., Executive Director, Tribal Law and Policy Institute

Eugene Goldfarb, Midwest Environmental Officer, U.S. Department of Housing and Urban Development

Donna Jacobsen, Lead Grants Management Program Specialist, Office of Grants Management, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Jacqueline Kruszek, Lead Grants Management Specialist, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Gary Murphy, Grants Evaluation Specialist, Denver Program Office of Native of Native American Programs, U.S. Department of Housing and Urban Develop

Patricia Roberts, Program Manager, ICF Consulting

Shirley Machonis, Project Manager, Neighborhood Networks, U.S. Department of Housing and Urban Development

James Zion, Tribal Law and Policy Institute



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12:00 p.m. – 1:30 p.m. **Lunch on Your Own**

1:30 p.m. – 3:00 p.m. **Concurrent Training Sessions (II)**

A. Lending Essentials: Lending in the 21st Century: Everything You Need to Know About Modern Lending in Indian Country (Room: Minnesota West Ballroom)

As tribal communities grow and change, so to does the world of housing and community development lending. This session will educate participants on several “hot topics” involving modern lending in Indian country, including the loan process, potential lending partners for native communities, the Community Reinvestment Act (CRA), and predatory lending.

Paul Jurkowski, Director, Office of Loan Guarantee, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Margaret Tyndall, Manager, Community Affairs, Federal Reserve Bank of Minneapolis

Sharon Wise, Executive Director, Native American Housing Services, Inc.

B. Tools in the New Economy: Native eEDGE: The Cutting eEDGE of Economic Development (Room: Kellogg I, II)

This session is your opportunity to explore the Native eEDGE website and learn more about how it can help you access grants, loans, and technical assistance to promote economic development. This powerful tool links eighteen Federal agencies and their programs and provides links to non-Federal resource databases that can help you find solutions to your community's needs.

Dennis Daniels, Native American Program Specialist, Office of Native American Programs, U.S. Department of Housing and Urban Development

C. Management Tools for Program Administration: Using New Census Data: Current Information for Accurate Estimates (Room: Capitol Ballroom)

As data from the 2000 Census becomes available, tribes and TDHEs can access new information that will lead to a more accurate analysis of current situations, assessment of local priorities, and addressing of local concerns. Designed for program managers as well as staff, this session will cover the schedule of release for new census information, useful tools for effective analysis, and how using census data for forecasting can strengthen housing programs.

Jennifer Bullough, Senior Contract Oversight Specialist, Office of Native American Programs, U.S. Department of Housing and Urban Development



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Thelma Stiffarm, Tribal Government Program, Customer Liaison Office,
U.S. Census Bureau

Robert Nygaard, Director of Planning and Development, Sault Ste.
Marie Tribe of Chippewa Indians

D. Federal Programs: Other HUD Programs: Other Resources and Programs Outside ONAP (Room: Minnesota East Ballroom)

Beyond HUD's Office of Native American Programs, numerous resources are available to tribes and TDHEs. This session will provide participants with knowledge of other HUD programs and resources outside the Office of Native American Programs.

Tony LookingElk, Community Builder, Minneapolis Office, U.S.
Department of Housing and Urban Development

N. Iris Friday, Community Builder, Northwest Office of Native American
Programs, U.S. Department of Housing and Urban Development

Thorin Druch, Native American Program Specialist, Southwest Office of
Native American Programs, U.S. Department of Housing and Urban
Development

E. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 1 (Room: State I)

Continued from session before the break.

F. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 2 (Room: State II)

Continued from session before the break.

G. TA Roundtables (Room: Governors Hall)

Continued from session before the break.

Jose Aguto, Environmental Protection Specialist, American Indian
Environmental Office, Environmental Protection Agency

Howard Boatman, Rural Housing Program Director, Rural Development,
U.S. Department of Agriculture

Ramona Burks, Vice President, ICF Consulting

Grace Cooper, Loan Production Officer, Department of Veterans Affairs

Dennis Daniels, Native American Program Specialist, Office of Native
American Programs, U.S. Department of Housing and Urban Development

Barbara Gallegos, Grants Management Specialist, Denver Program Office
of Native American Programs, U.S. Department of Housing and Urban
Development

Jerry Gardner, Esq., Executive Director, Tribal Law and Policy Institute

Donna Jacobsen, Lead Grants Management Program Specialist, Office of
Grants Management, Denver Program Office of Native American Programs,
U.S. Department of Housing and Urban Development

Robert Knecht, Senior Loan Guarantee Specialist, Office of Loan
Guarantee, Denver Program Office of Native American Programs, U.S.
Department of Housing and Urban Development



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Bruce Knott, Director, Office of Grants Evaluation, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Jacqueline Kruszek, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Jay Marcus, Director of Housing Initiatives, The Enterprise Foundation

Gary Murphy, Grants Evaluation Specialist, Denver Program Office of Native of Native American Programs, U.S. Department of Housing and Urban Development

Peter Petrunich, Grants Management Specialist, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Patricia Roberts, Program Manager, ICF Consulting

James Zion, Tribal Law and Policy Institute

3:00 p.m. – 3:30: p.m.

Break

3:30 p.m. – 5:00 p.m.

Concurrent Training Sessions (III)

A. Lending Essentials: Lending in the 21st Century: Everything You Need to Know About Modern Lending in Indian Country (Room: Minnesota West Ballroom)

Continued from session before the break.

B. Tools in the New Economy: Neighborhood Networks: Using Technology to Build Success, One Community at a Time (Room: Kellogg I, II)

For almost six years, Neighborhood Networks partnerships have helped establish technology centers that have provided a wide range of digital opportunities for community members. Model programs are now underway in Indian Country that focus on meeting the unique needs of individual tribes. Through this presentation you will learn how Neighborhood Networks technology can be a gateway to computer training, education, and employment, health, and social services in your community.

Ruth Jaure, Project Manager, ICF Consulting

Shirley Machonis, Project Manager, Neighborhood Networks, U.S. Department of Housing and Urban Development

Yvonne Harris, Senior Project Manager/Neighborhood Networks Coordinator, Buffalo Office, U.S. Department of Housing and Urban Development



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C. Management Tools for Program Administration: Facilitation Skills for Managers: Planning and Agenda-Setting for Effective Meetings and Presentations (Room: Capitol Ballroom)

Frequently required to schedule public meetings, and deliver presentations to board and council, Executive Directors regularly face the challenges that go with developing agendas, planning meetings, and designing presentations. This session will provide housing professionals with tips on how to plan for successful group discussions, improve facilitation for productive group dialogue, and organize presentations for optimal results.

Marsha Tonkovich, Vice President, ICF Consulting

D. Federal Programs: Environmental Review Tips: A User-Friendly Introduction and Instruction (Room: Minnesota East Ballroom)

This session will give an overview to the environmental review process, its integration into the overall housing planning process and touch on Best Practices and tips for an effective Environmental Review.

Robert G. Barth, Senior Program Specialist, Office of Grants Evaluation, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Eugene Goldfarb, Midwest Environmental Officer, U.S. Department of Housing and Urban Development

E. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 1 (Room: State I)

Continued from session before the break.

F. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 2 (Room: State II)

Continued from session before the break.

G. TA Roundtables (Room: Governors Hall)

Continued from session before the break.

Friday, July 13, 2001

8:30 a.m. – 3:30 p.m.

Web Clinic (Room: State III)



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9:00 a.m. – 12:00 p.m.

Concurrent Training Sessions (IV)

**A. Lending Essentials: LIHTC: Learning From a New Mexico Success Story: Using LIHTC in Your Community
(Room: Minnesota West Ballroom)**

Innovative financing can often facilitate the completion of housing and community development projects. An example of such financing is the Low Income Housing Tax Credit (LIHTC) program, which encourages funding for low-income housing through a tax credit allocation based on population. This session will discuss successful projects funded in part or in whole with the LIHTC program, focusing particularly on the success of the Santo Domingo project. Participants will be given the tools to replicate this success in their own communities.

Ed Vaughan, Native American Program Specialist, Northern Plains Office of Native American Programs, U.S. Department of Housing and Urban Development

Deborah Webster, Director, Native American Programs, The Enterprise Foundation

Patrick Wagner, Senior Development Officer, Enterprise Social Investment Corporation

Michael Bowman, Consultant, Native Nations Consulting, Inc.

**B. Tools in the New Economy: Forming a Non-Profit
(Room: Kellogg I, II)**

This session tackles many of the issues involved in establishing a nonprofit entity in your community. This resource tool will walk participants through the nonprofit planning stages, including the legal creation of the entity, the development of the organization, and eventual program operations.

Max Rice, Native American Program Specialist, Northwest Office of Native American Programs, U.S. Department of Housing and Urban Development

Perry Pockros, Principal Consultant, PricewaterhouseCoopers LLP

Bill Picotte, Executive Director, Oti Kaga, Inc.



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C. Management Tools for Program Administration: Building Skills for Effective Staff Management: Organizational and Supervisory Skills for Maintaining a Successful Staff (Room: Capitol Ballroom)

Managing staff requires team leadership and sensitive supervision, as well as the development of an organizational structure that utilizes effective personnel policies and procedures. This session will walk participants through case studies in which they will learn how to apply supervisory skills in project settings. It will also provide managers with useful techniques for evaluating the effectiveness of various policies and procedures.

Jennifer Bullough, Senior Contract Oversight Specialist, Office of Native American Programs, U.S. Department of Housing and Urban Development

Kermit Mankiller, Training Director, National American Indian Housing Council

Ramona Burks, Vice President, ICF Consulting

D. Federal Programs: Summary of Lead-Based Paint Requirements: Educating and Protecting for Future Generations: Insuring Safety and Compliance with LBP Requirements (Room: Minnesota East Ballroom)

Tribes and TDHEs will have the opportunity to learn about the Lead Based Paint grant application process and how they can access funds to educate their communities on lead hazard control and health issues. This session will provide participants a basic overview of LBP Requirements.

Robert I. Holden, Director, Nuclear Waste Program, National Congress of American Indians

Trish Roberts, Project Manager, ICF Consulting

Harry Hudson, Architect/Training Coordinator, Office of Native American Programs, U.S. Department of Housing and Urban Development

E. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 1 (Room: State I)

Continued from session on Thursday.

F. Financial Literacy: Building Native Communities: Financial Skills for Families, Track 2 (Room: State II)

Continued from session on Thursday.

G. TA Roundtables (Room: Governors Ballroom)



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Robert G. Barth, Senior Program Specialist, Office of Grants Evaluation, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Rodger Boyd, Program Manager, Community Development Financial Institutions Fund, U.S. Department of the Treasury

Grace Cooper, Loan Production Officer, Department of Veterans Affairs

Dennis Daniels, Native American Program Specialist, Office of Native American Programs, U.S. Department of Housing and Urban Development

Paul Jurkowski, Director, Office of Loan Guarantee, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Bruce Knott, Director, Office of Grants Evaluation, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Shirley Machonis, Project Manager, Neighborhood Networks, U.S. Department of Housing and Urban Development

Jay Marcus, Director of Housing Initiatives, The Enterprise Foundation

Gary Murphy, Grants Evaluation Specialist, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

Peter Petrunich, Grants Management Specialist, Denver Program Office of Native American Programs, U.S. Department of Housing and Urban Development

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			Consultation Tracks					
	Time		Other Federal Requirements	IHP / APR	Development Issues	NAHASDA Eligibility & Income	NAHASDA - Administration	NAHASDA - Financial Issues
Day 1 - 7/10/01	9:00 a.m. - 12:00 p.m.	Opening Welcome and HUD Review						
	12:00 p.m. - 1:30 p.m.	Lunch (on your own)						
	1:30 p.m. - 3:00 p.m.		Environmental Review	IHP/APR Review Process	Cooperation Agreements	Eligibility	Current Assisted Stock	Lending Programs
	3:00 p.m. - 3:30 p.m.	Break						
	3:30 p.m. - 5:00 p.m.		Environmental Review (cont.)	IHP/APR Review Process (cont.)	Cooperation Agreements (cont.)	Eligibility (cont.)	Current Assisted Stock (cont.)	Lending Programs (cont.)
Day 2 - 7/11/01	9:00 a.m. - 10:30 a.m.		Labor Issues	IHP/APR Compatibility and Forms	Infrastructure	Income	Program Income	Obligation of Funds
	11:00 a.m. - 12:00 p.m.		Labor Issues (cont.)	IHP/APR Compatibility and Forms (cont.)	Infrastructure (cont.)	Income (cont.)	Program Income (cont.)	Obligation of Funds (cont.)
	12:00 p.m. - 1:00 p.m.	Lunch (on your own)						
	1:00 p.m. - 3:00 p.m.	Final Consultation Discussion						
	3:00 p.m. - 3:30 p.m.	Break						
	3:30 p.m. - 5:30 p.m.	Final Consultation Discussion (cont.)						
			Training Tracks					
	Time		Lending Essentials	Tools in the New Economy	Management Tools for Program Administration	Federal Programs	Financial Literacy*	Technical Assistance Roundtables
Day 3 - 7/12/01	8:30 a.m. - 9:30 a.m.	Plenary						
	9:30 a.m. - 10:00 a.m.	Break						
	10:00 a.m. - 12:00 p.m.		Dreams, Indian Homes, and Mortgage Ordinances	CDFI and Other Intermediaries	Consortia Development	Inter-Agency Update	Building Native Communities: Financial Skills for Families	TA Meetings
	12:00 p.m. - 1:30 p.m.	Lunch (on your own)						
	1:30 p.m. - 3:00 p.m.		Lending in the 21st Century	Native eEDGE	Using New Census Data	Other HUD Programs	Building Native Communities: Financial Skills for Families	TA Meetings
	3:00 p.m. - 3:30 p.m.	Break						
	3:30 p.m. - 5:00 p.m.		Lending in the 21st Century (cont.)	Neighborhood Networks	Facilitation Skills for Managers	Environmental Review Tips	Building Native Communities: Financial Skills for Families	TA Meetings
Day 4 - 7/13/01	9:00 a.m. - 12:00 p.m.		LIHTC: Learning from a New Mexico Success Story	Forming a Non-Profit	Skill-Building for Effective Staff Management	Summary of Lead-Based Paint Requirements	Building Native Communities: Financial Skills for Families	TA Meetings
	12:00 p.m. - 1:30 p.m.	Lunch (on your own)						
	8:30 a.m. - 3:00 p.m.	Web Clinic**						

* Interested individuals must attend all four training sessions and pre-register for the Financial Literacy track. Seating is limited in the Financial Literacy track.

** If you will be attending the Web Clinic, you must send an email to Candis_B._Harrison@hud.gov with your name, organization and phone number, or call Alisa Reese at (202) 708-1547.



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Speaker Biographies

Jose Aguto
Environmental Protection Specialist
American Indian Environmental Office
Environmental Protection Agency

Jose Aguto works on legal and policy issues for EPA's American Indian Environmental Office (AIEO). AIEO coordinates the Agency-wide effort to strengthen public health and environmental protection in Indian country with a special emphasis on helping tribes administer their own environmental programs. Previous work experience in Indian country includes summer legal internships with the Oglala Sioux Tribe and Lummi Indian Nation. Other work experience includes policy and development work with the Lawyers' Committee for Civil Rights Under Law, policy guidance in EPA's Office of Cooperative Environmental Management, and the advancement of constitutional rights with the Ateneo Human Rights Center in the Philippines.

In addition to his work on the Interagency Task Force to address housing infrastructure in Indian country, Jose is helping lead the Agency's effort to implement Executive Order on Tribal Consultation (EO 13175), and participates in the development of rules and other EPA actions which may have an impact on Tribal governments. He has a BA in International Relations from Brown University, a JD from Villanova University, is near completion of an MS in Environmental Studies from Tufts University, and is licensed to practice law in the State of Maryland. He can be reached at (202) 260-6084, and aguto.jose@epamail.epa.gov.

Robert G. Barth
Team Leader, Office of Grants Evaluation
Denver Program Office of Native American Programs
U.S. Department of Housing and Urban Development

Robert G. Barth is a Team Leader for the Office of Grants Evaluation in the Denver Program Office of Native American Programs (ONAP). He is responsible for the development and analysis of ONAP policy regarding various HUD tribal assistance programs including the Indian Housing Block Grant program. His responsibilities also include reviewing and monitoring the implementation of tribal program responsibilities by the six ONAP field offices. He served as one of the HUD members of the Negotiated Rule Making Committee for the development of program regulations to implement NAHASDA. Prior to working in his current position, he was a Program Manager in the ONAP Southwest Field Office. He has worked for the HUD Office of Indian Programs (now Office of Native American Programs) since 1976. Before moving to San Francisco in 1974, he held various positions in the Chicago and Milwaukee HUD offices. He received both his B.A. and M.A. (in Economics and Urban and Regional Planning) from the University of Wisconsin.



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Sherry Salway Black **Vice President** **First Nations Development Institute**

Sherry Salway Black, a member of the Oglala Lakota Tribe, has over 25 years experience working with Indian people and Indian issues. She currently serves as the Vice President of First Nations Development Institute, a position she has held for fifteen years. First Nations is a national cross-tribal American Indian development institute working with Tribes and Native communities on alternative economic development. Her experience covers philanthropy, health care planning and administration, business and financial management in both the private, public and governmental sectors, and economic development and policy formulation.

Prior to coming to First Nations, Ms. Black worked with the Indian Health Service, Department of Health and Human Services for over six years. She also worked with the American Indian Policy Review Commission with the Task Force on Indian Alcoholism and Alcohol Abuse.

Ms. Black is a trustee of the Hitachi Foundation. She is currently on the Boards of Directors for First Nations Development Institute, First Nations Oweesta Corporation, and American Indian Business Leaders. Ms. Black serves on the advisory board for the "Honoring Contributions in the Governance of American Indian Nations" of the Harvard Project on American Indian Economic Development, and Bank of America's Ad Hoc Taskforce for their Indian Country 2010 Community Development Initiative and on the Rural 2000 Initiative advisory board. Ms. Black also serves on the Regional Coordinating Committee for the American Indian Headstart Program. She is a former member of the Health and Research Subcommittee of the EPA's National Environmental Justice Advisory Committee and is a past board director of Native Americans in Philanthropy, the National Rural Development and Finance Corporation, Coalition for Environmentally Responsible Economies, Women and Philanthropy, and the National Community Reinvestment Coalition.

Ms. Black has served as an advisor on indigenous issues to the U.S. Employees Delegates to the U.N. International Labor Organization in Geneva, Switzerland. In addition, was a presenter at the first White House Conference on Women's Economic Development and participated in the Fourth World Conference on Women in Beijing, China.

Ms. Black was honored in 1994 by her selection to submit the first Richard Schramm Paper on Community Development for Tufts University Lincoln Filene Center's Management and Community Development Institute. Ms. Black has a Master's Degree in Business Administration from the Wharton School of Business of the University of Pennsylvania in Philadelphia.



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Rodger J. Boyd **Program Manager** **Community Development Financial Institutions Fund** **U.S. Department of the Treasury**

Mr. Boyd is currently the Program Manager in the Community Development Financial Institutions Fund (CDFI), Department of the Treasury. The CDFI Fund uses federal resources to invest in and build the capacity of private, for-profit and non-profit financial institutions throughout the country. As the manager for Fund's Native American program, he is responsible for managing and directing the Fund's Congressional mandated Native American Lending Study to identify barriers and impacts of accessing capital and equity investments on Indian reservations, Alaska Native villages and Native Hawaiian communities. A final report will be submitted to the President and Congress. He is also developing the Fund's \$5.0 million Native American TA and Training Program to encourage the establishment of financial institutions in Indian reservations, Alaska Native villages, and Native Hawaiian communities and represents the Fund on Native American activities throughout the U. S.

Throughout his career, Mr. Boyd has worked with Indian Tribal governments, Federal agencies, and private sector. He has used his wide range of experience to enhance economic development opportunities for the Native American community and to establish greater self-sustaining reservation economies.

His work has included the developed and implementation of Federal Indian policies, economic and community development projects, housing, and business development. He has held positions in the offices of Commissioner of Indian Affairs, Bureau of Indian Affairs and Assistant Secretary of Indian Affairs, Department of the Interior. He has worked as legislative aid in the U. S. Congress. Working for the Navajo Nation, he established and directed the Tribe's governmental affairs office in Washington, D.C. and was the Executive Director for the Division of Economic Development. As a private consultant his professional services included reservation strategic economic planning, technical assistance in retail and commercial business development, and creating tribal corporations.

Mr. Boyd holds a Bachelor of Architecture degree from the University of New Mexico and a Master of City and Regional Planning from the Massachusetts Institute of Technology.

He is an enrolled member of the Navajo Nation.

Michael Bowman **Partner** **Native Nations Consulting, Inc.**

Michael Bowman is a partner in Native Nations Consulting, Inc, a Minnesota consulting firm providing technical assistance and services to tribes and tribal entities on housing development and finance and economic development. Prior to his work with Native Nations, Mr. Bowman was Executive Director of the Santo Domingo Tribal Housing Authority where he was responsible for the development of a new subdivision including 71 Mutual Help and 20 LIHTC homes and establishing an historic restoration/job training program in the traditional village. Mr. Bowman has over 18 years experience in Indian housing as an Executive Director of IHAS and THDEs in both Minnesota and New Mexico.



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Ramona Burks **Vice President** **ICF Consulting**

Ms. Burks, an ICF Consulting Vice President, has more than 20 years of experience in community development and affordable housing. She began her career with the U.S. Department of Housing and Urban Development, where she assisted state and local governments with program design and implementation, project development and underwriting, and regulatory compliance. Since leaving HUD, her work has focused on providing program and policy analysis, technical assistance and training services to HUD, Indian tribes, state and local governments, and nonprofit organizations on topics ranging from strategic planning, organizational development and management, and program regulations. She is an experienced facilitator, trainer, technical writer, curriculum developer, evaluator and project manager.

Chester Carl **Executive Director** **Navajo Housing Authority**

Chester Carl has been the Executive Director of the Navajo Housing Authority (NHA), the largest Indian Housing Authority in the United States, for five years. Mr. Carl has worked for NHA for more than ten years. As the Executive Director, Mr. Carl is responsible for the day-to-day administration of 7,000 housing units and 900 employees, including housing renovation and construction of new homes for a geographical area the size of West Virginia. The management of the program includes the Section 8 Voucher Program, the Drug Elimination Program, Youth Sports, Resident Initiatives Program, Risk Management/Self-Insurance Program, Force Account Construction Operation, Management Information Systems, and an in-house Accounting Program.

Mr. Carl is currently serving as the Chairman of the National American Indian Housing Council (NAIHC); a member of the Board of Directors of the Navajo Partnership for Housing (Neighborhood Works); and as Vice-President of the Southwest Indian Housing Association (SWIHA). Mr. Carl has also served as a member of the Fannie Mae Advisory Council, and as the Co-Chair of the Native American Housing Assistance and Self-Determination Act (NAHASDA) Negotiated Rule-Making Committee.

Dennis Daniels **Native American Program Specialist** **Office of Native American Programs** **U.S. Department of Housing and Urban Development**

Dennis Daniels has worked in HUD's Office of Native American Programs (ONAP) as a Native American Programs Specialist since May 2000. Dennis's current assignment is with *Native eDGE*, a partnership among 18 Federal agencies working on the economic development needs of Indian country. Since August 2000, Dennis has helped facilitate the activities of the interagency task force on housing-related infrastructure and comprehensive planning in American Indian and Alaska Native communities. Before joining the Office of Native American Programs, Dennis was the statewide Rural Development Program Coordinator for the U.S. Department of Agriculture's (USDA)



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Rural Development Office in Arizona. Dennis was a regional coordinator in USDA's headquarters Office of Community Development (OCD). OCD administers the Federal Empowerment Zone and Enterprise Community Initiative for tribal and rural communities. Dennis was the Caddo County Executive Director of the Agricultural Stabilization and Conservation Service in his home state of Oklahoma before moving to Washington, DC in 1987.

Thorin Druch **Native American Program Specialist** **Office of Native American Programs, Southwest Office** **U.S. Department of Housing and Urban Development**

Thorin Druch grew up in the Southwestern United States, living in Tucson, AZ most of his life. He traveled extensively in Mexico and Guatemala and developed an acute interest in the diversity and uniqueness of cultures. He majored in Spanish at the University of Arizona and received his Bachelor of Arts degree in 1991 with a minor in Anthropology. He received his Master of Arts degree in 1994 in Bilingual Multicultural Education. Thorin has over four years planning experience with the Pascua Yaqui Tribe where he started as a Tribal Planner, then Senior Tribal Planner, and later became the Director of the Land Office for the tribe. He also served as the Acting Director of the Pascua Yaqui Housing Department. Working for a tribe where a majority of the population lives in communities off reservation and where the reservation is served by the city and county for water and sewer, Thorin was required to work continuously with Local, State and Federal agencies on a variety of projects. Thorin recently accepted the position of Native American Program Specialist with HUD's Southwest Office of Native American Programs and moved to Phoenix with his wife and two children, (4 years and 25 months old, respectively).

Edward V. Fagan **Senior Native American Programs Specialist** **Office of Native American Programs** **U.S. Department of Housing and Urban Development**

Ed Fagan is the Senior Native American Programs Specialist in HUD's Office of Native American Programs in Washington, DC. A 1977 graduate of the Antioch School of Law, he began his career in Indian affairs as a legal intern with the American Indian Policy Review Commission. He has worked as a Professional Staff Member for the United States Senate Committee on Indian Affairs, the Institute for the Development of Indian Law, and the Housing Assistance Council, where he authored, among other works, "Indian Housing in the United States: A History." He was a primary participant in the effort to draft and pass the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), and most recently he has been involved in Native Hawaiian housing legislation (the recently-enacted Hawaiian Homelands Homeownership Act of 2000, now title VIII of NAHASDA).



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N. Iris Friday

Community Builder, Seattle Office

U.S. Department of Housing and Urban Development

N. Iris Friday is a member of the Tlingit tribe and serves as a Community Builder on urban Indian issues for the U.S. Dept. of Housing and Urban Development in Washington state. During her two year tenure with HUD, Ms. Friday has been instrumental in focusing attention on the housing & community development needs of Puget Sound's urban Indian population. Working cooperatively with lending institutions and Native non-profits Ms. Friday organized the 1st & 2nd Annual Housing Information Fair for the urban Indian community, developed a resource guide on Native organizations, and has organized homebuyer education counseling sessions for Native families throughout the Puget Sound. Nationally, she served on the planning committee for HUD's 1st National Urban Indian Housing conference held in Seattle, Wash.

Prior to joining HUD, Ms. Friday served as the Development Director and Publications Editor for the National Congress of American Indians, identifying funding opportunities for the organization, building coalitions, and developing public relations materials. As a self-employed Event Planner, Ms. Friday coordinated fundraising events and tribal legislative briefing sessions. She served as the Community and Tribal Liaison Director of the United Indians of All Tribes Foundation. Ms. Friday is a member of the American Indian Ambassadors Program, a national leadership training initiative for Native Americans.

Ms. Friday's volunteer activities include coordination of the First and Second Annual Indian Film Festivals, development of a Native Authors workshop, and distribution of supplies to needy children. In her spare time she does website development and communications marketing.

Ms. Friday received a BA in Political Science from the University of Washington.

Barbara Gallegos

Grants Management Specialist

Denver Program Office of Native American Programs

U. S. Department of Housing and Urban Development

Barbara Gallegos is a Grants Management Specialist for the Denver Program Office of Native American Programs in Denver, Colorado. Ms. Gallegos also served in various supervisory positions at the Southwest Office of Native American Programs in Phoenix, Arizona before moving to Denver. She has 25 years of experience in Indian, public and rural housing programs, having served as a Development Officer and Executive Director for two Indian Housing Authorities before coming to HUD 10 years ago. Ms. Gallegos also worked as a Rural Development Specialist with the FmHA and the New Mexico State Housing Authority.



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Jerry Gardner, Esq. **Executive Director** **Tribal Law and Policy Institute**

Jerry Gardner is the Executive Director of the Tribal Law and Policy Institute, an Indian owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the improvement of justice in Indian country and the health, well-being, and culture of Native peoples. Some of the current Tribal Law and Policy Institute programs include providing training and technical assistance for Tribal Court CASA (Court Appointed Special Advocate) programs, the Native American Children's Justice Act programs (programs to improve the investigation and prosecution of child abuse cases), and the tribal court drug court (or Healing to Wellness Court) programs. The Tribal Law and Policy Institute also maintains the Tribal Court Clearinghouse (www.tribal-institute.org) and is working with UCLA's American Indian Studies Center and tribal colleges on Project Peacemaker – a program to develop Tribal Legal Studies programs at tribal colleges.

Jerry has 20 years of experience providing training and technical assistance for Indian tribes and tribal court systems with a particular focus upon child abuse, victims' services, and juvenile justice issues. He has also served as the Administrator for the National American Indian Court Judges Association (NAICJA) since 1997 and has served a key role in the establishment of the National Tribal Justice Resource Center. He has been an Adjunct Lecturer for the University of California, Berkeley, School of Law (Boalt Hall) where he directed the Hopi Appellate Court Clinical and taught Indian Law and Tribal Legal Systems classes. He holds a Juris Doctor from Antioch School of Law (1979) and a B.A. from Northwestern University (1976). He is a member of both the California State Bar Association and the District of Columbia Bar Association. From 1983-1996, Jerry Gardner served as the Senior Staff Attorney and Curriculum Specialist for the National Indian Justice Center (NIJC), an organization formed by tribal court judges to design and deliver educational, research, technical assistance, and training programs to promote the development of justice in Indian country. Prior to 1983, Jerry Gardner served as a Staff Attorney and Curriculum Specialist for the American Indian Lawyer Training Program (1981-1983), Training Specialist and Assistant to the Director of the Advocacy Training and Development Unit of the Office of Program Support of the national office of the Legal Services Corporation (1979-1981), and as a Professional Staff Member of the United States Senate Committee on Indian Affairs (1978-1979).

Eugene Goldfarb **Midwest Environmental Officer** **U.S. Department of Housing and Urban Development**

Eugene Goldfarb is the Midwest Environmental Officer for the U.S. Department of Housing and Urban Development. In that capacity he has the responsibility of assuring environmental compliance for a broad range of HUD programs administered by HUD, local governments, and Public Housing Authorities. Eugene is a certified planner (AICP) & licensed attorney (Illinois).

Eugene has spent much of his HUD career in the environmental area, preparing environmental impact statements (EIS), noise, and historic and other environmental reviews. He has also worked for HUD on mortgage insurance, subsidized and public



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housing programs. He was the leader of the Region's 1985-office automation effort (microcomputers). He has also worked for a single-family homebuilder, the New York City Housing Authority, the US Post Office, and has even driven a taxi in NYC.

Eugene has been active in environmental training for almost 20 years. In the late 70's and early 80's he organized environmental training for local governments administering HUD programs and has lectured at various universities (University of Illinois at Chicago, IIT, University of Chicago), US Civil Service environmental workshops, and the American Planning Association's Institute of Zoning (1977). More recently he has organized a broad curriculum of (continuing) environmental training geared to local government and tribal officials with the University of IL and other federal, state & city agencies (see <http://www.hud.gov/local/chi/chienv2.html>). He has also lectured at various environmental conferences sponsored by the Energy Resource Center, IEPA, USEPA, Northeast Midwest Institute, Affordable Comfort, etc.

Francis Harjo

Manager of Communications and Information Services

HQ National Office of Native American Programs

U.S. Department of Housing and Urban Development

Francis Harjo is the Manager of Communications and Information Services in the National Office of Native American Programs (Washington, DC), and is also the Webmaster for Code Talk, the ONAP Internet site and Editor of the ONAP Newsletter "Dream Catcher". Mr. Harjo is an enrolled member of the Paiute Tribe at Duck Valley Indian Reservation and has a unique distinction as one of the first Native American Federal Webmasters.

Mr. Harjo came to HUD in 1996 as the Administrator for the Eastern Woodlands Office of Native American Programs, Chicago, IL and in 1997 relocated to the Denver National office. In 1994, Mr. Harjo was as a Special Assistant to the Under Secretary for Rural Development in the United States Department of Agriculture, Washington, DC and was later named to Director of Native American Programs in the USDA Office of Intergovernmental Affairs.

Preceding his work with USDA, Mr. Harjo served as the Executive Director of the National Commission on American Indian, Alaska Native and Native Hawaiian Housing (1991-1993). The Commission was the first Native American Commission appointed by Congress and the Executive Branch of the Government to study the problems and impediments in Indian Housing. The Commission submitted a Final Report with recommendations known as the "Blueprint for Change". The Final Report went toward satisfying housing needs for Native Americans. Prior to his appointment with the Commission, Mr. Harjo was employed as the Information Coordinator for the National American Indian Housing Council (1989-1991). While with NAIHC, Mr. Harjo conducted a series of field hearings and submitted results to Congress in a report "Indian Housing in the 1990's: Still Waiting." He has also worked with the National Congress of American Indians (NCAI). Prior to locating to Washington, DC, Mr. Harjo was the Tribal Administrator for the Klamath Tribe in Chiloquin, OR.



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Robert I. Holden **Director Nuclear Waste Program** **National Congress of American Indians**

Robert Holden is of Choctaw and Chickasaw descent. He currently serves as the Director of the Nuclear Waste Program for the National Congress of American Indians (NCAI). He has tracked nuclear waste issues for the NCAI for over ten years, providing NCAI constituent tribal governments with information on storage, transportation, and disposal of high level radioactive waste and spent fuel programs of the U.S. Department of Energy (DOE). One of his tasks is monitoring federal program activities to ensure cultural resource protection compliance and trust responsibility requirements to tribal governments, lands and peoples are met. Mr. Holden has experience in evaluation of radiological emergency protection and hazardous materials emergency exercises and coordinates the NCAI Tribal Response/Emergency Preparedness Emergency Program, a workshop designed for tribal first responders and tribal officials, which presents fundamental emergency response concepts. He coordinated a national NCAI tribal workgroup to review and revise the current DOE American Indian and Alaska Native Policy, and assisted Department of Defense officials in developing the Department of Defense American Indian and Alaska Native Policy.

Harry L. Hudson **Architect, Training Coordinator** **Office of Native American Programs** **U.S. Department of Housing and Urban Development**

Harry Hudson has a BA in Science and Architecture from Howard University and 12 years experience with the United States Department of Housing and Urban Development where he provides technical and program support. He has also practiced for 3 years in private practice as a professional Architect.

Harry has worked at the Office of Native American Programs from September 2000 to the present as a Training Coordinator. From April 1997 to September 2000, Harry worked at the Office of Healthy Homes and Lead Hazard Control. He was an Asset Manager in September 1996 to April 1997, at the Multifamily Asset Management. In July 1994 to September 1996 he worked at the Multifamily Development as an Architect. In May 1991 to July 1994, he worked at the Multifamily Property Disposition, also as an Architect.

(Private GNM & Associates, Engineers, Grimm & Parker, Architects
Bryant & Bryant, Architects, Robert J. Nash, FAIA & Associates, Architects
Johnson, Mirmiran & Thompson, Engineers.)

Donna K. Jacobsen **Lead Grants Management Program Specialist** **Office of Grants Management** **Denver Program Office of Native American Programs** **U. S. Department of Housing and Urban Development**

Donna Jacobsen comes to the National Office of Native American Programs with 20 years of HUD experience. She is currently in the Housing Management Division and



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reviews model housing activity proposals in Indian Housing Plans. She participated in the Negotiated Rulemaking Committee and Affordable Housing Workgroup meetings that developed rules implementing the Native American Housing Assistance and Self-Determination Act of 1996. Ms. Jacobsen has a Bachelor of Science degree in Financial Accounting from Metropolitan State College, Denver, Colorado.

Ruth Jaure **Project Manager** **ICF Consulting**

Ms. Jaure is a Project Manager at ICF and has had almost twenty years of experience in housing and community development. She has worked at the management level on housing issues relating to low income communities, both rural and urban. For the past fifteen years, Ms. Jaure has worked on Indian housing issues, serving four years as the Executive Director of the National American Indian Housing Council (NAIHC) and as Director of Operations for AMERIND Risk Management Corporation, a self-funded risk pool for Tribally Designated Housing Entities. She was also NAIHC's Training Director before becoming the Executive Director.

Currently, she provides technical assistance to tribal entities setting up community technology centers. Ms. Jaure has trained tribes and Indian housing authorities on fire safety and prevention, USDA's rural housing programs, resident services programs and financial management.

Paul Jurkowski **Director, National Program Office** **Denver Program Office of Native American Programs,** **U.S. Department of Housing and Urban Development**

Mr. Jurkowski is the new Director of the National Program Office of the Office of Native American Programs in Denver, Colorado. This office administers the Section 184 mortgage loan guarantee program as well as the Title VI guarantee program. Prior to joining HUD, Mr. Jurkowski was involved in mortgage lending for the past 15 years in New Mexico. Most recently, he was involved in Community Reinvestment lending that served several of the Rio Grande pueblos. He is a graduate of Penn State University, a past President of the NM Mortgage Bankers Association, a licensed Real Estate Broker & Instructor and a member of the NM Tribal Housing Coalition.

Ted Key **Acting Deputy Assistant Secretary** **Office of Native American Programs** **U.S. Department of Housing and Urban Development**

Ted Key is a member of both the Chickasaw and Choctaw Tribes and is currently the Acting Deputy Assistant Secretary for the Office of Native American Programs within the U.S. Department of Housing and Urban Development (HUD) in Washington, DC. Prior to his seven-year employment with HUD, Mr. Key worked for the Chickasaw Nation for 18 years where he was one of the framers of the tribes Constitution, and was the Executive Director of the tribal housing authority.



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Mr. Key was a Congressional appointee to the National Commission on American Indian, Alaskan Native, and Native Hawaiian Housing, and for many years served as both the President of the regional Indian housing association and as a representative to the National American Indian Housing Council Board of Directors. As an original member of the NAHASDA negotiated rulemaking committee, Mr. Key participated in developing the rules that implement our current Indian Housing Block Grant program.

E. Crispin Kinney, P.E.

Acting Director, Division of Sanitation Facilities Construction Office of Environmental and Engineering, Indian Health Service

Mr. Kinney currently serves as Acting Director, Division of Sanitation Facilities Construction at the Indian Health Service (IHS) headquarters office in Rockville, Maryland. In this capacity, he manages the IHS program to construct water, sewer and solid waste facilities for American Indian/Alaska Native communities and homes throughout the United States. Mr. Kinney has served with this program for over 25 years, with assignments in Anchorage, Alaska, Portland, Oregon and Whiteriver, Arizona, prior to his current assignment at the Headquarters Office. He received a Bachelor of Science degree from the University of Colorado in 1974 and a Master of Science degree in Civil Engineering from Tufts University in 1976. He is registered as a Professional Engineer in the State of Oregon and holds the rank of Captain in the U.S. Public Health Service.

Robert E. Knecht

Senior Loan Guarantee Specialist Denver Program Office of Native American Programs U. S. Department of Housing and Urban Development

Robert E. Knecht has been a Loan Guarantee Specialist with the Denver Program Office of Native American Programs, U. S. Department of Housing and Urban Development, for four and one-half years. He served as the Acting Director for the Office of Loan Guarantee for more than one year. Mr. Knecht, who has more than 23 year of Federal service, previously worked for HUD/FHA for 18 years, including 7 years as an FHA single family underwriter in Columbus, OH, and Coral Gables, FL and 11 years with the Monitoring Division (now known as the Quality Assurance Division) out stationed in Chicago, IL, and then at HUD Headquarters in Washington, DC. Prior to HUD, Mr. Knecht worked for the Internal Revenue Service in St. Paul, MN.



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Jacqueline A. Kruszek

**Lead Grants Management Specialist, Office of Grants Management
Denver Program Office of Native American Programs
U. S. Department of Housing and Urban Development**

Jacqueline A. Kruszek manages the Indian Housing Block Grant (IHBG) formula process, including the review of data corrections and challenges. She led the Workgroup responsible for developing accounting procedures for Program Income under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) and participated on the NAHASDA Negotiated Rulemaking Committee and Formula Workgroup. She is also lead in administering the Indian Community Development Block Grant Program. Ms. Kruszek received management training in housing and community development from the U.S. Department of Housing and Urban Development and graduate training in economics, mathematics and computer science from the University of Pittsburgh.

Deborah M. Lalancette

Director

Office of Grants Management

Denver Program Office of Native American Programs

U. S. Department of Housing and Urban Development

Deborah M. Lalancette has worked for the Office of Native American Programs since April 1980. She worked in the Denver Area Office from 1980 to 1989 before moving to Washington, D.C. She was the Financial Manager and the Director of Housing Management in Washington, D.C. from 1989 to 1996. In 1996, Ms. Lalancette moved back to Denver with the Denver Program Office of Native American Programs. In this office, she is the Director of the Office of Grants Management and is responsible for implementing the Indian Housing Block Grant Program under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). She also oversees the Indian Community Development Block Grant, Drug Elimination Program and the Resident Opportunities and Self Sufficiency Program.

Tony LookingElk

Community Builder - Minneapolis Office

U.S. Department of Housing and Urban Development

Tony LookingElk is a member of the Red Lake Band of Chippewas and his father is Oglala Lakota from the Pine Ridge Reservation. He has served in variety of roles in community-based agencies ranging from the Minneapolis School District to a Community Action agency in Arizona.

Tony joined the U.S. Department of Housing and Urban Development as a Community Builder Fellow in the spring 1999 and accepted a permanent position as a Community Builder in the summer of 2001. His work with HUD has consistently focused on the needs of the American Indian communities both in urban and reservation lands. He has participated in developing a 14 state conference on Housing and Economic Development for American Indians. He has also developed an American Indian Housing Task Force for the city of Saint Paul. He is currently the chair of the Metropolitan Urban Indian



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Directors Group and has participated in the development of a community planning process for an urban American Indian community.

Tony has as well served on a variety of volunteer activities. He was a Commissioner on the Minneapolis Civil Rights Commission and the Tempe Human Relations Commission. He served on the boards and committees of several civic organizations, including Habitat for Humanity, YouthCARE, the Page Education Foundation, and the Diversity Communities Fund.

Kermit Mankiller **Training Director** **National American Indian Housing Council**

Kermit C. Mankiller is a Training Director for the National American Indian Housing Council (NAIHC). In this position Mr. Mankiller develops and presents management training courses for Indian housing professionals throughout the United States. Previously, Mr. Mankiller was employed by NAIHC as a Technical Assistant Specialist and assisted Indian Housing Organizations with improving their management and operations and developing alternative financing initiatives. Prior to his employment with NAIHC, Mr. Mankiller served as Executive Director of the Nez Perce Tribal Housing Authority and held other management positions with the Nez Perce Tribe of Idaho. Mr. Mankiller is a member of the Nez Perce Tribe and holds a BS degree in Business Administration from Lewis-Clark State College and an MBA from Gonzaga University.

Jay Marcus **Director of Housing Initiatives** **The Enterprise Foundation**

Jay Marcus is Director of Housing Initiatives for The Enterprise Foundation. Jay has over 20 years experience developing and financing affordable housing and community development projects. Mr. Marcus has assisted in creating over 10 nonprofit agencies and bank consortium and has packaged over \$350 million in financing for affordable housing programs. Jay has been at Enterprise for nine years.

At Enterprise, Jay currently leads the Habitat for Humanity, Native American and New Orleans initiatives and created the Enterprise programs in Los Angeles and Charleston. Previous to Enterprise, Jay developed homeless shelters and permanent housing for families in New York City and served as Special Assistant to the Commissioner of Human Rights for NYS. Jay has a Masters in City and Regional Planning from Harvard University and a Bachelor's from Columbia College.



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Gary L. Murphy **Grants Evaluation Specialist, Office of Grants Evaluation** **Denver Program Office of Native American Programs** **U. S. Department of Housing and Urban Development**

Gary L. Murphy is a Grants Evaluation Specialist in the Denver Program Office of Native American Programs (DPONAP). Mr. Murphy is beginning his fifteenth year with ONAP in September. He was previously in the Northern Plains ONAP. He has been in the DPONAP for a year. Mr. Murphy has a Bachelor of Science degree in Business Administration with a concentration in accounting and a Masters degree in Business Administration. Most of Mr. Murphy's federal career has been in accounting or auditing positions with the Department of the Navy, the Department of the Interior and ONAP. With this background, Mr. Murphy brings a solid understanding of business and governmental operations.

Herb Nelson **Environmental Scientist, Acting Director** **Midwest Regional Office of the Bureau of Indians Affairs**

Herb Nelson is the BIA Midwest Regional Environmental Scientist and supervises the Regional Archaeologist and Regional Hydrologist. The BIA Midwest Region serves 35 tribes in Iowa, Indiana, Michigan, Minnesota, and Wisconsin. Herb is responsible for environmental compliance to support decisions made by the BIA Regional Director and the agency and field offices in the Midwest, including NEPA compliance. Herb has a BA of Civil Engineering and is professionally registered in WI. He has worked for BIA since 1992, and for 15 years before that was a water project planner for the U.S. Army Corps of Engineers in St. Paul, MN. Herb Nelson is an active member and recent past chair of the Multi-Agency MOU Work Group, a Midwestern coordinating group for federal agencies and tribal staff for the purposes of meeting tribal environmental needs. The MOU Working Group is focusing on a number of issues, including developing tribal capacity for planning for community development and conservation of natural and cultural resources. Herb is also a member of an award winning Multi-Agency Training team that teaches compliance with NEPA and related statutes to tribal and federal staff.

Bill Picotte **Executive Director** **Oti Kaga, Inc.**

Bill Picotte is the Executive Director and a member of the Board of Directors of Oti Kaga, Inc., a non-profit 501(c)(3) housing development corporation he founded in 1993. Mr. Picotte is a member of the Cheyenne River Sioux Tribe. He has been a member of the Board of Directors of the Housing Assistance Council (HAC) since 1993 and served on their Loan Committee from 1994-1999. He currently serves as the 1st Vice-President of HAC. He also sits on the Board of Directors of the National Rural Housing Coalition, a position he has held since 1996. In December 2000 Bill was placed on the Affordable Housing Advisory Committee of the Federal Home Loan Bank of Des Moines. Mr. Picotte is also President of Eagle Thunder Consulting, a housing and business-consulting firm.



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Perry J. Pockros **Principal Consultant** **PricewaterhouseCoopers LLP**

Affiliated with PwC's Washington Consulting Practice, Mr. Pockros has more than 20 years in federal, state and local government management experience. He concentrates in the areas of organizational assessment and change management, business process development, strategic planning and performance measurement, program evaluation, technical assistance and team facilitation. In collaboration with ONAP's Grants Evaluation Program Office, Mr. Pockros developed the NAHASDA Indian Block Grant Recipient Self-Monitoring Assessment Guidebook that he presented during a workshop held at the Sixth Native American Housing Summit held in Portland, Oregon (May 2000). Over an 18-month period, Mr. Pockros provided technical assistance to the Oglala Sioux Tribe Partnership for Housing Inc., in forming a nonprofit corporation to serve as a homeownership financial intermediary, homebuyer counseling and housing development entity. Under contract to ONAP, Mr. Pockros led a project team that drafted the Shared Visions Guide to Creating a Nonprofit Homeownership Entity in May 2000.

Mr. Pockros served as a professional staff member for ten years in the U.S. House of Representatives. He holds a Masters degree in Public Policy Studies from the University of Chicago and a B.A. from Wesleyan University.

David D. Saffert **Native American Program Coordinator** **Rural Department** **U.S. Department of Agriculture**

David Saffert is the National Native American Program Coordinator for USDA – Rural Development. David has worked for the United States Department of Agriculture in the State of Wisconsin for over 27 years. Since 1985 he has been a District Director with the Farmers Home Administration in northern Wisconsin, while also having a collateral duty as the Native American Program Coordinator. On May 8, 2000, he was appointed as the National Native American Program Coordinator for all of the mission areas associated with the USDA – Rural Development, i.e. Rural Housing Service, Rural Utilities Service, and the Rural Business and Cooperative Service. Some of his major duties include the identification, and where possible the removal, of barriers preventing the full utilization of Rural Development's programs by Native American communities and individuals, as well as outreach and training for internal and external customers.

Relocating to live and work in the DC area was never one of his life long goals and ambitions, but the rewards of working on this most important initiative have made it more than worthwhile.



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Trish Roberts **Project Manager** **ICF Consulting, Inc.**

Ms. Roberts has 23 years experience in the area of community development and affordable housing. She is a national trainer, facilitator, and technical assistance provider for the Office of Native American Programs and the Office of Community Planning and Development. Ms. Roberts provides both large group training and one-on-one technical assistance. Ms. Roberts has served as a facilitator, trainer and track coordinator for four Homeownership Summits and National Native American Conferences. Ms. Roberts is also a member of the HUD Lead Based Paint training team, delivering courses on these new lead paint requirements in more than 16 cities across the U.S. As a program design specialist, she has helped many city and county programs transition into compliance. For the 12 years prior to consulting, Ms. Roberts worked in both technical and management positions for city, county and state governments. She has been certified as a Level C structural inspector in the State of Oregon.

Douglas K. Schroeder **Associate** **Steven Winter Associates, Inc.**

For over 15 years Mr. Schroeder has gained extensive knowledge and experience in numerous aspects of training curriculum development and program facilitation, business management and development, and trade and industry association management. Mr. Schroeder has specialized in developing and implementing market driven training as a catalyst for technology transfer and to establish long-term institutional partnerships.

Mr. Schroeder has served for over four years as the Associate Director of the Sustainable Buildings Industry Council (SBIC), a buildings trade organization managed by Steven Winter Associates, Inc. (SWA). During this period Mr. Schroeder directed SBIC's hugely successful Designing Low-Energy Buildings with Energy-10 program. The related DLEB/Energy-10 curriculum program has trained hundreds of architects and engineers throughout the US, influencing the design of hundreds of residential and small commercial buildings in the US.

Working closely with SWA project partners, Mr. Schroeder also supervised the development of training curriculum on the subject of "Tribal Housing Administration Policy." Four workshops were held, drawing Alaskan Native participants from across the state. Mr. Schroeder was one of the workshop presenters. This activity was sponsored by HUD's Office of Native American Programs.

Prior to joining SWA, Mr. Schroeder held management and director positions with a number of nonprofit organizations. He served as the Latin American/Caribbean, Curriculum Development Manager, for the United States Environmental Training Institute (USETI), a nonprofit organization dedicated to promoting US environmental management methods and technology in emerging markets.

Mr. Schroeder has traveled extensively throughout the United States, and Latin America and the Caribbean, working on various energy, environmental, and housing projects. He is fluent in both Spanish and English.



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Rebecca Seib **Acting Director of Grantmaking** **First Nations Development Institute**

Ms. Seib (Eastern Cherokee) has worked in the community economic development field for the past twenty years. As Acting Director of the Grantmaking Department, Ms. Seib administers funds that address culturally appropriate economic development through an asset building strategy. In addition, she provides capacity building technical assistance in organization and program development, as well as small business development.

Ms. Seib holds a BS degree from University of Illinois, completed two years of post-graduate work at Penn State University, and is certified as an Economic Development Financial Professional. She is currently attending New Hampshire Graduate School to receive her Masters in Community Economic Development.

In addition, Ms Seib was the Executive Director of a Native non-profit organization for eight years and served as the Business Developer for the Maryland Native American business community for two years. To complement her work with Native American businesses, she was appointed by the Governor of Maryland to sit as Chairman of the State Minority Advisory Committee and as a Commissioner on the Maryland Commission on Indian Affairs for six years.

Natasha Shulman **Principal** **Shulman Consulting**

Natasha Shulman is the Principal of Shulman Consulting, a consulting practice providing curriculum development, training, project management and associate development services.

Ms. Shulman has worked actively in the economic development arena since 1992 and has developed and implemented training for eight years. She was a Vice President with Bank of America and managed the rollout of the new Bank of America brand across 36 countries and 35,000 associates engaged in corporate, investment and treasury services. As a CRA officer with Seafirst/ Bank of America, Ms. Shulman designed and managed Seafirst's Native American Initiative. The Initiative received national recognition including the Department of Labor Eve award. While at Bank of America, Ms. Shulman also coordinated and managed a variety of training including workshops for small business owners, affordable housing practitioners, Chinese, Hispanic, Vietnamese, Korean, Russian and American Indian Consumers. Ms. Shulman created the cross-cultural communications training implemented nationwide by Bank of America.

Prior to launching Shulman Consulting, she was the Associate Director of Training and Development for the First Nations Oweesta Corp., where she was the manager and principal author of *Building Native Communities: Financial Skills for Families*.



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Catherine Baker Stetson **Owner/Attorney** **Stetson Law Offices, P.C.**

Catherine Baker Stetson attended Vassar College during her undergraduate career and later earned an M.A. from Brown University and a Ph.D. from the University of New Mexico. After obtaining her law degree from the University of New Mexico, she practiced Indian law with Ussery & Parrish until leaving to start an Indian-owned, woman-owned firm with Kevin Gover and Susan Williams in 1986. Gover, Stetson & Williams, P.C. was honored as one of the Top 25 Women-Owned Businesses in New Mexico in 1996.

In 1997, Kevin Gover went to Washington, D.C. to become Assistant Secretary of Indian Affairs, and Cate opened Stetson Law Offices, P.C., a law firm whose practice is limited primarily to providing legal services to tribes and tribal agencies. In addition, she started Legi\X Company, a political consulting and lobbying firm. Cate's Indian law experience has been largely in working on housing and commercial transactions on Indian reservations. She has helped develop on-reservation restaurants, casinos, hotels, shopping centers, mobile home parks, sanitary landfills, and gas stations, and has also designed tribal regulatory, tax, and business structures intended to complement tribes' economic development objectives.

Thelma Stiffarm **Program Administrator** **Tribal Government Program** **Customer Liaison Office** **U.S. Census Bureau**

Thelma has a BA degree in Secondary Education from the University of Montana and a law degree from the University of New Mexico. Thelma has over twenty years experience working with Indian tribes throughout the country. She has been employed by the All-Indian Pueblo Council, American Indian Law Center, United Tribes of North Dakota, and the Native American Rights Fund. She most recently served as the Executive Director of the Montana-Wyoming Tribal Leaders Council in Billings, Montana. Thelma is a member of the Gros Ventre Tribe of the Fort Belknap Reservation in Montana. She served one term on the Fort Belknap Tribal Council. Thelma also owned and operated her own company, which specialized in providing legal seminars to tribal governments and federal agencies. Thelma is one of the primary contacts at the Census Bureau for any issues regarding tribal governments. She also serves as the liaison for the Census Bureau's American Indian Alaska Native Advisory Committee.



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Marsha Tonkovich **Vice President** **ICF Consulting**

Ms. Tonkovich is a Vice President at ICF Consulting with over twelve years of professional experience covering housing, community development, and economic development. She has worked with tribal housing organizations, as well as the federal, state, and local levels of government. She is an expert in the management, design and delivery of training seminars and has helped to develop training materials on topics such as: Indian Housing Plans; building public/private partnerships; the Native American Housing Assistance and Self-Determination Act (NAHASDA); the Section 184 Indian Housing Loan Guarantee Program; the Community Development Block Grant Program; and economic development. Ms. Tonkovich manages ICF's contract with HUD's Office of Native American Programs, including overseeing the development of technical assistance and training materials.

Margaret Tyndall **Manager, Community Affairs** **Federal Reserve Bank of Minneapolis**

Margaret Tyndall is the manager of Community Affairs at the Federal Reserve Bank of Minneapolis, a position she assumed in 1995. For five years prior to that, she was in the Consumer Affairs section of the Banking Supervision Department of the Federal Reserve Bank where she specialized in CRA and HDMA issues. Her banking experience also includes seven years at First Bank System (now US Bank), where she was employed in various divisions including trust and retail banking as a strategic and financial planner.

Ms. Tyndall has an MBA from the University of Minnesota and a BA in sociology from the University of Illinois.

James F. Wagenlander **Attorney at Law** **Wagenlander & Heisterkamp, LLC**

Jim Wagenlander is the founder and a principal in the twenty-three year old Denver based law firm of Wagenlander & Heisterkamp, LLC. He is a former regional HUD attorney (leaving HUD in 1976) and is a graduate of the University of Denver (1970) and the School of Law at Case Western Reserve University (1973).

Wagenlander & Heisterkamp LLC is a cross-cultural law firm practicing in the fields of Indian, housing, contract, construction and international law. A majority of its work involves Indian housing both in the field and on national issues. Jim has worked with over a hundred tribes, tribal-housing authorities and tribally designated housing entities in Indian country across the country. The firm is currently general counsel to sixteen tribal housing programs.

As an attorney for tribes, Jim was extensively involved in the NAHASDA Negotiated Rule Making Committee and its development of the regulations for the new NAHASDA program. Jim also represents public housing authorities and non-profit housing corporations. He is a popular lecturer and consultant in Indian and housing matters. In



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addition to representing tribes on daily matters and national issues, Jim also has been involved for 24 years in designing and contributing to program and legal training activities and materials. He is very experienced in taking complex issues and effectively communicating the essential information that allows entities and individuals to make their own decisions. His Indian practice emphasizes local administration, government-to-government principles and tribal sovereignty.

Patrick Wagner **Senior Development Officer** **Enterprise Social Investment Corporation**

Patrick Wagner is a Fund Manager with The Enterprise Social Investment Corporation (ESIC) in Columbia, Maryland, a national affordable housing investor and syndicator of Low Income Housing Tax Credits. Mr. Wagner has worked in the affordable housing field for 16 years as a developer and investor, serving as project manager and housing development manager with non-profits in Baltimore, Maryland and Washington, DC. Mr. Wagner joined ESIC in 1998 after completing a joint master's degree in City and Regional Planning and Business Administration at the University of North Carolina at Chapel Hill. With ESIC, Mr. Wagner invests in tax credit projects in Colorado and New Mexico.

Deborah Webster **Director** **Native American Program** **The Enterprise Foundation**

In her position as a Director for the Native American Program with The Enterprise Foundation, Ms. Webster is assisting New Mexico Pueblos and Tribes to design and implement rental and homeownership projects, in addition to advocacy and policy work.

Ms. Webster has more than 20 years of experience in affordable housing development and finance. Since joining the Foundation in 1994, Ms. Webster has provides on-site technical assistance and training to nonprofit organizations and tribal entities nationwide. Assistance is provided in financing, construction, and housing management. Ms. Webster is a founding board member of the Native American Lending Group, Inc, a tribally focused CDFI. Ms. Webster has an AA Degree in Paralegal.

Sharon Wise **Executive Director** **Nation American Housing Services, Inc.**

Sharon Wise, a member of the Choctaw Tribe of Oklahoma, has over twenty years experience in mortgage banking, the last four years concentrating on Native American lending programs. She has worked as a consultant for Fannie Mae and has assisted with creating special Native American loan programs. Ms. Wise feels quality homebuyer education is the best tool to increase responsible homeownership in Indian country. Her organization holds monthly workshops for individuals and has assisted several tribes in creating and facilitating their education workshops. She is an instructor for Native American lending programs with East Central University in Ada, Oklahoma and Tulsa



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Technology in Tulsa, Oklahoma. She is member of the Oklahoma Predatory Lending Task Force and Fannie Mae's Housing Advisory Board.

Ms. Wise is currently working with the Four Tribes Consortium of Oklahoma and their Employment Training program to rehabilitate elders' homes with Four Tribes labor and donation of materials. She is also working with the consortium on a labor assisted new construction program creating six new homes in the next year.

James W. Zion **Partner** **Native Rights Advocates**

James W. Zion, B.A., J.D., is a 1966 graduate of the University of Saint Thomas and a 1969 graduate of the Columbus School of Law, Catholic University of America. He has a career of approximately 30 years in Indian law, including service to the Blackfeet Tribe of Montana, the Courts of the Navajo Nation, the Navajo Housing Authority, and the Federation of Saskatchewan Indian Nations. His fields of special interest are Indian nation government, traditional Indian law, and the rights of Indigenous Peoples in International Law. He has published extensively in those fields. He is a partner in Native Rights Advocates; an international support organization headquartered in Albuquerque, New Mexico, with Elsie RedBird, J.D. (Navajo).



CHRISTOPHER D. BOESEN
SPECIAL ASSISTANT TO THE SECRETARY
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Christopher Boesen joined the U.S. Department of Housing and Urban Development in January 2001 as a Presidential appointee. Mr. Boesen serves as Special Assistant to Secretary Mel Martinez and is responsible for the operation of the Office of Legislation in Congressional and Intergovernmental Relations, interacting with the Congress on all matters involving the Department's budget and programs.

Before joining HUD, Mr. Boesen spent four years as the Executive Director of the National American Indian Housing Council, a Washington-based non-profit providing services to the Tribes and Tribal housing programs. During his tenure at NAIHC, Mr. Boesen founded the NAIHC Leadership Institute, created the Tribal Mortgage Partnership Program, and founded and served as publisher of *Native American Housing News*. In 1999 Mr. Boesen, in cooperation with NAIHC's Board, founded the Coalition for Indian Housing and Development, a Tribal advocacy group representing more than 440 sovereign Tribes, Alaska Native Villages and Native Hawaiian interests.

As Senator Ben Nighthorse Campbell's (R-Colo.) housing and economic policy specialist, Mr. Boesen conducted oversight activities on behalf of the Senate Committee on Indian Affairs.

During the 104th Congress, Mr. Boesen served as a professional staff member for the Committee on Banking and Financial Services in the U.S. House of Representatives. Working for Housing Subcommittee Chairman Rick Lazio (R-NY), Mr. Boesen worked on a broad range of housing and community development issues, served as the Subcommittee's speechwriter and drafted legislation, including the Native American Housing Assistance and Self-Determination Act of 1996 (P.L. 104-330).

Prior to serving in the Congress, Mr. Boesen was the senior housing reporter for Community Development Publications News Service in Silver Spring, Maryland where he was assistant editor for the *Housing Affairs Letter* and editor of the *Federal Housing Monitor*. Mr. Boesen has worked as a communications and political consultant for HUD and several trade groups as well as holding positions on political campaigns, including as Campaign Manager for John McClaughry, Republican nominee for Governor of Vermont.

Originally from Albuquerque, New Mexico, Mr. Boesen holds a Master's Degree in Journalism and Public Affairs and a Bachelor's Degree in Political Science from The American University in Washington, DC. He has served on the steering committees for the Coalition for Housing and Community Development Funding and the Stand Up for Rural America Campaign, as an advisor to the Bureau of Indian Affairs Trust Management Working Group and was also an advisor to the Bush-Cheney Transition Team in 2000-2001.



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Radisson Riverfront Hotel
St. Paul, Minnesota
July 9–13, 2001

Final List of Participants

Joseph N. Abdo, Jr.
Executive Director
Yankton Sioux Tribe Housing Authority
410 South Main Street
Wagner, SD 57380
Phone: (605) 384-3171
Fax: (605) 384-5907
E-Mail: ysthsng@charles-mix.com

Gus Adams
Executive Director
Baranof Island Housing Authority
P.O. Box 517
Sitka, AK 99835
Phone: (907) 747-5088
Fax: (907) 747-5701
E-Mail: kathybiha@yahoo.com

Jason M. Adams
Housing Resource Manager
Assistant Director
Salish and Kootenai Housing Authority
P.O. Box 38
Pablo, MT 59855
Phone: (406) 675-4491
Fax: (406) 675-4495
E-Mail: jasona@ronan.net

Jose Aguto
Environmental Protection Specialist
American Indian Environmental Office
U.S. Environmental Protection Agency
12th and Pennsylvania Avenue, NW
MC 4104
Washington, DC 20460
Phone: (202) 260-6084
Fax: (202) 260-7509
E-Mail: aguto.jose@epa.gov

Jana Ahlman
Deputy Director
Northern Ponca Housing Authority
1501 Michigan Avenue
Norfolk, NE 68701
Phone: (402) 379-8224
Fax: (402) 379-8557
E-Mail: jana@poncahousing.org

Randall Akers
Administrator
Northern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Wells Fargo Bank Building
633 17th Street, 12th Floor
Denver, CO 80202
Phone: (303) 672-5465
Fax: (303) 672-5003
E-Mail: randall_r_akers@hud.gov

Dee A. Alexander
U.S. Census Bureau
608 Skylark Drive
Oklahoma City, OK 73127
Phone: (405) 473-5340

Don Alexander
Secretary/Treasurer
Baranof Island Housing Authority
P.O. Box 517
Sitka, AK 99835
Phone: (907) 747-5056
Fax: (907) 747-8576
E-Mail: donalex@ptialaska.net



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Ken Alkire
Executive Director
Standing Rock Housing Authority
P.O. Box 484
1333 92nd Street
Fort Yates, ND 58538-0484
Phone: (701) 854-3891
Fax: (701) 854-3855
E-Mail: hac@westriv.com

Gina Anderson
Occupancy Specialist
Mille Lacs Reservation Housing Authority
43408 Oodena Drive
Onamia, MN 56359
Phone: (320) 532-3497
Fax: (320) 532-4192
E-Mail: gina_a@millelacsotlbwensn.us

Jim R. Anderson
IHBG Customer Service Center
University of Illinois
1 East St. Mary's Road
Champaign, IL 61820
Phone: (217) 244-6769
Fax: (217) 244-2204
E-Mail: jimand@uiuc.edu

Mikel Anderson
Attorney/Advisor
Southern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
500 West Main Street, Suite 400
Oklahoma City, OK 73102
Phone: (405) 553-7431
Fax: (405) 553-7404
E-Mail: mikel_k_anderson@hud.gov

Virginia G. Anderson
Executive Director
White Earth Indian Housing Authority
P.O. Box 436
White Earth, MN 56591
Phone: (218) 983-3277
Fax: (218) 983-3116
E-Mail: coco@tvutel.com

Rita A. Archambeau
Administrative Manager
Yankton Sioux Tribe Housing Authority
410 South Main Street
Wagner, SD 57380
Phone: (605) 384-3171
Fax: (605) 384-5907
E-Mail: ysthsng@charles-mix.com

Brandy Archambeault
Staff Accountant
Comanche Nation Housing Authority
P.O. Box 1671
Lawton, OK 73502
Phone: (580) 357-4956
Fax: (580) 357-1103
E-Mail: barchi@cnha.net

Larry Armijo
Second Lieutenant Governor
Pueblo of Jemez Tribe
P.O. Box 100
Jemez Pueblo, NM 87024
Phone: (505) 834-7359
Fax: (505) 834-1105

Gil Arviso
Member
Board of Commissioners
Navajo Housing Authority
P.O. Box 559
Window Rock, AZ 86515
Phone: (520) 871-2603
Fax: (520) 871-2604
E-Mail: gcarviso@hotmail.com

Wendell Askenette
Director
Menominee Tribal Housing Department
P.O. Box 459
Keshena, WI 54135
Phone: (715) 799-3236
Fax: (715) 799-4306
E-Mail: rainbowrd@frontiernet.net



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Phillip Attean
Housing Commissioner
Penobscot Nation
6 River Road
Old Town, ME 04468
Phone: (207) 827-7776
Fax: (207) 827-4612
E-Mail: pinmis@penobscotnation.org

Charlisa Attla
Tribal Planning Officer
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 456-8941
E-Mail: kwood@irha.org

Irene Auginaush
Tribal Council and TDHE Chairperson
White Earth Reservation
P.O. Box 418
White Earth, MN 56591
Phone: (218) 983-3285
Fax: (218) 983-3641
E-Mail: reneaug@tvutel.com

Martin Avery
General Counsel
Navajo Housing Authority
P.O. Box 4980
Window Rock, AZ 86515
Phone: (520) 871-2607
Fax: (520) 871-2604
E-Mail: mavery@hooghan.org

Willis Bad Hand
Board of Commissioners
Rosebud Housing Authority
P.O. Box 69
Rosebud, SD 57570
Phone: (605) 747-2203
Fax: (605) 747-2966

Michael W. Baer
Home Improvement
Tribal Housing Assistance
Spirit Lake Sioux Tribe
P.O. Box 238
Fort Tohen, ND 58335
Phone: (701) 766-1217
Fax: (701) 766-1282
E-Mail: homeimprov@stellarnet.com

Rosalie Baer
Board Member
Spirit Lake Housing Authority
P.O. Box 187
Fort Totten, ND 58335
Phone: (701) 766-4131
Fax: (701) 766-4843
E-Mail: ronhunt@spiritlakenation.com

Barbara J. Baker
Executive Director
Fort Berthold Housing Authority
P.O. Box 310
New Town, ND 58763
Phone: (701) 627-4731
Fax: (701) 627-3802

Mary Al Balber
Assistant General Counsel
Prairie Island Indian Community
5636 Sturgeon Lake Road
Welch, MN 55089
Phone: (800) 554-5473 x4006
Fax: (651) 385-2548
E-Mail: mabalber@yahoo.com

Mitzi Barker
Director
Community Planning and Housing
Rural Alaska Community Action Program
P.O. Box 200908
Anchorage, AK 99520
Phone: (907) 279-2511
Fax: (907) 222-1834
E-Mail: mbarker@ruralcap.com



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Jane L. Barrett
Executive Director
Red Lake Reservation Housing Authority
P.O. Box 219
Highway 1 East
Red Lake, MN 56671
Phone: (218) 679-3368
Fax: (218) 679-2264
E-Mail: roxy@paulbunyan.net

Richard Barrett
Chairman
Housing Board
Red Lake Reservation Housing Authority
P.O. Box 220
Highway 1 East
Red Lake, MN 56671
Phone: (218) 679-3368
Fax: (218) 679-2264

Richard G. Barrows
Attorney
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Robert Barth
Senior Program Specialist
Office of Native American Programs
U.S. Department of Housing
and Urban Development
450 Golden Gate Avenue
San Francisco, CA 94102
Phone: (415) 436-8122
Fax: (415) 836-8208
E-Mail: robert_g._barth@hud.gov

Elena L. Bassett
Assistant Executive Director
Yakama Nation Housing Authority
P.O. Box 156
Wapato, WA 98951
Phone: (509) 877-6171
Fax: (509) 877-4862

Sherry J. Bauswell
Tribal Housing Administrative Assistant
Otoe-Missouria Tribe of Oklahoma
8151 Highway 177
Red Rock, OK 74651
Phone: (580) 723-4466
Fax: (580) 723-4273

Michelle Bayless
Housing Manager
Copper River Regional Housing Authority
P.O. Box 89
Glennallen, AK 99588
Phone: (907) 822-3633
Fax: (907) 822-3662
E-Mail: mbayless@crbrha.org

Cindy Beaulieu
Records and Processing Assistant
Minnesota Chippewa Tribal Housing Corporation
P.O. Box 217
Cass Lake, MN 56633
Phone: (218) 335-8582
Fax: (218) 335-6925
E-Mail: cindyb@paulbunyan.net

Monrovia Beecher
Director
Hualapai Tribe
P.O. Box 130
Peach Springs, AZ 86434
Phone: (520) 769-2274
Fax: (520) 769-2703

Cheryl L. Bennett
Intern
U.S. Census Bureau
418 Hughes Hall
4400 Massachusetts Avenue
Washington, DC 20016
Phone: (301) 803-7735
E-Mail: cheryl.bennett@census.gov



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Ella Bennett
Chairman
Housing Committee
Tlingit-Haida Indians of the City
and Borough of Juneau
3235 Hospital Drive
Juneau, AK 99801
Phone: (907) 586-9218
Fax: (907) 780-6895

Nicole Bennett
Management Consultant
Federal Reserve Bank of Minneapolis
P.O. Box 291
90 Hennepin Avenue
Minneapolis, MN 55480
Phone: (612) 204-5470
Fax: (612) 204-5163
E-Mail: nicole.bennett@mpls.frb.org

Joe Bereskin
President
Board of Commissioners
Aleutian Housing Authority
4000 Old Seward Highway, Suite 202
Anchorage, AK 99503
Phone: (907) 563-2146
Fax: (907) 563-3105
E-Mail: nicole@aleutian-housing.com

James R. Berg
Financial and Program Analyst
Community Development Financial
Institutions Fund
U.S. Department of the Treasury
601 13th Street, NW, Suite 2005
Washington, DC 20005
Phone: (303) 255-8847
Fax: (202) 622-7754
E-Mail: bergir@cdfi.treas.com

Cheryl Beyal
Administrative Assistant
Navajo Nation
P.O. Box 1580
Fort Defiance, AZ 86504
Phone: (520) 729-4439
Fax: (520) 729-4436
E-Mail: quin_yaa@yahoo.com

Kathleen Bialas
Attorney/Advisor
Office of the General Counsel
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 8158
Washington, DC 20410
Phone: (202) 708-2027 x5276
Fax: (202) 401-2115
E-Mail: kathleen_m._bialas@hud.gov

Tim Billy
Housing Officer
Dry Creek Rancheria Band of Pomo Indians
P.O. Box 607
Geyserville, CA 95441
Phone: (707) 431-2388
Fax: (707) 431-2615
E-Mail: dcradmin@sonic.net

Allison C. Binney
Attorney
Hobbs, Streus, Dean, and Walker, LLP
2120 L Street, NW
Washington, DC 20037
Phone: (202) 822-8282
E-Mail: abinney@hswdwc.com

Dean J. Bird, Sr.
Executive Director
Crow Tribal Housing Authority
P.O. Box 99
Crow Agency, MT 59022
Phone: (406) 638-2665
Fax: (406) 638-2668

Sydney Bird
Secretary of Board
Housing Authority of the Village
of Winnebago
P.O. Box 669
Winnebago, NE 68071
Phone: (402) 878-2241
Fax: (402) 878-2240
E-Mail: havw@huntel.net



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Terry Bird In Ground
Board of Commissioners
Crow Tribal Housing Authority
P.O. Box 99
Crow Agency, MT 59022
Phone: (406) 638-2665
Fax: (406) 638-2668

Brian Bisonette
Environmental Planner
Lac Courte Oreilles Housing Authority
13416 West Trepania Road
Hayward, WI 54843
Phone: (715) 634-2147
Fax: (715) 634-5692
E-Mail: lcoha@cheqnet.net

John W. Blackhawk
Chairman
Winnebago Tribe of Nebraska
P.O. Box 687
Winnebago, NE 68071
Phone: (402) 878-3103
Fax: (402) 878-2963
E-Mail: jblackhawk@aol.com

David W. Bland
President
Travois
P.O. Box 4768
110 Barlow Creek Road, HC 50
Red Lodge, MT 59068
Phone: (406) 446-3482
Fax: (406) 446-3488
E-Mail: davidb@travois.com

Sharon M. Blevins
Community Affairs Coordinator
Federal Reserve Bank of Kansas City
925 Grand Boulevard
Kansas City, MO 64198-2898
Phone: (816) 881-2867
Fax: (816) 881-2135
E-Mail: sharon.m.blevins@kc.frb.org

Michael Blumfield
Director of Marketing
Community Reinvestment Fund
821 Marquette Avenue, Suite 2400
Minneapolis, MN 55402
Phone: (612) 338-3050
Fax: (612) 338-3235

M. Howard Boatman
Housing Program Director - Minnesota
U.S. Department of Agriculture
and Rural Development
St. Paul, MN 55101

Christopher D. Boesen
Special Assistant to the Secretary
U.S. Department of Housing
and Urban Development
451 7th Street, SW
Washington, DC 20410
E-Mail: christopher_d._boesen @ hud.gov

Brenda Bogacz
Tribal Council Member
Board of Commissioners
Northern Ponca Housing Authority
P.O. Box 2486
Norfolk, NE 68701
Phone: (402) 379-8224
Fax: (402) 379-8557
E-Mail: npha@conpoint.com

Robert V. Bojorcas
Housing Director
Board of Commissioners Chairman
Southern Puget Sound Inter-Tribal
Housing Authority
SE 11 Squaxin Drive
Shelton, WA 98584
Phone: (360) 426-4641
Fax: (360) 427-7115

Micheal Boling
Commissioner
Cook Inlet Housing Authority
3510 Spenard, Suite 201
Anchorage, AK 99502
Phone: (907) 276-8115
Fax: (907) 258-4957
E-Mail: cfields@citi.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Stephanie N. Bolman
Tribal Member
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763
Phone: (701) 627-4781
Fax: (701) 627-3625

Ronald Boni
Executive Director
San Carlos Apache Housing Authority
P.O. Box 740
Peridot, AZ 85542
Phone: (520) 475-2346
Fax: (520) 475-2349

Peter Bonner
Vice President
ICF Consulting
9300 Lee Highway, 10th Floor
Fairfax, VA 22031
Phone: (703) 934-3815
Fax: (703) 218-2718
E-Mail: pbonner@icfconsulting.com

Mary Lou Bottorff
Housing Director
Kenaitze/Salamatof Tribally Designated
Housing Entity
P.O. Box 988
Kenai, AK 99611
Phone: (907) 283-3633
Fax: (907) 283-3052
E-Mail: tdhe@pobox.alaska.net

Michael S. Bowman
Consultant
Native Nations Consulting, Inc.
36992 313th Avenue
Ogema, MN 56569
Phone: (218) 844-5660
Fax: (218) 983-3967
E-Mail: msbowman@paulbunyan.net

Ken Bowring
Administrator
Northwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Seattle Federal Office Building
909 1st Avenue, Suite 300
Seattle, WA 98104-1000
Phone: (206) 220-5270
Fax: (206) 220-5234
E-Mail: ken_a_bowring@hud.gov

Rodger J. Boyd
Program Manager
CDFI Fund
U.S. Department of the Treasury
601 13th Street, NW, Suite 200 South
Washington, DC 20005
Phone: (202) 622-8258
Fax: (202) 622-7754
E-Mail: boydr@cfdi.treas.gov

Patricia Boydston
Director, Grants Evaluation
Northwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
909 First Avenue, Suite 125
Seattle, WA 98104-1000
Phone: (206) 220-5360 x3121
Fax: (206) 220-5159
E-Mail: patricia_boydston@hud.gov

Dorothy Brewer
Assistant Director
Northern Pueblos Housing Authority
207 Los Alamos Highway
Española, NM 87532
Phone: (505) 747-2881
Fax: (505) 747-2883

Kate Brown
IHBG Customer Service Center
University of Illinois
1 East St. Mary's Road
Champaign, IL 61820
Phone: (217) 244-6769
Fax: (217) 244-2204



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Lisa L. Brown
Community Advancement
Program Specialist
First Preston Management
1888 Sherman Street, Room 375
Denver, CO 80203
Phone: (303) 830-0555 x305
Fax: (303) 813-0168
E-Mail: lbrown@firstpreston.com

Ernestine Bulifant
Administration Manager
Lumbie Regional Development
Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

Jennifer A. Bullough
Senior Contract Oversight Specialist
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 4126
Washington, DC 20410
Phone: (202) 401-7914
Fax: (202) 401-7909
E-Mail: jennifer_a._bullough@hud.gov

Ramona Burks
Vice President
ICF Consulting
1209 141st Place, NE
Bellevue, WA 98007
Phone: (425) 747-6863
Fax: (425) 653-3026
E-Mail: rburks@icfconsulting.com

Gwen Burns
Board of Commissioners
Kickapoo Housing Authority
883 112th Drive, No. 815
Horton, KS 66439
Phone: (785) 486-3638
Fax: (785) 486-2637

Rob Burnside
Vice Chairman
Board of Trustees
Confederated Tribes of the Umatilla
Indian Reservation
P.O. Box 638
Pendleton, OR 97801
Phone: (541) 966-2016
Fax: (541) 276-3095
E-Mail: robburnside@ctuir.com

Phil M. Bush
Housing Director
Modoc Lassen Indian Housing Authority
401 Peninsula Drive, Suite 6
Lake Almanor, CA 96137
Phone: (530) 596-4127
Fax: (530) 596-4137
E-Mail: modoclasseniha@thegrid.net

Lorey Cachora
Acting Executive Director
Quechan Tribally Designated Housing Entity
1860 West Sapphire Lane
Winterhaven, CA 92283
Phone: (760) 572-0243
Fax: (760) 572-0245

Bill Cadotte
Executive Director
Lac Courte Oreilles Housing Authority
13416 West Trepania Road
Hayward, WI 54843
Phone: (715) 634-2147
Fax: (715) 634-5692
E-Mail: lcoha@cheqnet.net

Shirley Cain
Tribal Attorney
White Earth Band of Ojibwe
P.O. Box 418
White Earth, MN 56591
Phone: (218) 983-3285 x410
Fax: (218) 983-3641
E-Mail: shirleyc@tvutel.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Joe Cajero
Governor
Pueblo of Jemez Tribe
P.O. Box 100
Jemez Pueblo, NM 87024
Phone: (505) 834-7359
Fax: (505) 834-1105

Bedelia Calhoun
Community Affairs Analyst
Division of Consumer and
Community Affairs
Federal Reserve Board
20th and C Streets, NW, Stop 803
Washington, DC 20551
Phone: (202) 452-3378
Fax: (202) 785-6032
E-Mail: bedelia.calhoun@frb.gov

Jill Canino
Research Assistant
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 934-3839
Fax: (703) 934-3278
E-Mail: jcanino@icfconsulting.com

Chester Carl
Executive Director
Navajo Housing Authority
P.O. Box 4980
1000 Morgan Boulevard
Window Rock, AZ 86515
Phone: (520) 871-2600
Fax: (520) 871-2604
E-Mail: ccarl@ims.hooghan.org

Ken Castro-Oistad
Tribal Grants Administrator/Interim Tribal
EPA Director
Torres Martinez Desert Cahuilla Indian Tribe
P.O. Box 1160
Thermal, CA 92274
Phone: (760) 397-8144
Fax: (760) 397-8146
E-Mail: slowturtle54@earthlink.net

Blake Chambliss
Rural Development Specialist
Rural Community Assistance Corporation
2460 West 26th Avenue, Suite 430C
Denver, CO 80211
Phone: (303) 455-7882
Fax: (303) 455-7916
E-Mail: blakec@rcac.org

Mark D. Charlie
Deputy Director
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-4020
E-Mail: mark@avcphousing.org

Ervin Chavez
Board of Commissioners
Navajo Housing Authority
P.O. Box 4980
Window Rock, AZ 86515
Phone: (520) 871-2603
Fax: (520) 871-2604
E-Mail: chavez@cyberport.com

Harold Chavis
Board Member
Lumbee Regional Development Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

Sam Chinana
Vice Chair
Board of Commissioners
Pueblo of Jemez Indian Housing Authority
P.O. Box 688
Jemez Pueblo, NM 87024
Phone: (505) 834-0305
Fax: (505) 834-1105

Bernida Churchill
Minneapolis Area Vice President
National Congress of American Indians
Minneapolis, MN



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

David Cole
Special Assistant
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671 x2673
Fax: (918) 458-6152
E-Mail: dcole@cherokee.org

Erin Cole
Executive Assistant
Division of Housing
Chickasaw Nation
P.O. Box 788
Ada, OK 74821-0788
Phone: (580) 421-8800
Fax: (580) 421-8879
E-Mail: erin.cole@chickasaw.net

Betty Cook
Rural Loan Underwriter
Cook Inlet Housing Authority
3510 Spenard Road, Suite 201
Anchorage, AK 99503
Phone: (907) 276-8122
Fax: (907) 276-8141
E-Mail: bcook@citci.com

Cecilia M. Cook
Executive Director
Akwesasne Housing Authority
P.O. Box 540
Hogansburg, NY 13655
Phone: (518) 358-9020
Fax: (518) 358-2958
E-Mail: cecilia@slc.com

Kimber Cook
Housing/Community Developer
Alabama-Quassarte Tribal Town
323 West Broadway, Suite 300
Muskogee, OK 74401
Phone: (918) 683-2388
Fax: (918) 683-3818
E-Mail: kimberleycook@netscape.net

Grace A. Cooper
Loan Production Office
U.S. Department of Veterans Affairs
1 Federal Drive
St. Paul, MN 55111
Phone: (612) 970-5567
Fax: (612) 970-5491
E-Mail: lgygcoop2@vba.va.gov

Karen A. Corbine
Housing Board Chairman
Bad River Housing Authority
P.O. Box 57
Odanah, WI 54861
Phone: (715) 682-2271
Fax: (715) 682-6818
E-Mail: briha@net.ncls

Migdalia Corbine
Resident Services Coordinator
Bad River Housing Authority
P.O. Box 57
Odanah, WI 54861
Phone: (715) 682-2271
Fax: (715) 682-6818
E-Mail: briha@net.ncls

Lorenzo F. Coriz
Treasurer
Board of Commissioners
Santo Domingo Tribal Housing Authority
P.O. Box 10
Santo Domingo, NM 87052
Phone: (505) 465-1003
Fax: (505) 465-1012

Kassandre M. Cowan
Intern
U.S. Census Bureau
4700 Silver Mill Road
Suitland, MD 20746
Phone: (301) 457-1305
Fax: (301) 457-4784
E-Mail: kassandre.m.cowan@census.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Rod Crawley
Company Operations Officer
AMERIND Risk Management Corporation
2201 San Pedro NE, No. 220
Albuquerque, NM 87121
Phone: (505) 837-2290
Fax: (505) 837-2053
E-Mail: rod@amerind-corp.org

Catherine Crews
Native American Direct Loan Coordinator
U.S. Department of Veterans Affairs
Regional Office/Fort Snelling
1 Federal Drive
St. Paul, MN 55111-4050
Phone: (612) 970-5571
Fax: (612) 970-5496

Vincent Crooked Arm
Board of Commissioners
Crow Tribal Housing Authority
P.O. Box 99
Crow Agency, MT 59022
Phone: (406) 638-2665
Fax: (406) 638-2668

Elsa J. Curley
Supervisor Realty Specialist
NRO/Real Estate Services
Bureau of Indian Affairs
P.O. Box 1060
Gallup, NM 87301
Phone: (520) 871-5935
Fax: (520) 871-5943
E-Mail: elsa.curley@bia.gov

Daniel P. Curry
Resource Support Service Advocate
American Indian Community Partnership
1845 East Franklin Avenue
Minneapolis, MN 55404
Phone: (612) 341-3358 x121
Fax: (612) 341-3766
E-Mail: danc@alolc.org

Dewey Dailey
Chairman
Otoe-Missouria Tribe of Oklahoma
405 Wendall Drive
Red Rock, OK 74651
Phone: (580) 723-4400
Fax: (580) 723-4590

Judy C. Dailey
Vice President/Community Investment Officer
Federal Home Loan Bank of Seattle
1501 4th Avenue
Seattle, WA 98101
Phone: (206) 340-8708
Fax: (206) 340-8711
E-Mail: jdailey@fhlbsea.com

Louis Dailey
Laguna Tribal Council Member
Laguna Housing Development and
Management Enterprise
P.O. Box 178
Laguna, NM 87026
Phone: (505) 552-6430
Fax: (505) 552-9409

Patrick C. Dallas
Executive Director
Hopi Tribal Housing Authority
P.O. Box 698
Second Mesa, AZ 86043
Phone: (520) 737-2556
Fax: (520) 737-9270

Dennis Daniels
Native American Program Specialist
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 9245
Washington, DC 20410
Phone: (202) 708-0614 x6329
Fax: (202) 708-1362
E-Mail: dennis_daniels@hud.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

David Danz
Planning Director
Bois Forte Band of Chippewa
P.O. Box 16
Nett Lake, MN 55772
Phone: (218) 757-3261
Fax: (218) 757-3312
E-Mail: ddanz@rangenet.com

Theo De La Rosa
CRRMC Secretary
Colorado River Indian Tribes
Route 1, Box 23-B
Parker, AZ 85344
Phone: (520) 669-9211
Fax: (520) 669-1334

Brian Deaner
Business and Community
Program Specialist
Rural Development
U.S. Department of Agriculture
4949 Kirschling Court
Stevens Point, WI 54481
Phone: (715) 345-7610
Fax: (715) 345-7616
E-Mail: brian.deaner@wi.usda.gov

Daniel F. Decker
Attorney at Law
Chippewa Housing and Salish
and Kootenai Housing
Decker and Desjarlais, PLLC
P.O. Box 310
St. Ignatius, MT 59865
Phone: (406) 745-0089
Fax: (406) 745-0091

Sheila DeLapp
Community Development and
Planning Manager
Tlingit-Haida Regional Housing Authority
P.O. Box 32237
Juneau, AK 99803
Phone: (907) 780-6868
Fax: (907) 780-6895
E-Mail: thrha@ptialaska.net

Jerry Demas
Community Representative
North Pacific Rim Housing Authority
8300 King Street
Anchorage, AK 99518
Phone: (907) 562-1444
Fax: (907) 562-1445

Jane M. Deneaives
Director of Community Research
and Development
National American Indian Housing Council
900 2nd Street, NE
Washington, DC 20002
Phone: (202) 789-1754
Fax: (202) 789-1758
E-Mail: jdemarines@naihcn.net

Bernard B. Devora
Mortgage Administrator
Yakama Nation Housing Authority
P.O. Box 156
611 South Camas Avenue
Wapato, WA 98951
Phone: (509) 877-6171
Fax: (509) 877-7830
E-Mail: bdevora@aol.com

Jennifer K. DeWald
Attorney
Samish Indian Nation
2121 SW Broadway, Suite 100
Portland, OR 97201
Phone: (503) 790-9060
Fax: (503) 242-9001
E-Mail: dewald@pnw1.com

Woodrow Dial
Board Member
Lumbee Regional Development Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Ron Diner
President
Raymond James Tax Credit Funds
880 Cariccon Parkway
St. Petersburg, FL 33716
Phone: (800) 438-8088
Fax: (727) 573-8455
E-Mail: rdiner@rjtcf.rjf.com

Darrell Dion
Board Commissioner
Yankton Sioux Tribe Housing Authority
410 South Main Avenue
Wagner, SD 57380
Phone: (605) 384-3171
Fax: (605) 384-5907
E-Mail: ysthsg@charles-mix.com

Thomas M. Disselhorst
Attorney
Legal Department
Three Affiliated Tribes
HC 3, Box 2
New Town, ND 58763
Phone: (701) 627-3621
Fax: (701) 627-3626
E-Mail: disselhorst@hotmail.com

Gregory P. Dorr
Houlton Band of Maliseet Indians
P.O. Box 738
61 Main Street, Suite 1
Bangor, ME 04402-0738
Phone: (207) 990-3314
Fax: (207) 991-0239

Jeff Doty
Executive Director
Copper River Regional Housing Authority
P.O. Box 89
Glennallen, AK 99588
Phone: (907) 822-3633
Fax: (907) 822-3662
E-Mail: crbrha@alaska.net

Varuny Douangmany
Associate
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 934-3167
Fax: (703) 934-3260
E-Mail: varunydouangmany@icfconsulting.com

Jennifer Dougherty
Associate
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031-1207
Phone: (703) 218-2746
Fax: (703) 934-3278
E-Mail: jenniferdougherty@icfconsulting.com

Bob Driver
Construction Director
Qualla Housing Authority
P.O. Box 1749
Cherokee, NC 28719
Phone: (828) 497-9161
Fax: (828) 497-3070
E-Mail: qualla@dnet.net

Thorin Druch
Native American Program Specialist
Southwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Two Arizona Center
400 North 5th Street, Suite 1650
Phoenix, AZ 85004
Phone: (602) 379-3876 x8247
Fax: (602) 379-3101
E-Mail: thorin_r_druch@hud.gov

Wayne L. Ducheneaux
Executive Director
Cheyenne River Housing Authority
P.O. Box 480
Eagle Butte, SD 57625
Phone: (605) 964-4265
Fax: (605) 964-1070
E-Mail: wayne@sat.net



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Michael J. Dunlap
Council Member
Douglas Indian Association
P.O. Box 240541
Douglas, AK 99824
Phone: (907) 364-2916
Fax: (907) 364-2917

Glenn W. Edwards
Executive Director
Housing Authority
Absentee Shawnee Tribe of Oklahoma
107 North Kimberly
Shawnee, OK 74801
Phone: (405) 273-1050
Fax: (405) 275-0678
E-Mail: asthsgauth@aol.com

Tom C. Elkins
Environmental Specialist III
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671 x2365
Fax: (918) 458-6152
E-Mail: telkins@cherokee.org

Charles England
Executive Director
Pueblo of Jemez Indian Housing Authority
P.O. Box 688
Jemez Pueblo, NM 87024
Phone: (505) 834-0305
Fax: (505) 834-1105
E-Mail: jackstraw@jemezpuablo.org

Helen English
Principal
Steven Winter Associates, Inc.
1331 H Street, Suite 1000
Washington, DC 20005
Phone: (202) 628-6100
Fax: (202) 393-5043
E-Mail: henglish@swinter.com

Harry J. Entwistle
Executive Director
Leech Lake Housing Authority
6530 Highway 2, NW
Cass Lake, MN 56633
Phone: (218) 335-8280
Fax: (218) 335-8367
E-Mail: llrha@paulbunyan.net

Lisa J. Estensen
Staff Attorney
Confederated Tribes of Grand Ronde
9615 Grande Ronde Road
Grand Ronde, OR 97347
Phone: (503) 879-2335
Fax: (503) 879-2333
E-Mail: lisa.estensen@grandronde.org

Carol Evans
Tribal Representative
Mentasta Traditional Council
P.O. Box 89
Glennallen, AK 99588
Phone: (907) 822-3633
Fax: (907) 822-3662

Carl Evon
Tribal Administrator
Native Village of Goodnews Bay
P.O. Box 138
Goodnews Bay, AK 99589
Phone: (907) 967-8929
Fax: (907) 967-8330

Edward V. Fagan
Senior Housing Management Specialist
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 4126
Washington, DC 20410
Phone: (202) 401-7914 x4270
Fax: (202) 401-7909
E-Mail: edward_v._fagan@hud.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Donna J. Fairbanks
TA/Technical Training Specialist
National American Indian Housing Council
1121 A Sandy Hook Lane
Luck, WI 54853
Phone: (715) 472-2260
Fax: (715) 472-8417
E-Mail: dfairbanks@naihc.gov

Mona Fandel
Deputy Assistant General Counsel
Northwest/Alaska Office of the Assistant
General Counsel
U.S. Department of Housing
and Urban Development
Seattle Federal Office Building
909 First Avenue, Suite 260
Seattle, WA 98104
Phone: (206) 220-5190 x3539
Fax: (206) 220-5194
E-Mail: mona_fandel@hud.gov

Phillip Farrell
Board Member
Standing Rock Housing Authority
P.O. Box 484
1333 92nd Street
Fort Yates, ND 58538-0484
Phone: (701) 854-3891
Fax: (701) 854-3855
E-Mail: hac@westriv.com

Clifford Fast Horse
Board of Commissioners
Rosebud Housing Authority
P.O. Box 69
Rosebud, SD 57570
Phone: (605) 747-2203
Fax: (605) 747-2966

Clayton Finkbonner
Executive Director
Salt River Community Housing Division
10177 East Osborn Road
Scottsdale, AZ 85256
Phone: (480) 850-8980
Fax: (480) 850-8997

Kevin Fitzgibbons
Administrator
Eastern/Woodlands Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Ralph H. Metcalfe Federal Building
77 West Jackson Boulevard, Room 2400
Chicago, IL 60604-3507
Phone: (312) 886-4532
Fax: (312) 353-8936
E-Mail: kevin_fitzgibbons@hud.gov

Betsy Fletcher
Native American Program Specialist
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW
Washington, DC 20410
Phone: (202) 401-7914 x7386
Fax: (202) 401-7909
E-Mail: betsy_w._fletcher@hud.gov

Lorna K. Fogg
Senior Acquisitions Analyst
Raymond James Tax Credit Funds
880 Carillon Parkway
St. Petersburg, FL 33716
Phone: (800) 438-8088
Fax: (727) 573-8455
E-Mail: lfogg@rjtf.rjf.com

Joseph M. Folsom
Community and Cooperative Development
Program Director
Rural Development
U.S. Department of Agriculture
410 Farm Credit Services Building
375 Jackson Street
St. Paul, MN 55101
Phone: (651) 602-7803
Fax: (651) 602-7824
E-Mail: joseph.folsom@mn.usda.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Gloria Fragua
Board of Commissioners
Pueblo of Jemez Indian Housing Authority
P.O. Box 688
Jemez Pueblo, NM 87024
Phone: (505) 834-0305
Fax: (505) 834-1105

Colleen Fraley
Senior Deputy Director
Minnesota Partnership Office
Fannie Mae
386 North Wabasha, Suite 1026
St. Paul, MN 55102
Phone: (651) 298-9826
Fax: (651) 298-9543
E-Mail: colleen_fraley@fanniemae.com

Joel M. Frank, Sr.
Director
Seminole Tribe of Florida
6300 Stirling Road
Hollywood, FL 33024
Phone: (954) 966-6300 x1702
Fax: (954) 967-3875

Glenn Fredericks
President
Georgetown Tribal Council
1400 Virginia Court
Anchorage, AK 99501
Phone: (907) 274-2195
Fax: (907) 274-2196
E-Mail: gtc@gci.net

Andrea P. Freeman
Director
Trainings and Conferences
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 218-2743
Fax: (703) 934-3260
E-Mail: afreeman@icfconsulting.com

Leroy Freeman
Chairman
Lumbee Regional Development Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

David G. Frey
Director of Planning
Squaxin Island Tribe
70 SE Squaxin Lane
Shelton, WA 98584
Phone: (360) 432-5307
Fax: (360) 427-2289
E-Mail: dfrey@squaxin.nsn.us

N. Iris Friday
Community Builder
Northwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
909 1st Avenue, Suite 260
Seattle, WA 98104
Phone: (206) 220-5104 x3542
Fax: (206) 220-5108
E-Mail: iris_friday@hud.gov

Abraham Friendly
Program Manager
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559-0767
Phone: (907) 543-3121
Fax: (907) 543-4020
E-Mail: abefriendly@avcphousing.org

David Fuentes
Senior Business Manager
Fannie Mae
One South Wacker Drive, Suite 1300
Chicago, IL 60606
Phone: (312) 368-6357
Fax: (312) 368-6064
E-Mail: david_fuentes@fanniemae.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Carson Funmaker
Commissioner
Ho-Chunk Housing Authority
P.O. Box 730
Tomah, WI 54660
Phone: (608) 374-1245
Fax: (608) 374-1251

Barbara A. Gallegos
Grants Management Specialist
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1900 x3314
Fax: (303) 675-1660
E-Mail: barbara_a._gallegos@hud.gov

Tonia Garcia
Board Member
Nez Perce Tribal Housing Authority
P.O. Box 188
Lapwai, ID 83540
Phone: (208) 843-2229
Fax: (208) 843-2973

Jerry Gardner, Esq.
Executive Director
Tribal Law and Policy Institute
8235 Santa Monica Boulevard, Suite 205
West Hollywood, CA 90046
Phone: (323) 650-5467
Fax: (805) 932-4470
E-Mail: jerry@tribal-institute.org

Cynthia Gardstein
Senior
Steven Winter Associates, Inc.
1331 H Street, NW, Suite 1000
Washington, DC 20005
Phone: (202) 628-6100
Fax: (202) 393-5043
E-Mail: cjgardstein@swinter.com

Lavonne K. Garvey
Administrative Assistant
Craig Tribal Association
P.O. Box 828
Craig, AK 99921
Phone: (907) 826-3996
Fax: (907) 826-3997
E-Mail: cgtribe@aptalaska.net

Robert Gauthier
Executive Director
Salish and Kootenai Housing Authority
P.O. Box 38
Pablo, MT 59855
Phone: (406) 675-4491
Fax: (406) 675-4495
E-Mail: rnicolai@skha.org

Tonia Geiger
Registration Coordinator
Circle Solutions, Inc.
2070 Chain Bridge Road, Suite 450
Vienna, VA 22182
Phone: (703) 902-1229
Fax: (703) 821-3247
E-Mail: tgeiger@circsol.com

Judy George
Chairman
Housing Committee
Tlingit-Haida Indians of the City and Borough
of Juneau
3235 Hospital Drive
Juneau, AK 99801
Phone: (907) 586-9218
Fax: (907) 780-6895

Tom Gillespie
Risk Management Director
AMERIND Risk Management Corporation
6201 Uptown, NE, Suite 100
Albuquerque, NM 87110
Phone: (505) 837-2290
Fax: (505) 837-2053
E-Mail: tom@amerind-corp.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Kristie L. Girdner
Budget Analyst
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671
Fax: (918) 458-6152
E-Mail: kgirdner@cherokee.org

Ernest Goatson
Department Director
Navajo Nation Housing Services
P.O. Box 2396
Window Rock, AZ 86515
Phone: (520) 871-6493
Fax: (520) 871-4025

Judy R.T. Gobert
Director
Drug Elimination Program
Blackfeet Housing
P.O. Box 449
Browning, MT 59417
Phone: (406) 338-5296
Fax: (406) 338-5298
E-Mail: pbhdep@3rivers.net

Terri Goggleye
Board Chairperson
Leech Lake Housing Authority
6530 Highway 2, NW
Cass Lake, MN 56633
Phone: (218) 335-8280
Fax: (218) 335-8367
E-Mail: llrha@paulbunyan.net

Sherry Goklish
Occupancy Specialist
White Mountain Apache Housing Authority
P.O. Box 1270
White River, AZ 85941
Phone: (520) 338-4931
Fax: (520) 338-4835
E-Mail: vvelasquez@cybertrails.com

Eugene Goldfarb
Midwest Environmental Officer
U.S. Department of Housing
and Urban Development
77 West Jackson Boulevard, Room 2420
Chicago, IL 60604
Phone: (312) 353-1696 x2727
Fax: (312) 353-5417
E-Mail: eugene_goldfarb@hud.edu

Loren Goldtooth
Executive Director
Tohono O'Odham KI:KI Association
P.O. Box 790
Sells, AZ 85634
Phone: (520) 383-2202
Fax: (520) 383-2259

Shannon Gomez
Administrative Officer
Comanche Nation Housing Authority
P.O. Box 1671
Lawton, OK 73502
Phone: (580) 357-4956
Fax: (580) 357-1103
E-Mail: sgomez@cnha.net

Raymond Gonzales, Sr.
Member
Board of Commissioners
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Raymond Gonzales, Jr.
Executive Director
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Kathy Goodwin
Housing Board Member
White Earth Reservation
P.O. Box 418
White Earth, MN 56566
Phone: (218) 983-3285 x267



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Wesley D. Goodwin
Housing Director
Northwest Inupiat Housing Authority
P.O. Box 331
1001 Turf Street
Kotzebue, AK 99752
Phone: (907) 442-3450
Fax: (907) 442-3486
E-Mail: wdgoowin@maniilaq.org

Gary L. Gordon
Director of Housing
Oneida Indian Nation
267 Union Street
Oneida, NY 13421
Phone: (315) 361-6355
Fax: (315) 361-6357

Carol Gore
President/CEO
Cook Inlet Housing Authority
3510 Spenard Road, Suite 201
Anchorage, AK 99503
Phone: (907) 276-8822
Fax: (907) 258-4957
E-Mail: cgore@citci.com

Ray Gorynski
Housing Vice Chairman
Samish Indian Nation
P.O. Box 217
Anacortes, WA 98221
Phone: (360) 293-6404
Fax: (360) 299-0790
E-Mail: raygorynski@email.msn.com

Jennie Greene
Housing Administrator
Aquinnah Wampanoag Tribal
Housing Authority
P.O. Box 479
Aquinnah, MA 02535
Phone: (508) 645-2711
Fax: (508) 645-2992

Aaron R. Greenlaw
Executive Director
Maliseet Indian Housing Authority
13 Clover Court, No. 1
Houlton, ME 04730
Phone: (207) 532-7637
Fax: (207) 532-7638
E-Mail: miha@ainop.com

Walter E. Gregg, Sr.
Housing Improvement Coordinator
Maniilaq Association
P.O. Box 256
Kotzebue, AK 99752
Phone: (907) 442-7763
Fax: (907) 442-7827

Brian Griffin
Home Buyer Counselor/Trainer
Shoshone-Bannock Tribes/Fort Hall
Housing Authority
P.O. Box 306
Fort Hall, ID 83203
Phone: (208) 478-3753
Fax: (208) 478-3766
E-Mail: bgriffin@shoshonebannocktribes.com

Leo Guitierrez
Board of Commissioners
SIRHA
P.O. Box 970
Susanville, CA 96130
Phone: (530) 257-5033
Fax: (530) 257-5035

Tex G. Hall
Tribal Chairman
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763
Phone: (701) 627-4781
Fax: (701) 627-2913
E-Mail: chairman@mhanation.com

Vickie L. Hanvey
Accounting Manager
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671 x2391
E-Mail: vhanvey@cherokee.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

James Hardin
Interim Housing Director
Lumbee Regional Development
Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

Allen Harjo
Housing Administration
Thlopthlocco Tribal Town
P.O. Box 188
Okemah, OK 74859
Phone: (918) 623-2620
Fax: (918) 623-0419
E-Mail: thlopthloccohousing@yahoo.com

Ben Harjo
Housing Program Coordinator
Indian Housing Authority
of Central California
4702 North Bendel Avenue
Fresno, CA 93722
Phone: (559) 453-9004
Fax: (559) 271-0125
E-Mail: ihacc@aol.com

Francis Harjo
Director of Communications and Information
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW
Room 4126
Washington, DC 20410
Phone: (202) 401-7914
Fax: (202) 401-7909
E-Mail: francis_l_harjo@hud.gov

Gary A. Harms
Planning Director
Fond du Lac Reservation
1720 Big Lake Road
Cloquet, MN
Phone: (218) 878-2631
Fax: (218) 879-4146

Marvena Harris
Office Manager
SIRHA
P.O. Box 970
Susanville, CA 96130
Phone: (530) 257-5033
Fax: (530) 257-5035

Olen Harris
Executive Director
North Pacific Rim Housing Authority
8300 King Street
Anchorage, AK 99518
Phone: (907) 562-1444
Fax: (907) 562-1445
E-Mail: olen@nprha.com

Valerie I. Harris
Associate Consultant
Title VI Division
IHA Management Systems, Inc.
16042 North 32nd Street, Suite B1
Phoenix, AZ 85032
Phone: (602) 482-0115 x225
Fax: (602) 485-1015
E-Mail: title6@ix.netcom.com

Yvonne M. Harris
Senior Project Manager
Neighborhood Networks Coordinator
Buffalo Office
U.S. Department of Housing
and Urban Development
Lafayette Court, 5th Floor
465 Main Street
Buffalo, NY 14203-1780
Phone: (716) 551-5755 x5506
Fax: (716) 551-3252
E-Mail: yvonne_m_harris@hud.gov

Christopher H. Hartenau
Senior Attorney for Environment
and Labor Standards
Office of the General Counsel
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 9262
Washington, DC 20410
Phone: (202) 708-3137
Fax: (202) 708-5689
E-Mail: christopher_h_hartenau@hud.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Donna J. Hartley
Director
Grants Management Division
Alaska Office of Native American Programs
U.S. Department of Housing
and Urban Development
Alaska Veco Building
949 East 36th Avenue, Suite 401
Anchorage, AK 99508-4399
Phone: (907) 271-4603
Fax: (907) 271-4605
E-Mail: donna_hartley@hud.gov

Donna S. Hay
Executive Director
Chippewa Cree Housing Authority
Rural Route 1, Box 567
Box Elder, MT 59521
Phone: (406) 395-4370
Fax: (406) 395-4249

Susie Hay
Executive Director
Chippewa Cree Housing Authority
RR 1, Box 567
Box Elder, MT 59521
Phone: (406) 395-4370
Fax: (406) 395-4249
E-Mail: ccha@hi-line.net

Kerry Heavy Runner
Board Member
Eastern Shoshone Housing Authority
P.O. Box 1250
Fort Washakie, WY 82514
Phone: (307) 332-5832
Fax: (307) 332-2074

Robin L. Heehn
Administrative Assistant
Umatilla Reservation Housing Authority
P.O. Box 1658
Pendleton, OR 97801
Phone: (541) 276-7544
Fax: (541) 276-7255
E-Mail: robinheehn@ctuir.com

David V. Heisterkamp, II
Attorney
Wagenlander and Heisterkamp, LLC
1700 Broadway, Suite 1202
Denver, CO 80290-1201
Phone: (303) 832-6511
Fax: (303) 830-2246
E-Mail: davidvh@wagenlander.com

Robert Henrichs
Member
Board of Commissioners
North Pacific Rim Housing Authority
8300 King Street
Anchorage, AK 99518
Phone: (907) 562-1444
Fax: (907) 562-1445
E-Mail: brenda@nprha.com

Retha M. Heme
Assistant Director
Akwesasne Housing Authority
P.O. Box 540
Hogansburg, NY 13655
Phone: (518) 358-9020
Fax: (518) 358-2958
E-Mail: herneretha@hotmail.com

Veronica Hickman
Chairman
Board of Commissioners
Sault Ste. Marie Tribe of Chippewa Indians
Housing Authority
2218 Shunk Road
Sault Ste. Marie, MI 49783
Phone: (906) 635-4960
Fax: (906) 635-7017

Gary Hilkemann
Executive Director
Northern Ponca Housing Authority
1501 Michigan Avenue
Norfolk, NE 68701
Phone: (402) 379-8224
Fax: (402) 379-8557
E-Mail: gary@poncahousing.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Clint Hill
Men's Council Member
Oneida Indian Nation
P.O. Box 1
Vernon, NY 13476
Phone: (315) 829-3090
Fax: (315) 829-5568

Loydene Hill
Board Member
Eastern Shoshone Housing Authority
P.O. Box 1250
Fort Washakie, WY 82501
Phone: (307) 332-5832
Fax: (307) 332-2074

Vernon Hill
Tribal Planner/Board Member
Eastern Shoshone Housing Authority
P.O. Box 1250
Fort Washakie, WY 82514
Phone: (307) 332-5832
Fax: (307) 332-2074

Leo Hirsch
Housing Data Systems, Inc
P.O. Box 883
West Salem, WI 54669
Phone: (608) 786-2366
Fax: (608) 786-2944
E-Mail: leoh@housingdatasystems.com

Ronald Hoffman
Executive Director
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-3933
E-Mail: ron@avcphousing.org

Robert I. Holden
Director
Nuclear Waste Program
National Congress of American Indians
1301 Connecticut Avenue, NW, 2nd Floor
Washington, DC 20036
Phone: (202) 466-7767 x221
Fax: (202) 466-7797
E-Mail: robert_holden@ncai.org

Rick Holiday
TSHA Board Commissioner
Yankton Sioux Tribe Housing Authority
419 South Main Avenue
Wagner, SD 57380
Phone: (605) 384-3171
Fax: (605) 384-5907
E-Mail: ysthsng@charles-mix.com

Margaret A. Horn
Occupancy Specialist
Fort Belknap Housing Department
Rural Route 1, Box 61
Harlem, MT 59524
Phone: (406) 353-2601
Fax: (406) 353-4975
E-Mail: margarethorn@yahoo.com

Candace Howard
Board Chairman
Housing Authority of the Sac and Fox Nation
P.O. Box 1252
Shawnee, OK 74801
Phone: (405) 275-8200
Fax: (405) 275-8203

Veronica Hoyle
Administrative Assistant
Tlingit-Haida Regional Housing Authority
P.O. Box 32237
Juneau, AK 99803
Phone: (907) 780-6868
Fax: (907) 780-6895

Harry L. Hudson
Architect/Training Coordinator
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 4126
Washington, DC 20410
Phone: (202) 401-7914 x4204
Fax: (202) 401-7909
E-Mail: harry_l._hudson@hud.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Scott Hull
Modernization and Rehabilitation
Coordinator
Pokagon Band of Potawatomi Indians
P.O. Box 180
714 North Front Street
Dowagiac, MI 49047
Phone: (616) 783-0385
Fax: (616) 783-0195

Ron Hunt
Contract Officer
Spirit Lake Housing Authority
P.O. Box 187
Fort Totten, ND 58335
Phone: (701) 766-4131
Fax: (701) 766-4843
E-Mail: ronhunt@spirittlakenation.com

Nick Huskey
Housing Management Director
Qualla Housing Authority
P.O. Box 1749
Cherokee, NC 28719
Phone: (828) 497-9161
Fax: (828) 497-3070
E-Mail: qualla@dnet.net

Steve Hutchings
Attorney
Cook Inlet Housing Authority
3510 Spenard Road, Suite 201
Anchorage, AK 99503
Phone: (907) 276-8822
Fax: (907) 258-4957
E-Mail: jandersen@citci.com

Carrie Imus
Vice Chairperson
Hualapai Tribe
P.O. Box 179
Peach Springs, AZ 86434
Phone: (520) 769-2216
Fax: (520) 769-2343

Bonnie Inman
Housing Department Manager
Grand Traverse Band of Ottawa and
Chippewa Indians
11244 East Ki-Dah-Keh Mi-Kun Road
Peshawbestown, MI 49682
Phone: (231) 271-4473
Fax: (231) 271-2025
E-Mail: binman@gtbindians.com

Roy G. Isturis
Alaska Regional Housing Officer
Bureau of Indian Affairs
P.O. Box 25520
Juneau, AK 99802
Phone: (907) 586-7434
Fax: (907) 586-8762
E-Mail: risturis@bia.gov

Duane Jackson
Board Member
Spirit Lake Housing Authority
P.O. Box 187
Fort Totten, ND 58335
Phone: (701) 766-4131
Fax: (701) 766-4843
E-Mail: ronhunt@spirittlakenation.com

Leroy Jackson
Acting Chairperson
Timbisha-Shoshone Tribe
P.O. Box 206
Death Valley, CA 92328
Phone: (760) 786-2374
Fax: (760) 786-2376

Margie Jacobs
Housing Director
Waccamaw Siouan Tribe
P.O. Box 221
7275 Old Lake Road
Bolton, NC 28423
Phone: (910) 655-8778
Fax: (910) 655-8779
E-Mail: wakamas@aol.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Sabrina Jacobs
Executive Director
Waccamaw Siouan Tribe
P.O. Box 221
7275 Old Lake Road
Bolton, NC 28423
Phone: (910) 655-8778
Fax: (910) 655-8779
E-Mail: Directexec@aol.com

Donna K. Jacobsen
Lead Grants Management
Program Specialist
Office of Grants Management
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1600 x3318
Fax: (303) 675-1660
E-Mail: donna_k._jacobsen@hud.gov

Matthew Jaffe
Attorney
Sonosky, Chambers, Sachse, Endreson,
and Perry
1250 Eye Street, NW, Suite 1000
Washington, DC 20005
Phone: (202) 682-0240
Fax: (202) 682-0249
E-Mail: mjaffe@sonosky.com

Charles Jamerson
Finance Assistant
Standing Rock Housing Authority
P.O. Box 484
1333 92nd Street
Fort Yates, ND 58539-0484
Phone: (701) 854-3891
Fax: (701) 854-3855
E-Mail: srha4@westriv.com

Venetia Jarrett-May
Credit Policy Emerging Markets Consultant
Wells Fargo Home Mortgage, Inc.
100 South 5th Street
MAC X4801-194
Minneapolis, MN 55402
Phone: (612) 341-6862
Fax: (612) 341-4824
E-Mail: venetia.jarrett-
may@mortgage.wellsfargo.com

Andrew Jasper
Council President
Akiak Native Community
P.O. Box 127
Akiak, AK 99552
Phone: (907) 765-7112
Fax: (907) 765-7512
E-Mail: hazel@avcphousing.org

Ruth Jaure
Project Manager
ICF Consulting
9300 Lee Highway, 11th Floor
Fairfax, VA 22031
Phone: (703) 218-2770
Fax: (703) 934-3156
E-Mail: rjaure@icfconsulting.com

Jeffrey C. Jeffers
Director of Development
Rural Community Assistance Program
1522 K Street, NW, Suite 400
Washington, DC 20005
Phone: (202) 408-1273
Fax: (202) 408-8165
E-Mail: jjeffers@rcap.org

Modesto Jimenez
Tirbal Council Member-At-Large
Klamath Tribes
P.O. Box 436
Chiloquin, OR 97624
Phone: (800) 524-9787
Fax: (541) 783-3994
E-Mail: barbjkirk8@hotmail.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Herb Johns
Squaxin Island Tribe
70 SE Squaxin Lane
Shelton, WA 98584
Phone: (360) 432-1532
Fax: (360) 426-6577

Alvis Johnson
Chairman
Karuk Tribe of California
P.O. Box 1016
Happy Camp, CA 96039
Phone: (800) 505-2785
Fax: (530) 493-2342

Dale Jones
Board of Commissioners
Tulalip Tribes Housing Authority
3107 Reuben Shelton Drive
Marysville, WA 98271
Phone: (360) 651-4580
Fax: (360) 651-4595
E-Mail: tulalip2u@aol.com

Elton Jones
Director
Grants Management Division
Eastern/Woodlands Office of Native
American Programs
U.S. Department of Housing
and Urban Development
77 West Jackson Boulevard, Room 2400
Ralph H. Metcalfe Federal Building
Chicago, IL 60604-3507
Phone: (312) 886-4532
Fax: (312) 353-8936
E-Mail: elton_jones@hud.gov

Floyd Jones
Senior Loan Officer
Housing Authority of the Creek Nation
P.O. Box 297
Okmulgee, OK 74447
Phone: (918) 759-4126
Fax: (918) 752-3274
E-Mail: tamia_1021@yahoo.com

Marvin Jones
Policy Advisor
Housing Authority of the Cherokee Nation
P.O. Box 1007
Tahlequah, OK 74465
Phone: (918) 456-5482
Fax: (918) 458-5018
E-Mail: mjones@hacn.net

Ronald G. Jones
Executive Director
Sisseton-Wahpeton Sioux Tribe
P.O. Box 687
Agency Village CPO
Sisseton, SD 57262
Phone: (605) 698-3901
Fax: (605) 698-7504
E-Mail: swhasiss@tnics.com

Frank A. Joseph
Housing Program Officer
Great Plains Region
Bureau of Indian Affairs
P.O. Box 324
Aberdeen, SD 57402-0324
Phone: (605) 226-7441
Fax: (605) 226-7392

Paul Jurkowski
Director
Office of Loan Guarantee
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 North Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1600 x3317
Fax: (303) 675-1660
E-Mail: paul_s._jurkowski@hud.gov

Norman A. Kallander
Home Loan Director
Cook Inlet Housing Authority
3510 Spenard Road, Suite 201
Anchorage, AK 99503
Phone: (907) 276-8822
Fax: (907) 276-8141
E-Mail: nkallander@citci.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Mary Kauffmann
Mortgage/Finance Specialist
Lummi Indian Nation
2828 Kwina Road
Bellingham, WA 98226
Phone: (360) 384-2295
Fax: (360) 384-2354
E-Mail: maryk@lummi-nation.bia.edu

John Kaul
Acting Executive Director
Kickapoo Housing Authority
883 112th Drive, No. 815
Horton, KS 66439
Phone: (785) 486-3638
Fax: (785) 486-2637
E-Mail: jkaul4334@jbntelco.com

Blake Y. Kazama
Executive Director
Tlingit-Haida Regional Housing Authority
P.O. Box 32237
Juneau, AK 99803
Phone: (907) 780-6868
Fax: (907) 780-6895
E-Mail: bkazama@thrha.com

Joe Keeper
Resource Development Specialist
Salt River Community Housing Division
10177 East Osborn Road
Scottsdale, AZ 85256
Phone: (480) 850-8980
Fax: (480) 850-8997
E-Mail: joe.keeper@saltriver.pima-maricopa.nsn.us

Diane Kelley
Executive Director
Community Services
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74464
Phone: (918) 456-0671
Fax: (918) 458-6152

James L. Kelley
Executive Director
Housing Authority of the Kiowa Tribe
of Indians of Oklahoma
P.O. Box 847
Anadarko, OK 73005
Phone: (405) 247-2417
Fax: (405) 247-3494

Joe Kennedy
Housing Coordinator
Timbisha-Shoshone Tribe
P.O. Box 206
Death Valley, CA 92328
Phone: (760) 786-2374
Fax: (760) 786-2376

Ted L. Key
(Acting) Deputy Assistant Secretary
Office of Field Operations
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW
Washington, DC 20410
Phone: (202) 401-7914 x6161
Fax: (202) 401-7909
E-Mail: ted_l_key@hud.gov

Roger Kihega
Member
Otoe-Missouria Tribe of Oklahoma
405 Wendall Drive
Red Rock, OK 74651
Phone: (580) 723-4400
Fax: (580) 723-4590

Tim King
Housing Chairman
Samish Indian Nation
P.O. Box 217
Anacortes, WA 98221
Phone: (360) 293-6404
Fax: (360) 299-0790
E-Mail: land2c@home.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

E. Crispin Kinney, P.E.
Acting Director
Division of Sanitation Facilities Construction
Office of Environmental Engineering
Indian Health Service
12300 Twinbrook Parkway, Room 610
Rockville, MD 20852
Phone: (301) 443-1046
Fax: (301) 443-7538
E-Mail: ckinney@hqe.ihs.gov

Jack Kirkgasler
Regional Sales Manager
Enercept, Inc.
3100 9th Avenue, SE
Watertown, SD 57201
Phone: (605) 882-2222
Fax: (605) 882-2753
E-Mail: jkirkgasler@enercept.com

Carina Kistler Ginter
Housing Director
Upper Skagit Indian Tribe
25948 Community Plaza Way
Sedro-Woolley, WA 98484
Phone: (360) 856-2900
Fax: (360) 856-3170
E-Mail: ustha@fidalgo.net

Connie N. Kittlesen
Loan Officer
Mille Lacs Reservation Housing Authority
43408 Oodena Drive
Onamia, MN 56359
Phone: (320) 532-7454
Fax: (320) 532-4192

Paul Kiunya, Sr.
Sergeant at Arms
Board of Commissioners
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-3933
E-Mail: mary@avcphousing.org

Robert Knecht
Senior Loan Guarantee Specialist
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1600 x3316
Fax: (303) 675-1660
E-Mail: robert_e._knecht@hud.gov

Becky Knight
Alternative Housing Program Manager
Fort Berthold Housing Authority
P.O. Box 310
New Town, ND 58763
Phone: (701) 627-4731
Fax: (701) 627-3802

Marlin B. Knight
Administrator
Alaskan Office of Native American Programs
U.S. Department of Housing
and Urban Development
Alaska Veco Building
949 East 36th Avenue, Suite 401
Anchorage, AK 99507
Phone: (907) 271-4633
Fax: (907) 271-1995
E-Mail: marlin_knight@hud.gov

Melanie L. Knight
Self-Governance Coordinator
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671
Fax: (918) 458-6157
E-Mail: mknight@cherokee.org

Rob Knoll
Deputy Director
North Dakota Partnership Office
Fannie Mae
400 East Broadway, Suite 412
Bismark, ND 58501
Phone: (701) 530-2563
Fax: (701) 530-2570
E-Mail: robert_c_knoll@fanniema.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Bruce A. Knott
Director
Office of Grants Evaluation
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 North Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1600 x3302
Fax: (303) 675-1662
E-Mail: bruce_a._knott@hud.gov

Mary K. Knoxsah
Occupancy Manager
Kickapoo Housing Authority
883 112th Drive, No. 815
Horton, KS 66439
Phone: (785) 486-3638
Fax: (785) 486-2637
E-Mail: mknoxsah@yahoo.com

Kim Knudson
Community Affairs Analyst
Federal Reserve Bank of Minneapolis
90 Hennepin Ave
Minneapolis, MN 55401
Phone: (612) 204-5166
Fax: (612) 204-5166
E-Mail: kim.knudson@mpls.frb.org

Tracey Knutson
Attorney
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 456-8941
E-Mail: kwood@irha.org

Gary Kompkoff
Chairman
Board of Commissioners
North Pacific Rim Housing Authority
8300 King Street
Anchorage, AK 99518
Phone: (907) 562-1444
Fax: (907) 562-1445

Barbara Krieg
Finance Officer
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 452-2114
E-Mail: barbara@irha.org

Robert S. Kroll
Senior Advisor
Southwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Two Arizona Center
400 North 5th Street, Suite 1650
Phoenix, AZ 85004-2361
Phone: (602) 379-4156
Fax: (602) 379-3101
E-Mail: robert_s._kroll@hud.gov

Jacqueline A. Kruszek
Lead Grants Management Specialist
Office of Grants Management
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 North Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1690 x3306
Fax: (303) 675-1660
E-Mail: jacqueline_a._kruszek@hud.gov

Anthony Laban, Sr.
Housing Program Specialist
Hopi Agency
Bureau of Indian Affairs
P.O. Box 158
Keams Canyon, AZ 86034
Phone: (520) 738-2227
Fax: (520) 738-2321
E-Mail: anthonylaban@bia.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Deborah M. Lalancette
Director
Office of Grants Management
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 Broadway, Suite 3390
Denver, CO 80020
Phone: (303) 675-1600 x3325
Fax: (303) 675-1660
E-Mail: deborah_m._lalancette@hud.gov

Janis J. Lambert
Credit Policy Specialist
Wells Fargo Home Mortgage, Inc.
100 South 5th Street
Mac No. X4801-195
Minneapolis, MN 55402
Phone: (612) 341-1935
Fax: (612) 341-4824
E-Mail: janis.lambert@wellsfargo.com

Mike LaMere
Chairman
Blackfeet Housing
P.O. Box 850
Browning, MT 59417
Phone: (406) 338-7181
Fax: (406) 338-7206
E-Mail: kyio@excite.com

Walter Lang
Executive Director
Spirit Lake Housing Authority
P.O. Box 187
Fort Totten, ND 58335
Phone: (701) 766-4131
Fax: (701) 766-4843
E-Mail: ronhunt@spiritlakenation.com

James LaPointe
Board Member
Northern Ponca Housing Authority
7930 Reno Road
Lincoln, NE 68505
Phone: (402) 379-8224
Fax: (402) 379-8557

Craig Larson
District Engineer
Indian Health Service
522 Minnesota Avenue
Bemidji, MN 56601
Phone: (218) 444-0520
Fax: (218) 444-0533
E-Mail: craig.larson@mail.ihs.gov

Virginia Lawnicki
Secretary
Craig Tribal Association
P.O. Box 828
Craig, AK 99921
Phone: (907) 826-3996
Fax: (907) 826-3997
E-Mail: cgtribe@aptalaska.net

Margaret Lekanoff
Commissioner
Board of Commissioners
Aleutian Housing Authority
4000 Old Seward Highway, Suite 202
Anchorage, AK 99503
Phone: (907) 563-2146
Fax: (907) 563-3105
E-Mail: nicole@aleutian-housing.com

Alexandra M. Lindgren
Accounting Supervisor
Kenaitze/Salamatof Tribally Designated
Housing Entity
P.O. Box 988
Kenai, AK 99611
Phone: (907) 283-3633
Fax: (907) 283-3052
E-Mail: sasha@pobox.alaska.net

Brad Linney
Project Manager
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 934-3888
Fax: (703) 934-3156
E-Mail: blinney@icfconsulting.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Vincent C. Lintz
Associate Director of Housing
Federal Home Loan Bank of Des Moines
907 Walnut Street
Des Moines, IA 50309
Phone: (515) 281-1198
Fax: (515) 699-1270
E-Mail: vlintz@fhlbdm.com

Edward Locklear
Rehabilitation Manager
Lumbee Regional Development
Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

Fred Longie
Board Chairman
Spirit Lake Housing Authority
P.O. Box 187
Fort Totten, ND 58335
Phone: (701) 766-4131
Fax: (701) 766-4843
E-Mail: ronhunt@spiritlakenation.com

Tony LookingElk
Community Builder
Minneapolis Office
U.S. Department of Housing
and Urban Development
220 2nd Street, South
Minneapolis, MN 55401-2195
Phone: (612) 370-3000 x2239
Fax: (612) 370-3220
E-Mail: tony_lookingelk@hud.gov

Kathryn E. Lopez
Council Member
Puyallup Tribe of Indians
2002 East 28th Street
Tacoma, WA 98404
Phone: (253) 573-7828
Fax: (253) 572-4390

Rita Louis
Housing Intake
Samish Indian Nation
1501 O Avenue, No. 3
Anacortes, WA 98221
Phone: (360) 299-2086
Fax: (360) 588-9537
E-Mail: rlouis@sam.portland.his.gov

Allen E. Lowry
Executive Director
Susanville Indian Rancheria Housing Authority
P.O. Box 970
Susanville, CA 96130
Phone: (530) 257-5033
Fax: (530) 257-5035
E-Mail: sirla@citlink.net

Minda Lupe
Loan Specialist
White Mountain Apache Housing Authority
P.O. Box 1270
White River, AZ 85941
Phone: (520) 338-4831
Fax: (520) 338-4835
E-Mail: vvelasquez@cybertrails.com

Jesse L. Luttenton
Grant Writer
Keweenaw Bay Indian Community
107 Beartown Road
Marquette, MI 49908
Phone: (906) 353-6623 x4205
Fax: (906) 353-6869
E-Mail: jluttenton@up.net

Jean Lyddane
Chair
Board of Commissioners
Kickapoo Housing Authority
883 112th Drive, No. 815
Horton, KS 66439
Phone: (785) 486-3638
Fax: (785) 486-2637



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Archie Lynch
Housing Director
Haliwa-Saponi Tribe
P.O. Box 99
39129 Highway 561/43 North
Hollister, NC 27844
Phone: (252) 586-1858
Fax: (252) 586-3918
E-Mail: alynch@coastalnet.com

Michael A. Lynn
Accounting Supervisor
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671 x2396
Fax: (918) 458-7621
E-Mail: mlynn@cherokee.org

Douglas MacDowell
Senior Loan Specialist
Rural Housing Service
U.S. Department of Agriculture
14th and Independence Avenue, SW
Washington, DC 20250-0781
Phone: (202) 720-1627
Fax: (202) 690-3444
E-Mail: dmacdowe@urdev.usda.gov

Shirley Machonis
Project Manager
Neighborhood Networks
U.S. Department of Housing
and Urban Development
451 7th Street, SW, Room 6154
Washington, DC 20410
Phone: (202) 708-2866
Fax: (202) 401-9087
E-Mail: shirley_l._machonis@hud.gov

Clifford Mahooty
Environmental Engineer
Office of Trust-Environment
Bureau of Indian Affairs
P.O. Box 2243
Albuquerque, NM 87103
Phone: (505) 346-7223
Fax: (505) 346-2543
E-Mail: cliffmahooty@bia.gov

Florine Maine
Secretary/Treasurer
Board of Commissioners
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Shelly J. Malik
Guaranteed Housing Manager
Rural Development
U.S. Department of Agriculture
1501 Cass Road
Traverse City, MI 49684
Phone: (231) 929-4379
Fax: (231) 929-7890
E-Mail: shelley.malik@mi.usda.gov

Terrye T. Malt
Attorney
Fort Belknap Housing Department
310 East Main Street
Cut Bank, MT 59427
Phone: (406) 873-4833
Fax: (406) 873-4944
E-Mail: healy@cut-bank.mt.us

Kermit Mankiller, MBA
Training Specialist
National American Indian Housing Council
Route 1, Box 157
Lapwai, ID 83540
Phone: (208) 843-5928
Fax: (208) 843-5929
E-Mail: kmankiller@naihcn.net

Robert J. Mann
Lands/Development Director
Ho-Chunk Housing Authority
P.O. Box 730
Tomah, WI 54660
Phone: (608) 374-1245
Fax: (608) 374-1251



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Mary Mantooth
Finance Director
Qualla Housing Authority
P.O. Box 1749
Cherokee, NC 28719
Phone: (828) 497- 9161
Fax: (828) 497-3070
E-Mail: qualla@dnet.net

Dean E. March
Native American Programs Specialist
Eastern/Woodlands Office of Native
American Programs
U.S. Department of Housing
and Urban Development
77 West Jackson Boulevard
Chicago, IL 60604
Phone: (312) 886-4532
Fax: (312) 353-8936
E-Mail: dean_march@hud.gov

Jay Marcus
Director of Housing Initiatives
Enterprise Foundation
10227 Wincopin Circle, Suite 500
Columbia, MD 21044
Phone: (410) 772-2474
Fax: (410) 984-1918
E-Mail: jmarcus@enterprisefoundation.org

Maureen Markham
Senior Consultant
ICF Consulting
2421 Tyndell Circle, SW
Tumwater, WA 98512
Phone: (360) 352-9748
E-Mail: maureenmarkham@home.com

Carl E. Martin
Housing Director
Tonkawa Tribe of Oklahoma
P.O. Box 70
Tonkawa, OK 74653
Phone: (580) 628-5301

James Martin
Rural Housing Program Director
Rural Development
U.S. Department of Agriculture
3003 North Central Avenue, Suite 900
Phoenix, AZ 85012-2906
Phone: (602) 280-8764
Fax: (602) 280-8879
E-Mail: jim.martin@az.usda.gov

Laurie Martin
Attorney
Office of Counsel
U.S. Department of Housing
and Urban Development
633 17th Street
Denver, CO 80206
Phone: (303) 672-5409 x1353
Fax: (303) 672-5027

Tiffany Martin
Legislative Aide
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763
Phone: (701) 627-3623
Fax: (701) 627-3625
E-Mail: tmartin@mhanation.com

Joyce Martinez
Pueblo of Picuris Tribe
P.O. Box 127
Penasco, NM 87553
Phone: (505) 587-2519
Fax: (505) 587-1071

Elizabeth Matusow
Research Assistant
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 934-3196
Fax: (703) 934-3278
E-Mail: lizmatusow@icfconsulting.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Christian M. May
Outreach Director
Steven Winter Associates, Inc.
1331 H Street, NW, Suite 1000
Washington, DC 20005
Phone: (202) 628-6100 x207
Fax: (202) 393-5043
E-Mail: cmay@swinter.com

Kristy McCarthy
Director
Coalition for Indian Housing
and Development
900 2nd Street, NE, Suite 306
Washington, DC 20002
Phone: (202) 789-1146
Fax: (202) 898-0027
E-Mail: kmccarthy@naihc.net

Sharon McClane
Board Secretary
Prairie Band of Potawatomi Nation
Housing Authority
8273 156th Lane
Mayatta, KS 66509
Phone: (785) 966-2756
Fax: (785) 966-2864
E-Mail: janis_simon@hotmail.com

Andrew McCloud
Housing Director
Puyallup Tribe of Indians
2002 East 28th Street
Tacoma, WA 98404
Phone: (253) 573-7955
Fax: (253) 573-7929

David E. McClure
Executive Director
Bristol Bay Housing Authority
P.O. Box 50
Dillingham, AK 99576
Phone: (907) 842-5956
Fax: (907) 842-2784
E-Mail: bristol@alaska.net

Scott D. McCrea
Administrator
Mesa Grande Band of Mission Indians
P.O. Box 270
Santa Ysabel, CA 92070
Phone: (760) 782-3818
Fax: (760) 782-9029
E-Mail: mesagrandeband@emailmsn.com

Linda McGraw-Adams
Compliance Specialist
Red Lake Reservation Housing Authority
P.O. Box 219
Highway 1 East
Red Lake, MN 56671
Phone: (218) 679-3368
Fax: (218) 679-2264

Judy McIntire
Labor Relations Director
U.S. Department of Housing
and Urban Development
220 2nd Street, South
Minneapolis, MN 55401
Phone: (612) 370-3000
Fax: (612) 370-3218

Bernadette McKale
Housing Director
Santa Clara Pueblo Housing Authority
P.O. Box 2218
Española, NM 87532
Phone: (505) 753-6170
Fax: (505) 753-3699
E-Mail: scpha@la-tierra.com

C. Raphael Mecham
Administrator
Southwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Two Arizona Center
400 North 5th Street, Suite 1650
Phoenix, AZ 85004-2361
Phone: (602) 379-4156
Fax: (602) 379-3101
E-Mail: c._raphael_mecham@hud.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Freda Medlin-Ross
Director of Finance and Administration
Cherokee Nation
P.O. Box 1948
Tahlequah, OK 74464
Phone: (918) 456-0671
Fax: (918) 458-6152
E-Mail: fross@cherokee.com

LaDarana Mees
Staff Member
Standing Rock Housing Authority
P.O. Box 484
1333 92nd Street
Fort Yates, ND 58538-0484
Phone: (701) 854-3891
Fax: (701) 854-3855
E-Mail: hac@westriv.com

Deborah K. Mendez
Client Service Supervisor
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Richard Mermejo
Picuris of Pueblo Tribe
P.O. Box 127
Renasco, NM 87553
Phone: (505) 587-2519
Fax: (505) 587-1071

C.W. (Chuck) Merritt
President
IHA Management Systems, Inc.
15414 North 7th Street, Suite 8-145
Phoenix, AZ 85022
Phone: (602) 482-0115 x225
Fax: (602) 485-1015
E-Mail: ihams@ix.netcom.com

Andrew Miller, Jr.
Nome Eskimo Community
P.O. Box 1090
Nome, AK 99762
Phone: (907) 443-2246
Fax: (907) 443-3539
E-Mail: amiller@nome.net

Benjamin Miller
Research Assistant
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031-1207
Phone: (703) 218-2555
Fax: (703) 934-3156
E-Mail: bmiller@icfconsulting.com

Delores A. Miller
Housing Authority
Prairie Band of Potawatomi Nation
Housing Authority
16281 Q Road
Mayetta, KS 66509
Phone: (785) 966-2255

Kelly Miller
Research Assistant
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 218-2589
Fax: (703) 934-3278
E-Mail: kmiller@icfconsulting.com

Monica Miller
Housing Board
Puyallup Tribe of Indians
2002 East 28th Street
Tacoma, WA 98404
Phone: (253) 573-7848
Fax: (253) 573-7929

Sylvia P. Miller
Council Member
Puyallup Tribe of Indians
2002 East 28th Street
Tacoma, WA 98404
Phone: (253) 573-7828
Fax: (253) 572-4390

Kenneth Milton
Housing Commissioner
Kickapoo Housing Authority
883 112th Drive, No. 815
Horton, KS 66439
Phone: (785) 486-3638
Fax: (785) 486-2637
E-Mail: jkaul4334@jbntelco.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Elrena Mitchell
Housing Specialist
Navajo Nation
P.O. Box 1580
Fort Defiance, AZ 86504
Phone: (520) 729-4438
Fax: (520) 729-4436
E-Mail: el_mitchell@yahoo.com

Marlene Mitchell
Assistant Executive Director
Leech Lake Housing Authority
6530 Highway 2, NW
Cass Lake, MN 56633
Phone: (218) 335-8280
Fax: (218) 335-8367
E-Mail: llrha@paulbunyan.net

Ed D. Mittelstet
Assistant Loan Production Officer
U.S. Department of Veterans Affairs
1 Federal Drive
St. Paul, MN 55111
Phone: (612) 970-5567
Fax: (612) 970-5491

Teresa Mojado
Rural Development Specialist - Housing
Rural Community Assistance Corporation
417 Carmel Street, Suite 203
San Marcos, CA 92078-4368
Phone: (760) 613-7129
Fax: (760) 471-9771
E-Mail: tmojado@rcac.org

John D. Mojica
Resident Services Coordinator
Mille Lacs Reservation Housing Authority
43408 Oodena Drive
Onamia, MN 56359
Phone: (320) 532-7455
Fax: (320) 532-4192

Raymond D. Moon, Sr.
Collection Officer
Hoopa Valley Tribe
P.O. Box 1285
Hoopa, CA 95546
Phone: (530) 625-4759
Fax: (530) 625-4745

William Moore
New Construction Manager
Lumbee Regional Development Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

William Joseph Moran
Board of Commissioners
Salish and Kootenai Housing Authority
P.O. Box 38
Pablo, MT 59855
Phone: (406) 675-4491
Fax: (406) 675-4495
E-Mail: rnicolai@skha.ort

Emanuel Morgan
Planning Administrator
Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447
Phone: (918) 752-7207
Fax: (918) 752-3291
E-Mail: nahasda5@ocevnet.org

Jackie M. Morgan
Community Development Specialist
Rural Development
U.S. Department of Agriculture
240 West Wright Street
West Branch, MI 48661
Phone: (989) 345-5470
Fax: (989) 345-4010
E-Mail: jackie.morgan@mi.usda.gov

William Morgan
Member
Board of Commissioners
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-3933
E-Mail: mary@avcpousing.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Cheryl Mose
Asset Specialist
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Olga Mulherin
Senior Associate
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 934-3731
Fax: (703) 934-3278
E-Mail: olgamulherin@icfconsulting.com

Wayne A. Mundy
Executive Director
Bering Straits Regional Housing Authority
P.O. Box 995
Nome, AK 99762
Phone: (907) 443-5256
Fax: (907) 443-2160
E-Mail: wmundy@bsrha.org

Gary Murphy
Grants Management Specialist
Office of Grants Evaluation
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 North Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1600
Fax: (303) 675-1662
E-Mail: gary_l._murphy@hud.gov

Steven J. Murray
Tribal Housing Director
Forest County Potawatomi Community
P.O. Box 338
Crandon, WI 54520
Phone: (715) 478-7270
Fax: (715) 478-7279

Johnny Naize
Board of Commissioners and Tribal Council
Navajo Nation
P.O. Box 2000
Window Rock, AZ 86515
Phone: (520) 871-6380
Fax: (520) 871-7255

Erica D. Nelson
Administrative Officer
Tupiq Services, Inc.
P.O. Box 536
Kotzebue, AK 99752
Phone: (907) 442-3378
Fax: (907) 442-3538
E-Mail: ednelson@maniilag.org

Jolene M. Nertoli
Housing Division Director
Sault Ste. Marie Tribe of Chippewa Indians
Housing Authority
2218 Shunk Road
Sault Ste. Marie, MI 49783
Phone: (906) 635-4960
Fax: (906) 635-7017
E-Mail: qhouse1@northernway.net

Annette J. Nesse
Director of Administration/Planning
Jamestown S'Klallam Tribe
1033 Old Blyn Highway
Sequim, WA 98382
Phone: (360) 681-4620
Fax: (360) 681-3405
E-Mail: anesse@jamestowntribe.org

David M. Neubeck
Staff Attorney
Lummi Indian Nation
2616 Kwina Road
Bellingham, WA 98226
Phone: (360) 384-2226
Fax: (360) 384-2358
E-Mail: davidn@lummi-nation.bia.edu



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Bill Nibbelink
Owner
Bill Nibbelink and Associates
P.O. Box 66
Flandreau, SD 57028
Phone: (605) 997-2887
Fax: (605) 997-0088
E-Mail: nib@mcisweb.com

Robert Nick
Secretary/Treasurer
Board of Commissioners
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-3933
E-Mail: mary@avcphousing.org

Edward Niewinski
Manager
Indian Housing Programs
Minnesota Housing Finance Agency
400 Sibley, Suite 300
St. Paul, MN 55101
Phone: (651) 297-3130
Fax: (651) 296-8292
E-Mail: ed.niewinski@state.mn.us

Sharon Noah
Acting Interim Executive Director
Housing Authority of the Sac and Fox Nation
P.O. Box 1252
Shawnee, OK 74801
Phone: (405) 275-8200
Fax: (405) 275-8203

John G. Norman
Tribal Housing Director
Otoe-Missouria Tribe of Oklahoma
8151 Highway 177
Red Rock, OK 74651
Phone: (580) 723-4466
Fax: (580) 723-4273
E-Mail: otobear11552@aol.com

Teri L. Nutter
Deputy Director
Copper River Regional Housing Authority
P.O. Box 89
Glennallen, AK 99588
Phone: (907) 822-3633
Fax: (907) 822-3662
E-Mail: tnutter@crbrha.org

Robert Nygaard
Director
Planning and Developing
Sault Ste. Marie Tribe of Chippewa Indians
523 Ashmund Street
Sault Ste. Marie, MI 49783
Phone: (906) 635-6050
Fax: (906) 635-4969
E-Mail: bnygaard@saulttribe.net

Charles A. Okakok
Tribal Operations Officer
Inupiat Community of the Arctic Slope
P.O. Box 934
Barrow, AK 99723
Phone: (907) 852-4227
Fax: (907) 852-4246
E-Mail: icastrb@barrow.com

Robert Olivar, Sr.
Board Chairman
San Carlos Apache Housing Authority
P.O. Box 740
Peridot, AZ 85542
Phone: (520) 475-2346
Fax: (520) 475-2349

Owen Ondelacy
Assistant Director
Pueblo of Acoma Housing Authority
P.O. Box 620
Pueblo of Acoma, NM 87034
Phone: (505) 552-6118
Fax: (505) 552-0542



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Carolyn J. O'Neil
Deputy Director
Sault Ste. Marie Tribe of Chippewa Indians
Housing Authority
2218 Shunk Road
Sault Ste. Marie, MI 49783
Phone: (906) 635-4960
Fax: (906) 635-7017
E-Mail: qhouse1@northernway.net

Richard Ong
Executive Director
Laguna Housing Development and
Management Enterprise
P.O. Box 178
Laguna, NM 87026
Phone: (505) 552-6430
Fax: (505) 552-9409

Lynn M. Oshelski
Executive Secretary
Sault Ste. Marie Tribe of Chippewa Indians
Housing Authority
2218 Shunk Road
Sault Ste. Marie, MI 49783
Phone: (906) 635-4960
Fax: (906) 635-7017
E-Mail: loshelski@saulttribe.net

Mary Ovebi
Member
Otoe-Missouria Tribe of Oklahoma
405 Wendall Drive
Red Rock, OK 74651
Phone: (580) 723-4400
Fax: (580) 723-4590

Dorothy M. Owen
Chairperson
Douglas Indian Association
918 3rd Street
Douglas, AK 85607
Phone: (907) 364-2916
Fax: (907) 364-2917
E-Mail: dia@qci.net

Dobbs Oxendine
Board Member
Lumbee Regional Development Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

Sam S. Painter
Attorney
Northern Cheyenne Housing and Crow
Tribal Housing
303 North Broadway, Suite 616
Billings, MT 59101
Phone: (406) 259-8611
Fax: (406) 259-3251
E-Mail: erlawoffice@aol.com

Sylvia Palmer
Council Member
Hualapai Tribe
P.O. Box 179
Peach Springs, AZ 86434
Phone: (520) 769-2216
Fax: (520) 769-2343

Don Parker
Executive Director
Comanche Nation Housing Authority
P.O. Box 1671
Lawton, OK 73502-1671
Phone: (580) 357-4956
Fax: (580) 357-1103
E-Mail: dparker@cnha.net

John Parker
Native American Housing Specialist
Share, Little Dixie C.A.A.
619 West 12th Street
Stillwater, OK 74076
Phone: (405) 624-2533
Fax: (405) 624-5004
E-Mail: jparkermslh@aol.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Nida M. Parker
Financial Manager
Chippewa Cree Housing Authority
Rural Route 1, Box 567
Box Elder, MT 59521
Phone: (406) 395-4370
Fax: (406) 395-4249

Walt Patton
Senior Business Manager
Fannie Mae
3900 Wisconsin Avenue, NW
Washington, DC 20016
Phone: (202) 752-2529
Fax: (202) 752-6845
E-Mail: walter_patton@fanniemae.com

Moses P. Paukan, Sr.
Commissioner
Board of Commissioners
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-3933
E-Mail: mary@avcphousing.org

Arlyce A. Paulson
Executive Director
Oneida Housing Authority
2913 Commissioner
Oneida, WI 54155
Phone: (920) 869-2227
Fax: (920) 869-2836
E-Mail: arlyce869@aol.com

Lahka Peacock
Home Loan Specialist
Northwest Inupiat Housing Authority
P.O. Box 331
1001 Turf Street
Kotzebue, AK 99752
Phone: (907) 442-3450
Fax: (907) 442-3486
E-Mail: lpeacock@maniilaq.org

Terry A. Pearman
Development Director
Cheyenne River Housing Authority
P.O. Box 930
Eagle Butte, SD 57625
Phone: (605) 964-4265
Fax: (605) 964-1070
E-Mail: terrycrha@sat.net

Paul Peigare
Southern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
500 West Main, Suite 400
Oklahoma City, OK 73102
Phone: (405) 553-7541

Peter Petrunich
Grants Management Specialist
Denver Program Office of Native
American Programs
U.S. Department of Housing
and Urban Development
1999 North Broadway, Suite 3390
Denver, CO 80202
Phone: (303) 675-1620
Fax: (303) 675-1660
E-Mail: peter_j._petrunich@hud.gov

Diana R. Phair
Housing Director
Lummi Nation Housing Authority
2828 Kwina Road
Bellingham, WA 98226
Phone: (360) 384-2295
Fax: (360) 384-2354

Patty Phair
Bookkeeper
Lummi Nation Housing Authority
2828 Kwina Road
Bellingham, WA 98226
Phone: (360) 384-2295
Fax: (360) 384-2354



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Rebecca Phelps
Executive Director
Turtle Mountain Housing Authority
P.O. Box 620
Belcourt, ND 58316
Phone: (701) 477-5673
Fax: (701) 477-3247

Edwin Phillips
Business Manager
Tlingit-Haida Regional Housing Authority
P.O. Box 32237
Juneau, AK 99803
Phone: (907) 780-6868
Fax: (907) 780-6895

Bill Picotte
Executive Director
Oti Kaga, Inc.
P.O. Box 751
Eagle Butte, SD 57625
Phone: (605) 964-4663
Fax: (605) 964-4664
E-Mail: billp@rapidnet.com

Donald L. Pilcher
Chairman
Sac and Fox Housing Authority of Missouri
106 West 4th Street, Unit 12
Reserve, KS 66434
Phone: (785) 742-7489
Fax: (785) 742-7494

Perry J. Pockros
Principal Consultant
PricewaterhouseCoopers, LLP
1616 North Fort Myer Drive
Arlington, VA 22209-3195
Phone: (703) 741-1518
Fax: (703) 741-1616
E-Mail: perry.pockros@us.pwcglobal.com

Walter Porter
Executive Director
Tupiq Services, Inc.
P.O. Box 536
Kotzebue, AK 99752
Phone: (907) 442-3378
Fax: (907) 442-3538
E-Mail: wporter@maniilag.org

Lois J. Powless
Board Chairman
Oneida Housing Authority
P.O. Box 68
2913 Commissioner
Oneida, WI 54155
Phone: (920) 869-2227
Fax: (920) 869-2836

Amanda Proctor
Housing Director
Pokagon Band of Potawatomi Indians
P.O. Box 180
714 North Front Street
Dowagiac, MI 49047
Phone: (616) 783-0385
Fax: (616) 783-0195

Emily A. Proskin
Family Support Advocate
Ain Dan Yung
579 Wells Street
St. Paul, MN 55101
Phone: (651) 776-2230
Fax: (651) 776-2290
E-Mail: kita9in@qwest.net

Ronald Qualls
Executive Director
Housing Authority of the Cherokee Nation
P.O. Box 1007
Tahlequah, OK 74465
Phone: (918) 456-5482
Fax: (918) 458-5018
E-Mail: rqualls@hacn.net

Jack Quinn
Secretary-Treasurer
LHA Board of Commissioners
Warm Springs Housing Authority
P.O. Box 1167
Warm Springs, OR 97761
Phone: (541) 553-3250
Fax: (541) 553-3358
E-Mail: cvanpelt@wstribes.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Cheri Racehorse
Accounting Manager
Shoshone-Bannock Tribes/Fort Hall
Housing Authority
161 Wardance Circle
Pocatello, ID 83202
Phone: (208) 237-1174
Fax: (208) 237-0455
E-Mail: cracehorse@ida.net

David Ramirez
Vice-Chairman
Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85946
Phone: (520) 883-5029
Fax: (520) 883-5075

Linda Raymond
Vice-Chairperson
Board of Commissioners
Maliseet Indian Housing Authority
13 Clover Court, No. 1
Houlton, ME 04730
Phone: (207) 532-7637
Fax: (207) 532-7638

Terrance RedFox
CEO
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763
Phone: (701) 627-3623
Fax: (701) 627-3625
E-Mail: tanalyst@mhanation.com

Blair Reels, Sr.
Housing Committee Member
Narragansett Indian Tribe
P.O. Box 148
Kenyon, RI 02836
Phone: (401) 364-9873
Fax: (401) 364-0466

Erna F. Reeves
Executive Assistant
Housing Authority of the Cherokee Nation
P.O. Box 1007
Tahlequah, OK 74465
Phone: (918) 456-5482
Fax: (918) 458-5018
E-Mail: ereeves@hacn.net

Alicia L. Reft
President
Karluk Indian Reorganization Act Tribal Council
P.O. Box 22
Karluk, AK 99608
Phone: (907) 214-2218
Fax: (907) 241-2208
E-Mail: a96lynn@aol.com

Linda Lee Retka
Mille Lacs Reservation Housing Authority
43408 Oodena Drive
Onamia, MN 56359
Phone: (320) 532-7454
Fax: (320) 532-4192
E-Mail: lindalee@millelacsobwe.nsn.us

Delbert J. Rexford
Executive Director
Tagiugmiullu Nunamiullu Housing Authority
P.O. Box 69
Barrow, AK 99723
Phone: (907) 852-0290
Fax: (907) 852-0373
E-Mail: drexford@co.north-slope.ak.us

Peggie Reynolds
Administrative Deputy
Seminole Tribe of Florida
6300 Stirling Road
Hollywood, FL 33024
Phone: (954) 967-3804
Fax: (954) 967-3496
E-Mail: preynolds@semtribe.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Max Rice
Native American Programs Specialist
Northwest Office of Native
American Programs
U.S. Department of Housing
and Urban Development
Seattle Federal Building
909 First Avenue, Suite 300
Seattle, WA 98104-1000
Phone: (206) 220-5273 x366
Fax: (206) 220-5234
E-Mail: max_rice@hud.gov

Dennis Richert
Development, Construction, and
Maintenance Manager
Tlingit-Haida Regional Housing Authority
P.O. Box 32237
Juneau, AK 99801
Phone: (907) 780-3101
Fax: (907) 780-6253
E-Mail: drichert@thrha.com

Liz Ricketts
Executive Director
Housing Authority of the Osage Tribe
P.O. Box 517
Hominy, OK 74035
Phone: (918) 885-6575
Fax: (918) 885-2405

Trish Roberts
Project Manager
ICF Consulting
1327 Sealawn Boulevard
Freeland, WA 98249
Phone: (360) 331-5322
Fax: (360) 331-5325
E-Mail: troberts@icfconsulting.com

Linda Robins
Development Director
Division of Housing
Chickasaw Nation
P.O. Box 788
Ada, OK 74821-0788
Phone: (580) 421-8800 x840
Fax: (580) 421-8879
E-Mail: linda.robins@chickasaw.net

Martin Robinson
Board Vice-Chairperson
Leech Lake Housing Authority
6530 Highway 2, NW
Cass Lake, MN 56633
Phone: (218) 335-8280
Fax: (218) 335-8367
E-Mail: llrha@paulbunyan.net

Samuel Rock
Executive Director
Mille Lacs Reservation Housing Authority
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359
Phone: (320) 532-4734
Fax: (320) 532-4192
E-Mail: samr@millelacsojibwe.nsn.us

Clarence Rockwell
Executive Director
Navajo Utah Commission
P.O. Box 570
Montezuma Creek, UT 84534
Phone: (435) 651-3508
Fax: (435) 651-3511

Charles W. Rogers
Executive Director
Gila River Housing Authority
P.O. Box 528
Sacaton, AZ 85247
Phone: (520) 562-3908
Fax: (520) 562-3927

Ann Roman
Director
Grants Evaluation Division
Northern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
633 17th Street
Denver, CO 80202
Phone: (303) 221-2369 x1295
Fax: (303) 672-5003
E-Mail: carol_a._roman@hud.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Ezra Rosser
Law Clerk
DNA-Peoples Legal Services
P.O. Box 268
Red Valley, AZ 86544
Phone: (505) 368-3211
Fax: (505) 368-3212
E-Mail: ezrarosser@yahoo.com

Neva Running Wolf
Vice Chairman
Blackfeet Housing
P.O. Box 482
Browning, MT 59417
Phone: (406) 338-5380

Julia A. Russ
Housing Manager
Northern Circle Indian Housing Authority
694 Pinoleville Drive
Ukiah, CA 95490
Phone: (707) 468-1336
Fax: (707) 468-5615
E-Mail: jar@nciha.org

Ursula Russette
Administrative Assistant
Chippewa Cree Housing Authority
Rural Route 1, Box 567
Box Elder, MT 59521
Phone: (406) 395-4370
Fax: (406) 395-4249

David D. Saffert
Native American Coordinator
Rural Development
U.S. Department of Agriculture
1400 Independence Avenue, SW
Stop 0701
Washington, DC 20250
Phone: (202) 720-0400
Fax: (202) 690-0500
E-Mail: dsaffert@rdmail.rural.usda.gov

Woodie Salmon
Commissioner
Board of Commissioners
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 456-8941
E-Mail: kwood@irha.org

Sherry Salway-Black
Vice President
First Nations Development Institute
The Stores Building
11917 Main Street
Fredericksburg, VA 22408
Phone: (540) 371-5615
Fax: (540) 371-3505
E-Mail: ssblack@firstnations.org

Jimmy Sam
Consultant
Tiwahe Tipi Okolakiciye
P.O. Box 109
Oglala, SD 57764
Phone: (605) 455-2813

Betty R. Sanchez
Navajo Jewelry and Crafts
2904 18th Street, NW
Albuquerque, NM 87104
Phone: (505) 345-5750
Fax: (505) 345-2808

Lupe L. Sanchez
Grants Writer
Quechan Tribally Designated Housing Entity
1860 West Sapphire Lane
Winterhaven, CA 92283
Phone: (760) 572-0243
Fax: (760) 572-0245

Ryan Sanchez
Navajo Jewelry and Crafts
2904 18th Street, NW
Albuquerque, NM 87104
Phone: (505) 345-5750
Fax: (505) 345-2808



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Paul Sanders
Emerging Markets/Programs and Initiatives
Wells Fargo Home Mortgage, Inc.
MAC No. 2401-03G, 1 Home Campus
Des Moines, IA 50328
Phone: (515) 213-4487
Fax: (515) 213-5809
E-Mail:
paul.sanders@mortgage.wellsfargo.com

Iris Sanford
Community Development Manager
Rural Development
U.S. Department of Agriculture
2014 3rd Street West
Ashland, WI 54806
Phone: (715) 682-9117 x4
Fax: (715) 682-9793
E-Mail: iris.sanford@wi.usda.gov

Jack Sawyers
Projects Coordinator
Utah Paiute Tribal Housing
665 North, 100 East
Cedar City, UT 84720
Phone: (435) 586-1122
Fax: (435) 586-0896
E-Mail: jlaqqis@netutah.com

Terri Schilke
Administrative Assistant
Ho-Chunk Housing Authority
P.O. Box 730
Tomah, WI 54660
Phone: (608) 374-1245
Fax: (608) 374-1251

Douglas K. Schroeder
Associate
Steven Winter Associates, Inc.
1331 H Street, NW, Suite 1000
Washington, DC 20005
Phone: (202) 628-6100 x210
Fax: (202) 393-5043
E-Mail: dschroeder@swinter.com

Richard Schroeder
Business Manager
Turtle Mountain Housing Authority
P.O. Box 620
Belcourt, ND 58316-0620
Phone: (701) 477-5673
Fax: (701) 477-3247

Tammy Scott
Board of Commissioners Treasurer
SWA Corporation
Rosebud Sioux Tribe
P.O. Box 256
Mission, SD 57555-0256
Phone: (605) 856-4288
Fax: (605) 856-4025
E-Mail: tjscott@gwtc.net

Sandra Sealey
Director of Accounting Services
Comanche Nation Housing Authority
P.O. Box 1671
Lawton, OK 73502-1671
Phone: (580) 357-4956
Fax: (580) 357-1103
E-Mail: ssealey@cnha.net

Rebecca Seib
Acting Director of Grantmaking
First Nations Development Institute
The Stores Building
11917 Main Street
Fredricksburg, VA 22408
Phone: (540) 371-5615
Fax: (540) 371-3505
E-Mail: rseib@firstnations.org

Shelley Selwyn
Finance Director
Yankton Sioux Tribe Housing Authority
P.O. Box 426
410 South Main
Wagner, SD 57380
Phone: (605) 384-3171
Fax: (605) 384-5907
E-Mail: ysthsng@charles_mix.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Ayana Shepherd
Senior Associate
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 934-3834
Fax: (703) 934-3278
E-Mail: ayanasherpherd@icfconsulting.com

Harvey Shinar
Board Member
Karuk Tribe Housing Authority
P.O. Box 1159
Happy Camp, CA 96039
Phone: (530) 493-5434
Fax: (530) 493-2485

Robert A. Shot
Board of Commissioners
Rosebud Housing Authority
P.O. Box 303
Parnellee, SD 57566
Phone: (605) 747-2203

Natasha Shulman
Principal
Shulman Consulting
2419 11th Avenue, East
Seattle, WA 98102
Phone: (206) 325-6823
E-Mail: natashashulman@hotmail.com

Marty C. Shuravloff
Executive Director
Kodiak Island Housing Authority
3137 Mill Bay Road
Kodiak, AK 99615
Phone: (907) 486-8111
Fax: (907) 486-4432
E-Mail: martys@kiha.org

Lori J. Siegharter
Administrative Assistant
Stockbridge-Munsee Community
N8618 Oak Street
Bowler, WI 54416
Phone: (715) 793-4219
Fax: (715) 793-4529

Dena Silliman
Attorney
Absentee Shawnee Housing Authority
1700 Broadway, Suite 1202
Denver, CO 80290
Phone: (303) 832-6511
Fax: (303) 830-2246
E-Mail: denas@wagenlander.com

Wayne Sims
Administrator
Southern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
500 West Main, Suite 400
Oklahoma City, OK 73102
Phone: (405) 553-7520
Fax: (405) 553-7403
E-Mail: wayne_sims@hud.gov

Elaine Sinyon
Tribal Representative
Board of Commissioners
Copper River Regional Housing Authority
P.O. Box 89
Glennallen, AK 99588
Phone: (907) 822-3633
Fax: (907) 822-3662
E-Mail: sinyone@alaska.net

Andrew Skeeter
Controller
Alabama-Quassarte Tribal Town
323 West Broadway
Muskogee, OK 74401
Phone: (918) 683-2388
Fax: (918) 683-3818

Jacques Smith
Commissioner
Board of Commissioners
Aleutian Housing Authority
4000 Old Seward Highway
Suite 202
Anchorage, AK 99503
Phone: (907) 563-2146
Fax: (907) 563-3105
E-Mail: nicole@aleutian-housing.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Jeannie M. Smith
Executive Director
Lower Brule Housing Authority
P.O. Box 183
Lower Brule, SD 57548
Phone: (605) 473-5522
Fax: (605) 473-5578
E-Mail: exe_dir_lbha@hotmail.com

Dene Sommer
Housing Management Director
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 456-8941
E-Mail: kwood@irha.org

Joni J. Soriano
General Manager
Sauk-Suiattle Indian Tribe
5318 Chief Brown Lane
Darrington, WA 98241
Phone: (360) 436-0131
Fax: (360) 436-1511
E-Mail: admin@sauk-suiattle.com

Rachel Sorrell
Executive Director
Southern Ute Indian Housing Authority
P.O. Box 447
Ignacio, CO 81137
Phone: (970) 563-4575

Russell Sossamon
Executive Director
Housing Authority of the Choctaw Nation
1005 South 5th Street
Hugo, OK 74743
Phone: (580) 326-7521
Fax: (580) 326-7641

Peter Soto
Development Supervisor
Tohono O'odham Kl:Kl Association
P.O. Box 790
Sells, AZ 85634
Phone: (520) 383-2202
Fax: (520) 383-2259

David W. Southerland
Deputy Director
Housing Authority of the Cherokee Nation
P.O. Box 1007
Tahlequah, OK 74465
Phone: (918) 453-2933
Fax: (918) 458-5018

Erica D. Spears
Executive Director
Omaha Tribal Housing Authority
P.O. Box 150
Macy, NE 68039
Phone: (402) 837-5728
Fax: (402) 837-5350

Casey Sponable
Executive Director
Wisconsin Potawatomi Housing Authority
5460 Kak Yot Lane
Crandon, WI 54520
Phone: (715) 478-7402
Fax: (715) 478-7401
E-Mail: cwspon@newnorth.net

Marilyn Spoon
Board Vice-Chairman
Housing Authority of the Sac and Fox Nation
P.O. Box 1252
Shawnee, OK 74801
Phone: (405) 275-8200
Fax: (405) 275-8203

Jayson Staton
Development Supervisor
Housing Authority of the Choctaw Nation
1005 South 5th Street
Hugo, OK 74743
Phone: (580) 326-7521
Fax: (580) 326-7641

Norma J. Stealer
Executive Director
Housing Authority of the Village of Winnebago
P.O. Box 671
Winnebago, NE 68071
Phone: (402) 878-2241
Fax: (402) 878-2240
E-Mail: havw@huntel.net



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Catherine Baker Stetson
Attorney
Stetson Law Offices, PC
1305 Rio Grande Boulevard, NW
Albuquerque, NM 87104
Phone: (505) 256-4911
Fax: (505) 256-5177
E-Mail: cbs@stetsonlaw.com

Thelma Stiffarm
Tribal Governments Program Administrator
U.S. Census Bureau
FOB 3-3620
Washington, DC 20233
Phone: (301) 457-1305
Fax: (301) 457-4784
E-Mail: thelma.j.stiffarm@census.gov

Gerald Strickland
Board Member
Lumbee Regional Development
Association, Inc.
P.O. Box 68
Pembroke, NC 28372
Phone: (910) 522-1101
Fax: (910) 522-0000
E-Mail: brooks-v@lycos.com

Darwin Strong
Program Director
St. Paul American Indians Community
1030 University Avenue
St. Paul, MN 55107
Phone: (651) 290-4849
Fax: (651) 290-4785

Ronald Suppah
Tribal Council Member
Confederated Tribes of the Warm Springs
Reservation of Oregon
P.O. Box 1299
Warm Springs, OR 97761
Phone: (541) 553-3257
Fax: (541) 553-1268

Eleanor Tafoya
Secretary/Treasurer
Board of Commissioners
Pueblo of Jemez Indian Housing Authority
P.O. Box 688
Jemez Pueblo, NM 87024
Phone: (505) 834-0305
Fax: (505) 834-1105

Rebecca Tafoya
Collection Specialist/Administrative Assistant
Santa Clara Pueblo Housing Authority
P.O. Box 2218
Española, NM 87532
Phone: (505) 753-6170
Fax: (505) 753-3699
E-Mail: scpha@la-tierra.com

Maria Tagliavento
Deputy Director
Cook Inlet Housing Authority
3510 Spenard Street, Suite 201
Anchorage, AK 99503
Phone: (907) 276-8115
Fax: (907) 258-4957
E-Mail: cfields@citci.com

Joni Talentino
Resident Services Manager
Sault Ste. Marie Tribe of Chippewa Indians
Housing Authority
2218 Shunk Road
Sault Ste. Marie, MI 49783
Phone: (906) 635-4960
Fax: (906) 635-7017
E-Mail: qhouse1@northernway.net

James Tate
Commissioner
Comanche Nation Housing Authority
P.O. Box 1671
Lawton, OK 73502-1671
Phone: (580) 357-4956
Fax: (580) 357-1103



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Gebrielle Tateyuskaskan
Board Commissioner
Sisseton-Wahpeton Sioux Tribe
P.O. Box 687
Agency Village
Sisseton, SD 57262
Phone: (605) 698-3901
Fax: (605) 698-7504

Bill Tegoseak
Interim Executive Director
Inupiat Community of the Arctic Slope
P.O. Box 934
Barrow, AK 99723
Phone: (907) 852-4227
Fax: (907) 852-4246
E-Mail: icasdir@barrow.com

Gwen L. Terrapin
Executive Director
Otoe-Missouria Tribe of Oklahoma
405 Wendall Drive
Red Rock, OK 74651
Phone: (580) 723-4400
Fax: (580) 723-4590
E-Mail: gwendy37@yahoo.com

H. Richard Thomas
Attorney-Advisor
U.S. Department of Housing
and Urban Development
P.O. Box 36003
450 Golden Gate Avenue
San Francisco, CA 94015
Phone: (415) 436-8224
Fax: (415) 436-6471
E-Mail: h._richard_thomas@hud.gov

Wilson Thompson
Program Development Specialist
Ginnie Mae
451 7th Street, SW, Room 6226
Washington, DC 20411
Phone: (202) 708-2772 x4974
Fax: (202) 401-8843
E-Mail: wilson_thompson@hud.gov

Anne C. Thunder Hawk
Tribal Attorney
Oglala Sioux Tribe
P.O. Box 57
Oglala, SD 57762
Phone: (605) 867-2806
E-Mail: anne_thunder_hawk@hotmail.com

Garry T. Tillotson
Senior Advisor
Southern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
500 West Main Street, Suite 400
Oklahoma City, OK 73102
Phone: (405) 553-7542
Fax: (405) 553-7403
E-Mail: garry_t._tillotson@hud.gov

Deborah Tomah
Secretary/Treasurer
Board of Commissioners
Maliseet Indian Housing Authority
13 Clover Court, No. 1
Houlton, ME 04730
Phone: (207) 532-7637
Fax: (207) 532-7638

Marsha Tonkovich
Vice President
ICF Consulting
9300 Lee Highway
Fairfax, VA 22031
Phone: (703) 218-2611
Fax: (703) 934-3278
E-Mail: mtonkovich@icfconsulting.com

Roselyn Tortalita
Assistant Executive Director
Santo Domingo Tribal Housing Authority
P.O. Box 10
Santo Domingo Pueblo, NM 87052
Phone: (505) 465-1003
Fax: (505) 465-1012
E-Mail: sdtha@starband.net



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Luke Toyebo, Jr.
Acting Executive Director
National American Indian Housing Council
900 2nd Street, NE, Suite 305
Washington, DC 20002
Phone: (202) 789-1754
Fax: (202) 789-1758
E-Mail: ltoyebo@naihcn.net

Melody Tso
Resident Services Specialist
Hopi Tribal Housing Authority
P.O. Box 698
Second Mesa, AZ 86043
Phone: (520) 737-2556
Fax: (520) 737-9270

Duke H. Tsoodle, Jr.
Executive Director
Housing Authority of the Apache Tribe
of Oklahoma
211 North Country Club Road
Anadarko, OK 73005
Phone: (405) 247-7305
Fax: (405) 247-3557
E-Mail: dtsoodle@hotmail.com

Alana Tsosie-LaBate
Client Service Counselor
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Edward A. Turner
Grants Administration
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671
Fax: (918) 458-6157
E-Mail: aturner@cherokee.org

Jason S. Two Crow
Development Specialist
Fort Berthold Housing Authority
P.O. Box 310
New Town, ND 58763
Phone: (701) 627-4731
Fax: (701) 627-3802
E-Mail: jason@fbha.org

Margaret Tyndall
Manager
Community Affairs
Federal Reserve Bank of Minneapolis
P.O. Box 291
90 Hennepin Avenue
Minneapolis, MN 55480-0291
Phone: (612) 204-5063
Fax: (612) 204-5163
E-Mail: margaret.tyndall@mpls.frb.org

Paul E. Tysse
Grants Writer
Ho-Chunk Housing Authority
P.O. Box 730
Tomah, WI 54660
Phone: (608) 374-1245
Fax: (608) 374-1251

Arthur J. Unap, Jr.
Chairman
Board of Commissioners
Housing Authority of the Kiowa Tribe
of Indians of Oklahoma
P.O. Box 847
Anadarko, OK 73005
Phone: (405) 247-2417
Fax: (405) 247-3494

Anthony Vaska
Executive Director
Association of Alaska Housing Authorities
4300 Boniface Parkway
Anchorage, AK 99504
Phone: (907) 338-3970
Fax: (907) 338-4904
E-Mail: aaha@alaska.net



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Don R. Vaughan
Special Projects Officer
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
Phone: (918) 456-0671 x2398
Fax: (918) 458-6157
E-Mail: dvaughan@cherokee.org

Edward Vaughan
Native American Program Specialist
Northern Plains Office of Native
American Programs
U.S. Department of Housing
and Urban Development
633 17th Street
Denver, CO 80202
Phone: (303) 672-5465
Fax: (303) 672-5003
E-Mail: edward_r_vaughan@hud.gov

Anthony Vermillion
Board Member
Standing Rock Housing Authority
P.O. Box 484
1333 92nd Street
Fort Yates, ND 58538-0484
Phone: (701) 854-3891
Fax: (701) 854-3855
E-Mail: hac@westriv.com

Rodney E. Vigil
Executive Director
Hoopa Valley Tribe
P.O. Box 1285
Hoopa, CA 95546
Phone: (530) 625-4759
Fax: (530) 625-4745
E-Mail: vigil31345@netscape.net

Sharon Vogel
Department Director
Program Design and Operations
Cheyenne River Housing Authority
P.O. Box 480
Eagle Butte, SD 57625
Phone: (605) 964-4265 x132
Fax: (605) 964-1070
E-Mail: vogel@sat.net

James F. Vollintine
Attorney
Bristol Bay Housing Authority
P.O. Box 113329
Anchorage, AK 99511-3329
Phone: (907) 346-4446
Fax: (907) 346-4898
E-Mail: bbha@alaska.net

Norbert Wacondo
Chairman
Board of Directors
Laguna Housing Development and
Management Enterprise
P.O. Box 178
Laguna, NM 87026
Phone: (505) 552-6430
Fax: (505) 552-9409

John Wadda
Board Member/Tribal Council Member
Eastern Shoshone Housing Authority
P.O. Box 1250
Fort Washakie, WY 82514
Phone: (307) 332-5832
Fax: (307) 332-2074

James F. Wagenlander
Attorney at Law
Wagenlander and Heisterkamp, LLC
1700 Broadway, Suite 1202
Denver, CO 80290-1201
Phone: (303) 832-6511
Fax: (303) 830-2246
E-Mail: wagenlan@wagenlander.com

Patrick Wagner
Senior Development Officer
Enterprise Social Investment Corporation
10227 Wincopin Circle, Suite 810
Columbia, MD 21044
Phone: (410) 772-2519
Fax: (410) 772-2580
E-Mail: pwagner@esic.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

John Walksalong
Procurement Officer
Northern Cheyenne Housing Authority
P.O. Box 327
Lame Deer, MT 59043
Phone: (406) 477-6419
Fax: (406) 477-6229

A. Brian Wallace
Chairman
Washoe Tribe of Nevada and California
919 Highway 395 South
Gardnerville, NV 89410
Phone: (775) 265-4191
Fax: (775) 265-5293

Christian C. Warrington
Family Advocate
Ain Dan Yung
579 Wells Street
St. Paul, MN 55113
Phone: (651) 776-2230
Fax: (651) 776-2290

E. Rhae Washburn
Mod Director
Cheyenne River Housing Authority
P.O. Box 480
Eagle Butte, SD 57625
Phone: (605) 964-4265
Fax: (605) 964-1070
E-Mail: rhae@sat.net

Pius Washington
IRA President
Native Village of St. Michael
P.O. Box 995
Nome, AK 99762
Phone: (907) 443-5256
Fax: (907) 443-2160

Reggie Wassana
Executive Director
Cheyenne and Arapaho Tribes of Oklahoma
Housing Authority
1000 Canyon Ridge Road
Clinton, OK 73601
Phone: (580) 323-4877
Fax: (580) 323-7036
E-Mail: cheyarp3@soonernet.com

Floyd G. Wells
Housing Manager
Prairie Island Indian Community
1158 Island Boulevard
Welch, MN 55089
Phone: (651) 267-4007
Fax: (651) 385-4162

Sharon R. Wells
Administrative Assitant
Prairie Island Indian Community
1158 Island Boulevard
Welch, MN 55089
Phone: (651) 267-4007
Fax: (651) 385-4162

Jo Ann Wenger-Lough
Business Development Manager
Washington Mutual Bank
8620 West Emerald, Suite 190
Boise, ID 83704
Phone: (208) 373-3056
Fax: (208) 373-3239
E-Mail: jo.wenger-lough@wamu.net

Jobe Weston
Secretary
Native Village of Mekoryuk
P.O. Box 66
Mekoryuk, AK 99630
Phone: (907) 827-8277
Fax: (907) 827-8133

Wilfred Whatoname
Council Member
Hualapai Tribe
P.O. Box 179
Peach Springs, AZ 86434
Phone: (520) 769-2216
Fax: (520) 769-2343

Moses White
Chairman
Board of Commissioners
AVCP Regional Housing Authority
P.O. Box 767
Bethel, AK 99559
Phone: (907) 543-3121
Fax: (907) 543-3933
E-Mail: mary@avcphousing.org



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Terrance White
Board Commissioner
Leech Lake Housing Authority
6530 Highway 2, NW
Cass Lake, MN 56633
Phone: (218) 335-8280
Fax: (218) 335-8367
E-Mail: llrha@paulbunyan.net

Tonya White Mountain
Loan Packager
Standing Rock Housing Authority
P.O. Box 484
1333 92nd Street
Fort Yates, ND 58538-0484
Phone: (701) 854-3891
Fax: (701) 854-3855
E-Mail: hac@westriv.com

Kathy White Rabbit
District V Legislator
Ho-Chunk Nation
P.O. Box 667
W 9814 Airport Road
Black River Falls, WI 54615
Phone: (715) 284-9343
Fax: (715) 284-3172
E-Mail: kwhiterabbit@ho-chunk.com

Phyllis White Shield
Board of Commissioners
Rosebud Housing Authority
P.O. Box 69
Rosebud, SD 57570
Phone: (605) 747-2203
Fax: (605) 747-2966

Dallas White Wing
Legislator
Ho-Chunk Nation
P.O. Box 667
Black River Falls, WI 54615

Eric L. Wilcox
Narragansett Indian Tribe
P.O. Box 148
Kenyon, RI 02836
Phone: (401) 364-9873
Fax: (401) 364-0466

Norma Sue Wilmoth
Community Reinvestment
Resource Consultant
Washington Mutual Bank
P.O. Box 834
Seattle, WA 98111
Phone: (206) 377-2293
Fax: (206) 554-5098
E-Mail: norma.wilmoth@wamu.com

A. C. Wilson, Sr.
Committee Member
Sac and Fox Nation Business Committee
Route 2, Box 246
Stroud, OK 74079
Phone: (918) 968-1141
Fax: (918) 968-1142
E-Mail: berdinag@yahoo.com

Jane M. Wilson
Staff Attorney
General Counsel's Office
Seminole Tribe of Florida
6300 Stirling Road
Hollywood, FL 33024
Phone: (954) 967-3950
Fax: (954) 967-3487
E-Mail: legal@semtribe.com

Joseph G. Wilson
Executive Director
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 456-8941
E-Mail: kwood@irha.org

Kevin M. Wilson
Development Coordinator
Southern Ute Indian Housing Authority
P.O. Box 447
Igaaico, CO 81137
Phone: (970) 563-4575
Fax: (970) 563-4417



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Sharon G. Wise
Executive Director
Native American Housing Services, Inc.
132 East Broadway, Suite 1
Anadarko, OK 73005
Phone: (405) 247-6077
Fax: (405) 247-6059
E-Mail: nahsi@tanet.net

Kim Wood
Administrative Officer
Interior Regional Housing Authority
828 27th Avenue
Fairbanks, AK 99701
Phone: (907) 452-8315
Fax: (907) 456-8941
E-Mail: kwood@irha.org

Wilbur Woods
Project Manager
Te-Moak Housing Authority
504 Sunset Street
Elko, NV 89801
Phone: (775) 738-9238
Fax: (775) 738-2436

Barbara Worth, CMP
Conference Director
Circle Solutions, Inc.
2070 Chain Bridge Road, Suite 450
Vienna, VA 22182
Phone: (703) 902-1205
Fax: (703) 821-3247
E-Mail: bworth@circsol.com

Emily Wright
Native American Program Specialist
Office of Native American Programs
U.S. Department of Housing
and Urban Development
451 7th Street, SW
Room 4126
Washington, DC 20410
Phone: (202) 401-7914
Fax: (202) 401-7909
E-Mail: emily_wright@hud.gov

Thomas C. Wright
Consultant
Wright and Associates
P.O. Box 385
Hessel, MI 49745
Phone: (906) 484-3495
Fax: (906) 484-5095
E-Mail: twright@up.net

Rick Wuori
Housing Director
Minnesota Chippewa Tribal
Housing Corporation
P.O. Box 217
Cass Lake, MN 56633
Phone: (218) 335-8582
Fax: (218) 335-6925
E-Mail: rwuori@paulbunyan.net

Dennis Wynott
Executive Director
Walking Shield American Indian Society
15032 Red Hill Avenue, Suite C
Tustin, CA 92780
Phone: (714) 258-7025
Fax: (714) 258-7026
E-Mail: walkingsheildeddw@msn.com

Martha L. Youckton
Executive Director
Coeur d'Alene Tribe
P.O. Box 267
Plummer, ID 83851
Phone: (208) 686-1927
Fax: (208) 686-7051
E-Mail: mlyouckton@aol.com

Roberta L. Youmans
External Liaison
Federal Housing Finance Board
1777 F Street, NW
Washington, DC 20006
Phone: (202) 408-2581
Fax: (202) 408-2915
E-Mail: youmansr@fhfb.gov



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Randy G. Young
Executive Director
Stockbridge-Munsee Community
N8618 Oak Street
Bowler, WI 54416
Phone: (715) 793-4219
Fax: (715) 793-4529
E-Mail: ryoung@frontiernet.net

Wanda Young Running Crane
Board Commissioner
Leech Lake Housing Authority
6530 Highway 2, NW
Cass Lake, MN 56633
Phone: (218) 335-8280
Fax: (218) 335-8367
E-Mail: llrha@paulbunyan.net

Steve Youvella
Board of Commissioners
Hopi Tribal Housing Authority
P.O. Box 698
Second Mesa, AZ 86043
Phone: (520) 737-2556
Fax: (520) 737-9270

Charles R. Zeh
Attorney
Zeh, Spoo, Quade, and Hearne
575 Forest Street, Suite 200
Reno, NV 89509
Phone: (775) 323-5700
Fax: (775) 786-8183
E-Mail: zpshp@aol.com

Maury Zeitler
Program Coordinator
Office of the Controller of the Currency
U.S. Department of the Treasury
250 East Street, SW
Washington, DC 20219
Phone: (202) 874-4930
Fax: (202) 874-5566
E-Mail: maurice.zeitler@occ.treas.gov

James Zion
Tribal Law and Policy Institute
8235 Santa Monica Boulevard, Suite 205
West Hollywood, CA 90046
Phone: (323) 650-5467
Fax: (805) 932-4470
E-Mail: jzion@aol.com

Curtis Zunigha
Executive Director
Delaware Tribe Housing Authority
220 Northwest Virginia Avenue
Bartlesville, OK 74003
Phone: (918) 336-5272 x230
Fax: (918) 336-5513
E-Mail: chiefcz@yahoo.com



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Resource Room Participants

NOTE: The private products and companies displayed in the Resource Room have not necessarily been reviewed by HUD. Booths were available free of charge to any organization that requested one. Tribes/TDHEs and Housing Authorities were recommended to use sound judgement and follow applicable requirements in selecting projects and companies.¹

Fannie Mae

Federal Housing Finance Board

Federal Reserve Bank of MN

Ginnie Mae

IHA Management Systems

National American Indian Housing Council

Navajo Jewelry & Crafts

Rural Community Assistance Corporation

University of IL, Urbana Champaign Campus - IHBG Technical Assistance Office

U.S. Census Bureau

U. S. Department of Agriculture - Rural Development

U. S. Department of Housing and Urban Development - Office of Native American Programs

U.S. Department of Veterans Affairs

¹ This list is as of June 26, 2001



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

U.S. Department of Housing and Urban Development Office of Native American Programs

Denver Program Office

Office of Native American Programs
1999 North Broadway, Suite 3390
Denver, CO 80202
Phone: 303-675-1600
FAX: 303-675-1662

Headquarters

Office of Native American Programs
451 7th Street, SW - Room 4126
Washington, DC 20410
Phone: 202-401-7914
FAX: 202-401-7909

Area Office Locations

Eastern/Woodlands ONAP

Ralph H. Metcalfe Federal Building
77 West Jackson Boulevard, Room 2400
Chicago, IL 60604-3507
Phone: 312-886-4532
FAX: 312-353-8936

Southwest ONAP

Two Arizona Center
400 North Fifth Street, Suite 1650
Phoenix, AZ 85004-2361
Phone: 602-379-4156
FAX: 602-379-3101

Southern Plains ONAP

500 W. Main
Suite 400
Oklahoma City, OK 73102
Phone: 405-553-7520
FAX: 405-553-7403

Northwest ONAP

Seattle Federal Office Building
909 First Avenue, Suite 300
Seattle, WA 98104-1000
Phone: 206-220-5270
FAX: 206-220-5234

Alaska ONAP

Alaska Veco Building
949 East 36th Avenue, Suite 401
Anchorage, AK 99508-4399
Phone: 907-271-4644
FAX: 907-271-4605

Northern Plains ONAP

Wells Fargo Bank Building
633 17th Street, 12th Floor
Denver, CO 80202-3607
Phone: 303-672-5465
FAX: 303-672-5003

Albuquerque Division

Native American Programs
Albuquerque Plaza
201 3rd Street, N.W.
Suite 1830
Albuquerque, NM 87102-3368
Phone: 505-346-6923
FAX: 505-346-6927

THE 8TH NATIVE AMERICAN HOMEOWNERSHIP SUMMIT

Sponsored by the
U.S. Department of Housing and Urban Development

Consultation Plenary
Tuesday, July 10, 2001



WELCOME

- Christopher Boesen
 - Special Assistant to Secretary Martinez
- Topics:
 - New HUD consultation policy
 - Summary of regional feedback
 - Consultation agenda
 - Next steps



NEW HUD CONSULTATION POLICY

- HUD ONAP mission:
 - ONAP ensures that safe, decent and affordable housing is available to Native American families, creates economic opportunities for Tribes and Indian housing residents, assists Tribes in the formulation of plans and strategies for community development, and assures fiscal integrity in the operation of the programs.



NEW HUD CONSULTATION POLICY

- Consultation policy:
 - Implements mission
 - Enhances communication and coordination
 - Outlines guiding principles



HISTORY OF CONSULTATION POLICY

- Presidential Memorandum (April 29, 1994)
 - Reaffirms government to government relationship
 - Directs agencies to consult on actions with substantial direct effects
 - HUD implements memorandum in June 1994 through the American Indian and Alaska Native Policy Statement



HISTORY OF CONSULTATION POLICY

- Executive order 13084 (May 14, 1998)
- HUD works with tribes regionally and nationally to develop new consultation policy
- Executive order 13175 (November 6, 2000)
 - Sets new guidelines for consultation and coordination with Tribal Governments



WHAT IS CONSULTATION?

- Direct and interactive tribal involvement in regulatory policies
- Active process of:
 - Seeking input
 - Considering interest of all parties



HUD POLICY PRINCIPLES

- HUD shall:
 - Foster government to government relationship
 - Recognize tribes as local decision-makers
 - Remove barriers
 - Encourage state/local cooperation
 - Enhance interagency collaboration
- Principles guide HUD actions



WHEN WILL CONSULTATION OCCUR

- Matters that have tribal implications
- Substantial direct effect from:
 - Policies
 - Programs
 - Actions



CONSULTATION METHODS

- Primary focus - Individual tribal governments
- Regional tribal meetings
- At least one annual national consultation



CONSULTATION WITH PARTNERS

- HQ consultation with national organizations
- AONAP consultation with regional tribal and other organizations
- Notes shared with partners



WORKING GROUPS

- May develop recommendations on issues
 - Membership diverse
 - Meetings posted
 - Members attend but alternates allowed
 - Protocols established
 - Results given serious consideration



DEVELOPING REGULATIONS

- May establish standing committee to determine what level of consultation is necessary
- Explore mechanisms, including:
 - “Notice and Comment” Rulemaking
 - “Negotiated Rulemaking”
 - Other Methods



UNFUNDED MANDATES

- Unless required by statute, HUD shall not promulgate any regulations with tribal implications without:
 - Necessary funds provided OR
 - Tribes consulted early in the process



INCREASED FLEXIBILITY

- Streamline waiver process for statutory and regulatory requirements
 - Decision within 120 days
 - Applies only when statute expressly allows



MECHANICS OF POLICY

- Timeframes:
 - Depends on task
 - 60 days, 30 days, 2-3 weeks
- Methods:
 - Internet, fax, mail, telephone, multimedia, direct, meetings
- Reporting:
 - HUD notification to tribes of decisions



HOMEOWNERSHIP SUMMIT NATIONAL CONSULTATION

- Consultation need at this time due to:
 - Statutory requirements
 - Re-examination of NAHASDA
 - Tribal issues and suggestions



Consultation Goals

- Goals:
 - Tribal input on identified issues
 - Recommendations on implementation
 - Framework for next steps



NATIONAL CONSULTATION SESSION OBJECTIVES

- Solutions, not more problem discussions
 - Number of topics limited
- Two-day timeframe
 - Provides effective use of time



NATIONAL CONSULTATION SESSION OBJECTIVES

- Explore options and recommend solutions
 - Range of viewpoints heard
 - Smaller working groups organized by track
 - Break-out sessions on tribal topics



HOW WE GOT HERE

- In partnership with Tribes, we:
 - Requested written comments
 - Held regional sessions
 - Compared priorities across regions
 - Set agenda based on tribal priorities



SUMMARY OF ISSUES

- Following issues were common across regions:
 - Other federal requirements
 - Environmental review
 - Labor issues
 - IHP/APR
 - IHP/APR process
 - IHP/APR compatibility
 - Development
 - Cooperation agreements
 - Infrastructure



SUMMARY OF ISSUES

- Also common across regions:
 - NAHASDA Income/Eligibility
 - NAHASDA eligibility
 - NAHASDA income rules
 - NAHASDA Administration
 - Current assisted stock issues
 - Program income
 - NAHASDA Financial Issues
 - Lending programs
 - Obligation of funds



OTHER ISSUES

- Will be addressed after National Consultation:
 - IHBG funding formula by negotiated rulemaking
 - Regulation interpretation
 - Consultation process
 - Interagency cooperation - Upcoming Conference
 - Technical assistance & training
 - Issues that were listed as priorities by one or two regions



CONSULTATION BREAK-OUT SESSIONS

- Session Format:
 - Brief summary of issue(s)
 - Open discussion to clarify issue(s)
 - Discussion to develop solutions and recommendations



ROLES

- Participants
- Tribal leader
- HUD staff
- Facilitator
- Notetaker



WEDNESDAY PLENARY REPORTING SESSION

- Opportunity to hear the recommendations from each track
- Session Format
 - Designated tribal representative provides summary of track
 - Comments from audience to add new information to recommendations
 - Additional comments can be recorded on comment cards



WHAT WE WANT TO ACCOMPLISH

- At the end of these two-day consultation sessions, we want to accomplish:
 - Discussion of the issues to clarify priorities
 - Recommendations for solutions
 - Guidance so draft notices can be developed
 - Input on needed regulatory/statutory changes



NEXT STEPS

- Attend break-outs of your choice
- Provide feedback
- Share ideas at plenary
- Contact AONAP or HUD HQ with comments after session
- Comment on draft policies and notices sent after session



THE 8TH NATIVE AMERICAN HOMEOWNERSHIP SUMMIT

Sponsored by the
U.S. Department of Housing and Urban
Development

Consultation Closing Plenary
Wednesday, July 11, 2001



WELCOME

- Plenary Reporting Session
 - Opportunity to hear the recommendations from each track
- Session Format
 - Designated tribal representative provides summary of track
 - Comments from audience to add new information to recommendations
 - Additional comments can be recorded on comment cards



NEXT STEPS

- Detailed notes from plenaries and break-outs will be developed
- Notes will be mailed to you and all tribal leaders who could not attend the sessions
- HUD will give all proposed solutions serious consideration
- HUD will schedule follow-up sessions as necessary to continue these discussions



Eligible Activities Issues

- Negotiated Rulemaking needs to occur prior to any regulatory or statutory changes.
- HUD needs to support tribal self-determination of what “eligible activities” include, consistent with Section 2 (6) and (7) of NAHASDA and 24 CFR, Section 1000.2 (6) and (7).
- Economic development as an eligible activity needs to be discussed in negotiated rulemaking.



Eligible Activities Issues

- Tribes determine what is an eligible activity under Section 202 and Subsection 1000.2 (6).
 - HUD needs to comply with the statute and regulation.
 - The model activity category should not be used restrictively – but in the most expansive manner possible.
- If HUD does not do the above, or issues a, a) guidance, b) regulation, or c) supports a statutory change that restricts eligible activities, it needs to go to negotiated rulemaking.



Eligible Activities Issues

Negotiated Rulemaking

- Negotiated rulemaking must be done for any regulatory and statutory changes (Section 106 (b) (2) (A)).
 - Insufficient time has been given to reach consensus and collaboration.
 - Tribal leaders **must** be involved in this process.
 - There should be an additional working meeting prior to negotiated rulemaking.
 - Agenda set collaboratively.



Eligible Activities Issues

Specific Neg Reg Issues

- Economic Development
 - Procurement exemption for force accounting with tribal corporations
 - What does “economic development” mean
- Community Development
 - Inability to fund community business
 - Inability to fund non-housing infrastructure



Income Issues

- Allow tribes to set their own income standards.
 - Use Davis Bacon as a model.
 - Send to Neg Reg to accomplish this
- Allow tribes to establish reasonable rents (including flat rents)
 - To allow families to save
 - To predict rental project income
 - Send to Neg Reg to accomplish



Income Issues

- Allow tribes to set payment level for homebuyer lease-to-purchase programs.
 - Send to Neg Reg to accomplish
- Repeal PIH Notice 2000-10 and 99-6
- Repeal PIH Notice 2000-10 and 99-6



Current Assisted Stock I & II

- **Issue I:** NAHASDA requires CAS funding for AK to be go through ANCSA regional corps. not owner of record
 - Regulations should state that if record owner of CAS in AK is state chartered IHA, IHA should be deemed TDHE for the area tribe for purposes of CAS funding. (Non-consensus). (Reg).



Current Assisted Stock I & II

- If recipient fails to fund CAS adequately,
 - > regs. should deem TDHE as the owner of record for the tribe for purposes of receiving CAS funding. (Reg) (in AK - non-consensus; other - non-consensus)
 - > regs. should send CAS funding in AK to village tribes. (Non-consensus) (Reg)
- No change. Leave the regulation as is. (Non-consensus).



Current Assisted Stock I & II

- **Issue II:** Some HAs not getting enough funds to maintain & operate CAS
 - HUD should monitor IHPs & APRs to verify CAS maintenance. (Policy)
 - HUD should clarify through regs. how CAS funds should be used. (Reg)
 - If no change in regs., HUD should interpret NAHSDA/reg as requiring all CAS funds to be used for CAS (Policy)



Current Assisted Stock I & II

- HUD should clarify what is meant by “such amounts as may be necessary” (Policy)
- HUD fac./req. resolution/agreement on CAS (Policy)
- IHAs not receiving CAS funds are not required to expend reserves on CAS units before they are determined to be in need of IHBG (Policy)



Program Income (P.I.)

- **Issue I:** P.I. rqmnts. too complex and difficult to implement. Solutions (Not in ranking order):
 - Reconvene Working Group
 - include persons with program knowledge & technical accountant knowledge
 - assure procedures are in accordance w/ GAAP & other accounting rqmnts.
 - Make HUD contract resources available.
 - Allow for optional single IHP/APR
 - Educate HUD staff on self-determination.
(P)



Program Income (P.I.)

- **Issue II:** The rqmnts. to spend P.I. before drawing funds from treasury reduces recipient interest income earnings. It is unclear why HUD gets authority to block access to LOCCs. Need clarification if rqmnts. can be waived. Solutions (Not in ranking order):
 - Stat. changes should be made to Sec. 104/204 to incorporate the intent of self-determination.
 - HUD should accept PI into reserves as an eligible expenditure. (Stat)
 - Clarify the authority HUD is using to block access to LOCCs. (HUD)



Lending Programs Priority Issues and Proposed Solutions

- Banks are unwilling to lend on reservations
 - Promote educational opportunities for both tribal members and banks/lenders (e.g. HUD satellite training, Federal Reserve's Sovereign Lending Task Force)
 - Work through bank Community Reinvestment Act (CRA) departments
 - Develop strong mortgage ordinances; share model ordinances already adopted
 - Work with willing lenders (e.g. Native American based financial institutions; banks with current tribal business; state housing finance agencies)



Lending Programs

Priority Issues and Proposed Solutions

- Need for training and technical assistance to tribes to facilitate private lending -- the 184 loan process is too complex
 - Promote educational opportunities for both tribal people and lenders
 - Share model leases and ordinances already adopted
 - Promote One-Stop model to streamline process for tribal members and lenders and develop housing counseling programs



Lending Programs Priority Issues and Proposed Solutions

- BIA title clearance process takes too long
 - Education and communication for BIA personnel from tribes and tribal members (e.g. BIA trained staff member expedites process; use TAAMS system)
 - Develop a One-Stop center or person who can work with the BIA on behalf of tribal members



Lending Programs Priority Issues and Proposed Solutions

- Need to preserve restricted land status of individual allotted lands
 - Tribal ordinances need to address the status of individual allotted land
 - Proactive foreclosure prevention
- NAHASDA amendments should be consistent with statutory changes in Section 184
 - Recommend the changes to the regulation be made as soon as possible



Obligation of Funds

Priority Issues and Proposed Solutions

- Clarify the definition of obligated funds
 - Change the policy to consider that funds are obligated when:
 - Sub-recipient agreements are executed
 - Funds are drawn-down for investment
 - When using Force Account consider the entire cost of the project obligated, including material and labor costs



Obligation of Funds

Priority Issues and Proposed Solutions

- Clarify the two year obligation requirements
 - Two years is a performance measure established by Negotiated Rulemaking
 - Revisit the timeline to address concerns by expanding the time frame to more than two years



Obligation of Funds

Priority Issues and Proposed Solutions

- Address the 1937 Housing Act unobligated funds to prevent possible recapture of funds by Congress
 - Establish a regulation to obligate funds within two years after publication; or
 - Change the regulation
 - To allow draw down of 1937 Act funds for investment (relates to obligation of funds issue)
 - When 1937 Act funds are included in a tribe's IHP they are subject to the NAHASDA obligation requirements



Cooperation Agreements

Session Description

- Cooperation agreements was a more difficult issue than originally anticipated
- No one solution will work for all tribes and situations due to unique circumstances of the tribal/local community relationships
- Discussion ranged from challenges and solutions regarding
 - Actions to implement the waiver amendment
 - Actions to solve broader challenges of cooperation agreements



Cooperation Agreements Suggested Solutions - Waiver

- The group identified a number of potential solutions involving the waiver amendment
 - HUD should proceed with negotiated rulemaking on this topic
 - Protect land/property from tax lien during the waiver process
 - A definition of and timeline for a good faith effort should be established to initiate waiver
 - HUD should focus on authorizing current waiver requests



Cooperation Agreements Suggested Solutions - Broader Challenges

- Debate on statutory action
 - Eliminating cooperative agreements from NAHASDA altogether?
 - Removing elements of cooperative agreements (i.e. tax exempt, increasing PILOTs, etc.)?
 - Keeping the statute as is?
- Exercise Fair Housing complaint/suit options
- HUD should proceed with negotiated rulemaking on this topic



Infrastructure Suggested Solutions

- Additional appropriations for NAHASDA for infrastructure improvements
- Legislative amendments to IHS' statutory language to allow use of IHS funds for NAHASDA-funded projects
- Stronger multi-party/inter-agency agreement to lower barriers for use of funds



Infrastructure Suggested Solutions

- Tribes and Federal agencies request legislative action to coordinate all appropriations for tribes
- More and better TA, training, and information on Federal and non-Federal funding sources for infrastructure development



Environmental Review Process

- **Issue #1: Waiver Procedures**
 - Use fastest way possible to implement (Policy)
 - Use PIH notice to implement rather than negotiated rulemaking (Policy)
- **Issue #2: Clarification of Roles**
 - Recognize tribe as lead agency; clear guidance from HUD HQ to field (Policy)
 - HUD should train its staff to provide consistent answers (Policy)
 - Clear understanding of tribe vs. HUD responsibilities (Policy)



Environmental Review Process

- **Issue #3: Unfunded Mandate - Resources to Conduct Review**
 - Resources for all tribes via non-competitive block grant; HUD to treat as unfunded mandate and discuss in budget process (Statutory)
 - Educate HUD staff to provide TA (Policy)
 - HUD provide training for lead-based paint inspectors and supervisors (Policy)



Environmental Review Process

- **Issue #4: Coordination among Agencies**
 - Tribe should be recognized as lead agency by other Federal agencies (Policy)
 - Fix categorical exclusion for infrastructure inconsistency between Federal agencies (Regulatory)
 - Work with CEQ to develop uniform guidance (e.g. categorical exclusions) (Regulatory)
 - Simplify/speed up process for recognizing tribal historic preservation officers (Policy)
 - Create separate environmental rule for NAHASDA (Regulatory)



Environmental Review Process

- **Issue #5: Eliminate Waiver of Tribal Sovereign Immunity**
 - Change NEPA statute (Statutory)
 - Hear cases in tribal court rather than Federal court (Statutory)
 - Appeal cases in Federal court (Statutory)
- **Issue #6: Simpler Requirements**
 - Provide clear definitions of rehabilitation and maintenance (Policy)
 - Issue revised form for minor rehabilitation for environment review (Policy)



Labor and Development Issues

Background: Davis-Bacon rates too high; threshold or exemption for Davis-Bacon; and need one set of rates for maintenance and development

- **Issue #1:** Implementation of Tribal Wage Rates
 - Tribes to examine their own constitutions and laws to determine how to implement the NAHASDA amendment enabling establishment of tribal wage rates (Policy)
 - HUD/ONAP should recognize immediately the tribes' right to set own prevailing wages (Policy)



Labor and Development Issues

- **Issue #2:** Self-Help Volunteers and Participants in Mortgage Buy-Down Programs should not be Subject to Davis-Bacon
 - Exempt self-help programs (Statutory/Regulatory)
 - Clarify the regulation on how Davis-Bacon applies to new spec homes (Statutory/Regulatory)
- **Issue #3:** Tribal Employment Preference
 - Permit tribal member employment preference (Statutory/Regulatory)



Recommendation #1 -- APR Submission Date

- Change to 90 days after completion of year
- Alternate suggestion for 180 days
- Recommend statutory change to allow Secretary more time to report to Congress



Recommendation #2 -- IHP Timeframe

- Change IHP from grant-based to annual budget plan (12 months)
 - Consolidate multi-year IHPs into single annual plan
 - Working group to suggest changes
- Due date for submitting IHP to change to reflect fiscal year and annual budget plan
- Discuss in negotiated rulemaking



Recommendation #3 -- Performance Objectives

- Remove performance objectives
- Guidance to modify 1-year goals to incorporate annual measurable activities



Recommendation #4 -- IHP/APR Content

- Statutory amendment to remove 5 year plan
- One set of forms for IHP and APR
 - Column on side of IHP forms for APR
- Work group to review IHP redundancies and streamline



Recommendation #5 -- IHP Amendments

- ONAP to provide guidance on when amendment needed
 - Only new activity, reduction in 1937 Act funding support
- Items submitted are only those required to document change
 - Form and accompanying narrative
 - Not entire IHP



Recommendation #6 -- Non-IHBG Funds

- Remove non-IHBG funds from IHP requirement
 - Working group to look at what statute requires
 - If regulatory change required, do so through Negotiated Rulemaking



Recommendation #7 -- Failure to Submit IHP

- Since related to reallocation of funds, issue sent to Formula Negotiated Rulemaking
- Develop capacity through technical assistance for tribes having trouble with IHP



Recommendation #8 -- Template

- HUD guidance to make it clear that the templates are optional
- Make a template available without macros



The Small Tribe Grant Program

A Cooperative Intermediary



Working Together to Build Programs and Opportunities

Slide 1



Small Tribe Program

- Provide 20-25 smaller Tribes with Grants, Technical Assistance, and training to access new forms of financing
- Cooperative venture between NAIHC, Enterprise and AMERIND, with support from ONAP
- \$1.05 million; \$350,000 from each of the partners
 - \$700,000 for grants
 - \$350,000 for technical assistance and training



Reason For Program

- NAHASDA provides strong opportunities to leverage new financing. For small tribes, the emphasis often needs to be on managing existing properties and handling administrative responsibilities. Smaller grants typically means less funding for new projects.



Reasons for Program

- Program is designed to provide Tribes or their designated TDHE's with resources to leverage new (non-Indian) financing for their projects -
 - Low Income Housing Tax Credits
 - HOME
 - Rural Housing and Economic Development
 - USDA RHS and/or RD
 - Mortgage Revenue Bonds
 - State Housing Trust Funds
 - Non-Indian CDBG
 - Affordable Housing Program of FHLB



Allowable Costs

- Designed to provide tribes with grants of up to \$30,000. Can be used for:
 - Staff and fringe
 - Consultants
 - Software/hardware upgrade
 - Training for staff and Board
 - Application Fees
 - Other costs that can reasonably lead to accessing new forms of financing



Eligible Applicants

- Tribes/Alaska Villages that were allocated less than \$200,000 in IHBG in FY2000; or
- TDHE's/Alaska Regional Corporations that represent Tribes that were allocated less than \$200,000 in IHBG in FY 2000
 - A TDHE/ARC that represents 4 or fewer tribes with less than \$200,000 in IHBG can apply for no more than 2 grants
 - A TDHE/ARC that represents 5+ tribes with less than \$200,000 in IHBG can apply for no more than 3 grants



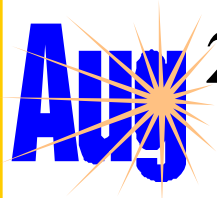
Application Timeline



- 2001** • Program announced: 6/4/01 at the *NAIHC* annual conference



- 2001** • Blue Ribbon Panel named: 7/10/01
- Blue Ribbon Panel adopts Notice of Funding Availability of Scoring System: 7/16/01
- NOFA sent to eligible Tribes and TDHE's: 7/23/01



- 2001** • Video on Program Available: 8/3/01
- Enterprise and NAIHC staff available for questions: August and September, 2001



- 2001** • Applications due: 9/24/01



Application Timeline

 Oct

- 2001**
- Blue Ribbon Panel meets to select winners: 10/12/01
 - Winners notified: 10/19/01

 Nov

- 2001**
- Winners announced and meet for initial training: 11/7/01 (at *The Enterprise Foundation* annual conference)

 Jan

- 2002**
- Contracts with winners signed and program begins - January, 2002

 JUN

- 2002**
- Six month progress report - June, 2002

 Dec

- 2002**
- Winners must have applied for at least one new form of financing for a housing project - 12/31/02



Applications

- Cover page
- Five pages
 - Description of housing project
 - Description of Housing Need
 - Type of Financing intended to use
 - Plan for learning about and accessing that financing
 - Timeline
- Attachments
 - Budget
 - Resumes
 - Summary of Experience
 - Documentation of 25% match
 - Project pro-forma/budget
 - *(if available)* Tribal land approval for project



Scoring System

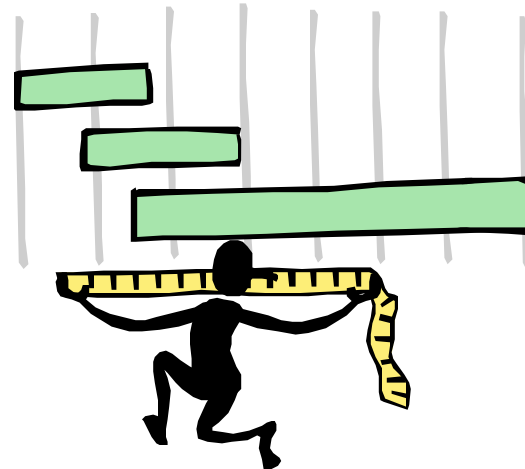
- Need
- Capacity
- Reasonableness of Plan
- Project Readiness

**Applications must be postmarked
by September 21, 2001**



After Award and Monitoring/Evaluation

- Enterprise and NAIHC will provide technical assistance to grant recipients
- Six months, one year and two years after award recipients must report on progress
- Progress will define whether this program is renewed



Hope for Program

Small Tribes will:

- **Develop** a needed housing project accessing new forms of financing
- **Have** the capacity in the future to access new forms of financing
- **Build** partnerships with new sources of financing for the future



Role of Intermediaries

- Technical assistance
- Training
- Grants (both direct and indirect)
- Loans (typically short-term)
- Equity investments
- State and National Advocacy
- Information gathering and dissemination



Current Intermediaries

- Enterprise Foundation 
- First Nations Development Institute
- Housing Assistance Council
- National Congress of American Indians
- National American Indian Housing Council
- Neighborhood Reinvestment Corporation
- Rural Community Assistance Program
- Rural LISC



Intermediary Issues

- For non-native intermediaries:
 - Positives
 - Most are active and expanding their Tribal involvement
 - Have strong expertise in variety of areas - housing, economic development, infrastructure, planning, child care
 - Are well established and, mostly, well funded
 - Encourage Tribal interaction with wide variety of agencies
 - Negatives
 - Tribal activity is limited either geographically or to select Tribes/TDHE's/Tribal nonprofits
 - Loan and Grant activity is limited on Tribal land
 - Training sessions that are not specifically for Tribes often miss important Tribal issues, particularly for those with Trust/allotted land issues



Intermediary Issues

- Native Oriented Intermediaries
 - Positives
 - Strong Tribal representation on Board and staff ensures focus
 - Have expertise in specific areas
 - Well connected in DC on Tribal issues and advocacy
 - Negatives
 - Each are limited in expertise - one doesn't do it all
 - None provide loan funds; minimal grant funds
 - Expertise on blending new forms of finance, while growing, still in infancy
 - Advocacy limited to Tribal related funding



Intermediary Options

- Have plan for expansion and coordination of existing efforts
- Decide intermediaries have limited value on Tribal land and just encourage existing efforts
- Create new Tribal-oriented intermediary that provides range of services of existing national intermediaries, but on Tribal land
- Other



Intermediary Survey

- Existing intermediaries have been meeting during the last six months, and consulting with government agencies, to discuss the Tribal activity
- Survey will provide input for future actions
- Intermediaries, by their nature, only are as effective as their constituents understand, want, and use them - survey intended to give that feel
- Please fill it out and leave it at NAIHC or Enterprise table



Dreams, Indian Homes and Mortgage Ordinances

© Stetson Law Offices, P.C., 2000¹

by Catherine Baker Stetson, Jennifer Lee Bradley and Timothy J. Humphrey, Sr.

Introduction

Hillary Clinton supposedly once said "more dreams have died in the parking lots of banks than anywhere else." In Indian country, perhaps more dreams have died in appropriations committees than in bank parking lots, but wherever the dream dies, the point is that it often dies for lack of money. Certainly, in the world of Indian housing, the block grant money available under the Native American Housing Assistance and Self-Determination Act ("NAHASDA") is not enough to meet the Indian housing need.²

When NAHASDA and other programs' grant money fails, many tribes begin to look elsewhere for housing funds. Some lucky tribes resort to financial resources from gaming or other economic development ventures to supplement their housing budgets. Others look for sources of OPM, "other people's money," such as low income housing tax credits and federally-guaranteed loans. One source of OPM is tribal members, especially those in the middle to upper income brackets. These tribal members, who don't qualify for Department of Housing and Urban Development ("HUD") assisted homes, often can afford to build or buy their own homes off-reservation by taking out a mortgage. But if they want to remain on-reservation, they have until recently been handicapped in their ability to get a mortgage.³

Access to mortgage credit is limited for many tribal members because they live on lands that were reserved for them by treaty or federal law and cannot be sold. This is a problem because a lender of money needs adequate remedies, including the right, upon default, to acquire the property through fore-

closure and resell it to another buyer. By establishing mortgage foreclosure and eviction ordinances that protect the lender and guide the tribe, individual tribal members can finally experience homeownership.

Access to mortgage credit is limited for many tribal members because they live on lands that cannot be sold

I. Why have an ordinance establishing procedures for mortgages and foreclosures as part of the tribal housing code?

A. Such an ordinance sets forth general procedures for mortgages and foreclosures to meet the needs of HUD and other lenders on the reservation, as well as of the secondary market.

B. The tribe in effect gets the benefit and the support of OPM.

C. Such an ordinance strengthens creditor/lender/investor confidence in lending to tribes. Some of the lending programs offer federal guarantees and insurance, further encouraging lending and often at reduced rates. Lending to tribal members also allows banks to serve traditionally under insured communities, helping them to fulfill their Community Reinvestment Act responsibilities.

D. Such an ordinance makes homeownership more available to tribal individuals.

E. More tribal members, especially those in the middle and upper income brackets, are able to return to or stay on the reservation, adding to the tribal community in many ways.

F. Some tribal housing operations have found that home buyers take better care of their units than renters; this lowers the administrative and maintenance costs to the housing entity.

G. Such an ordinance increases the tribe's access to a variety of federal and other programs that can be used together to accomplish dreams that would otherwise not be a possibility.

H. The tribe, tribal members, lenders, and the secondary market⁴ all can profit in one way or another from a well-designed, practical tribal mortgage program.

II. What are the basic elements of an effective tribal ordinance establishing procedures for mortgages and foreclosures?

A. General Provisions. Some tribes may prefer simply to adopt their state mortgage and foreclosure laws; others will adopt their own.⁶ Whatever the chosen process, the general provisions that should be included in a tribal mortgage and foreclosure law/ordinance/code ("ordinance") are:

1. Applicability: a statement that clearly sets forth how and to whom it applies.

2. Statement of Jurisdiction: a statement of the jurisdiction and the entity (i.e., tribal court) that can exercise such jurisdiction.

3. Purpose and Interpretation: a statement that the ordinance should be interpreted and construed to fulfill its purposes, along with a list of such purposes.

4. Relation to Other Laws: a statement of other laws that may be applicable and which will be controlling in case of a conflict.

5. Definitions: any technical

(Continued on page 20)

(Continued from page 19)

term, or term used in a manner not in accordance with its generally understood meaning, should be defined. While it is not uncommon to include a definition when a term is first used, a definition section is often more useful.

B. Recording. The ordinance must contain a provision for recording mortgages. The tribe must decide how it wishes mortgages to be recorded and can use tribal, state, or BIA recording offices. Some federal agencies require filing with the BIA even if the tribe maintains a fully functional recording office.⁷

C. Priority. The ordinance must include a statement of priority that specifies that a mortgage granted under the ordinance shall have priority over all other liens not perfected at the time of recording of the mortgage. If the tribe has a leasehold tax, include a statement that a tribal leasehold tax lien takes priority.

D. Right of First Refusal. While not currently required by law or regulation, the BIA is requiring a "right of first refusal" be included in all leases to be used in mortgaging. The right of first refusal typically gives the lessor (usually the tribe) the right to acquire the borrower's (usually a tribal member) interest in the mortgaged lands upon payment of all sums then in arrears and either payment of the balance of the loan or assumption of the mortgage.

E. Foreclosure Procedures.⁸ The ordinance must contain the procedures to be followed in order to foreclose upon a mortgage. The procedures should include provisions related to:

1. Filing of complaint and required contents thereof;
2. Use of summons;
3. Service of process (typically this provision will require compliance with rules established by the tribal court);
4. Cure of default by subordinate lienholder; and

5. Judgement and remedy provisions explaining the time frame in which the tribal court must act and the various remedies that may be ordered by the court.

F. Right of Redemption. If the tribe wishes to provide the homebuyer the right to buy back his or her property after it has been sold at a foreclosure sale, the ordinance should contain a "right of redemption" provision. Such provision must contain a statement of the period of time in which the right can be exercised and must provide for specific notice to the homebuyer explaining his or her rights under the provision. This right may be limited by certain agencies or lenders, and it may be expanded by tribes to allow a tribe to exercise the right instead of, or in addition to, the defaulting homebuyer.

G. Eviction Upon Foreclosure. The ordinance should contain provisions related to the removal of persons from the premises after judgment is entered in a foreclosure proceeding. These provisions may refer to an eviction and order of eviction, or action in unlawful detainer and writ of restitution. The provisions should establish a clear procedure that must be followed, including:

1. Filing of complaint;
2. Use of summons;
3. Service of process;
4. Actions that may be taken by the court; and
5. Methods of execution of judgment.

H. Limited Waiver of Immunity. Because tribal leases often underlie the homes being mortgaged, the ordinance should contain a specific and limited waiver of immunity from suit by which terms the tribe clearly agrees to submit to the jurisdiction of the tribal court as necessary to interpret and enforce terms of mortgages and necessary collateral documents. Because this is a critical and some-

times controversial undertaking, this provision must be compatible with other applicable tribal, federal and state laws. (But see endnote 5.)

I. Compliance with Requirements of Federal and Private Mortgage Insurance Entities. If the purpose of the ordinance is specifically to authorize mortgages made, bought, or insured by governmental agencies or Fannie Mae, the tribe should ensure that every provision required by that entity is included in the ordinance. If any provision the tribe wishes to include in its ordinance conflicts with a requirement of such an entity, the ordinance provision should contain a specific exemption.

J. Compliance with BIA Requirements. Any ordinance adopted by a tribe must comply with BIA requirements. Such compliance requires periodic review of the BIA leasing regulations and agency guidance.⁹

III. Where can tribes or tribal members find housing loans?

A. HUD Section 184 Indian Housing Loan Guarantee Program. The Section 184 Loan Program guarantees loans made to Indian families and TDHEs to construct, acquire, or rehabilitate (but not refinance) one to four unit family dwellings located on trust land. *The tribe must have adopted legal and administrative procedures for evictions, foreclosures, priority of lien procedures, and leasing of tribal trust land.* A tribe with tribal court jurisdiction must also demonstrate its commitment to support a particular program by notifying the lender that the tribe has enacted the legal and administrative framework.

B. FHA Section 248 Construction/Permanent Loans. Section 248 loans are Federal Housing Administration guaranteed, and the money can be used to build, purchase, or rehabilitate a home on trust land. Like the Section 184 loan, each tribe must certify to HUD

that it agrees to the conditions of Section 248, such as providing the legal protections that support mortgage lending. (One major difference between the Section 248 and the Section 184 loans is that *Section 248 allows for refinancing of an existing property.*)

C. Veteran's Administration ("VA") Loan Guarantees. If a Native American veteran, certified as eligible by the VA, can locate a private mortgagor willing to lend monies for the construction or purchase of a home on trust lands, he or she may apply for a loan guarantee from the VA.

D. VA Native American Veteran Direct Loan Program. The main purpose of the VA program is to provide direct loans to Native American veterans for the purchase or construction of homes on trust lands. The tribe or TDHE must have signed a Memorandum of Understanding with the Secretary of Veterans Affairs which includes the following conditions governing its participation in the program:

1. That the tribe has established standards and procedures that apply to the conveyance of a leasehold or other acceptable interest in real property by a Native American veteran borrower to the VA as security for the loan, *including procedures for foreclosing the interest and procedures for reconveyance of the lot or the dwelling*¹⁰ (or both) purchased, constructed, or improved using the proceeds of the loan.¹¹

2. That each Native American who is under the jurisdiction of the tribal organization and to whom the VA makes a direct loan holds, possesses, or will obtain a leasehold or other acceptable interest in a lot that is located on trust land and will purchase, construct, or improve a dwelling on that lot with the proceeds of the VA direct loan.

3. That each such Native American will convey the above described interest to the Secretary of Veterans Affairs, by an appropriate

instrument, as security for the direct housing loan made pursuant to title 38 U.S. Code § 3761.

4. That the tribal organization and each veteran who obtains a loan from the VA under this agreement will permit the VA, its agents, and employees to enter upon the trust land of the tribe and/or the veteran for the purpose of carrying out such actions as the Secretary determines are necessary to evaluate the advisability of the loan and to any purchase, construction, or improvements carried out using the proceeds of the loan.

5. The tribal organization will, to the maximum extent possible, assist the VA in its efforts to manage this program in a prudent and cost-effective manner. This will include assisting the VA in finding qualified substitute purchasers if the initial borrower is unable to fulfill his or her obligations under the law, carrying out evictions, assuring that mortgages and other legal instruments can be properly recorded, and otherwise assuring that the program is operated in a responsible and prudent manner.

E. Fannie Mae's Native American Conventional Lending Initiative ("NACLI"). Under NACLI, Fannie Mae will purchase conventional, fixed-rate mortgage loans that are made to Native Americans living on tribal trust land, restricted land, or restricted fee simple land. Before Fannie Mae will purchase loans made on restricted lands, the tribe must first be approved by Fannie Mae to participate in NACLI. To be approved, the tribe's laws must be reviewed by Fannie Mae to determine whether the tribe provides protections needed for mortgage lending, including priority of lien and lender's right to foreclose, evict, and resell. In addition to its mortgage and foreclosure ordinance, a tribe must also enter into agreements with Fannie Mae including: (1) a Tri-Party Agreement ensuring

Fannie Mae and lenders will be authorized to enforce mortgage-related documents and to carry out foreclosures and evictions on trust lands; (2) any lease, note, and mortgage riders to be used; and (3) any credit enhancement required by Fannie Mae.¹² NACLI loans may be used for new, existing, or rehabilitated properties located on tribal trust or restricted lands. Any construction or rehabilitation must be completed before loans can be sold to Fannie Mae.

F. Rural Housing Native American Pilot. Fannie Mae and the Rural Housing Service ("RHS") developed a pilot for Native Americans that is modeled after the RHS Section 502 Guaranteed Rural Housing Loan Program (Section 502 Loans may be used to repair homes, purchase existing homes, or build modest homes). Fannie Mae will purchase single-family mortgage loans that are guaranteed by RHS under this pilot. The home buyer can borrow 100% of the appraised market value and obtain affordable monthly mortgage payments. Lenders can pool loans with 30-year fixed-rate conventional loan products, have additional funds as the result of Fannie Mae's participation, and can use standard Fannie Mae forms. This pilot requires that:

1. Fannie Mae must review the laws of the tribe to determine whether there are adequate legal protections for mortgage lending.

2. The tribe must enter into a Memorandum of Understanding with Fannie Mae and RHS to ensure that documents are enforceable and that Fannie Mae can foreclose and evict.

3. A special ground lease is signed by the tribe and approved by the BIA (a model document has been developed by RHS and Fannie Mae).

4. Loans will be documented with Fannie Mae/Freddie Mac Uniform Instruments.

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G. State Mortgage Finance Authorities. State mortgage finance authorities provide affordable housing finance through a statewide network of lenders and housing partners. Many have special programs for Native Americans interested in buying, building, or repairing a home on trust land. The following requirements usually must be met:

1. A tribe must have a resolution in place to enforce eviction and foreclosure procedures in tribal court.

2. A borrower must have a home site lease from the tribe, approved by the BIA.

IV. The Secondary Market.

A. How the Secondary Mortgage Market Works.

1. Home buyers go to a local lender to purchase a home. These lenders make up the "primary market."

2. The lender keeps the new mortgages as investments or more often sells them to investors such as Fannie Mae. These investors make up the "secondary market."

3. When the secondary market buys mortgage loans, the original lender gets back money to make more home loans. In 1996, secondary market investors purchased about 55 percent of all mortgages originated in the U.S.

4. Fannie Mae can keep the loans in its investment portfolio or package the loans into Mortgage-Backed Securities for other investors.

Banks participate in the secondary market for two primary reasons. First, the secondary market enables a bank to remove the volume limitations for its mortgage lending by relieving funding and capital constraints. This in turn allows the bank to achieve a much greater volume of originations, resulting in a significant increase in fee income and an increased ability to serve its community, attract new

customers, and generate new deposits and equity lending accounts. These also help the bank achieve its Community Reinvestment Act (CRA) goals.

Secondly, participating in the secondary market makes mortgage lending more profitable by transferring to the investor the interest rate risk and credit risk associated with holding long-term mortgages while at the same time enabling the bank to improve its portfolio diversity, liquidity, and capital position.

B. Fannie Mae.¹³

1. Fannie Mae has partnered with HUD, the Rural Housing Service, the BIA, and others to expand the financing available to Native Americans living on trust land. To date, Fannie Mae has provided services to sixty-eight tribes in eighteen states, providing approximately \$93 million in affordable mortgage financing from 1995 to 1999. In 1999 alone, Fannie Mae invested \$30 million in Indian housing, a forty percent increase since 1998. Since 1995 Fannie Mae has served 974 tribal households with 265 being served in 1999 alone. Fannie Mae has serviced over eighty-five percent of all HUD Section 184 Guaranteed Loans, investing over fifty million dollars in 1999. Since 1995, Fannie Mae has provided over \$5.1 billion in affordable financing to fifty-five thousand (\$5,000) Native Americans purchasing homes on non-trust lands.

2. In addition to making more financing available, Fannie Mae is attempting to work more effectively with the tribes by altering some of its foreclosure requirements, including its right to sell foreclosed properties to anyone and its acceptance of tribal court jurisdiction over foreclosure actions. Fannie Mae also has sponsored housing fairs for more than a dozen tribes, including Lac du Flambeau, Navajo, White Mountain Apache, Gila River, and Salt River, to provide free information on affordable

mortgage products and the home buying process.

V. What are some of the common barriers to tribal mortgage programs?

A. Credit and Qualification Problems. Many tribal individuals have not had experience or education in developing and protecting their credit records. As a result, when suddenly faced with the reality of applying for a mortgage, they do not qualify. While mortgages are increasing, so are denials of mortgage applications by tribal members. Some tribes have countered this by sending tribal applicants to the local credit counseling office or by contracting with the Consumer Credit Counseling Service of America; others offer such services in-house. In addition, the One-Stop Mortgage manuals offer help, and many banks such as some Federal Home Loan Banks, have been working with tribal housing programs to train personnel in credit counseling as well as in the requirements of loan qualification.

B. A similar obstacle is that many would-be home buyers do not have a thorough understanding of the responsibilities of home ownership or of the resultant tax and equity benefits. Education and training similar to that described above can help new home buyers get the full benefit and pleasure of owning a home.

C. Many lenders have a fear of dealing with foreclosures and evictions in tribal courts. In large part this is the result of ignorance about the tribal court system. Often the laws and procedures have not been in written form, the judges are not trained in the law, the underlying principles differ from those of the outside jurisprudence, and previous decisions are not published and therefore deny outsiders the opportunity to determine the precedent. Education and experience are the way to combat the ignorance, and

the University of New Mexico Native American law students have responded by creating a new tribal law journal and developing a website specifically to address such issues.¹⁴ In addition, the development by tribes of current written laws governing commercial activities, from building codes to commercial codes, to recording laws, zoning, and published opinions, all will help to lessen the natural fear that outsiders have when dealing with the unknown.

D. Tribal councils themselves present numerous obstacles to the development of mortgage programs on their own reservations. Mortgages and foreclosures are difficult procedures to understand, especially when presented to the tribal council as codes or ordinances by the attorneys. This is especially touchy for tribes that have for years left Indian housing matters to their Indian Housing Authorities and as a result do not really understand either the needs or the workings of tribal housing. Many council members, not wanting to read the code, understand the often-complex issues, become up-to-date on housing, or make serious decisions affecting tribal land, let proposed mortgage ordinances disappear for lack of action. For

tribes with short term tribal administrations, a tribal mortgage program may face the same confusion and reluctance every year, virtually assuring no progress. Also, many tribes do not have realty offices with an adequate knowledge of reservation leases, assignments, surveys and titles, or with the ability to do accurate, complete and up-to-date title searches on reservation land. This forces the tribes to rely more heavily upon the BIA and its record-keeping, a not-always-satisfactory or timely option. Finally, because most mortgage programs require the tribe to waive its immunity (so that the various tribal laws including the tribal foreclosure and eviction laws can be enforced with certainty), many tribal council members are unwilling to go forward with a mortgage program. For those with substantial assets, there are other options and methods for securing loans, but the majority of tribes are forced to deal with this sticky issue.

E. Even when the legal framework is ready, the tribal council is informed and enthusiastic, and the lenders and borrowers are ready, few resources are available to help tribal housing groups and tribal members find and coor-

dinate all the sources of funds available. As a solution, the One-Stop Mortgage program is intended to aid in packaging the various funding sources, and many banks, including several of the Federal Home Loan Banks and the Federal Reserve Banks, work closely with tribal housing groups to put together effective housing programs.

Conclusion

On-reservation mortgages are not the solution to the great problems in Indian housing, nor are they for every tribe. But for those whose current housing programs are inadequate and who have a number of middle to upper income tribal families living on or wishing to return to the reservation, a mortgage program may be a useful supplement to a tribe's NAHASDA block grant funds. In that case, the tribe and the tribal housing entity must work together to set up a foreclosure and eviction ordinance with the basic components mentioned above, understanding that the ordinance is likely to be useful only in a larger context of activities such as credit counseling, title recording, tribal court accountability, and lender education.

ENDNOTES

1. Authors are attorneys with Stetson Law Offices, P.C., with offices in Albuquerque, New Mexico and Washington, D.C., and may be contacted at <info@stetsonlaw.com>.
2. Forty percent (40%) of tribal homes are substandard compared to an overall national average of six percent (6%). Sixty-nine percent (69%) of Native Americans in tribal areas live in severely overcrowded conditions. Sixteen and one half percent (16.5%) of the households on Native lands are without complete indoor plumbing. Thirty-seven percent (37%) of Native Americans live below the poverty level, a rate more than three times higher than that of rural whites and higher than any other racial or ethnic group in the United States. According to the National American Indian Housing Council, fifty-two thousand (52,000) Native American owned residences need renovation and an additional nineteen thousand (19,000) homes need replacement.
3. Poorer tribes have fewer financing options, and not all tribes can or should place heavy emphasis upon individual tribal member mortgages. But tribes should be aware of the availability, requirements and pitfalls of a mortgage program.
4. See Section IV.
5. Many federal and other programs require, prior to lending, guaranteeing, or otherwise providing money, that a tribe adopt a mortgage ordinance; however, the specific requirements vary from agency to agency, program to program. Many of these agencies have been active in the drafting of proposed documents intended to assist tribes in meeting the agency guidelines. While some are adequate, none of them completely meets the requirements of law. Leasing and mort-

(Continued on page 24)

(Continued from page 23)

gaging of Indian lands is complex at best, and must be undertaken carefully. In addition to meeting the requirements set forth by the federal agencies and the laws authorizing their specific activities, every leasehold mortgage must meet requirements set forth by the Bureau of Indian Affairs ("BIA"). We suggest that no tribe rely on any single agency's model documents, but rather that it consult with the agencies in whose programs it is interested and its own tribal attorneys to develop an ordinance meeting its needs. The tribes must understand that the mortgaging of Indian lands is new to both federal agencies and private lenders, and, typically, they do not have a complete understanding of the varied, confusing, and sometimes conflicting requirements. The most common sources of homeownership money available to tribes or tribal members are the HUD Section 184 program, the Veteran's Administration ("VA") programs, the FHA 248 program, the RHS Section 502 program, the low income housing tax credit program, as well as conventional mortgage lending (through a bank, including the Federal Home Loan Bank system), as supplemented by the secondary market such as the Federal National Mortgage Association ("Fannie Mae").

6. The Navajo Nation apparently handles its cases without having an actual mortgage and foreclosure code, by processing foreclosures like any other contract case, using the underlying mortgage, lease, and related legal documents. This is unlikely to work well for tribes that have a less well-developed system of jurisprudence, and we believe the Navajo Nation is in the process of developing an actual mortgage and foreclosure law.
7. BIA's recording offices have been understaffed, and documents are occasionally lost or misplaced. We recommend that, if BIA recording is required by mortgage lenders or guarantors, the tribe also require recording mortgage documents in tribal offices, or, if tribal offices are not available, in the state.
8. Foreclosure proceedings are important so that a lender whose mortgage is not being paid can take the house back and sell it to another person. In order for the lender to lend, a tribe is generally asked for a limited waiver of its sovereign immunity so that the lender can enforce the foreclosure. The giving of a limited waiver is often unacceptable to a tribe. Foreclosure proceedings are not necessary if the tribe, or someone else, guarantees to pay off mortgages that are in default and pledges its collateral, establishes an escrow, and/or offers a letter of credit to back up the guarantee. This is, however, probably not financially realistic for most tribes.
9. As an example, on July 14, 2000, the BIA issued proposed regulations for comment that include revisions to the Part 162 regulations on leasing of Indian lands. Included in the proposed changes are: § 162.8, requiring notice to the BIA of tribal laws effecting leases; § 162.12, continuing the requirement of compliance with the National Environmental Protection Act ("NEPA"); § 162.15, requiring recordation of *all* leases in the appropriate BIA Lands, Titles, and Records Office; § 162.16, delegating the responsibility of recordation of BIA approved leases to the BIA; § 162.22, requiring BIA approval of *all* leasehold mortgages prior to their effective date; § 162.29, providing that improvements only may be constructed on leasehold interests if the lease specifically authorizes such construction; § 162.45, requiring the Lessee to post a bond covering one year's rent and the value of improvements to be constructed (such bond being a waivable provision); and Subpart G, requiring payment to the BIA of administrative fees for its work in reviewing and approving documents related to land use.
10. The VA guidelines actually discuss resale of the lot or residence, or both. Because the real property underlying the residence is held in trust, sale cannot occur without BIA approval and often a transfer from trust to fee patent status. A reconveyance, typically a sublease or assignment of lease, is what would be required.
11. While the statutes authorizing mortgaging of trust land typically authorize mortgaging of tribal *and* individually owned trust lands, the programs developed by the agencies often only deal with use of leasehold interests as collateral. Thus, program documents and guidelines require that the homebuyer obtain a lease for the property from the tribe. If the homebuyer wishes to mortgage part of his or her individually owned lands, the mortgage may be entered into pursuant to 25 U.S.C. § 483a, which allows an individual Indian owner of lands held in trust to execute a mortgage or deed of trust to such land. However, for the purpose of foreclosure or sale proceeding, the land will be treated as if it is held in fee simple, and the United States will not be a necessary party to the proceedings. Conveyance of the land pursuant to the foreclosure will divest the United States of title to the land, taking the land out of trust.
12. Fannie Mae has prepared model documents that tribes may use in setting up their tribal mortgaging, foreclosure, and eviction programs. These documents are not required to be used, as long as the tribe adopts documents that accomplish basically the same goals. The Tri-Party Agreement among the lender, the tribe, and Fannie Mae establishes procedures for the purchase of first-lien mortgages by Fannie Mae on trust or restricted land. The Residential Ground Lease is a lease between the tribe and the borrower/lessee that allows the borrower/lessee to construct or maintain improvements on tribal lands. The Addendum to Fixed Rate Note amends and supplements the note made by the borrower to the lender to include additional terms and conditions concerning governing law and transfer of the property or any interest therein. The Rider for Leaseholds amends and supplements the Mortgage, Deed of Trust, or Security Deed given by borrower to secure borrower's note to lender to include additional terms and conditions on ground lease termination, ground lease default, ground lease assignment, right of first refusal, acceleration and remedies, no subordination of ground lease, modification, termination, and forfeiture of ground lease, and governing law. The Rider for Allotments also amends and supplements the Mortgage, Deed of Trust, or Security Deed given by borrower to secure borrower's note to lender, but in relation to transfers of interests in individual allotments.
13. Specifics are taken from Fannie Mae's publication: *1999 Native American Progress Report*.
14. The website for the journal may be found at <<http://tlj.unm.edu>>.

SAMPLE

[NAME OF TRIBE]

Ordinance Concerning Mortgages, Mortgage Foreclosure, and Evictions

Adopted by Resolution No. _____ on _____, 2001

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Ordinance Concerning Mortgages, Foreclosures, and Evictions

Adopted by Resolution No. _____ on _____, 2001

I. General

1. **Definitions.** Unless otherwise provided, the following definitions shall apply throughout this Ordinance:

(a) “Allotment” means lands held in trust by the United States for the benefit of an individual Indian.

(b) “Borrower/Mortgagor” means the Tribe, its Tribally Designated Housing Entity (if applicable), or any Member who has the legal right and capacity to execute a Mortgage and who has executed a Mortgage on his or her Leasehold or Allotment Interest, including any heir(s), successor(s), executor(s), administrator(s), or assign(s) of such Borrower.

(c) “Federal Agency” means any agency of the federal government that makes, guarantees, or insures mortgage loans, including but not limited to the Veteran’s Administration (“VA”), the Department of Housing and Urban Development (“HUD”), the Federal Home Administration (“FHA”), and Department of Agriculture (“USDA”).

(d) “Forbearance Relief” means an action that results in the lender or the government refraining from pursuing Mortgage Foreclosure.

(e) “Governor” means the Governor of the Tribe.

(f) “Lease” means the residential ground lease or other agreement for use of Trust Land or Restricted Land on which a Mortgage has been or may be given.

(g) “Leasehold Interest” means the Borrower’s right, title, and interest under a Lease from the Tribe, as Lessor, and may include improvements.

(h) “Leasehold Tax” means any tax that may be assessed by the Tribe against a Lessee for the use of land subject to a Leasehold Interest.

(i) “Lender/Mortgagee” means any mortgage lender or any successors or assigns of any such lender, and includes any subsequent holder, whether by assignment, succession, or otherwise, of the original Lender’s/Mortgagee’s right, title, or interest in and to the Mortgage.

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(j) “Lessee” means a person who has acquired a legal right of possession of tribal Trust or Restricted Lands by a Lease.

(k) “Lessor” means the Tribe.

(l) “Member” means an enrolled member of the Tribe.

(m) “Mortgage” means the leasehold mortgage or other mortgage given to secure a mortgage loan made by a Lender to a Borrower, which Mortgage must be approved by the Governor, Tribal Council, and the Secretary.

(n) “Mortgage Foreclosure Proceeding” means a proceeding in the Tribal Court (i) to foreclose on the Leasehold Interest or other interests of the Borrower and/or (ii) to assign such interest of the Borrower to the Lender or other person or entity.

(o) “Nuisance” means maintenance on the mortgaged property of a condition that:

(1) unreasonably threatens the health or safety of the community or neighboring land users; or

(2) unreasonably and substantially interferes with the ability of neighboring real property users to enjoy the reasonable use and occupancy of their property.

(p) “Order of Repossession” is an order of the Tribal Court:

(1) restoring the Lessor or Lender to possession of Trust Land or Restricted Land; and/or

(2) evicting a Borrower or other occupant from such property.

(q) “Residential Unit” means a building constructed or used for residential purposes.

(r) “Restricted Land” means land within the jurisdiction of the Tribe that is subject to restrictions against alienation imposed by federal treaty, statute, Executive Order, or the Tribe.

(s) “Secretary,” unless otherwise indicated, means the Secretary of the United States Department of the Interior or his duly designated representative.

(t) “Subordinate Lienholder” means the holder of any lien, including a mortgage perfected subsequent to the recording of a Mortgage under this Ordinance; provided,

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however, such definition shall not include the Tribe with respect to a claim for a tribal tax on the Mortgaged property, where applicable.

(u) “Tribal Council” means the [Name of Tribe] Tribal Council, being the governing authority of the Tribe.

(v) “Tribal Court” means (i) the Tribal Court established by the laws of the Tribe, or (ii) such body as may now or hereafter be authorized by the laws of the Tribe to exercise the powers and functions of a court of law.

(w) “Tribe” means the [Name of Tribe] of the [Name of Reservation].

(x) “Trust Land” means land within the jurisdiction of the Tribe, title to which is held by the United States for the benefit of the Tribe or an individual Indian.

(y) “Unlawful Detainer Action” shall be a suit brought before the Tribal Court to terminate a Borrower’s interest in Trust Land or Restricted Land and/or to evict any person from occupancy of such property.

(z) “Waste” shall mean spoil or destruction of land, buildings, gardens, trees, or other improvements on the mortgaged property which result or will likely result in substantial injury to such property.

2. Applicability. Except as otherwise specifically stated, this Ordinance shall apply to any and all mortgages, leasehold mortgages, and agreements to secure an interest in all housing, dwellings, or accommodations for human occupation or residence, or buildings on Trust or Restricted Land and supercedes and replaces all other codes and ordinances previously adopted by the Tribe specifically relating to mortgages. In addition, the section on eviction contained herein may be applied against any person or entity occupying Trust or Restricted lands without right.

3. Purpose and Interpretation. The Tribal Court shall interpret and construe this ordinance to assist tribal members, and others, in obtaining mortgage financing for the purchase of residences on certain Trust Land or Restricted Land within the jurisdiction of the Tribe, by prescribing procedures for recordation, priority, and foreclosure and evictions in connection with Mortgages given to secure loans made by or through any government agency or lending institution.

4. Jurisdiction. The Tribal Court shall exercise jurisdiction over all matters arising within the jurisdiction of the Tribe with respect to the subjects of this Ordinance, and with respect to any person or entity acting or causing actions which arise under this Ordinance.

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5. **Conflicts with Other Laws.** If this Ordinance is determined to conflict with any other law of general application adopted by the Tribe, this Ordinance shall control.
6. **Appeals.** Appeals under this Ordinance shall be in accordance with the Tribe's general appellate provisions.
7. **No Mortgage of Leasehold Interest Without Lease.** Notwithstanding anything to the contrary contained herein or in any Mortgage document, no Borrower may mortgage a Leasehold Interest without first (1) having a valid Lease for such property from the Tribe and (2) obtaining the written consent of the Tribal Council to mortgage the Leasehold Interest. Any Mortgage given in violation of this Section shall be void and of no effect.
8. **Merger of Estates.** There shall be no merger of estates by reason of the execution of a Lease or a Leasehold Mortgage or the assignment or assumption of same, including an assignment adjudged by the Tribal Court or by operation of law, except as such may arise upon satisfaction of the Leasehold Mortgage.
9. **Alternative Remedies.** If the persons or property are subject to the jurisdiction of the courts of the United States, the remedies and procedures provided by this Ordinance are in the alternative to the remedies and procedures provided by the laws of the United States.
10. **Recording of Mortgages and Leases.** The appropriate offices for recording Mortgages and Leases are the [Name of Tribe] Realty Office and the Bureau of Indian Affairs Regional Land, Titles, and Records Office. The Tribe agrees that a Lender may also require that the Leases and Mortgages be recorded in the state and/or county recorder's office in the state and/or county in which the mortgaged properties are located. For documents recorded at the [Name of Tribe] Realty Office:
- (a) The recording clerk shall endorse upon any Lease and/or Mortgage or other security instrument received for recording the following:
- (1) The date and time of receipt of the Lease and/or Mortgage or other security instrument;
- (2) The filing number, to be assigned by the recording clerk, which shall be a unique number for each Lease and/or Mortgage or other security instrument received; and
- (3) The name of the recording clerk receiving the Lease and/or Mortgage or other security instrument.

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(4) Upon completion of the above endorsements, the recording clerk shall make true and correct copies of the Lease and/or Mortgage or other security instrument and shall certify each copy as follows:

[NAME OF TRIBE]) ss.

I certify that this is a true and correct copy of a document received for recording this date.

Given under my hand and seal this ____ day of _____.

(SEAL)

Signature

Title

(b) The recording clerk shall maintain such copies in the records of the recording system and shall return the original Lease and/or Mortgage or other security instrument to the person or entity that presented the same for recording.

(c) The recording clerk shall also maintain a log of each Lease and/or Mortgage or other security instrument recorded in which log there shall be entered the following:

(1) The name(s) of the Mortgagor(s) of each Mortgage or Lessor of each Lease, identified as such;

(2) The name(s) of the Mortgagee(s) of each Mortgage or Lessee or each Lease, identified as such;

(3) The name(s) of the parties and their designation in any other security instrument;

(4) The date and time of receipt;

(5) The filing numbers assigned by the recording clerk; and

(6) The name of the recording clerk receiving any Lease, Mortgage or other security instrument.

(d) Certified copies of Leases, Mortgages and other documents and the log maintained by the Recording Clerk shall be made available for public inspection and copying.

11. Priority. All Mortgages recorded in accordance with the recording procedures set forth in this Ordinance, including Leasehold Mortgages, and including loans guaranteed or held by a governmental agency, shall have priority over any lien not perfected at the time of such

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recording and any subsequent lien or claim excepting a lien or claim arising from a tribal Leasehold Tax assessed after the recording of the Mortgage.

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II. Foreclosure

1. **Notice of Default Required.** If a Borrower defaults in performance under a Mortgage, the Lender must provide a written Notice of Default prior to enforcing the terms and conditions of the Mortgage and prior to availing itself of the remedies under this Ordinance. All Notices of Default on a Mortgage shall be properly served by Lender on Borrower, all Subordinate Lienholders, and the Tribe. Prior to initiating a Mortgage Foreclosure Proceeding on any HUD guaranteed mortgage, notice shall be provided to the Secretary of HUD or his duly appointed representative. Prior to initiating a Mortgage Foreclosure Proceeding on any Mortgage guaranteed by any other Federal Agency, notice should be provided to the individual designated by the agency to receive such notice.

2. **Actions Upon Default.**

(a) A Borrower shall be considered to be in default when he or she is thirty (30) days past due on his or her Mortgage payment or is in violation of any material term or condition of the Mortgage for more than thirty (30) days.

(b) When a Borrower is thirty (30) days past due on his or her Mortgage, and before any foreclosure action or activity is initiated, the Lender shall:

(1) make a reasonable effort to arrange a face-to-face interview with the Borrower. This shall include at least one trip to meet with the Borrower at the mortgaged property; and

(2) document that it has made at least one phone call to the Borrower (or to a phone designated by the Borrower as able to receive and relay messages to the Borrower) for the purpose of arranging a face-to-face meeting.

(c) In addition to the preceding notification requirements, the Lender shall:

(1) notify the Borrower that, if the Mortgage remains past due on three installment payments, the Lender may ask the applicable Federal Agency to accept assignment of the Mortgage if required;

(2) notify the Borrower of the qualifications for Forbearance Relief from the Lender, if any, and that Forbearance Relief may be available from the federal government; and

(3) provide the Borrower with names and addresses of government officials to whom further communication may be addressed, if any.

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(d) When a Borrower is past due on three (3) installment payments and at least ten (10) days before initiating a foreclosure action, the Lender shall, in writing by mail, certified return receipt requested, and by posting prominently on the Residential Unit or other building subject to a Mortgage, with a copy provided to the Tribe, advise the Borrower:

(1) that information regarding the loan and default/delinquency will be given to credit bureaus;

(2) of the availability of homeownership counseling opportunities/programs offered by the Lender or otherwise; and

(3) of available assistance regarding the Mortgage/default.

3. Cure of Default. The Borrower or any Subordinate Lienholder may cure the default(s) at any time before entry of a judgement of foreclosure. Any Subordinate Lienholder who has cured a default shall thereafter have included in its lien the amount of all payments made by such Subordinate Lienholder to cure such default(s), plus interest on such amounts at the rate stated in the promissory note secured by the subordinate lien.

4. Right of First Refusal.

(a) In the event of default by the Borrower on any Mortgage or other loan agreement for which a Lease is pledged as security, the Lessor shall have the Right of First Refusal to acquire the Borrower's interest in the premises (subject to all valid liens and encumbrances) upon:

(1) payment of all sums then in arrears; and

(2) either payment of the balance of the loan or assumption of the Mortgage.

The Right of First Refusal may be exercised at any time within thirty (30) days after the Lessor receives notice in writing from the Lender of the Borrower's default. The Notice of the Lessor's Intent to Exercise the Right of First Refusal shall be provided in writing from the Lessor to the Borrower, all Subordinate Lienholders, and the Lender; provided, however, that the Borrower shall have the remainder of the thirty (30) day period in which to cure the default. The estate acquired by the Lessor through exercise of its Right of First Refusal shall not merge with any other estate or title held by the Lessor as long as the Lease is mortgaged or otherwise pledged as security for any loan.

(b) If the Borrower(s) default(s) on a mortgage, the Right of First Refusal may not be exercised by the Lessor unless the Borrower has been advised of Forbearance Relief that may be available, if any, and the Lender or the relevant federal agency has found the borrower to be ineligible.

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6. Mortgage Foreclosure Proceedings. Upon expiration of any applicable cure period for a default under a Mortgage, as identified in the Mortgage documents or otherwise provided in this Ordinance, if there is a failure to cure, and if the Borrower is past due on three or more installment payments and the Lender has complied with the provisions set forth in this Ordinance, the Lender may commence a Mortgage Foreclosure Proceeding in the Tribal Court as follows:

- (a) by filing a verified complaint:
 - (1) citing authority for jurisdiction of the Tribal Court;
 - (2) naming as defendant(s) the Borrower and each record owner claiming through the Borrower subsequent to the recording of the Mortgage, including each Subordinate Lienholder;
 - (3) describing the property subject to the Mortgage;
 - (4) stating the facts concerning (i) the execution of any Lease and/or the Mortgage; (ii) the recording of the Mortgage; and (iii) the alleged default(s) of the Borrower(s); and (iv) any other facts necessary to support a cause of action;
 - (5) appending as exhibits true and correct copies of each promissory note, Lease, if any, Mortgage, and, if applicable, assignment thereof relating to such mortgaged property;
 - (6) including an allegation that all relevant requirements and conditions prescribed in federal and tribal law, and in the promissory note, security instrument, and the Lease, if any, have been complied with by the Lender;
 - (7) otherwise satisfying the requirements of the Tribal Court;
- (b) by obtaining and serving upon each defendant a summons requiring the defendants to appear for a trial upon the complaint on a date and time specified in the summons, and filing a copy of such summons with the Tribal Court. The summons must be issued in accordance with established Tribal Court rules and procedures. The trial date specified in the summons shall be no less than 30 nor more than 45 days from the date of service of the summons and complaint and must notify the defendants that judgment will be taken against them in accordance with the terms of the complaint unless they file with the court an answer and appear for trial at the time, date, and place specified in the summons; and
- (c) by delivering, faxing, or sending such complaint and summons to the Governor and Tribal Council by means capable of verification.

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7. **Service of Process and Procedures.** The laws of the Tribe governing service of process and all other matters relating to the conduct of Tribal Court proceedings shall apply to any Mortgage Foreclosure Proceeding.

8. **Continuances.** Except by agreement of all parties and in the sole discretion of the Tribal Court, there shall be no continuances in cases involving the Lender or a Federal Agency. **Power of the Tribal Court.**

(a) If a Notice of Default has been properly provided to all persons or entities required, if the Right of First Refusal has not been exercised or the default is not cured within the allowable period, as identified in the Mortgage documents or otherwise provided in this Ordinance, and if the Tribal Court should find for the Lender, the Tribal Court shall enter judgment:

(1) foreclosing the Borrower's interest in the mortgaged property, and each other defendant named in the complaint upon whom proper and timely service has been made, including each Subordinate Lienholder; and

(2) assigning such mortgaged property to the Lender or any purchaser of the mortgaged property at a foreclosure sale. The proceeds of such sale shall be applied first toward satisfaction of any lien resulting from the easement of any Leasehold Tax, next toward any lien having a priority date prior to that of the Mortgage documents, next as provided in the Mortgage documents, finally toward any liens having a priority date subsequent to the Mortgage documents.

(3) Assignment of such mortgaged property shall be subject to:

- (i) the right of redemption, if any;
- (ii) limitations as to who may become an assignee of Tribal property as determined by the Tribal Council or as stated in the Lease;
- (iii) the right, under HUD Section 248 guarantees, of the Lender to convey the Leasehold Interest to the HUD Secretary without providing the Tribe the right of first refusal.

(b) The Tribal Court shall have the authority to enter against the Borrower a judgment for the following: (1) back rent, unpaid utilities, and any charges due the Tribe or Lessor under any Lease or occupancy agreement; (2) any and all amounts secured by the Mortgage that are due the Lender; and (3) damages caused by the Borrower to the property other

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than ordinary wear and tear. The Tribal Court shall have the authority to award to the prevailing party costs and reasonable attorney's fees in bringing suit.

10. Redemption. [NOTE: The Tribe may wish to specify its own redemption period, allowing itself and/or the borrower to purchase the leasehold interest within a specified date of the foreclosure sale. Two possible provisions are provided below.]

Redemption. If redemption is authorized, the redemption period shall be that period provided by applicable law or in the Mortgage documents. If the Lender is assigned the Borrower's Leasehold Interest, the Lender may subsequently sell or assign such Leasehold Interest without the approval of the Secretary, but only with the written approval of the Lessor. If HUD acquires the Leasehold Interest, it may transfer the same subject to the terms and conditions of the Lease and pursuant to applicable law.

Redemption. All interests in real property, whether an interest in a Leasehold Estate, an Allotment, or fee simple, sold as provided herein is subject to redemption by the Borrower or his or her successor in interest in the whole or any part of the foreclosed property.

(a) The Borrower or successor in interest may redeem the interest in real property, of whatever nature, from the purchaser of the foreclosed interest in property within six months after the sale by paying the purchaser for the amount of his purchase together with interest thereon at the rate of 8% per annum from the date of sale to the date of redemption, together with the amount of any assessments or additional costs which the purchaser may have paid thereon after the date of the purchase.

(b) Written notice of redemption must be given to the Tribal Police and copies filed with the [Name of Tribe] Realty Office and the BIA Regional Land, Titles, and Records Office.

(c) A Borrower or successor in interest desiring to redeem property must present to the person from whom he seeks to redeem or the Tribal Court:

(1) a certified copy of the judgment and order of sale under which he or she claims a right to redeem; and

(2) his own affidavit that he or she is the person entitled to redeem and showing the amount due to effect the redemption.

(d) Redemption payment must be made in U. S. currency or by certified or Cashier's check and be made to the purchaser of the foreclosed interest in property or for him to the Tribal Court.

SAMPLE

(e) If the Borrower redeems, the effect of the sale is terminated, and he is restored to his or her estate.

(f) Upon redemption by the Borrower, the person to whom the payment is made must execute and deliver to the Borrower sufficient copies of a Certificate of Redemption acknowledged and proved before an officer authorized to take acknowledgments of conveyances of real property. Copies of such certificates shall be filed with the [Name of Tribe] Realty Office and the BIA Regional Land, Titles, and Records Office.

(g) Until expiration of the time for the redemption, the Court may restrain the commission of waste or changing the character of the property, but it shall not be waste for the person entitled to possession of the property to continue to use it in the manner it had been previously used, or use it in the ordinary course of husbandry, or to make necessary repairs thereon, or to make a reasonable use of the wood and timber thereon for the benefit of the property or the possessor in his reasonable enjoyment of the property.

(h) The purchaser of a foreclosed interest in property, from the time of sale until redemption, is entitled to receive from the occupants, the rents of the property sold, or the value of the use and occupation thereof. However, when any rents or profits have been received by the purchaser, or his assigns from the property thus sold prior to redemption, the amount of such rents and profits shall be a credit on the redemption money to be paid. If the Borrower or other person entitled to redeem, prior to the expiration of the time for redemption, demands of the purchaser or his assigns a written and verified statement of the amount of such rents and profits received, and/or assessments of costs paid by the purchaser, the period of redemption is extended until five days after such sworn statement is received by the Borrower. If such purchaser or his assign fails or refuses for a period of one month to give such statement, the Borrower may, within 60 days of such demand, bring an action in the Tribal Court to compel an accounting and disclosure of such rents and profits, and until fifteen days after the final determination of such action, the right of redemption is extended to such Borrower.

(i) If no redemption is made within six months, the purchaser of the foreclosed interest in property or his or her assignee is entitled to a conveyance by means of an appropriate document of conveyance by [Name of Tribe] Realty Office at the expiration of such time. Copies of such documents shall be recorded with the [Name of Tribe] Realty Office and the BIA Regional Land, Titles, and Records Office.

11. Intervention. The Tribe or any Lessor may petition the Tribal Court to intervene in any Lease or Leasehold Mortgage Foreclosure Proceeding under this Ordinance. Neither the filing of a petition for intervention by the Tribe, nor the granting of such petition by the Tribal Court, shall operate as a waiver of the sovereign immunity of the Tribe, except as expressly authorized by the Tribe.

SAMPLE

SAMPLE

III. Eviction

1. No Self-Help Eviction. No person or entity may compel an occupant to vacate any premises by force or in a way that causes a breach of the peace. All persons or entities attempting to regain possession of any property shall give a notice to quit and obtain a court order as provided in this Ordinance.

2. Notice to Quit.

(a) If anyone claiming a right to possession desires to obtain possession of real property from another, he or she shall give notice to the occupant to quit possession of the property.

(b) The purpose of the notice to quit is to provide advance notice of a specific problem that needs to be addressed.

(c) The notice to quit shall be addressed to the adult occupant(s) of the real property and shall state the reasons(s) for termination of possession and the date by which the occupant is required to quit possession of the property. The notice to quit shall be in writing substantially in the following form:

I (or we) have a legal right to possession of the property now occupied by you at (here insert the address or other reasonable description of the location of the property), and hereby give you notice that you are to quit possession or occupancy on or before the (here insert the date) for the following reason (here insert the reason(s) for the notice to quit possession).

Signed, (here insert the signature, name and address of the party with a right to possession, as well as the date and place of signing).

(d) The notice must be delivered within the following periods of time:

(1) At least seven (7) calendar days prior to the date to quit specified in the notice for any failure to pay rent or other payments required by an agreement with the occupant.

(2) At least three (3) calendar days prior to the date to quit specified in the notice for Nuisance, serious injury to property, or injury to persons.

(3) If there is an emergency or condition making the dwelling unsafe or uninhabitable, or in situations involving an imminent or serious threat to public health or safety, the notice may be made in a period of time which is reasonable, given the situation.

SAMPLE

(4) At least fourteen (14) calendar days in all other situations.

4. Unlawful Detainer. A person may be charged with unlawful detainer if such person has received notice to quit and continues in occupancy of real property under any of the following situations:

- (a) after the expiration of the term of a Lease;
- (b) if such person has entered onto or remains on the real property of another without the permission of the owner and without having any substantial claim under a lease or title to such property;
- (c) after the Lessor has terminated a person's tenancy pursuant to court procedures providing a hearing;
- (d) after a Leasehold or Allotment Interest has been foreclosed in a Mortgage Foreclosure Proceeding and the Borrower, Lessee, sublessee, or other occupant of the property has received notice of such foreclosure and has remained in possession of the property for at least thirty (30) days contrary to the terms of the notice;
- (e) when a person has received notice (i) that he or she is in default under a Lease; and (ii) requiring him or her to cure such default or surrender possession of the occupied property, and such person has not done either within the period provided in such notice;
- (f) when a person continues to fail to keep or perform any condition or covenant of any lease or other use agreement under which the property is held after he or she has been given notice to comply with such condition or covenant or else to surrender the property;
- (g) when a person fails to comply with applicable tribal housing policies and/or regulations; or
- (h) when such person continues to commit or to permit Waste upon or maintain a Nuisance upon the occupied property after having been given notice to either cease such Waste or maintenance of Nuisance or to surrender the property.

5. Petition and Summons. Any person claiming a right to possess property held by another, including but not limited to a Lender or a Federal Agency, as appropriate, may commence an action in unlawful detainer in Tribal Court as follows:

- (a) by filing a verified petition for eviction:
 - (1) citing authority for jurisdiction of the Tribal Court;

SAMPLE

(2) naming as defendant(s) the occupant(s) of the property and, if the property is subject to a Mortgage, the Borrower and each record owner claiming through the Borrower subsequent to the recording of the Mortgage, including each Subordinate Lienholder;

(3) describing the property subject to the petition;

(4) stating the facts concerning the alleged unlawful possession of the property by the defendant and, if the property is subject to a Leasehold Interest and/or a Mortgage (i) the execution of any Lease and/or the Mortgage; (ii) the recording of the Mortgage; and (iii) the alleged default(s) of the Borrower(s); and (iv) any other facts necessary to support a cause of action;

(5) appending as exhibits true and correct copies, if any, of each occupancy agreement, promissory note, lease, loan agreement, security instrument, and/or Mortgage, and, if applicable, any assignment thereof relating to such mortgaged property;

(6) including an allegation that all relevant requirements and conditions prescribed in federal and tribal law, and in the occupancy agreement, promissory note, lease, loan agreement, security instrument, and/or Mortgage, and the assignment, if any, have been complied with by the petitioner;

(7) otherwise satisfying the requirements of the Tribal Court;

(b) by obtaining and serving upon each defendant a summons requiring him or her to appear for a hearing upon the complaint on a date and time specified in the summons, and filing a copy of such summons with the Tribal Court. The summons must be issued in accordance with established Tribal Court rules and procedures. The hearing date specified in the summons shall be at least six (6) but not more than thirty (30) days from the date of service of the summons and petition and must notify each defendant that judgment will be taken against him or her in accordance with the terms of the petition unless he or she appears for the hearing at the time, date, and place specified in the summons to provide evidence as to why he or she should not be evicted; and

(c) by delivering, faxing, or sending such complaint and summons to the Governor and Tribal Council by means capable of verification.

7. Service of Process and Procedures. The laws of the Tribe governing service of process and all other matters relating to the conduct of Tribal Court proceedings shall apply to any eviction proceeding.

8. Power of the Tribal Court. The Tribal Court shall enter an order of repossession if:

SAMPLE

- (a) Notice of suit is given in accordance with procedures provided herein; and
- (b) the Tribal Court finds at the hearing that the defendant has committed an act of unlawful detainer; or
- (c) the defendant(s) fails to appear pursuant to the summons.
- (d) Upon issuance of an order of repossession, the Tribal Court shall have the authority to enter a judgement against the defendant(s) for the following, as may be deemed appropriate:
 - (1) back rent, unpaid utilities, and any charges due the Tribe, tribal housing authority, or Sublessor under any sublease or other written agreement, except for a Leasehold Mortgage;
 - (2) if the property is subject to a Leasehold Mortgage, any and all amounts secured by a Leasehold Mortgage that are due the Lender or the appropriate Federal Agency;
 - (3) damages to the property caused by the defendant(s), other than ordinary wear and tear; and
 - (4) costs and reasonable attorney's fees.

9. Continuances. Except by agreement of all parties and in the sole discretion of the Tribal Court, no continuances are permitted in cases involving a Lender or a Federal Agency if such continuance will delay enforcement.

10. Enforcement. Upon issuance of an order of repossession by the Tribal Court, tribal law enforcement officers shall enforce the order by evicting the defendant(s) from the property that is unlawfully occupied, within fifteen (15) days after the order.

SAMPLE

IV. Limited Waiver of Immunity

The Tribe hereby authorizes a limited waiver of immunity from suit that the Tribe may enjoy with respect to any and all controversies or claims arising out of or related to the obligations of the Tribe under a Lease or any Mortgage documents or instruments to which the Tribe may be a party pursuant to a Mortgage assumption. In connection with such waiver, the Tribe hereby consents and attorns to the personal jurisdiction of Tribal Court with respect to any action to enforce any obligations owed by it to any other party or to enforce any of the other party's rights and/or remedies under such Lease(s) or Mortgage documents. THE AUTHORITY PROVIDED HEREIN IS NOT INTENDED TO NOR SHALL IT BE CONSTRUED TO WAIVE THE IMMUNITY OF THE TRIBE FOR ANY OTHER PURPOSE OR WITH RESPECT TO ANY CLAIM OR OTHER MATTER NOT SPECIFICALLY MENTIONED HEREIN, AND IS NOT INTENDED TO, NOR SHALL IT, EXTEND TO THE BENEFIT OF ANY PERSON OTHER THAN THE PARTIES TO SUCH AGREEMENTS OR THEIR SUCCESSORS OR ASSIGNS.

POSSIBLE SUBJECTS TO INCLUDE IN A Land (Property) and Natural Resources Code

- I. Tribal Administration; Enforcement
 - A. Jurisdiction; Sovereignty
 - B. Definitions
 - C. Organization
 - D. Land Use Plan
 - 1. Organization
 - 2. Planning and Development; Hearings
 - 3. Studies; Reports
 - E. Recordation; Titles; Liens
 - F. Enforcement
- II. Land Use
 - A. Trust and Restricted Lands
 - B. Leasing and Subleasing; Assignments
 - C. Easements; Access; Rights-of-Way
 - D. Roads; Highways
 - E. Utilities: telecommunications, electrical, gas
 - 1. Distribution Lines
 - 2. Service Lines
 - F. Railroads
 - G. Agricultural and Grazing Permits; Forestry; Range Lands
 - H. Individual Holdings and Allotments
 - I. Timber Resources
 - J. Non-Trust, Non-Restricted Lands
 - K. Condemnation; Eminent Domain
 - L. Life Estates; Future Interests
 - M. Customary and Religious Uses
 - N. Non-member Uses
 - O. Land-into-Trust
 - P. Leasehold Mortgages
 - Q. Probate; Devise and Descent
 - R. Archaeological Resources
 - S. Applicable Federal Laws and Regulations
- III. Water Use
 - A. Irrigation; Agricultural Uses
 - B. In-Stream Uses
 - C. Rights: Priority and Quantity
 - D. Water Quality
 - E. Water System
 - F. Wastewater
- IV. Energy and Mineral Use
 - A. Mining
 - 1. Allotted

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- 2. Surface Mining
 - B. Oil and Gas; Other Minerals
- V. Fish and Wildlife
 - A. Management
 - B. Fish
 - C. Hunting
 - D. Endangered and Protected Species
 - E. Religious and Customary Uses
- VI. Housing
 - A. Contractor Licensing
 - B. Building Code
 - C. HUD-Assisted and BIA Programs
 - D. Mortgage
 - E. Foreclosure
 - F. Landlord and Tenant
 - G. Manufactured and Modular Housing
 - H. Mobile Homes; Repossession
 - I. Enrollment
 - J. Applicable Federal Laws and Regulations
- VII. Economic and Land Development
 - A. Zoning
 - B. Commercial; Retail
 - C. Industrial
 - D. Banking
 - E. Small Business; Microenterprise
 - F. Indian Trader's License
 - G. Secured Transactions; UCC
- VIII. Environmental Uses and Considerations
 - A. Environmental Impact Statements; Environmental Assessments
 - B. Flood Lands; Wetlands
 - C. Solid Waste; Landfills
 - D. Hazardous Waste
 - E. Liability
 - F. Applicable Federal Laws and Regulations
- IX. Taxation
 - A. Organization
 - B. [Types of Taxes]
 - C. Enforcement
- X. Corporations and Partnerships
 - A. Corporations
 - B. Partnerships; Joint Ventures
- XI. Transportation
 - A. Commercial
 - B. Private
 - C. Tribal

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XII. Miscellaneous

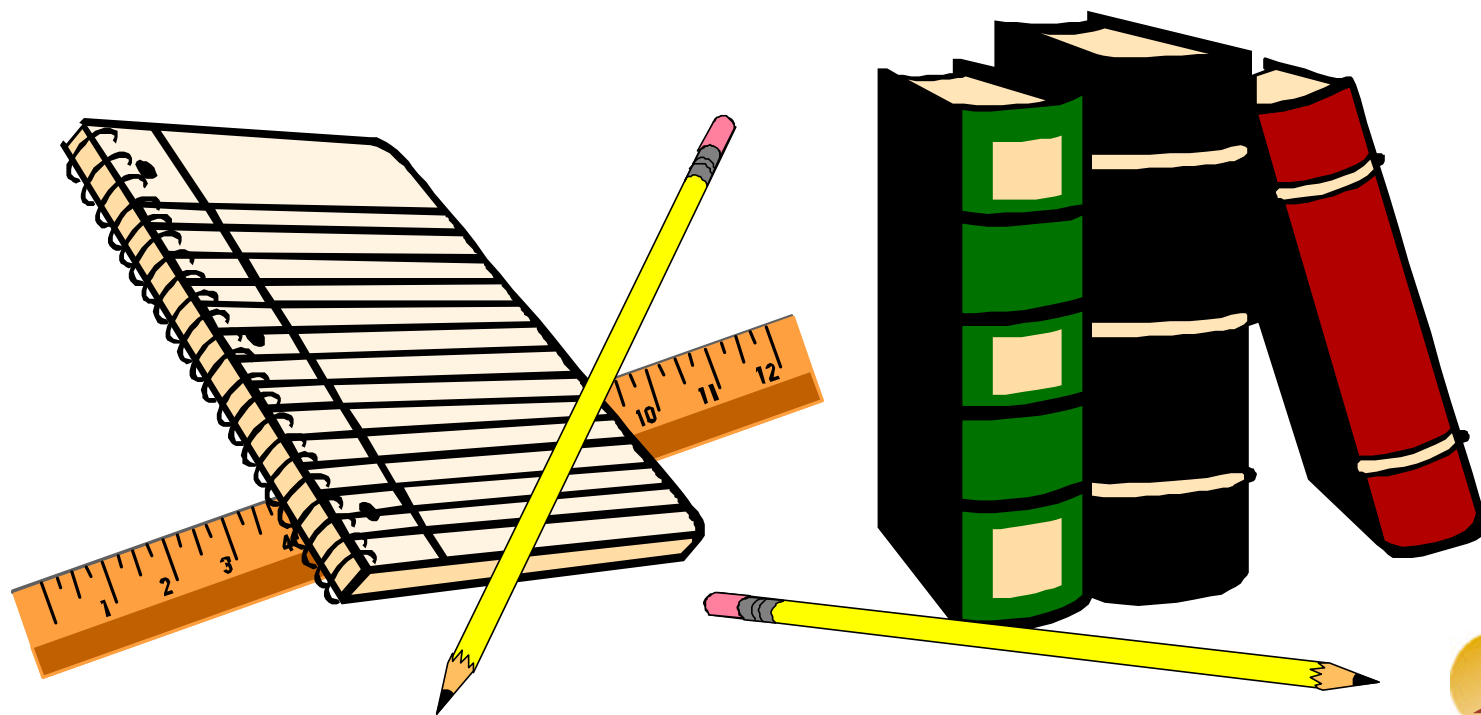
- A. Trespass; Destruction**
- B. Religious Sites**
- C. Withdrawn Areas; Preservation**
- D. Public Nuisance**
- E. Cultural Resources**
- F. Miscellaneous Applicable Federal Laws and Regulations (e.g., FEMA)**

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THE ABCs OF CRA

July 12, 2001



Working Together to Build Programs and Opportunities

Slide 1



Principles of CRA

- CRA is geographically based
- CRA has no fixed formulas
- Large banks are assessed on record of:
 - lending,
 - offering services, and
 - making community development investments



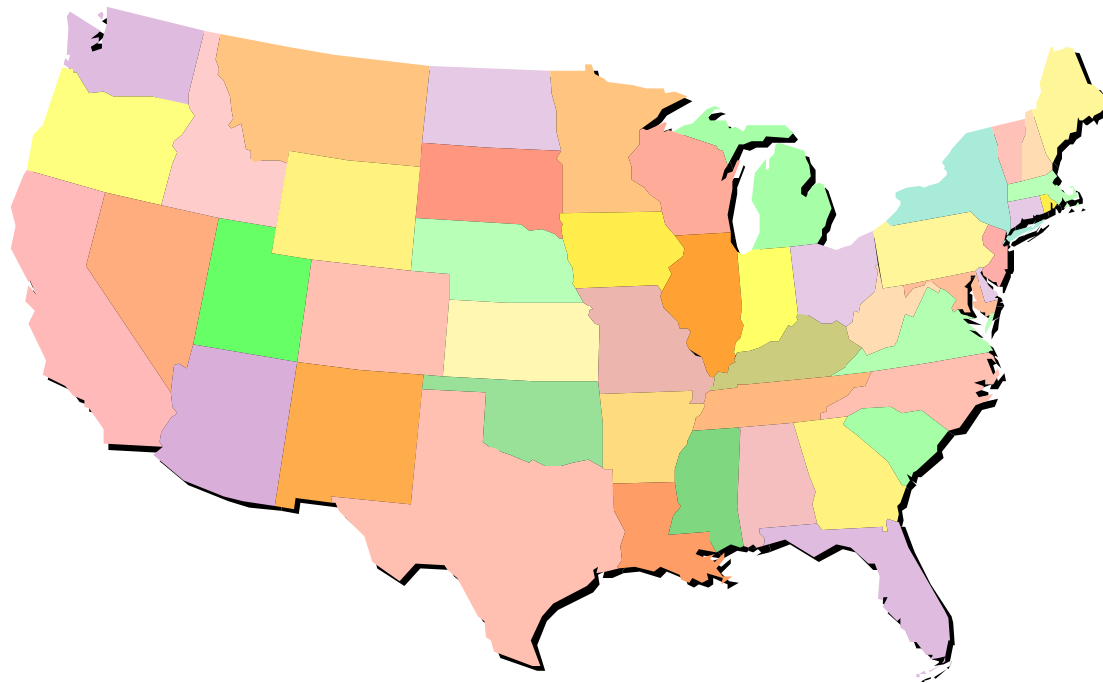
Principles of CRA

- Small banks are assessed on record of lending
- Community development activities under CRA target L/M people and geographies
- Violation of fair lending laws and regulations “adversely affects” CRA ratings



Assessment Area

- Principle of CRA:
 - CRA is geographically based



Assessment Area

- Area in which regulator evaluates FI's record of helping to meet credit needs of its community



AA Technical Requirements

- One or more political subdivisions
- Main offices, branches and deposit taking ATMs
- Surrounding geographies containing substantial portion of loans



AA Technical Requirements

- May not reflect illegal discrimination
- May not arbitrarily exclude LMI areas



Performance Context

Principle of CRA:
CRA has no fixed formulas



What is Performance Context?

- Perspective and context for the FI's performance
- Performed by examiners



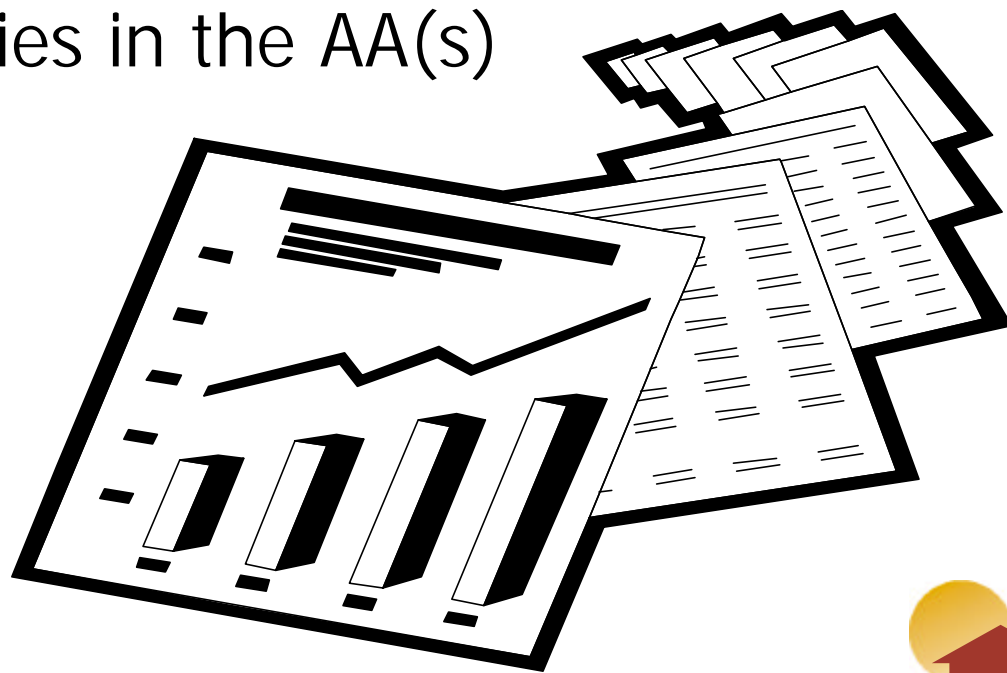
Performance Context - Questions to Answer

- What opportunities does the FI have to lend and invest in various parts of its AA?
- What products and services are needed/wanted?
- What products and services does the FI offer?
- Is the FI in a position to lend and invest?
- How has the FI performed in the past?
- How does the FI compare to other FIs?



Types of Information Considered

- Economic and demographic characteristics of AA(s)
- Lending, service, and investment needs and opportunities in the AA(s)
- FI's Public File



FI's CRA Public File

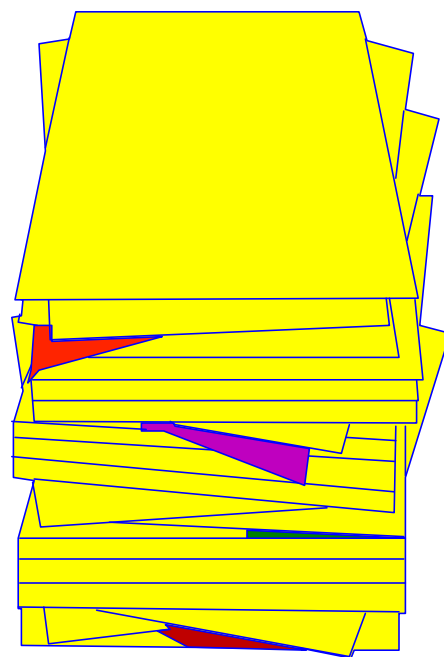
- Written comments
- CRA public evaluation
- Branch information
- Map of assessment area(s)
- HMDA disclosure statements (if applic.)
- Small Bank
 - Loan-to-deposit ratios
- Large Bank
 - Consumer loan information (if applicable)
 - CRA disclosure statement



Data Collection and Reporting

- CRA data and HMDA data
 - FIs send to Board of Governors on diskette
 - data released in July each year
- Aggregate data and individual FI data used by:
 - community organizations
 - research institutions
 - government
 - policymakers
- Available at:

www.ffiec.gov/cra/default.htm



Large Bank CRA

Principle of CRA:

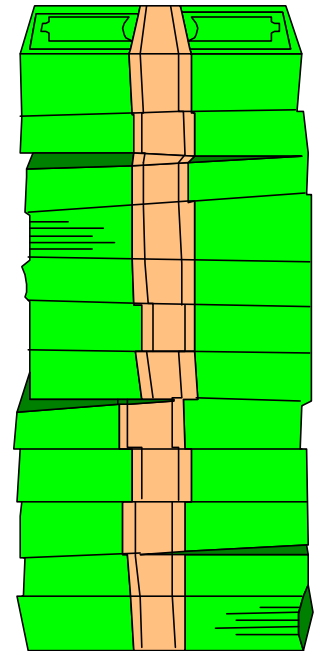
Large banks are assessed on
record of:

lending,
offering services, and
making community
development investments



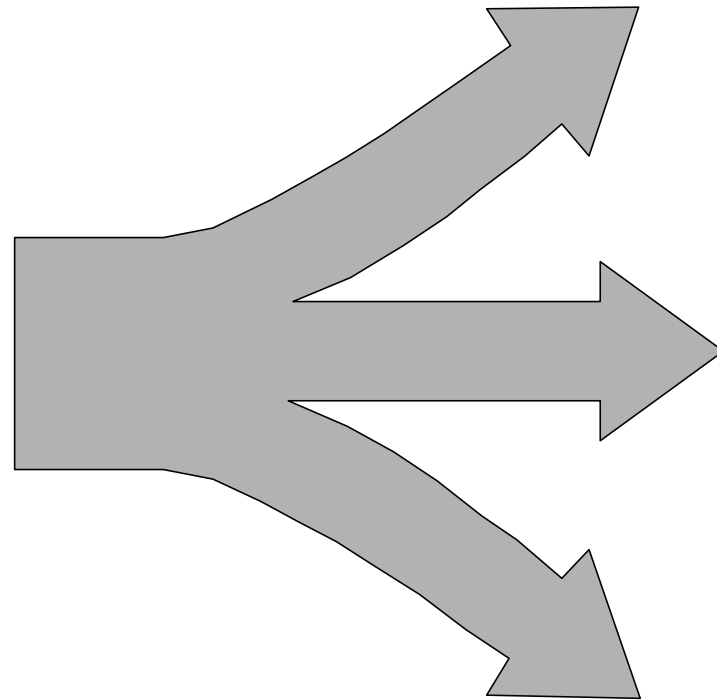
Large Bank Definition

- Total assets greater than or equal to \$250 million or
- Total assets less than \$250 million AND affiliated with a holding company with assets greater than or equal to \$1 billion.



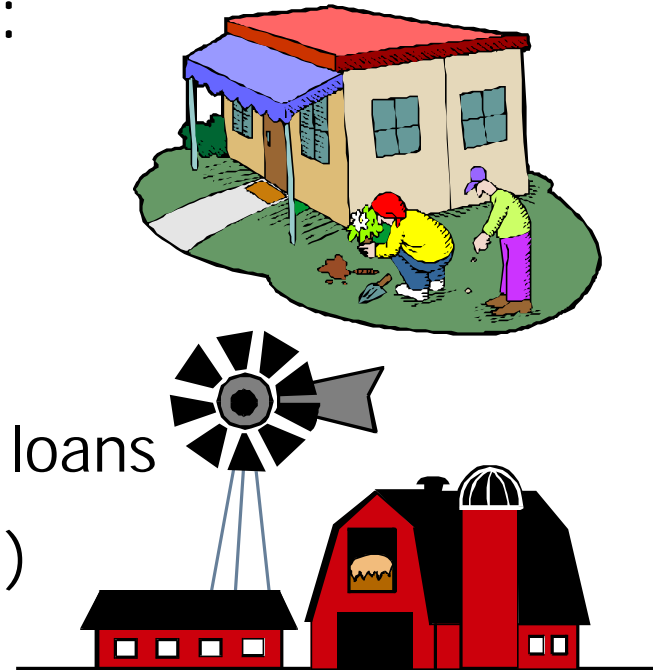
Three Tests

- Lending Test
- Investment Text
- Service Test



Lending Test

- Record of helping to meet credit needs of AA(s) through lending activities
- Types of loans assessed:
 - Small business loans
 - Small farm loans
 - Home mortgage loans
 - Community development loans
 - Consumer loans (optional)



Lending Test - Central Questions

- Is lending concentrated in the assessment area?
- Is lending distributed to census tracts or BNAs of varying income levels?
- Is lending distributed to borrowers of varying income levels?
- Does FI use innovative and flexible lending practices?
- Does FI engage in community development lending as defined by CRA?



Investment Test

- Record of helping to meet credit needs of AA(s) through qualified investments



Service Test

- Record of helping to meet credit needs of AA(s) by offering retail and CD services
- Types of services assessed:
 - Retail banking services
 - Community development financial services



Retail Service Test - Central Questions

- How available and effective is FI's system for delivering retail services?
 - Are branch offices distributed in census tracts or BNAs of varying income levels?
 - What types of services does the FI offer in each branch?
 - What is the FI's record of opening and closing branches?
 - What alternative delivery systems does the bank offer?



Large Bank Ratings

	Lending	Service	Investment
Outstanding	12	6	6
High Satisfactory	9	4	4
Low Satisfactory	6	3	3
Needs to Improve	3	1	1
Substantial Noncompliance	0	0	0



Large Bank Ratings

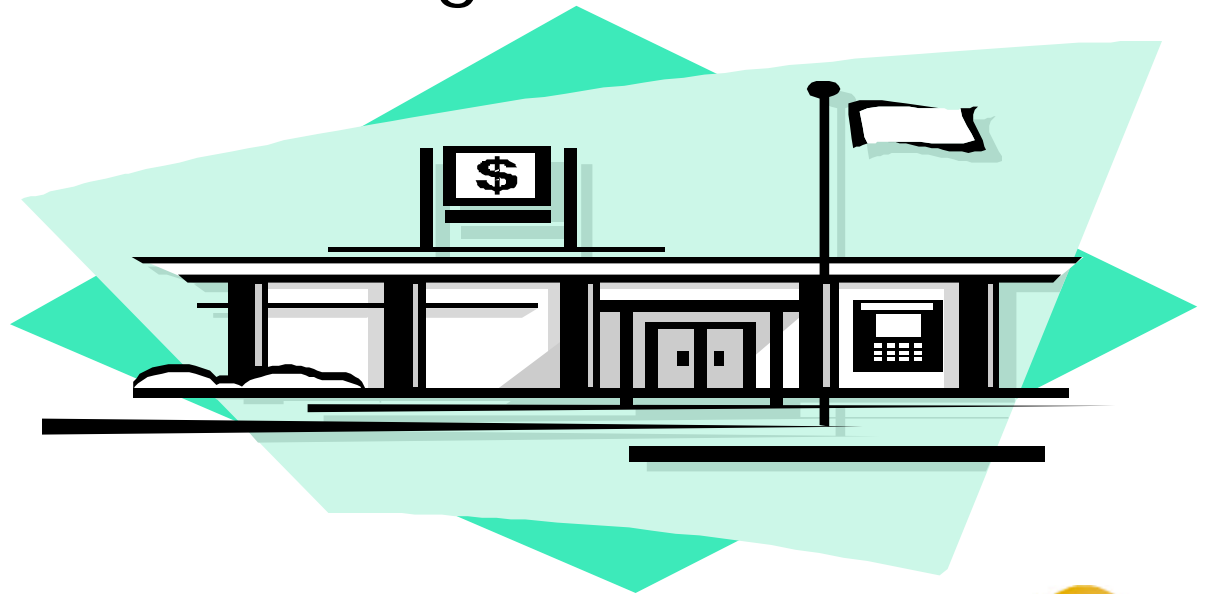
	Needed for Rating
Outstanding	20+
Satisfactory	11-19
Needs to Improve	5-10
Substantial Noncompliance	0-4



Small Bank CRA

Principle of CRA:

Small banks are assessed
on record of lending



Small Bank Definition

- Total assets less than \$250 million

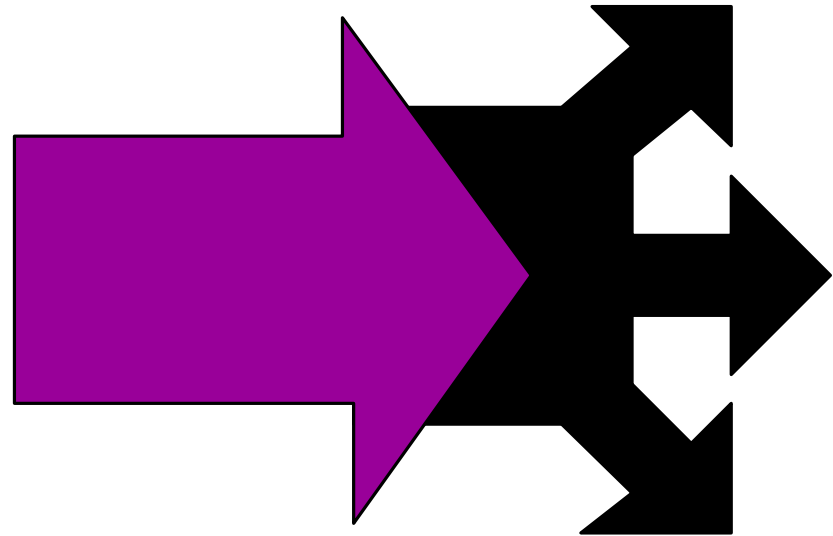
AND

- Independent or affiliate of holding company under \$1 billion in assets



Small Bank Test

- Streamlined procedures
 - Performance criteria
 - Lending test
- Examiners perform analysis



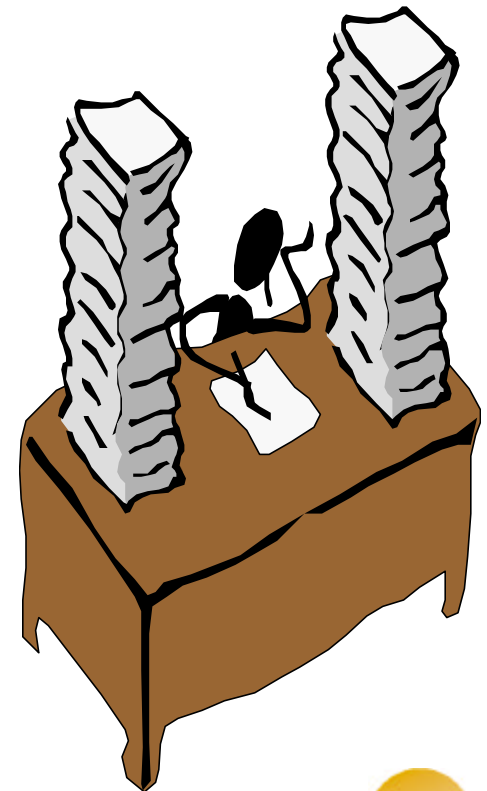
Five Questions for Small Banks

- Is the FI
 - making loans?
 - making loans in its assessment area?
 - making loans to low-/moderate-income residents?
 - making loans in low-/moderate-income areas?
 - responding to complaints?



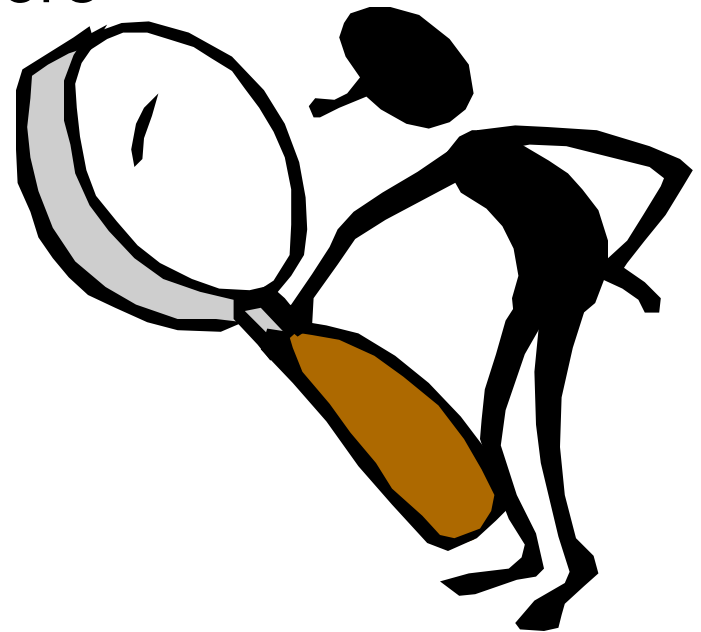
Answers to Questions

- Loan-to-deposit ratio
- Percentage of loans in assessment area
- Borrower profiles
- Geographic distribution of loans
- Response to written complaints



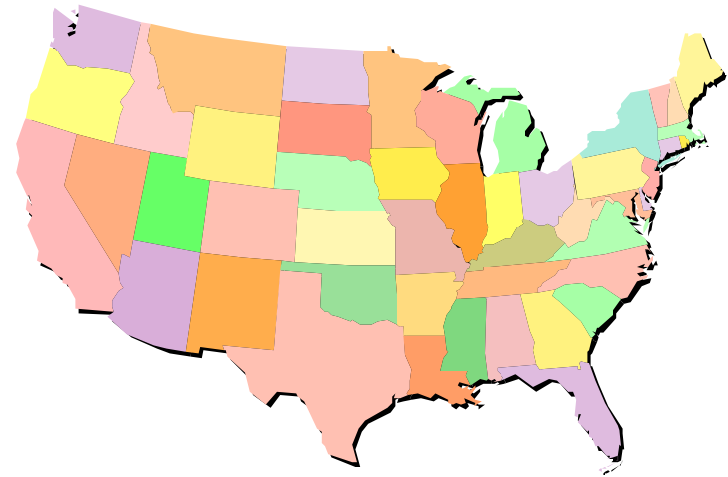
Borrower Profiles

- Size of businesses or farms
- Income level of borrowers



Geographic Distribution of Loans

- Lending in low-, moderate-, middle-, and upper-income geographies in assessment area
- Small institutions not expected to lend in every census tract or BNA



Small Bank Ratings

- Assume Small Banks content with satisfactory rating
- To get outstanding
 - FI asks to have services and investments considered or
 - FI has exceptional geographic distribution and borrower profiles



Community Development Activities Under CRA



Principle of CRA:

Community development activities under CRA target L/M people and geographies

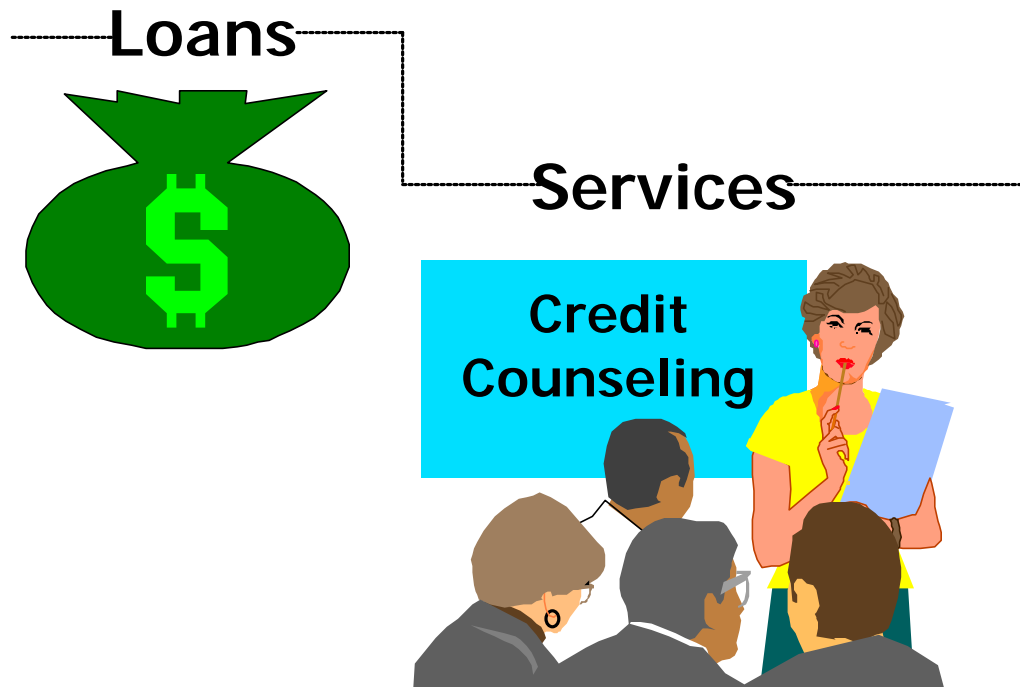


Community Development Activities

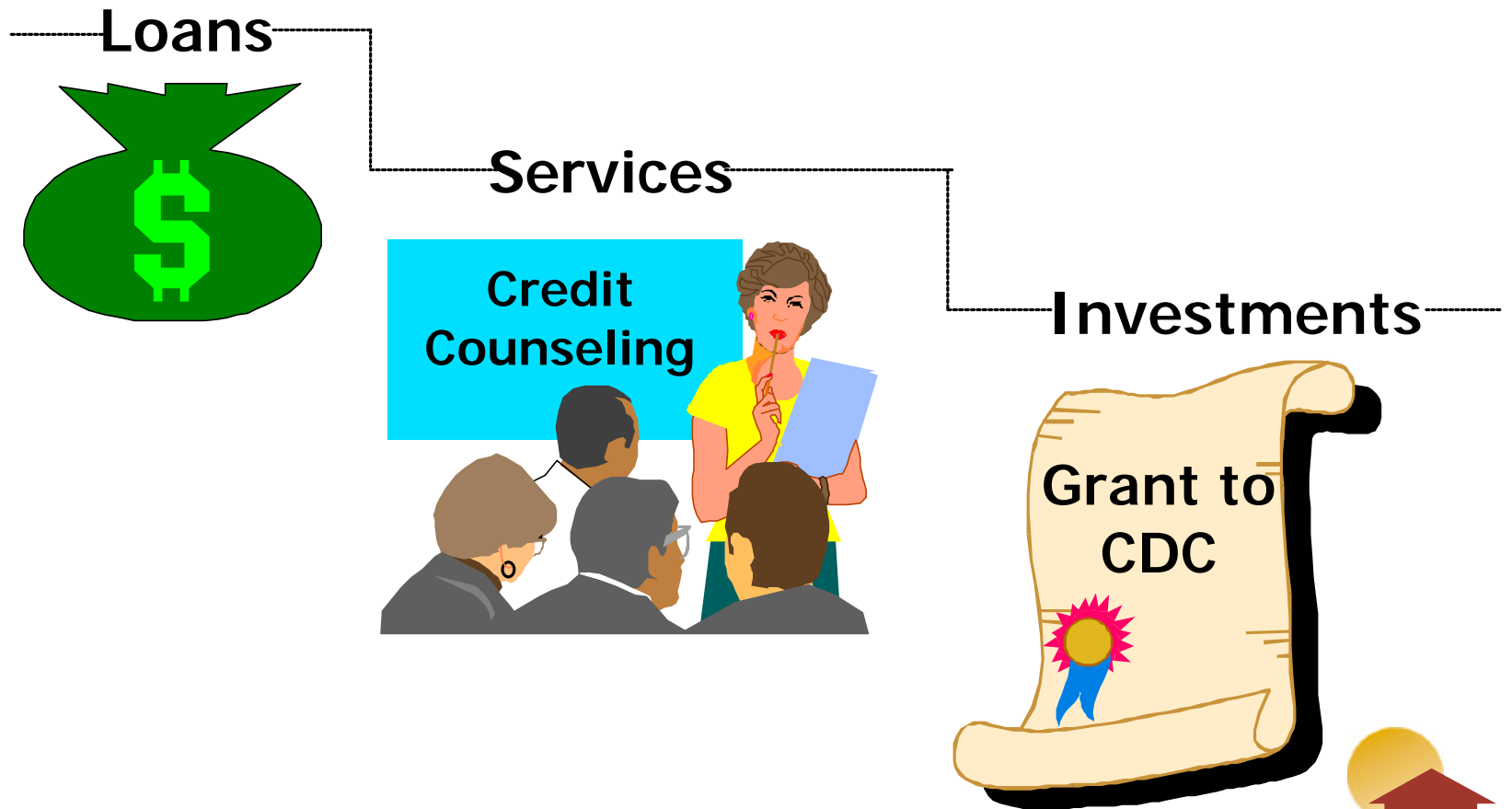
-----Loans-----



Community Development Activities



Community Development Activities



Working Together to Build Programs and Opportunities

Slide 35



Definition of Income Levels



Low - Less than 50% of median income



Moderate - 50% to less than 80% of median income



Middle - 80% to less than 120% of median income



Upper - 120% of median income or greater

Four Types of CD Activities



- Affordable housing for L/M individuals*
Low and moderate as defined by regulation.



Four Types of CD Activities



- Services targeted to L/M individuals



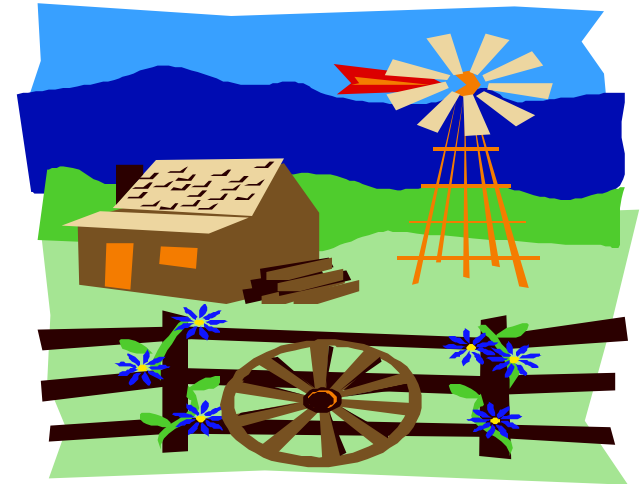
Four Types of CD Activities



- Activities that promote economic development by financing small businesses or small farms



Small business/farm activities must:



- Benefit L/M individuals or geographies and
- Meet size eligibility standards:
 - SBA incubator programs (SBIC or SBDC) or
 - Gross annual revenues of \$1 million or less



Four Types of CD Activities



**Activities that revitalize or stabilize
L/M geographies**

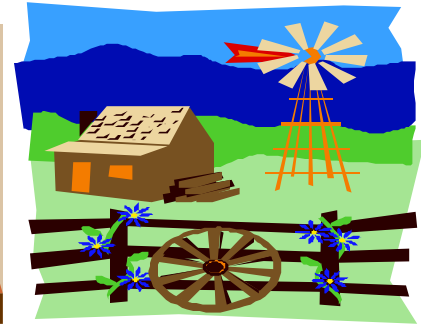
Must have direct and long-term benefits



Four Types of CD Activities



Affordable Housing



**Econ. development by
financing small bus/farms**



**Services targeted to
L/M individuals**



**Activities to revitalize or
stabilize L/M geographies**



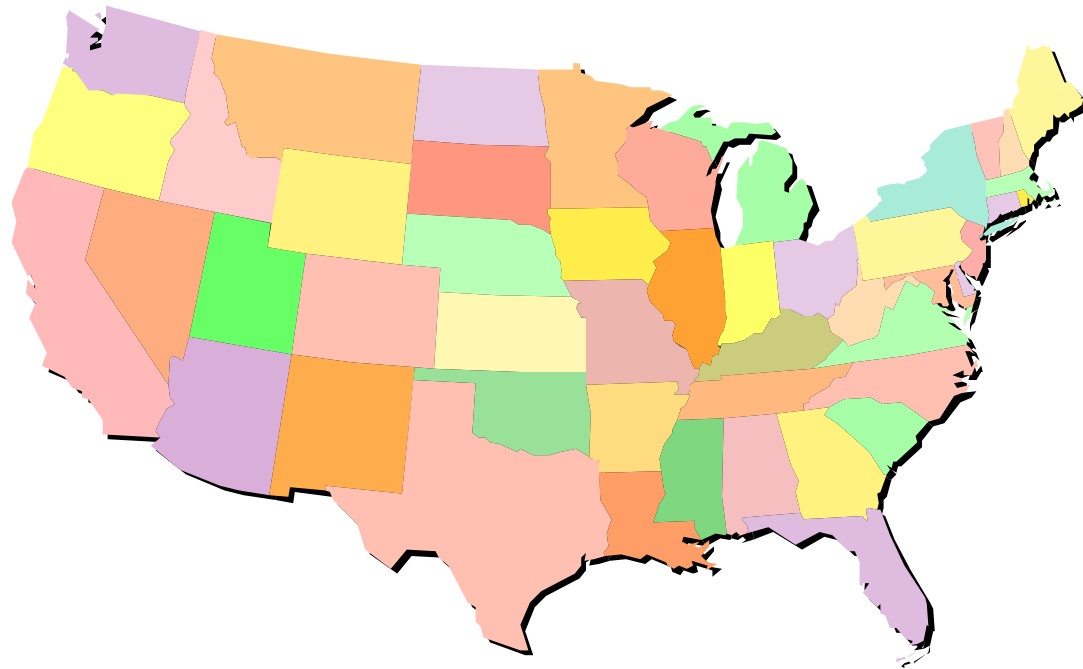
Other Conditions

- Must have CD as primary purpose



Other Conditions

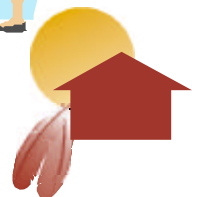
- Must have CD as primary purpose
- Must benefit AA or larger area



Evaluation of Community Development Under CRA

Examiner consideration of loans, services, and investments based on:

- Complexity
- Innovation
- Responsiveness



CRA and Fair Lending

Principle of CRA:

Violation of fair lending laws and regulations “adversely affects” CRA ratings



Principles of CRA

- CRA is geographically based
- CRA has no fixed formulas
- Large banks are assessed on record of:
 - lending,
 - offering services, and
 - making community development investments



Principles of CRA

- Small banks are assessed on record of lending
- Community development activities under CRA target L/M people and geographies
- Violation of fair lending laws and regulations “adversely affects” CRA ratings



CRA Regulation--Reg. BB

- Information about CRA available at:
 - www.ffiec.gov/cra/default.htm
 - Regulation
 - Official Q & A's
 - Examination schedules
 - CRA data
 - link to HMDA data
- Regulators will be re-evaluating in 2002





Lending in the 21st Century

Predatory Lending

Sharon Wise

Executive Director

Native American Housing Services, Inc.

Working Together to Build Programs and Opportunities

Slide 1



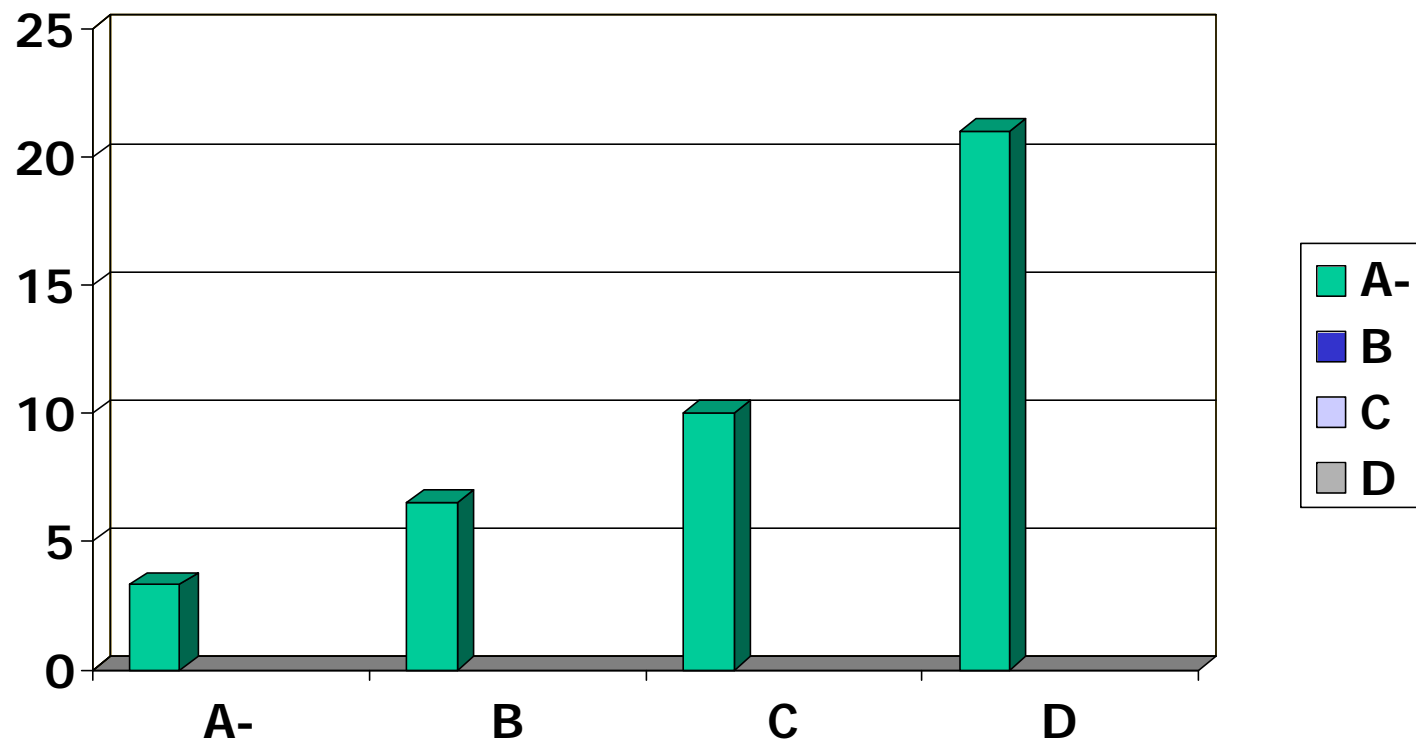
Predatory Lenders: What makes a Lender “Predatory”

- The benefit of the subprime market is that it has widened access to credit for many who previously could not qualify for it. However, according to recent reports, certain subprime lenders have taken advantage of some borrowers, inducing them to agree to mortgages with onerous terms that the borrowers cannot realistically meet. When the borrowers do default, they lose the equity in their homes to the lenders. Moreover, the abusive practices appear to be targeted at the elderly and residents of minority and low-income communities.



Serious Delinquency Rate for Subprime Borrowers

Third Quarter 1999 - 90 Days Late



- Defining the practices that make a loan predatory, however, is a problematic task. Any list of predatory practices, sometimes to evade government regulation. Furthermore, a list does not consider the context in which the alleged abuse has occurred. Some practices may be considered abusive in the context of high-cost subprime loans: other practices may be deemed unacceptable in all contexts; and others - while not necessarily abusive for all high cost borrowers - are abusive in the borrower's situation or because the borrower was misled or deceived.



Four Specific Practices Characteristic of Predatory Lending

- Loan Flipping
- Excessive Fees
- Lending Without Regard to Repayment Ability
- Outright Fraud and Abuse



Loan Flipping

- Refinancing borrowers' loans repeatedly in a short period of time, charging higher fees each time and consequently doing away with borrowers' equity in their homes. Loan flipping is often accomplished through large balloon payments required over short periods of time.



Excessive Fees

- Charging fees that far exceeded what is justified on economic grounds, and fees “packed” into the loan amount without the borrower’s understanding. This includes large up-front charges and prepayment penalties, which are not related to the risks posed by the borrowers.



Lending Without Regard to Repayment Ability

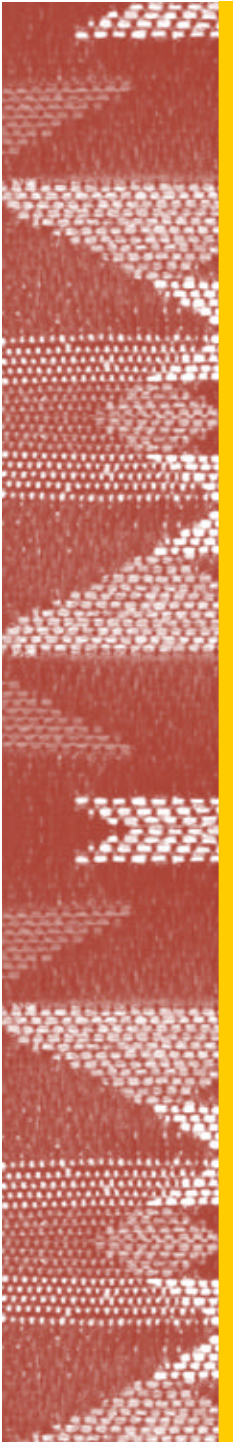
- The extension of unaffordable loans based on the assets, and not the income, of the borrower, a practice that frequently leads to default and foreclosure.



Outright Fraud and Abuse

- Outright fraud or deception designed to conceal the true, onerous nature of the loan contract, typically from unsuspecting or unsophisticated borrowers.





In short, predatory loans are those that would not have been made in more competitive markets and where borrowers are more fully informed about the credit alternatives available to them. Put differently, borrowers are more likely to be victims of one or more of the practices just listed in geographic areas where there may be relatively few lenders and where the borrowers themselves are not financially sophisticated and thus relatively easy prey for unscrupulous lenders.



Predatory Lending Targets in Indian Country

- Increased numbers of American Indian People purchasing their Mutual Help Homes
- Paid off homes being refinanced
- Limited choices of Lenders in Rural Areas
- Credit not adequate for A Loans
- Inadequate Appraisals
- In ability to finance repairs or improvements on Mutual Help Homes



Developing Defenses

- Implementing counseling when a request for payoff is received
- Develop mortgage loan initiatives with local banks, lenders, and government agencies
- Develop refinance loan programs with local banks, lenders, and government agencies
- Develop revolving loan programs within the housing authority or the TDHE



Developing Defenses

continued

- Loan Counseling Programs!
 - The first line of defense is education. Set up workshops with your occupants of Mutual Help Homes. Create brochures, pamphlets, and flyers and have them posted in your daycare centers, health services, and senior centers. Develop loan education programs in your schools and boys and girls clubs.



Agencies for Enforcement

- The Federal Trade Commission has enforcement authority under :
 - The Federal Trade Commission Act
 - The Truth in Lending Act
 - The Home Ownership and Equity Protection Act
 - The Equal Credit Opportunity Act



Examples of Pending Rules

- Require that lenders verify the borrower's ability to repay the loan based on the borrower's income and debt obligations
- Prohibit deceptive refinancing known as loan flipping, where lenders refinance existing loans, charging additional points and fees, without any financial benefit to the consumer
- Prohibit the financing of single premium credit insurance--optional insurance products that are often rolled into



Rules Continued

- Loans unbeknownst to the borrower, significantly increasing the cost to consumers
- Forbid “negative amortization” loans - in which the terms of the loan cause the outstanding balance to actually increase over the course of the loan because the regular payments do not even cover the full amount of the interest due



Rules Continued

- Strictly limits “negative equity” loans to the value of the property securing the loan, plus reasonable closing costs that cannot exceed 5% of the total loan amount
- Prohibit the financing of points and fees in excess of 6% of the total loan
- Limit the size and interval of balloon payments, and limit prepayment penalties that can be charged to consumers
- Limit direct payments by lenders to home improvement contractors



Rules Continued

- Require lenders to notify borrowers of the availability of consumer credit counseling if a loan becomes delinquent by more than 30 days
- Require lenders to inform borrowers of the right to participate in homebuyer education workshops
- Upon approval of loan applications, requires lenders to notify borrowers of the opportunity to seek independent third party review of the loan to determine the affordability of the loan



- The Oklahoma Predatory Lending Task Force defines Predatory Lending in one Sentence:
- “Deceptive, aggressive or fraudulent practices that result in high risk loans with excessive costs to targeted groups resulting in financial hardship and/or loss to consumers.”





**“I was robbed, and they
never pulled a gun...”**

Comment from a victim of a Predatory Lender.



Community Dividend

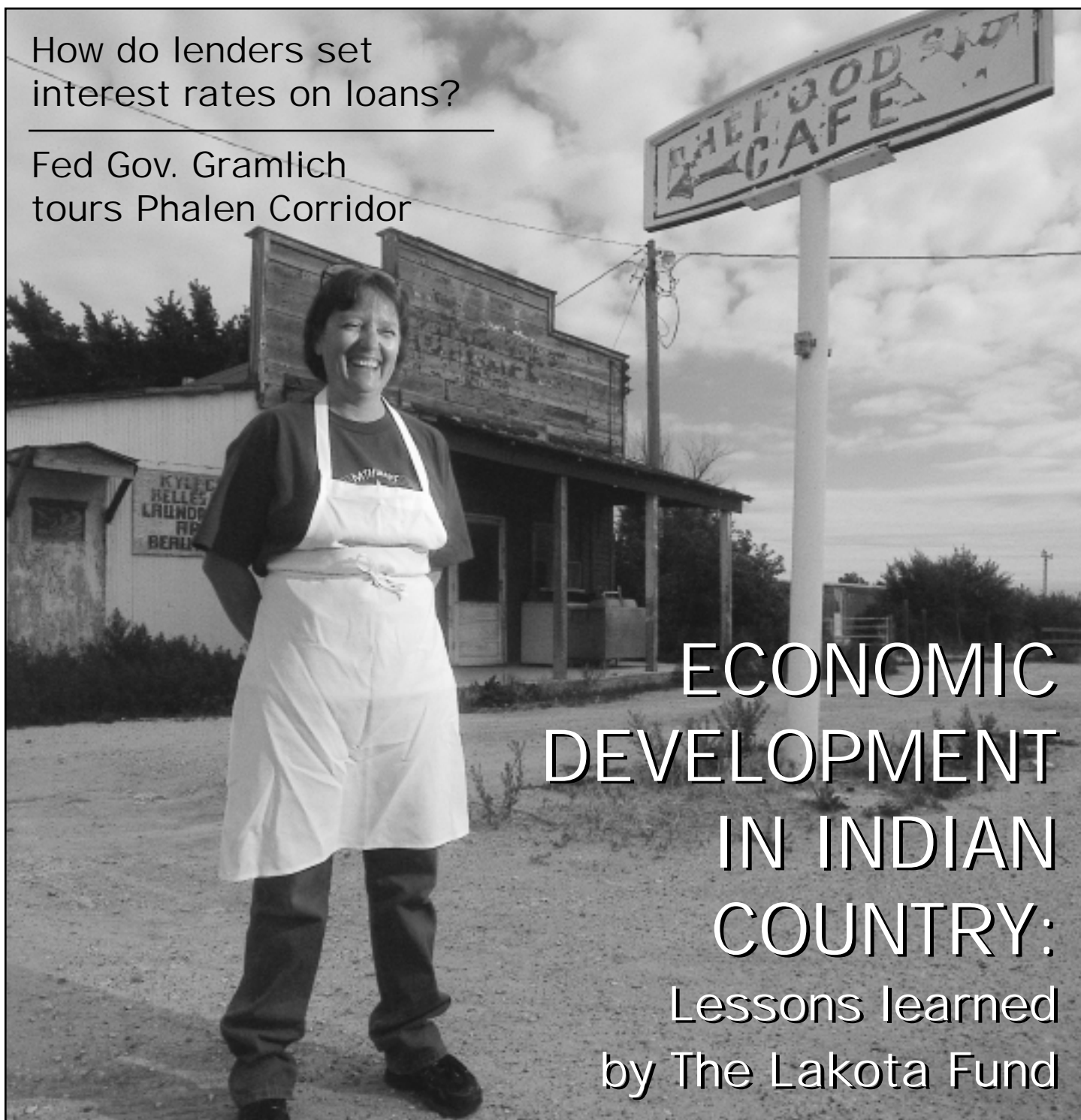
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Issue N° 2 • 2000

Economic
Development
in Indian
Country

How do lenders set
interest rates on loans?

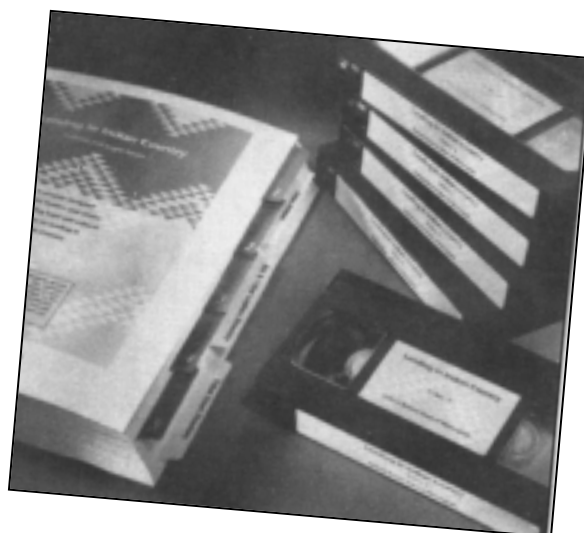
Fed Gov. Gramlich
tours Phalen Corridor



ECONOMIC DEVELOPMENT IN INDIAN COUNTRY:

Lessons learned
by The Lakota Fund

Lending in Indian Country: Cultural and Legal Issues



This five-part video series, produced by the Federal Reserve Bank of Minneapolis, is a live seminar recorded on video. The videos explore cultural differences, land and title issues, tribal powers, sovereign immunity, tribal courts, collateral, remedies and other issues of

interest to those seeking to do business in Indian Country. The package is available for \$135 and payment must accompany the order.

For more information, please contact Community Affairs at (800) 553-9656, ext. 5074.

Contents

- Video 1* Explores Indian culture, history and perceptions.
- Video 2* Looks at Indian Country land and title issues.
- Video 3* Discusses civil regulatory authority on Indian reservations.
- Video 4* Examines collateral and secondary sources of repayment.
- Video 5* Reviews the various remedies that financial institutions have at their disposal when lending in Indian Country.

Who can benefit from this program? Financial institutions located on or near Indian reservations, mortgage lenders, government agencies, attorneys and banking regulators.

Order Form

Please send me *Lending in Indian Country: Cultural and Legal Issues*. Enclosed is a check for \$135 (cost includes shipping and handling) plus sales tax (if in Minnesota). For orders shipped to Minneapolis, please add \$9.46 sales tax. To other Minnesota locations, please add \$8.78. Make checks payable to the Federal Reserve Bank of Minneapolis.

Name _____

Title _____

Organization _____

Address _____

City _____

Phone () _____ Fax () _____

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Federal Reserve Bank of Minneapolis, BSD, Community Affairs,
P.O. Box 291, Minneapolis, MN 55480-0291.

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Issue N° 2, 2000

Photo by Johnny Sundby/Dakota Skies Photography



Photo by Johnny Sundby/Dakota Skies Photography

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COVER PHOTO: On Main Street in Kyle, S.D., Carol Vocu stands outside her restaurant, The Food Stop Café. Established in 1991, Vocu's business has grown with help from The Lakota Fund, which provided technical assistance and loans ranging from \$1,000 to \$14,000.

Community Affairs Officer's note

Lending in Native American communities

Economic development activities take place in communities of every size and description, from the largest cities to the smallest rural towns. No matter where development takes place or what population it affects, it depends on funding for its support. In many cases, lending is the primary vehicle for delivery of development funds.

In this issue of *Community Dividend*, we focus on aspects of lending, with a special emphasis on lending in Native American communities. As in other communities, reservation-based business owners often face barriers to obtaining start-up or expansion financing. To counter this problem, some Indian Country communities have established community development loan funds.

The Lakota Fund, the focus of our cover story, is a perfect example. Established 14 years ago in response to depressed economic conditions on the Pine Ridge Indian Reservation, the Lakota Fund is now an instrumental part of the community's development infrastructure. Our article discusses lessons learned from the fund's lending activities and the accompanying photos depict some of the fund's success stories.

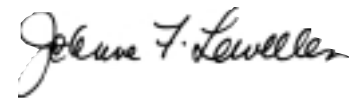
The discussion continues in "A Conversation With...", featuring Lakota Fund Executive Director Elsie Meeks. In our interview, Meeks explains the challenges faced by small businesses in Indian Country and offers advice to help

lending institutions become involved with Indian Country loan funds.

Expanding on the theme of Indian Country lending, a feature in this issue revisits 1999's "Walking the Native Path: Seeking Solutions Through Economic Development and Housing Opportunities" conference, co-sponsored by Community Affairs. The article discusses the feedback received from attendees and reports on development activities that grew from the information provided in conference sessions.

A special feature in this issue explores lending from the consumer's point of view. The article explains how loan-pricing models are used to determine interest rates for commercial lending. An awareness of these models can help consumers understand how their credit histories affect the lending process.

Finally, we round out the issue with features on two special happenings in Community Affairs. First, we report on a July tour of St. Paul's developing Phalen Corridor area, arranged for Federal Reserve System Governor Edward Gramlich. Second, we announce the unveiling of our redesigned Community Affairs web page. We hope the information presented on our web page and in this *Community Dividend* will enhance your understanding of community development.



JoAnne F. Lewellen
Federal Reserve Bank
of Minneapolis



Community Dividend is published by the Federal Reserve Bank of Minneapolis, 90 Hennepin Ave., P.O. Box 291, Minneapolis, MN 55480-0291; (612) 204-5000. It covers topics relating to community development, reinvestment and neighborhood lending. It reaches financial institutions, community-based and development organizations and government units throughout the Ninth Federal Reserve District.

Community Affairs Officer
JoAnne Lewellen
(612) 204-5064
joanne.lewellen@mpls.frb.org

Community Affairs Manager
Margaret Tyndall
(612) 204-5063
margaret.tyndall@mpls.frb.org

Community Affairs Staff
Nikki Foster
nikki.foster@mpls.frb.org

Leslie Krueger
leslie.krueger@mpls.frb.org

Thomas Moore
thomas.moore@mpls.frb.org

Paula Woessner
paula.woessner@mpls.frb.org

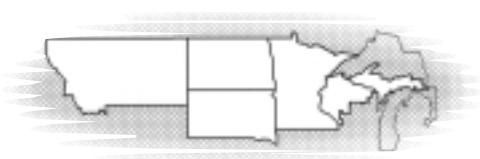
Editor: Paula Woessner
Design/Production:
Straight River Media

For address changes or additions,
call (612) 204-5074 or e-mail
Mpls.CommunityAffairs@mpls.frb.org

We welcome your questions and concerns. Please contact any of the Community Affairs staff members listed above.

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news and notes

To submit news and notes *from your community or organization*, contact Paula Woessner at (612) 204-5179 or paula.woessner@mpls.frb.org.

Indian business group receives \$1 million grant

The U.S. Department of Commerce awarded a \$1 million Economic Development Administration (EDA) grant to the American Indian Business Development Corporation (AIBDC) for the revitalization of Minneapolis's economically distressed Phillips neighborhood.

The grant will be used to construct a multipurpose business incubator facility and make neighborhood lighting and landscaping improvements, according to Cong. Martin Olav Sabo (D-MN), who is an AIBDC sup-

porter. The AIBDC works to improve economic conditions and stimulate business development in Phillips, which suffers from high unemployment and extremely low per capita income.

The grant was awarded through the EDA's Public Works and Development Facilities Grant Program, which encourages new industry, business expansion, economic diversification and job creation in communities threatened by low per capita income and high unemployment.

FIVE MINNESOTA COMMUNITIES RECEIVE HOUSING GRANTS

Five Minnesota communities will receive grants totaling \$3,489,550 through the Minnesota Department of Trade and Economic

HONORS FOR HOUSING INITIATIVE

The Federal Home Loan Bank of Des Moines (FHLB) announced it has given a Community Partnership Award to Norwest Bank South Dakota, N.A. (Norwest) for its work in addressing the affordable housing shortage on Native American reservations in South Dakota.

Using nearly \$1.8 million in grants from FHLB's Affordable Housing Program, Norwest partnered with local organizations on constructing and renovating nearly 200 affordable homes on the Pine Ridge Indian Reservation, the Rosebud Indian Reservation and other reservations in the state.

Development's Small Cities Development Program.

According to Southwest Minnesota Housing Partnership's *Home Works* newsletter, the funds will be used for housing construction and rehabilitation. Recipients and grant amounts are: City of Marshall, \$1,395,900; City of Mountain Lake,

\$587,800; City of Round Lake, \$411,100; City of Woodstock, \$564,800; and Chippewa County, \$529,950.

FOSTER JOINS COMMUNITY AFFAIRS

Nikki Foster recently joined Community Affairs as an analyst for rural issues and affordable housing. Foster has a bachelor's degree in political science and sociology from Luther College in Decorah, Iowa, and a master's degree in applied sociology from American University in Washington, D.C. She worked for Neighborhood Reinvestment Corporation in D.C. and most recently served as a policy advocate for the Minnesota Housing Partnership.

As a member of Community Affairs, Foster will apply her community development expertise through outreach activities, issue analysis and special projects.

Montana high school students build affordable housing

Neighborhood Housing Services, Inc. (NHS) of Great Falls, Mont., has received grants totaling \$10,600 to help defray the costs of constructing two High School Houses and making them affordable to buyers.

High School Houses are built by construction technology students from Great Falls high schools. With guidance from teachers and construction workers, students participate in

every step of the construction process, from acquiring building permits to laying sod for the finished houses. Construction materials are donated or purchased through grants, and the completed houses are sold to local low- to median-income families that have completed NHS's homebuyer program.

Since the project began in 1997, NHS, in partnership with the City of Great Falls and local contractors,

has overseen the construction of five High School Houses. Two houses are under construction and will be completed by June of 2001.

The recent grants were awarded by the Montana Community Fund, in the amount of \$5,000, and the Gannett Foundation, in the amount of \$5,600, according to the *Neighborhood Housing Services, Inc., of Great Falls* newsletter.

Marcell Bull Bear surveys his 3,100-acre ranch south of Kyle, S.D. A 1999 loan from TLF helped Bull Bear expand operations at Kiyaksa Buffalo & Cattle Company. "Thanks to TLF's technical and financial assistance, I've come this far," Bull Bear says. (Photos by Johnny Sundby/Dakota Skies Photography)



Economic development in Indian Country:

Lessons learned by The Lakota Fund

BY MARGARET TYNDALL

Electrician Darwin Eagle Elk, restaurant proprietor Carol Vocu and many other entrepreneurs on the Pine Ridge Indian Reservation (Pine Ridge) learned the lessons of running a small business from The Lakota Fund (TLF). A private, nonprofit community development financial institution, TLF was established to provide capital and technical assistance for the development of a private-sector economy on Pine Ridge.

In the 14 years since TLF was established, many economic development agencies and organizations in Indian Country have created loan funds to assist reservation-based enterprises. When they are well-designed and well-managed, loan funds can be a vital component of a healthy reservation economy, helping create jobs and wealth.

LESSONS LEARNED

In those 14 years, the managers of TLF learned important lessons from their experiences. Following are 10 of those lessons. They are not

lessons in raising funds or designing a capital structure. Instead, they are lessons learned through the daily interactions among fund managers, borrowers and other community members. By sharing these lessons learned in Indian Country, TLF hopes to benefit all community developers.

Lesson 1: Establish and follow your mission

TLF's mission has been clear from the start: to develop a private sector on Pine Ridge that will provide jobs, offer products and services close to home and keep money on the reservation. However, to fulfill this mission, TLF has learned that capital must be made available to businesses of varying sizes and not just to the smallest businesses. A robust private sector cannot consist primarily of very small businesses. It must include larger businesses as well, to create significant wealth and employ individuals who do not wish to run their own firms.

When they are well-designed and well-managed,
loan funds can be a **vital**
component of a healthy
reservation economy,
helping create jobs and wealth.

Lesson 2: Know and meet your market's needs

Elsie Meeks, executive director of TLF, notes that fund managers must be aware of the full range of funding needs in the community, even if their organization's mission is to only make loans of a certain size. When it started operating, TLF offered micro loans to very small businesses. According to Meeks, other lenders were not making larger loans on Pine Ridge. So, as TLF gained experience, and in order to follow its mission, the fund raised its lending limit from \$10,000 to \$25,000. TLF then increased the limit to six percent of the fund's capital, up to a maximum of \$200,000.

Lesson 3: Be flexible and learn as you go

At its start, TLF's lending policy relied not on credit histories but on the philosophy that "character makes the difference" in loan repayment. The reliance on character lending forced staff members to constantly defend their decisions to deny credit, a hard task in a small community where borrowers are the friends and rel-



Christine Red Cloud's handiwork. In addition to providing loans, TLF assists her business with supply ordering and book-keeping.

atives of the lenders.

To counteract these problems, TLF began a circle-lending program based on the model pioneered by the Grameen Bank in Bangladesh. (For more information on the Grameen Bank, visit www.grameen.org.) Potential borrowers received training before any money was lent, and other circle members took part in the lending decisions, which took some of the pressure off TLF's staff. Also, by observing the circles, staff members learned about group dynamics, which helped them devise lending policies and collection procedures appropriate for the reservation.

Circle lending provided a valuable learning experience for the staff, but it could not fulfill TLF's basic mission of building a private sector on the reservation. Circle loans were capped at \$1,000, so borrowers were overwhelmingly "mom and pop" operations. By 1999, TLF managers recognized that such small-scale businesses with limited growth potential would not lead to a vibrant private sector and decided to end



Christine Red Cloud creates quillwork in her Pine Ridge home. Her 36-year-old family business, Red Cloud Quillwork, received a \$10,000 inventory-purchase loan from TLF.

the circle-lending program.

Lesson 4: Approach new ventures with caution

Decent, affordable housing has always been a critical need on Pine Ridge. Several years ago, TLF managers decided that the lack of such housing was impeding local economic development and, despite their lack of experience in housing development, decided to tackle the problem by constructing affordable housing. Unfortunately, managers saw the construction drain resources from the core activity of lending to small businesses. TLF later curtailed its housing develop-

Economic Development in Indian Country:

Lessons learned by The Lakota Fund



Rosie Olson displays the wares at Singing Horse Trading Post, located 7 miles north of Manderson, S.D., on Pine Ridge. Established in 1995 by Rosie and her husband, Howard, the business sells leather, beads and other supplies to local artisans. TLF provided the Olsons with technical assistance and a \$25,000 loan, which was used to construct a bed and breakfast.

ment efforts.

The experience taught TLF managers to wade into new project areas slowly, with guidance from experts in the field, instead of diving in quickly — especially when significant resources may have to be committed to the new project.

Lesson 5: Learn from others, then learn from experience

In the early days of TLF, the staff had little lending experience and countered the problem through the use of outside resources. “We relied on a lot of people in those days,” comments Meeks. TLF received templates for loan policies, collection procedures, liquidity and loan reserves and loan status reports from other funds and lenders. First Nations Development Institute (First Nations) provided training for TLF’s staff and, for the first five years of the fund’s operations,

administered the larger of its two loan programs, which allowed loans up to \$10,000.

The arrangement with First Nations was designed to allow time for the inexperienced staff of TLF to learn how to lend. However, with First Nations administering the larger loan program from its offices in the state of Virginia, TLF staffers in Kyle were left managing the smaller, \$1,000-limit loan program. The process of

making only the small loans did not demand that staff learn and rigorously apply principles of business lending. Not until 1992, when TLF assumed authority for making loans under both programs, did TLF staff learn how to lend.

According to Meeks, “We didn’t grow and learn until we were

left on our own, to make our own decisions and to deal with the consequences of those decisions.”

Lesson 6: Hire staff with the “right stuff”

A loan fund’s success or failure is largely dependent on its employees. In the case of TLF, managers credit much of their success to hiring staffers with the right combination of abilities and experience to administer the fund well.

TLF managers always made it a priority to hire local residents who knew the community and could help implement the fund’s policy of character-based lending. However, local knowledge was no substitute for knowledge of and experience in lending. Meeks says she now looks for a balance. She favors staffers who are local residents but, as the fund moves into making larger loans, plans to hire for

Loan funds in brief

In areas with underdeveloped private sectors, loan funds often play a critical role, providing credit and technical assistance to local small businesses. Capital for loan funds comes from a variety of sources, including federal, state and tribal governments; private banks; corporations; individual investors and foundations. Often, loan funds fill financing gaps that occur when businesses cannot meet conventional financing requirements. Loan funds consider whether a borrower has a viable business plan, the managerial skills to execute the plan and intangibles such as a personal commitment to succeed, rather than concentrating solely on a borrower’s historical repayment ability and collateral.

This holistic approach to borrower eligibility makes loan funds a good fit for Indian Country communities, where low incomes and nonexistent credit histories have kept potential entrepreneurs from tapping into sources of conventional small-business financing.

expertise and hire outsiders as needed. Hiring experienced staff from outside the organization can accelerate the training of current staff members as they learn from the expert. The hoped-for outcome is that the “outsiders” hired for their expertise will become familiar with the community, while the skills and experience of locally hired staff continue to increase.

But Meeks insists that all staff she hires, whether local or from another community, must have two key characteristics: integrity and the strength and courage — or as she puts it, the “guts” — to take on tough work. She says that business lending is difficult and business lending in Indian Country is especially difficult. Local or not, experienced or not, loan fund employees must be strong and committed to upholding the values and standards of the fund.

Lesson 7: Be diligent to keep delinquencies in check

According to Meeks, managing delinquent loans has always been and will always be an issue for TLF. While losses were 10 percent in 1999, Meeks thinks the rate could easily rise to 50 percent or more if fund managers are not constantly diligent. TLF’s policies clearly emphasize to staff and borrowers alike that it makes loans, not grants, and that repayment according to

Pine Ridge and The Lakota Fund: Then and now

The Lakota Fund (TLF) was established to assist the Oglala Lakota Nation on the Pine Ridge Indian Reservation (Pine Ridge) in southwestern South Dakota. TLF operates out of Kyle, S.D., in the geographic center of Pine Ridge. The reservation covers roughly 2 million acres and is home to about 22,000 people. At the time TLF was organized, Pine Ridge had fewer than 40 small businesses, most owned by non-Indians. According to a 1983 study by First Nations Development Institute (First Nations), the lack of local businesses caused some \$74 million to flow off the reservation to neighboring towns each year. Rampant unemployment and inadequate housing added to the reservation’s economic woes.

In 1986, First Nations created TLF as an economic development project. According to Elsie Meeks, executive director of TLF, First Nations provided start-up support, which allowed the fund time to become operational while shielding it from political interference. First Nations’ support also helped TLF build its local capacity and develop relationships with national funders. In 1992, First Nations spun off TLF and it became an independent organization.

TLF fulfills its mission by providing small-business loans and technical assistance to members of the Oglala Lakota Nation. It has lent more than \$1.6 million to more than 400 borrowers, helping to create a private-sector economy on Pine Ridge and lessening the flow of money off the reservation. In addition, TLF has initiated and operated a marketing program and opened a retail gift shop to assist artists; obtained funding for and constructed a 13,000-square-foot building to provide office space for TLF and other businesses; developed — with the help of the Small Business Administration — a Tribal Business Information Center, making PCs and Internet access available to borrowers; constructed a 30-unit affordable housing project and provided housing loan packaging for individuals who wished to obtain funds from the U.S. Department of Agriculture’s Rural Development program.

Recently, TLF received certification as a Community Development Financial Institution (CDFI) from the Department of Treasury’s CDFI Fund, making it one of only two reservation-based loan funds to receive this certification.

For more information, visit www.lakotafund.org.

schedule is expected. Staff members receive training in loan

monitoring and collections procedures. To stay on top of the

All staff must have two key characteristics:
integrity and the strength and courage
to take on tough work.

Economic Development in Indian Country: *Lessons learned by The Lakota Fund*



Darwin Eagle Elk provides electrical services for a customer on Pine Ridge. His firm, Eagle Elk Services, was established in 1995 and has continuous contracts with

area businesses. TLF has helped Eagle Elk with technical assistance and loans ranging from \$1,000 to \$7,000.

loans, staff members meet weekly to discuss loans, perform site visits to see how businesses are doing, and receive training in the fundamentals of the businesses in TLF's portfolio.

Lesson 8: Accept and manage risks

On average, loans made by a fund such as TLF are inherently riskier than loans made by a commercial bank. This is true because loan funds often work

with borrowers that are not "bankable"; that is, they do not have a low enough risk profile or sufficient collateral to receive a bank loan.

According to Meeks, community development loan fund managers must understand that, given the mission of such funds, their loans are risky and some will not be repaid. Then, management must control the risk. First, the fund must set reasonable delinquency and loan loss

targets and make it a top priority to not exceed them. Second, the fund must use good, basic, lending practices. In Meeks's view, this means the fund must establish and consistently apply lending criteria based on ratios, collateral policies and such. Last, but by no means least, the fund must establish and maintain a good loan-tracking system and, as discussed above, have a commitment to and system for collections. While these steps seem

The fund must set
reasonable delinquency and loan loss targets and
make it a **top priority** to not exceed them.

Operating a thriving loan fund requires hard work, perseverance and an adherence to basic business principles.

daunting, Meeks notes that TLF has involved bankers and other lenders as advisors — advisors who have helped the fund construct and implement loan fund policies and systems.

Lesson 9: Develop borrowers through training and investment

Although TLF abandoned the circle-lending approach, it incorporated the lessons learned during the circle program's operation. First, TLF managers determined that borrowers usually did not understand what it meant to be in business and that owning a business requires a total commitment. With an unemployment rate of 85 percent, many residents of Pine Ridge have never worked in a business or held a regular job.

Second, fund managers learned that it is essential to the eventual repayment of the loan that borrowers invest something of themselves in the process. Since borrowers on Pine Ridge often have few or no assets to offer as security on a loan, the "something of themselves" that they must invest has to be another scarce commodity — time.

The fund requires potential borrowers to attend seven weeks of business preparation classes. As evidence of their seriousness and commitment, potential borrowers must have perfect attendance at all classes and fulfill all

assignments before they can qualify for a loan. The classes prepare potential business owners for the realities and hard work of owning a business and dissuade the less committed from borrowing funds and starting businesses.

Lesson 10: Don't mix politics with private-sector lending

Often in Indian Country, the tribal government controls the reservation's loan fund. According to Meeks, in the end, these funds invariably pursue goals other than developing profitable businesses, such as providing jobs or filling spaces in a shopping center.

In Meeks's opinion, if developing a private sector is the goal, lending decisions must be made free from the political considerations that inevitably creep into tribally controlled funds. Lending staff must be able to make, deny and collect loans free from political pressure, no matter how well-intentioned that pressure may be. In her view, only funds that are controlled by a body independent from the tribal government will have that freedom and be able to foster the successful private businesses necessary to develop a private sector on a reservation.

THE FINAL LESSON

The lessons learned by established Indian Country loan funds like TLF provide a primer

for the development of other loan funds, in Indian Country and elsewhere. Implicit in the lessons learned by TLF is a final lesson — perhaps the most important lesson of all: operating a thriving loan fund, just like operating a thriving small business, requires hard work, perseverance, and an adherence to basic business principles. That lesson is key to the success of small-business owners like Darwin Eagle Elk and Carol Vocu, and key to the success of TLF as well. 

Editor's note: Over the next six months, Elsie Meeks will be phasing out her Lakota Fund responsibilities in order to become the executive director of First Nations Development Institute's Oweesta Fund. For more information on First Nations and the Oweesta Fund, please see Resources on page 20.

Use of 'Indian Country'

The term "Indian Country" is commonly used to refer to tribal lands. Congress defined it first in 1948 in a federal criminal statute. See 18 U.S.C. § 1151. The Supreme Court also borrowed this definition for several civil cases. See *DeCoteau vs. District County Court*, 420 U.S. 425, 427 n. 2 (1975). Generally, the courts have defined Indian Country broadly to include formal and informal reservations, dependent Indian communities and Indian allotments, whether restricted or held in trust by the United States.

Fed Gov. Gramlich tours Phalen Corridor project in St. Paul

On July 19, Edward Gramlich, member of the Board of Governors of the Federal Reserve System, and Gary Stern, president of the Federal Reserve Bank of Minneapolis, toured the Phalen Corridor, a large mixed-use redevelopment area on St. Paul's East Side. The Phalen Corridor boasts active residents and community groups, and its diverse population includes Hmong, Laotians, African Americans and Latinos.

More than 60 public, private and nonprofit partners from the area have joined forces as the Phalen Corridor Initiative. The organization works to create new business opportunities, jobs, housing and retail establishments for area residents. (For more information on the Phalen Corridor Initiative's successes to date and its upcoming projects, see the box below.)

Curt Milburn, Phalen Corridor Initiative project director, conducted the July tour, which visited the following sites:

- Phalen Village — a development featuring green space, wetlands, commercial redevelopment and a planned townhouse complex;
- The Job Bank — a neighborhood jobs and employment connection;



Photo courtesy St. Paul Port Authority

Following the tour, Gov. Edward Gramlich (right) meets with Jim Erchul (left) of Dayton's Bluff Neighborhood Housing Services and Rick Johnsen of Aries Precision Metal (center).



Photo courtesy St. Paul Port Authority

Gramlich and Erchul discuss Phalen Corridor redevelopment with Muffie Gabler of Wells Fargo Bank and Curt Milburn of the Phalen Corridor Initiative.

The Phalen Corridor Initiative: successes and upcoming projects

The Phalen Corridor Initiative is a community partnership working to rebuild the economic, social and physical prosperity of St. Paul's East Side. Initiative partners have achieved the following successes to date: the Williams Hill Business Center, which created six new businesses with 650 jobs; a new Job Bank and Eastside Work Resource Hub; the Johnson Achievement Plus Elementary School with an attached YMCA; the Ames Lake Wetland, which replaced a parking lot; the construction of 29 mixed-income housing units at Phalen Village Town Homes; development of the East Metro Transit Facility, opening in 2001 with 300 projected jobs; and the Bureau of Criminal Apprehension Building, opening in 2002

with 300 employees.

Upcoming projects include constructing Phalen Boulevard, with groundbreaking scheduled for 2002; building more than 100 new housing units in the Rail Road Island Neighborhood, which will connect new housing with jobs, transit and greenspace; developing the Phalen Westminster site, with 270 jobs expected; converting 100 polluted acres into desirable business sites; connecting two regional bicycle and recreational trails; and linking East Side schools with a job-training curriculum.

For more information, contact Curt Milburn at (651) 772-6220, or cmilburn@isd.net or visit www.phalencorridor.org.



While leading the tour, Curt Milburn describes a Phalen Corridor redevelopment project to Jessica Deegan, Phalen Corridor Initiative, and Gov. Gramlich.

- Edgerton Bridge — an elevated spot for viewing the layout of the initiative's road-improvement and transportation plan and seeing Phalen West, the next industrial project slated for development in the corridor;

- Rivolli Bluff — the planned site of new housing; and

- Williams Hill Business Center — formerly a polluted industrial site, now an industrial park.

At the conclusion of the tour, Governor Gramlich and President Stern met with Phalen

Corridor Initiative partners including Dick Hanson, 3M and 3M Foundation; Muffie Gabler, Wells Fargo Bank; Lorrie Louder, St. Paul Port Authority; Jim Erchul, Dayton's Bluff Neighborhood Housing Services; Howard Siewert, owner of Ideal Printers; and Rick Johnsen, owner of Aries Precision Metal. The partners discussed their reasons for getting involved in the area's redevelopment project and the importance of having business, community and government sectors participate in the initiative. 

“We’re always excited to conduct tours for individuals like Governor Gramlich and President Stern. Showing them our work brings out our partners’ pride and reconnects them to the business, community and government relationships that have been the keys to our success. It also gives us the opportunity to have visitors with a national perspective critique our work and introduce us to best practices from other projects nationwide.”

— *Curt Milburn, project director,
Phalen Corridor Initiative*

“It’s impressive to see the hard work and dedication of the Phalen Corridor partners and their willingness to seize opportunities for building a livable community. Touring a community that’s undergoing revitalization and talking to the local partners provides the opportunity to witness economic growth firsthand.”

— *Gary Stern, president,
Federal Reserve Bank of Minneapolis*

How do lenders set interest rates on loans?

BY MATTHEW D. DIETTE

For many borrowers, the factors that determine a bank's interest rate are a mystery. How does a bank decide what rate of interest to charge? Why does it charge different interest rates to different customers? And why does it charge higher rates for some types of loans, like credit card loans, than for car loans or home mortgage loans?

Following is a discussion of the concepts lenders use to determine interest rates. It is important to note that many banks charge fees as well as interest to raise revenue, but for the purpose of our discussion, we will focus solely on interest and assume that the principles of pricing remain the same if the bank also charges fees.

COST-PLUS LOAN-PRICING MODEL

A very simple loan-pricing model assumes that the rate of interest charged on any loan includes four components:

- The funding cost incurred by the bank to raise funds to lend, whether such funds are obtained through customer deposits or through various money markets;
- Operating costs of servicing the loan, which include application and payment processing, and the bank's wages, salaries and occupancy expense;
- A risk premium to compensate the bank for the degree of default risk inherent in the loan request; and
- A profit margin on each loan that provides the bank with an adequate return on its capital.

Let's consider a practical example: how this loan-pricing model arrives at an interest rate on a loan request of \$10,000. The bank must obtain funds to lend at a cost of 5 percent. Overhead costs for servicing the loan are estimated at 2 percent of the requested loan amount and a premium of 2 percent is added to compensate the bank for default risk, or the risk that the loan will not be paid on time or in full. The bank has determined that all loans will be assessed a 1 percent profit margin over and above the financial, operating and risk-related costs. Adding these four components, the loan request can be extended at a rate

of 10 percent (10% loan interest rate = 5% cost of funds + 2% operating costs + 2% premium for default risk + bank's targeted profit margin). As long as losses do not exceed the risk premium, the bank can make more money simply by increasing the amount of loans on its books.

PRICE-LEADERSHIP MODEL

The problem with the simple cost-plus approach to loan pricing is that it implies a bank can price a loan with little regard to competition from other lenders. Competition affects a bank's targeted profit margin on loans. In today's environment of bank deregulation, intense competition for both loans and deposits from other financial service institutions has significantly narrowed the profit margins for all banks. This has resulted in more banks using a form of price leadership in establishing the cost of credit. A prime or base rate is established by major banks and is the rate of interest charged to a bank's most creditworthy customers on short-term working capital loans.

This "price leadership" rate is important because it establishes a benchmark for many other types of loans. To maintain an adequate business return in the price-leadership model, a banker must keep the funding and operating costs and the risk premium as competitive as possible. Banks have devised many ways to decrease funding and operating costs, and those strategies are beyond the scope of this article. But determining the risk premium, which depends on the characteristics of the individual borrower and the loan, is a different process.

CREDIT-SCORING SYSTEMS AND RISK-BASED PRICING

Because a loan's risk varies according to its characteristics and its borrower, the assignment of a risk or default premium is one of the most problematic aspects of loan pricing.

A wide variety of risk-adjustment methods are currently in use. Credit-scoring systems, which were first developed more than 50 years ago, are sophisticated computer programs used to evaluate potential borrowers and to underwrite all forms of consumer credit, including credit cards, installment loans, residential mortgages, home equity loans and even small-business lines of credit. These programs can be developed in-house or purchased from vendors.

Credit scoring is a useful tool in setting an appropriate default premium when determining the rate of interest charged to a potential borrower. Setting this default premium and finding opti-

How does credit scoring work?

To determine a credit score, lenders use credit-scoring software, which analyzes data from a large pool of borrowers. Most lenders rely on the credit-scoring software developed by Fair, Isaac and Company, with data gathered by the three major credit-reporting agencies: Experian; Equifax, Inc.; and Trans Union Corporation.

When a customer's name and address are entered into a credit-scoring program, a complete credit history is obtained from one of the three credit-reporting agencies. Through a series of calculations, the history is analyzed and compared to the histories of other borrowers. The customer is then assigned a credit score, which is usually between 400 and 825.

A score above 710 is normally considered a good credit risk, while a score under 620 is considered a very high risk. Customers in the latter category have blemishes or irregularities in their credit histories and are often referred to as

"subprime" borrowers. So what is the benefit of knowing a credit score? The information is vital for lenders, because a customer with a score of 710 has a statistically determined default rate of only 1 in 21, while a customer with a score of 680 has a default rate of 1 in 11.

Although the calculations that determine credit scores are complex, obtaining your credit history is fairly simple. You have the legal right to see your credit report and can request it from any of the three major credit-reporting agencies. (For more information, please see Resources on page 19.)

Lenders are not obligated to share your credit score with you when you apply for a loan, but there are signs that this may be changing. According to the Nov. 13, 2000, issue of *Newsweek*, Fair, Isaac and Company recently took steps to better explain credit scores to lenders, so they can convey the information to customers. And, according to the article, Fair, Isaac plans to make credit scores available to customers soon through Experian and Equifax, while Trans Union plans to release scores on its own.

mal rates and cutoff points results in what is commonly referred to as risk-based pricing. Banks that use risk-based pricing can offer competitive prices on the best loans across all borrower groups and reject or price at a premium those loans that represent the highest risks.

So, how do credit-scoring models and risk-based pricing benefit the borrower who only wants a loan with reasonable repayment terms and an appropriate interest rate charge?

Since a bank is determining a reasonable default premium based on past credit history, bor-

rowers with good credit histories are rewarded for their responsible financial behavior. Using risk-based pricing, the borrower with better credit will get a reduced price on a loan as a reflection of the expected lower losses the bank will incur. As a result, less risky borrowers do not subsidize the cost of credit for more risky borrowers.

OTHER RISK-BASED PRICING FACTORS


Two other factors affect the risk premium charged by a bank: collateral required and the term, or length, of the loan. Generally, when a loan is secured by collat-

eral, the risk of default by the borrower decreases.

For example, a loan secured by a car typically has a lower interest rate than an unsecured loan, such as credit card debt. Also, the more valuable the collateral, the lower the risk. So it follows that a loan secured by the borrower's home typically has a lower interest rate than a loan secured by a car.

However, there may be other factors to consider. First, the car may be easier to sell, or more liquid, making the risk of the loan lower. Second, the term, or length of a car loan is usually short — three to five years — as compared to the 15- to 30-year term of a home loan. As a general rule, the shorter the term, the lower the risk, since the ability of the borrower to repay the loan is less likely to change.

Assessing the interplay of credit score, collateral and term to determine the risk premium is one of a lender's most challenging tasks. Whether loan-pricing models are based on a simple cost-plus approach or price leadership, or use credit-scoring or other risk-based factors, they are valuable tools that allow financial institutions to offer interest rates in a consistent manner.

Knowledge of these models can benefit customers as well as banks. Although it cannot help customers make their payments, an awareness of loan-pricing processes can ease the uncertainty that may be involved in applying for a loan. 

Matthew D. Diette is a field supervisory examiner in the Community and Regional Banking section of the Banking Supervision Department, Federal Reserve Bank of Minneapolis.

Walking the Native Path to Economic Development: Results of Fall 1999 conference

BY THOMAS MOORE AND
MARGARET TYNDALL

On Sept. 27, 1999, more than 250 housing and economic-development practitioners gathered at the "Walking the Native Path: Seeking Solutions Through Economic Development and Housing Opportunities" conference at the Grand Casino Mille Lacs Hotel and Convention Center in Onamia, Minn. Located on the Mille Lacs Indian Reservation, the conference center was the site for three days of sessions that provided participants with the opportunity to increase their knowledge of lending and investing issues and opportunities on tribal lands.

Community Affairs, a sponsoring partner of the conference, recognizes that such meetings are often informative and enjoyable but are not ends in themselves. A conference is not truly successful unless its sessions lead participants to action. In this article, we will discuss the gains that have resulted from the Walking the Native Path conference, the topics that were discussed in conference sessions and the next steps for maintaining the meeting's momentum.

NEW STEPS ON THE PATH: WHAT WAS GAINED

In April of this year, we sent an evaluation survey to attendees, soliciting opinions on the conference's usefulness. The feedback was overwhelmingly positive. More than 75 percent

of the 52 participants who responded to the survey said they learned something from the conference that will enable them to solve a particular problem or concern that their tribe, bank or agency is currently facing. Impressively, 70 percent of the respondents have formed or anticipate forming a partnership with another entity in the near future to achieve a specific housing or economic-development objective. These respondents credited the conference with providing the information or contacts that made such relationships possible.

Examples of respondents' new partnerships include a banker who has started working with two reservations in his

bank's lending area and another banker whose institution plans to underwrite mortgage loans on a reservation in its lending area. A tribal housing official has formed a partnership with a local bank and tribal officials from two other reservations are pursuing low-income housing tax-credit projects. Finally, a community development venture capital firm is now working with many more Indian clients, having gained an understanding of Indian Country lending and investing issues at the conference.

ILLUMINATING THE PATH: WHAT WAS DISCUSSED

Kicking off the conference on Sept. 27, Patrick Borunda, for-

Sponsoring partners made conference a reality

Successful economic development depends on the participation of many organizations. Successful economic development conferences are no different. Following is a list of the sponsoring partners of the September 1999 Walking the Native Path conference.

American Indian Housing & Community Development Corporation
Fannie Mae Minnesota Partnership Office
Federal Deposit Insurance Corporation, Kansas City and San Francisco
Federal Home Loan Bank of Des Moines
Federal Reserve Bank of Minneapolis
Department of Housing and Urban Development
The Minnesota Chippewa Tribal Housing Corporation
Minnesota Dakota Indian Housing Authority
Minnesota Housing Finance Agency
Office of the Comptroller of the Currency, Kansas City
Office of Thrift Supervision, Dallas
Red Lake Housing Finance Agency
United States Department of Agriculture Rural Development

mer executive director of First Nations Development Institute's Oweesta Fund, spoke on the relationship between economic development and housing. In his remarks, Borunda expressed a concern that on some reservations affordable housing has suffered due to an emphasis on small-business lending, while on other reservations the situation is reversed. He stressed that reservation-based community-development practitioners must learn to balance the short-term and long-term needs of reservation residents for both housing and business development.

Borunda emphasized the need for lenders' products to conform to the realities of doing business on reservations. He also asserted that reservation economies will continue to suffer unless reservation-based practitioners and private-sector lenders maintain a dialogue about ways to manage the integration of housing and small-business creation.

The next day, Marge Anderson, former chief executive officer of the Mille Lacs Band of Ojibwe, spoke about the economic struggles and achievements of the tribe, which has sought private-sector investment and leveraged its gaming profits in pursuit of a more diversified economy.

Conference workshops were split into two concurrent tracks:

Conference attendees indicated that they wish to continue meeting to **study and work** on reservation community development issues.


housing and economic development. The housing sessions focused on financial literacy and the latest housing initiatives under way in Indian Country. The economic-development sessions addressed operational and technical aspects of microenterprise-lending organizations and provided an overview of emerging business opportunities on reservations for the private sector.

THE PATH AHEAD: NEXT STEPS

On the final day of the conference, JoAnne Lewellen, Federal Reserve Bank of Minneapolis Community Affairs officer, challenged attendees to write down three steps they would take individually to transform what they learned at the conference into an increase in housing and small-business lending activity on reservations. We in the Community Affairs section accepted our officer's challenge and began planning our next steps.

In survey responses and other contacts, conference attendees indicated that they wish to continue meeting to study and work on reservation

community development issues. In response, the Federal Reserve Bank of Minneapolis, in partnership with other organizations, is sponsoring a series of sovereign-lending workshops to present information and explore ways of removing barriers to reservation-based lending and investing.

Earlier this fall, we inaugurated the workshop series in Minnesota, North Dakota and Wisconsin. Sessions in Michigan, Montana and South Dakota are planned for 2001. The goal of the workshops is to engage the partners in Indian Country, encourage them to search for appropriate solutions to development problems and assist them in setting priorities and action plans. Whether or not you participated in the conference, we encourage you and all who are interested in Indian Country to join us at a workshop in your area, as we continue "walking the Native path" — the path to full participation by Indian Country residents in this country's economic life. 

For more information on the workshop series, see the shaded box on page 21.

At <http://minneapolisfed.org/banking/develop/index.html>

Community Affairs unveils new web site

BY DAMIAN ENGEN

Community Affairs is proud to announce the completion of a comprehensive update of our web site at <http://minneapolisfed.org/banking/develop/index.html>. The update provides a fresh look and a much-needed reorganization of the site's contents.

The modifications took several months to complete and were the result of varied research. Input was gathered from a sectionwide survey of Community Affairs employees, interviews with community developers, in-depth online research and an evaluation of the original site's interface. Fed management and users provided specific input and requirements that were invaluable.

Users were most concerned with the old site's lack of organization. By making frequently accessed pages more easily available and organizing the web site by topic, the new layout reduces clutter and facilitates navigation.

During the site renovation, we added new features, including an introduction that explains the function of Community Affairs and our objectives within the Federal Reserve System. The new site offers content that the previous site lacked. Dozens of links to additional resources and publications were added, enabling users to access outside information more easily. We also added a page with Federal Reserve Bank employee contact




information, allowing users to direct questions or comments to Community Affairs staffers within their specific fields. The events calendar has been revamped as a table to allow easier reading.

Other ideas for improving the site include electronic order forms for publications or newsletters, an e-mail notification system and online registration for conferences and events. These features may be added in the future.

The site will be kept current through frequent updates. Additions and changes will be marked with a "NEW" icon, allowing regular visitors to focus their attention on what has been updated or changed.

While researching ways to improve the site, we asked community developers in the Twin

Cities to help us determine what information was relevant and necessary for the site's target audience. We wish to continue this process by inviting you to fill out our online survey at <http://minneapolisfed.org/banking/develop/Survey/html>. Please indicate any suggestions or questions you may have concerning the site. We look forward to receiving your ideas and comments. 

Damian Engen interned with Community Affairs during the summer of 2000 and performed our web site update. He is a sophomore at the Massachusetts Institute of Technology, majoring in economics and management.

COMMUNITY DIVIDEND

For free copies of recent issues, contact Community Affairs at the Federal Reserve Bank of Minneapolis at (612) 204-5074 or visit www.minneapolisfed.org.

Issue No. 1, 2000: Rural CDCs: Building the capacity for success; Revolving Loan Funds: A source of capital in South Dakota; In response to feedback, banker roundtables to be continued, expanded.

Issue No. 3, 1999: Conference highlights: Partnerships and financing are key to mixed-use development; Risk-focused fair lending examinations; Harvard recognizes outstanding tribal governance programs.

Issue No. 2, 1999: Personal Finance: The bedrock of a community's financial health; Credit card buyers, look before leaping to a new card; Microenterprise awards are announced.

Issue No. 1, 1999: The facts about the Twin Cities; Who's receiving mortgage loans in the Twin Cities?

CAPITAL CONNECTIONS

This newsletter highlights the community development and reinvestment support activities of the Federal Reserve System's Community Affairs program. To subscribe, call (202) 452-3378 or visit www.federalreserve.gov. The Spring/Summer 2000 issue focuses on small-business development and resources.

The following sources provide additional information on the topics featured in this issue of Community Dividend. Please note that the Federal Reserve Bank of Minneapolis is not responsible for the accuracy of the contents of these sources, nor should their inclusion here be construed as our endorsement of the views they contain.

LOAN PRICING

In *Commercial Bank Management*, author Peter S. Rose provides a comprehensive view of bank management practices from the perspective of both a bank manager and a bank customer. Irwin/McGraw-Hill, 1999.

Credit-Reporting Agencies provide consumer credit histories to individuals and businesses. Most credit reports are provided for a small fee; however, they may be provided free of charge under cer-

Financial services education guide helps people understand money, credit

Millions of Americans are left out of the financial mainstream because they do not have accounts with banks, savings and loans or credit unions. These individuals may have difficulty managing and saving money and accessing credit. To address this problem, the Financial Services Education Coalition has developed a free, comprehensive guide for community educators titled *Helping People in Your Community Understand Basic Financial Services*.

Available in English and Spanish, the guide is designed to help educate people who do not have accounts with financial institutions or who need basic information on using accounts. It includes consumer fact sheets, resource listings, an outline of consumer protection laws, information on Electronic Funds Transfer, and order forms for additional educational materials.

For more information, contact the Financial Management Service at (202) 874-6540 or visit www.fms.treas.gov/eft/educ/educmain.html.

tain circumstances. In addition to credit reporting, credit-reporting agencies may offer businesses and lenders fraud prevention and detection systems, bankruptcy protection software, database development and credit-monitoring services. There are three major credit-reporting agencies in the United States. For more information or to request a credit report, contact:

Equifax, Inc., at (800) 685-1111 or www.equifax.com;

Experian at (888) 397-3742 or www.experian.com; or

Trans Union Corporation at (800) 888-4213 or www.transunion.com.

Fair, Isaac and Company designs credit data information systems, including credit-scoring models, for lending institutions. Fair, Isaac's web site at www.fairisaac.com answers frequently asked questions about credit scoring and includes links to related articles.

INDIAN COUNTRY LOAN FUNDS

The Association for Enterprise Opportunity (AEO) provides a forum for microenterprise-devel-

resources

opment organizations to share information and promotes access to economic resources. AEO members receive a newsletter, the *AEO Exchange*, which provides updates on microenterprise projects and programs. For more information, call (703) 841-7760 or visit www.microenterpriseworks.org.

The Enterprise Foundation delivers housing and community development assistance to low-income people through a nationwide network of 1,500 community-based development organizations. Membership is free for certain organizations, including Native American tribes, and includes subscriptions to the *Building Blocks* and *Network News* publications, access to online best practices resources and policy updates and other benefits. For more information, call (410) 964-1230 or visit www.enterprisefoundation.org.

The First Nations Development Institute promotes Native American economic development through education, research, advocacy, funding and ideas. Its loan fund, the Oweesta Fund, was formed to provide culturally accessible capacity building, technical assistance and access to capital for community-development organizations in Indian Country. For more information, call (360) 373-1824 or (888) 734-1824 or visit www.firstnations.org.

The Harvard Project on American Indian Economic Development (Harvard Project), a program of the John F. Kennedy School of Government at Harvard University, researches the conditions under which sustained, self-determined socioeco-

omic development is achieved on American Indian reservations. The Harvard Project's Honoring Contributions in the Governance of American Indians (Honoring Nations) awards recognize Native American tribal government programs and initiatives that successfully address the challenges facing reservation communities. For more information on the Harvard Project or the Honoring Nations award program, call (617) 495-1338 or visit www.ksg.harvard.edu/hpaied.

The Minority Business Development Agency of the U.S. Department of Commerce encourages the development of minority-owned businesses through programs that focus on the unique business problems of specific target markets. For more information, call (202) 482-5061 or visit www.mbda.gov.

Native eDGE (economic Development Guidance and Empowerment), a program of the U.S. Department of Housing and Urban Development, provides a call center, interactive web site and publications clearinghouse to promote communication and information sharing about sustainable economic development in reservation communities. For more information, call (877) 807-9013 or visit <http://nativeedge.hud.gov>.

The Office of Economic Development of the U.S. Bureau of Indian Affairs participates in broad national economic development initiatives such as facilitating reservation economic development and welfare-to-work reform. For more information, call (202) 208-5324 or visit www.doi.gov/bureau-indian-affairs.html.

Rural Development & Finance Corporation provides loans and technical assistance to rural community-based organizations and entrepreneurs, with an emphasis on minority communities in economic distress. For more information, call (406) 247-5095 or visit www.rdfc.org.

The U.S. Small Business Administration (SBA) provides information, funding and counsel to protect the interests of small businesses. For more information, visit www.sba.gov or contact your local SBA District Office directly:

Michigan, (313) 226-6075;
Minnesota, (612) 370-2324;
Montana, (406) 441-1081;
North Dakota, (701) 239-5131;
South Dakota, (605) 330-4243; or
Wisconsin, (608) 264-5261 or (414) 297-3941.

CRA ratings and future evaluations

Federal Reserve Board
www.federalreserve.gov

Federal Deposit Insurance Corporation
www.fdic.gov

Office of the Comptroller of the Currency
www.occ.treas.gov

Office of Thrift Supervision
www.ots.treas.gov

Federal Financial Institutions Examination Council
www.ffiec.gov (This site provides an excellent search engine for CRA ratings.)

resources

COMMUNITY DEVELOPMENT

The National Center for Small Communities (NCSC) provides technical assistance and training-program materials for small and rural community leaders. Its publication *Getting Online: A Guide to the Internet for Small-Town Leaders* offers comprehensive information on accessing and exploring the Internet and building a community web site. \$14.95 for NCSC members, \$19.95 for non-members. To read the guide online, visit www.natat.org/NCSC. To order a copy, call (202) 624-3550 or visit www.natat.org/NCSC.

In a two-volume set titled *Effective Strategies for Community Development Finance/Community Development Resource Guide*, the Office of the Comptroller of the Currency (OCC) explores successful community-development finance practices and lists approximately 145 resources for community development information. \$15. The OCC's 1999 *National Bank Community Investments Directory* lists the community development corporation and community development project investments made by national banks last year. One free copy per customer. To order OCC publications, visit the Community Affairs page at www.occ.treas.gov or send request and payment

(checks only) to Comptroller of the Currency, P.O. Box 70004, Chicago, IL, 60673-0004.

FINANCIAL LITERACY

In its guide *Building Wealth: A Beginner's Guide to Securing Your Financial Future*, the Federal Reserve Bank of Dallas offers advice on reaching personal financial goals through budgeting, saving, and investing. The guide includes budgeting worksheets, descriptions of various financial products, a glossary, and a wealth-building resource guide. For more information, call (800) 333-4460, ext. 5254, or visit www.dallasfed.org.

ONLINE CONSUMER RESOURCES

On its *Keys to Vehicle Leasing* web page, the Federal Reserve Board answers frequently asked questions about vehicle leasing, compares leasing to buying, and identifies the costs at each stage of the leasing process. For more information, visit www.federalreserve.gov/pubs/leasing.

At www.safeshopping.org, the American Bar Association explores the legal and practical issues of Internet commerce and offers advice on shopping safely in cyberspace.

Update on Sovereign Lending Workshops

Earlier this year, Community Affairs kicked off a series of Sovereign Lending Workshops with meetings in Minnesota, Wisconsin and North Dakota. At each session, bankers, reservation representatives and community-development practitioners met to discuss ways to make banking inroads in Indian Country.

The first session was held in Minneapolis on Sept. 19. Sponsors included the Federal Reserve Bank of Minneapolis, the Minnesota Bankers Association, the Minnesota American Indian Chamber of Commerce and the U.S. Department of

Housing and Urban Development. The second session, held Sept. 21 in Stevens Point, Wisc., was sponsored by the Federal Reserve Banks of Minneapolis and Chicago. On Oct. 3, the Federal Reserve Bank of Minneapolis, United Tribes Technical College and the North Dakota Rural Development Council sponsored the third session in Bismarck, N.D.

Comments and recommendations from session attendees will help determine the future form of the workshops. Additional sessions are tentatively planned for 2001. For information, contact Thomas Moore at (612) 204-5166 or thomas.moore@mpls.frb.org.

calendar

LaCrosse Community/Lender Forum. Jan. 25, LaCrosse, Wisc. Sponsored by the Federal Reserve Bank of Minneapolis. Contact: (612) 204-5470.

Changing Financial Markets & Community Development: The Federal Reserve System's Second Community Affairs Research Conference. April 5-6, Washington, D.C. Contact: (617) 973-3461.

International Summit on Community & Rural Development: A Joint Conference of the Community Development Society, Minnesota Rural Development, and the National Rural Development Partnership. July 22-25, Duluth, Minn. Sponsored by more than 20 partner groups, including the Federal Reserve Bank of Minneapolis. Contact: (612) 204-5172.

Visit our online calendar at <http://minneapolisfed.org/banking/development/upcoming.html> for other upcoming events.

a conversation with...

Elsie Meeks *of The Lakota Fund*

The Lakota Fund, a loan fund serving the Pine Ridge Indian Reservation (Pine Ridge) in South Dakota, is a major source of small-business capital for tribal members. Established in 1986 in response to a high unemployment rate and a depressed local economy, the fund provides loans and technical assistance to pursue its mission of developing a private-sector economy on Pine Ridge.

Community Dividend discussed the economic-development efforts of The Lakota Fund with its executive director, Elsie Meeks.

Community Dividend: Economic development in Native American communities presents many challenges. What are the greatest challenges to Native small businesses and to the loan funds that serve them?

Elsie Meeks: The greatest challenge to Native small businesses is a lack of experience in business, and the greatest challenge to our loan fund is to build a business foundation. Most people here have not even had the chance to work in a small business, let alone run one. If people haven't had the opportunity to work in or run a business, how do they learn to be good managers? They must learn from experience, and our work is about giving people that experience.

CD: The Lakota Fund's mission is to develop a private-sector economy on Pine Ridge.

How has this mission changed since The Lakota Fund was founded?

Meeks: It hasn't changed a lot, although we do see ourselves becoming more of an economic-development organization instead of just a small-business loan fund.

CD: Your economic-development efforts involve providing capital and technical assistance to very small businesses, or microenterprises. How necessary are capital and technical assistance for microenterprises?

Meeks: In our experience, most people need capital and technical assistance. That's especially true if they want to expand their business. Even if people have been operating microenterprises for a period of time, we've found that most haven't kept very good track of their expenses and haven't priced their products or services in the right way. Sometimes, people can operate a microbusiness without a loan by financing it themselves, but most people need at least a short-term loan.

One thing I want to stress is that a microenterprise loan fund shouldn't be an end unto itself, but should be a tool used for growing people's expertise. I believe that there is one instance, in the U.S., when microenterprise development is needed. That instance is when people do not have credit viability or business experience.



ELSIE MEEKS

Photo by Johnny Sundby/Dakota Skies Photography

Microenterprise development allows people their first entry into credit and business, but it alone doesn't create jobs or increase income substantially. Although microenterprise is a tool that The Lakota Fund utilizes, we identify ourselves as a small-business loan fund.

CD: Aside from small-business loans and technical assistance, what services do you provide?

Meeks: We provide small-business training for people who wish to borrow from The Lakota Fund. We provide credit counseling and assist in workouts with creditors. For those interested in developing a business plan, we provide access to computers and other business resources through the Tribal Business Information Center. We also provide assistance for people who want to obtain a loan for a house. And we recently complet-

A microenterprise fund should be a **tool** for growing people's expertise.

ed a 30-unit low-income tax credit housing project, which was a whole new arena for us.

CD: How is The Lakota Fund managed?

Meeks: We have a nine-person board made up of enrolled members of the Oglala Lakota Nation, with the exception of one member. The outside position was designed so we could bring in some outside expertise. So, eight of our board members are members of this tribe. They're community people, extremely committed to seeing positive changes happen, and they're very supportive of our vision. One of the board positions is reserved for a tribally elected person. All of the board members, except the elected person, serve on the loan committee.

Our board is self-selecting, which means that it isn't elected by a public vote. The reason for this is that when we were organizing, people didn't want the fund to be modeled after tribal organizations. Most tribal boards become too political, and we thought it was important that we not be a political organization. And we are not connected to tribal government in any way; we're a private nonprofit. The board hires the executive director, and the executive director hires the staff.

CD: Is there anything that tribal governments should do to assist tribally operated loan funds?

Meeks: The best thing that tribal governments can do is to pass laws that assist small busi-

nesses — effective laws governing collection of debt, checks, etc. If a tribe can provide capital, it should provide it in a nonpolitical way. By that, I mean that it should not have strings attached to the capital, and it should not try to influence decisions that loan funds make.

CD: How does your loan approval process work?

Meeks: Anyone who wants a loan from The Lakota Fund must complete our seven-week small-business training program. This not only provides good information and training for the potential businessperson, it also tells us how committed someone is about starting a business. After the training, if the person hasn't completed a business plan, staff assists them in completing it. At that point, the lending director analyzes the person's business plan and credit history. If the borrower has an acceptable plan and debt-to-income ratio, the application is taken to the loan committee for a decision. The lending director has the authority to approve loans of \$1,000 or less.

CD: Do you work closely with your borrowers?

Meeks: Yes, very. That's absolutely key to our success. First, we get to know them through our small-business training program. After training, if they want to pursue their business idea and a loan, we assist them in completing their business plan. If they get a loan, we do quarterly site visits. We have a great staff that is completely dedicated to helping people and

to getting our loans repaid.


CD: How can financial institutions become involved with tribal loan funds?

Meeks: One way, of course, is to provide capital at a reasonable rate for loan funds to relend, or perhaps contribute to a loan-loss reserve fund to help protect investments in the loan fund. Another way is to lend their considerable expertise in business analysis and underwriting. That would be a great help, because most reservation-based loan funds have limited access to experienced business lenders.

CD: Have you noticed a change in the local economy resulting from the capital and technical assistance that the fund has provided?

Meeks: To this point, we've been building a foundation by teaching people basic business principles through training and microenterprises and teaching them about credit. A foundation isn't that visible, but it's very important. When we started, there were very few businesses here and most, if not all, were owned by nontribal members. Today, there are many more businesses, and tribal members own almost all of them.

CD: In 2006, The Lakota Fund will be 20 years old. How do you see the fund operating in six years?

Meeks: I see us making larger loans to bigger businesses in a more effective, efficient manner. We have made strides in building the foundation. Now, we will become more effective, and our success will be more visible. 



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COMMUNITY DIVIDEND

Summer 1998

Model code addresses economic development in Indian Country

By Maylinn E. Smith

The model code should encourage the business and lending communities to invest in Indian Country and foster economic development.

Indian Country historically has not been a hotbed of economic development. Non-Indian entities frequently do not evaluate opportunities for establishing viable business ventures within Indian Country, except perhaps in the natural resource-extraction arena. As a result, the economic development projects that do exist in Indian Country generally reflect some type of revenue-generating enterprise or activity established and operated directly or indirectly by the tribal government. Reasons given by non-Indian developers or investors for this lack of economic development within Indian Country are routinely summed up with two words: "uncertainty" and the "unknown."

Indians, non-Indians address strategies

The Montana Regional Strategies Initiatives (MRSI) held several meetings beginning in 1995 to explore issues contributing to low levels of economic development in the state. Indian and non-Indian participants met to address strategies to improve the business opportunities in the economically depressed regions of Montana, including Indian Country areas. Meeting participants identified several key factors perceived as barriers to economic development in Indian Country. One concern expressed repeatedly at these meetings was the lack of tribal laws that would provide some legal certainty with regard to commercial transactions.

Consequently, MRSI created the Tribal Business Code Development Task Force to evaluate various alternatives for addressing this concern. The task force ultimately recommended developing a model commercial code for tribes. The group decided on this approach because it believed it would likely have the broadest effect on economic development prospects in Indian Country in the shortest time.

In the spring of 1996, Professor Raymond Cross from

the University of Montana-Missoula's School of Law offered MRSI the services of the Indian Law Clinic to develop a model secured transaction law. Gerald Sherman, community development officer with First Interstate BancSystem, Billings, Mont., sought funding from a variety of tribal and nontribal entities to help defray the costs of this project. Although several clinic students worked on the project, Morgan Damerow, now an attorney in the Seattle area, drafted the majority of the secured transaction law.

Drafting this model law was a multistep process similar to other tribal code development projects the clinic has undertaken. The clinic reviewed all existing tribal commercial laws and determined the areas of commercial law that tribes considered important. During the drafting process, the clinic incorporated as many of these provisions as deemed to be relevant into the model law. Several provisions were included as options for tribes to consider when drafting their own tribal commercial codes. In addition, based on discussions with various tribal entities or interests, the clinic considered current tribal needs and included provisions for handling problems frequently experienced in commercial dealing in Indian Country. The clinic used the secured transaction article of the Uniform Commercial Code as drafted by the National Conference of Commissioners on Uniform State Laws for provisions to incorporate into the model tribal law.

Sidebar:

[What is A Uniform
Commercial Code?](#)

Model code provides uniformity, certainty

The final product is intended to be a culturally responsive document that recognizes the sovereign aspects of tribes and that can be used in the development of individual tribal commercial codes. The model law can be enacted independently or incorporated as part of a more comprehensive commercial code. In addition, the model law incorporates principles that are intended to reduce-if not eliminate-the perceived barriers to doing business in Indian Country. Because this model secured transaction law is designed to provide a degree of uniformity and certainty in commercial dealing, it should minimize the perceived risks associated with doing business in Indian Country. This may in turn encourage the business and lending communities to invest in Indian Country and foster economic development.

The clinic continues to receive requests for this model secured transaction law from tribal entities and organizations. Given the expressed interest in this area of Indian law, the clinic would consider creating additional model tribal laws focusing on other commercial areas, provided funding can be located.

To obtain a free copy of the Model Tribal Code, Secured Transactions, download the document from the law school web page at

www.umt.edu/law/library/lawbysub/ucc.htm.

Individuals may also receive a copy by writing to Indian Law Clinic, School of Law, The University of Montana, Missoula, MT 59812. A modest fee will be assessed to cover copying and postage costs.

Maylinn E. Smith is director of the Indian Law Clinic of the University of Montana's School of Law.

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U.S. Department of Housing and Urban Development

1999 Broadway, Suite 3390, Box 90
Denver, Colorado 80202

**OFFICE OF THE ASSISTANT SECRETARY
FOR PUBLIC AND INDIAN HOUSING**

**NATIONAL OFFICE OF NATIVE
AMERICAN PROGRAMS**

Dear Tribal Leader:

The One-Stop Mortgage Center Initiative in Indian Country (One-Stop) was a partnership of Tribal, Federal and private organizations to streamline mortgage lending in Indian Country. As part of this mission, One-Stop addressed the legal infrastructure necessary to allow lenders to make mortgage loans on trust and restricted lands.

Background

Tribal trust lands can not be encumbered (have mortgage liens placed against the land) or alienated (removed from trust status) and are often under the jurisdiction of Tribal courts. The inability to mortgage trust lands and the unfamiliarity of mortgage lenders with tribal courts have created barriers to home mortgage lending in Indian Country.

To overcome these barriers, the Federal loan programs have used a variety of residential mortgage leases and eviction, foreclosure and priority of lien procedures to facilitate mortgage lending on trust lands. However, Tribal governments had to adopt the different leases and procedures necessary for each of the Federal lending programs available.

One-Stop Documents

To ease this burden placed on Tribal governments and to increase homeownership in Indian Country, One-Stop created a set of model documents for use with the Federal mortgage lending programs on trust land.

The One-Stop model documents include:

1. Model Tribal Procedures For: Lien Priority, Eviction and Foreclosure and Leasing;
2. Residential Lease of Tribal Owned Land;
3. Memorandum of Understanding Between The Tribal Nation and Federal Agency; and
4. Checklist for Tribal Approval

Copies of the sample documents are enclosed.

The adoption of the model documents by a tribe for a home mortgage program offered by the U.S. Departments of Veterans Affairs (VA), Agriculture (USDA) or Housing and Urban Development (HUD), will be accepted by the other federal agencies for participation in their home mortgage programs. The model Residential Lease of Tribal Owned Land has been accepted by the Bureau of Indian Affairs.

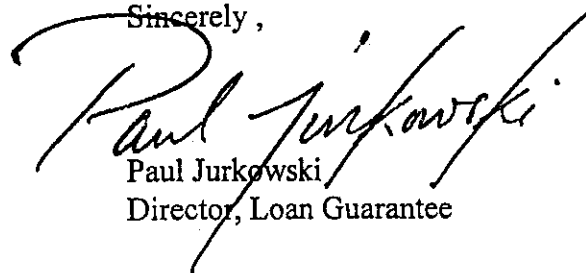
If your tribe is not yet one of the 100 plus that have adopted the legal framework necessary for participation in the HUD Section 184 Indian Loan Guarantee Program, we invite you to consider adopting the model documents. This would open not only the HUD Section 184 Program to your tribal members, but also the mortgage programs offered by VA and the USDA.

Following your adoption of the Model Procedures and Residential Lease, the tribe and HUD will sign the Memorandum of Understanding. HUD will then provide the VA and USDA with a copy of the signed Memorandum of Understanding.

You may contact the Office of Loan Guarantee, in Denver, CO, at 1-800-561-5913 or visit our website at www.codetalk.fed.us/loan184.html for additional information on the Section 184 Program.

Together, we can open further the door to homeownership in Indian Country.

Sincerely ,

A handwritten signature in black ink, reading "Paul Jurkowski". The signature is fluid and cursive, with a large initial "P" and "J".

Paul Jurkowski
Director, Loan Guarantee

Enclosures



Success Stories

HUD Section 184

Fannie Mae buys Section 184 loans. We have purchased approximately 60% of all Section 184 loans.

Title VI

Fannie Mae is committed to and has developed a way of purchasing NAHASDA Title VI guaranteed loans through its American Communities Fund (ACF). ACF will work with the local lender to determine the appropriate interest rate and terms for the loan and will buy the loan after HUD has issued its guarantee.

Title VI is a Title of NAHASDA (Native American Housing Assistance and Self Determination Act) that enables the tribe to borrow up to five times its annual NAHASDA grant amount, for eligible affordable housing activities.

Oneida Indian Nation of New York

Fannie Mae has recently completed a new loan program with the Oneida Indian Nation of New York that will eliminate the need to seek Bureau of Indian Affairs (BIA) approval for title status and mortgage filings.

Loans to the Oneida tribal members will be guaranteed by the tribe and processed by Key Bank. Conventional loans will be processed using standard loan documents and the loans will be sold to Fannie Mae.

Seminole Tribe of Florida

The Seminole Tribe of Florida and Fannie Mae have created a loan program where the borrower is only required to contribute one percent, out of pocket, towards the down payment on the loan and the tribe will loan funds to the tribal member to make up the balance of the down payment. This loan from the tribe will have a nominal interest rate.

This loan product utilizes Fannie Mae's "Timely Payment Rewards" program which makes it possible for borrowers with less than perfect credit to obtain a home loan. Timely Payment Rewards is a mortgage that rewards you for demonstrating 24 consecutive months of timely payments by reducing the interest rate by 1 percent. Eligible borrowers may finance their home at a mortgage rate as much as 2 percent lower than what is typically paid for higher-rate alternative financing.

Choctaw

The Choctaw (Oklahoma) Housing Authority—the first tribal housing authority in the country to have access to Fannie Mae's Desktop Originator—will use our system to originate loans for tribal members in Oklahoma and seven other states through Fannie Mae's Native American Conventional Lending Initiative (NACLI). DO will provide home buyers with access to Fannie Mae's Expanded Approval-Timely Payment Reward product, helping tribal members with slightly impaired credit to qualify for a mortgage.

Predatory Lending Publications and Resources

Background Materials

Coalition for Responsible Lending. 2000. Model Statute Against Abusive Home Loans.

World Wide Web page <<http://www.responsiblelending.org>>

Goldstein, Deborah. October 1999. Understanding Predatory Lending: Moving Toward A Common Definition and Workable Solutions. Published by Neighborhood Reinvestment and the Joint Center for Housing Studies of Harvard University.

Hangen, Eric. 1999. Predatory Lending: A Look at the Problem and Possible Solutions. Publication by a consultant to the Neighborhood Reinvestment Corporation, The Neighborworks Network and The Neighborworks Campaign for Homeownership 2002.

Mortgage Bankers Association of America. 2000. Industry Update. *Predatory Lending Watch*. August 200.

Seidman, Ellen. 2000. Fostering Competition Is Key to Fighting Predatory Lending. Keynote presentation and paper by Ellen Seidman, Director of Office of Thrift Supervision, at the Neighborhood Reinvestment Training Institute on Feb. 23, 2000.

Lending Practices and Consumer Behavior

Bradley, Jeanette & Skillern, Peter. 2000. Predatory Lending: Subprime lenders trick homeowners into expensive loans. World Wide Web page <<http://nhi.org>>

Brennan, William, Jr. 1998. Predatory Lending. Testimony of William J. Brennan, Jr., Home Defense Program of the Atlanta Legal Aid Society, Inc. Before the United States Senate Special Committee on Aging. 16 March. World Wide Web page <<http://www.law.emory.edu>>

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Lee, Matthew. 1999. Strategies to Combat Predatory Subprime Lending, Particularly When Targeted at Communities of Color. National Fair Housing Advocate Online. May. World Wide Web page
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Neighborhood Reinvestment Corporation. 2000. Land Sharks: Dangerous But Legal. *Bright Ideas*. Spring 2000.

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Sharpe, Tom. 1999. The Money Trap: Get Used to it: Loan sharks charging more than 500 percent interest have a legal foothold in New Mexico. *Santa Fe Reporter*. April 7-13, 1999.

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<<http://www.smresearch.com/WSCS98.html>>

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Consumer Education Materials

Curricula:

- AARP: The Women's Financial Information Program: A Money Management Workbook, 1999.
- National Community Reinvestment Coalition (NCRC): Financial Literacy Manuals, 1999.
- Neighborworks Campaign for Home Ownership 2002 and Neighborhood Reinvestment Corporation. Annotated Bibliography for Financial Fitness Education (over 20 curricula and supplemental resources), 1999.
- NHS New York City: Financial Literacy Workshop, 1999.
- NHS Salisbury: Predatory Lenders and Other Sharks in the Financial Waters, 1999.

Videos Purchased

- KCTS/Seattle and Oregon Public Broadcasting videos: *Affluenza*, 1998 and *After Affluenza: Living Better on Less*, 2000.
- Center for Community Self Help: *Predatory Lending Practices News Coverage*, 1997 and 1998.

Links to Related Websites:

- AARP Home Equity Information (<http://www.aarp.org/hecc/home.html>)
- Atlanta Legal Aid Society (<http://www.law.emory.edu/PI/ALAS/>)
- Center for Community Self Help (<http://www.selfhelp.org/>)
- Coalition for Responsible Lending (<http://www.responsiblelending.org>)
- Consumer Federation of America (<http://www.consumerfed.org>)
- Consumers Union (<http://www.consumersunion.org>)
- The Federal Trade Commission (<http://ftc.gov>)
- National Association of Attorneys General (<http://www.naag.org>)
- National Center for Home Equity Conversions (<http://www.reverse.org>)
- National Consumer Law Center (<http://www.consumerlaw.org>)
- National Fair Housing Advocate (<http://www.fairhousing.com>)

* Also have a newspaper article archive in-house with national and local articles collected and distributed through National Task Force on Predatory Lending Network. Currently have 150 article entries.

TITLE VI SUCCESS STORIES

One of the primary objectives of the NAHASDA is to ensure better access to private capital markets for Indian Tribes. Through the Title VI Program, Tribes and TDHEs have access to a federal guarantee on loans obtained from financial institutions. To date, HUD/ONAP has guaranteed five Title VI projects. They are:

Mountain Village Development

Mountain Village, situated 150 miles Northwest of Bethel, AK, is a remote community accessible only by river, air or dogsled. Despite its distant location, it became the **first Title VI project** in the Nation.

The **Asa'carsarmuit** Tribal Council is addressing the critical shortage of housing through a Title VI project, which will provide much needed affordable rental units for eight families.

The modular housing units were constructed in Palmer, AK, and were shipped by barge to the home sites. Infrastructure will be constructed using force account labor.

The First National Bank of Anchorage is the private financing provider for this **Title VI** guaranteed loan for \$1,696,020 at a fixed rate for a 20-year period. Payments are made annually to coincide with the receipt of IHBG funds.

Giiwedin Townhouse Project

The **Lac Courte Oreilles** Band of Lake Superior Chippewa Indians is a family of the Ojibwe Nation. The Lac Courte Oreilles reservation is a typical "checkerboard" which is a mix of trust, state, federal, and private lands.

Recognizing the need for housing opportunities for young adults and college students, the LCOHA has created a project of 40 one-bedroom units in 4 separate buildings and infrastructure.

Multiple resources were pooled to develop this project. They include 1937 Act development funds, mutual help proceeds, a FHLBank Affordable Housing Program Grant, BIA Indian Education Program funds, Community Development Block Grant funds, and a Title VI guaranteed loan.

On December 14, 2000, the Indian-owned Chippewa Valley Bank in Winter, WI, closed the **Title VI** guarantee loan for \$900,000 at a fixed rate of interest for 25 years. Monthly payments are comprised of rental income and IHBG funds.

For more information regarding the Title VI Loan Program and how it can assist in a project's development, please contact the Office of

Loan Guarantee at 1-800-561-5913 or visit our website at www.codetalk.fed.us/loan184titleVI.html

Green Earth

Green Earth is a master-planned community located in York County, SC, developed for the **Catawba Indian Nation** by the ISWA Development Corporation.

The 120 units of Phase 1 of the development include 90 single-family units that will be rented with an option to purchase and 30 multifamily units. Green Earth was developed with consideration of the Native American's respect for nature. The infrastructure was designed with regard for wildlife habitat and the preservation of wetlands.

The total cost of Phase 1 is estimated at \$10.8 million dollars, with \$5,300,000 derived from a Title VI loan guarantee. First Union provided the financing. Other funding sources include grants for the water and sewerage from the Indian Health Service, IHBG funds, and Rural Housing grant funds. **Title VI** loan terms for the \$5,300,000 include a 2½ year construction period based upon a LIBOR floating rate plus margin. The loan converts to a permanent fixed rate loan for 20 years. Monthly payments begin after the conversion date.

Willow Wynne Mobile Home Park

The **Salish & Kootenai** Housing Authority (SKHA) recently obtained a Title VI guaranteed loan for \$1,525,000 to purchase and renovate a mobile home park located in Pablo, MT. Park redesign includes upgrades to the water and sewer system and a reduction in the number of units to enhance livability.

The community lender is the Ronan State Bank located in nearby Ronan, MT. The **Title VI** project is a loan for \$1,525,000 for 15 years at a fixed rate of interest with one annual payment. Site rents collected, supplemented with IHBG funds, are the source of repayment.

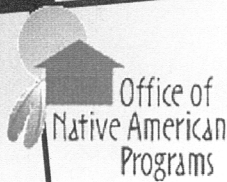
White Sands Village

The **Pojoaque** Housing Corporation (PHC) plans to construct a 30 unit (10 3-bedroom and 20 4-bedroom) rental housing development at the beautiful White Sands Village location under the Sangre De Christo Mountains on this New Mexico Pueblo. The total project includes infrastructure and streets. This is the first phase, on 47 acres; of a 215-acre multi-phase development on Pueblo trust land.

The project will be funded with Indian Housing Block Grant, HUD Rural Housing and Economic Development Grant, and the FHLBank's Affordable Housing Program and a Title VI guaranteed loan. PHC also received Low Income Housing Tax Credits (LIHTC) for this rental project. Financing for the **Title VI** guaranteed loan was provided by Century Bank in Santa Fe, NM, in the amount of \$434,900. With a Fannie Mae commitment, the lender was able to offer a permanent fixed interest rate below 8.00% for a period of 20 years.



SECTION 184 LOAN GUARANTEE PROGRAM



HUD
Office of Native American Programs
Section 184, Loan Guarantee Program
1999 Broadway, Suite 3390, Box 90
Denver, CO 80202
(303) 675-1600 fax (303) 675-1671
Toll Free 1-800-561-5913

HOMEOWNERSHIP IN INDIAN COUNTRY

Congress established the Section 184 Indian Housing Loan Guarantee Program in 1992. The program is designed to offer homeownership and property rehabilitation opportunities for eligible Tribes, Indian Housing Authorities (including Tribally designated housing entities), and Native American individuals or families wanting to own a home on their native lands.

Why a loan program specific to Indian Country?

Historically, there has been a lack of mortgage capital in Indian Country because much of the land is held in trust by the United States Government for the benefit of a particular tribe or individual Native American. Land held in trust for a Tribe cannot be mortgaged, and land held in trust for an individual must receive Bureau of Indian Affairs (BIA) approval before a lien is placed on the property. Recordation must also take place with the local BIA.

How does the Section 184 Program bring mortgage capital to Indian Country?

For a home loan on Tribal trust land, the eligible individual borrower leases the home site from the Tribe on a lease approved by the BIA and the Department of Housing and Urban Development (HUD). That lease creates a leasehold. It is the home and the leasehold interest in the home site that are mortgaged so that in the event of a foreclosure, the home and leasehold interest are foreclosed, not the Tribal land. The ownership of the land itself remains in trust for the Tribe.

The 184 Loan Guarantee Program is currently partnering with over 150 lenders and 100 Tribes that are committed to making homeownership a reality for Native Americans. To continue the program's growth and success, we want to expand our lender and Tribal partnerships.

184 PROGRAM HIGHLIGHTS

- 100% guarantee to lender
- Nationwide program on Tribal Trust, allotted trust or fee simple land in an Indian operating area
- New & existing housing
- Single close construction (permanent) loan
- Loan limit—150% of FHA limit
- Low down payment
- No maximum income limits
- Flexible underwriting
- 1% guarantee fee at closing
- Assumable
- Secondary markets

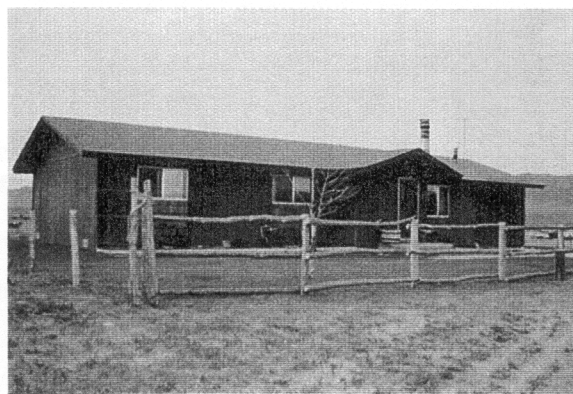
Since program inception, over 825
184 guaranteed loans have been made in Indian
Country



HOW THE 184 PROGRAM WORKS

HUD guarantees the mortgage loan made by eligible lenders to eligible borrowers. The loan guarantee assures the lender that its investment will be repaid in the event of foreclosure. The borrower pays a 1% loan guarantee fee at closing. The guarantee fee may be financed in the mortgage or paid in cash.

The borrower applies for the loan with a participating lender. The borrower works with the Tribe and the BIA if leasing Tribal land. The lender compiles and evaluates the necessary loan documentation and submits the loan for approval to the Office of Loan Guarantee in Denver for underwriting and a firm commitment.



ELIGIBLE 184 BORROWERS

- A person recognized as Indian or Alaskan Native by an Indian Tribe, the Federal Government or any state
- An Indian Housing Authority
- A Tribally Designated Housing Entity
- An Indian Tribe

HOW CAN TRIBES PARTICIPATE IN THE 184 LOAN PROGRAM?

A key element of the 184 Loan program is Tribal participation. Participating Tribes must enact foreclosure, eviction and priority of lien procedures and must have an approved lease for use on Tribal trust land. The Tribe must submit copies of the foreclosure, eviction and priority of lien procedures, a copy of its lease, and the Tribal resolution adopting the procedures to the office of Loan Guarantee for approval. The Tribal resolution should state that the Tribe has:

- Enacted and agrees to enforce the foreclosure, eviction and lien procedures or that the Tribe agrees to follow state foreclosure procedures
- Enacted and agreed to enforce leasing procedures

Sample copies of foreclosure, eviction and lien procedures can be obtained by calling the 184 Program Office (1-800-561-5913) or on our website at <http://www.codetalk.fed.us/loan184>

ELIGIBLE ACTIVITIES

- Acquisition of existing housing
- Acquisition and rehabilitation of existing housing
- Rehabilitation of existing housing
- Construction of new housing (including manufactured housing)

Tribes or housing authorities can obtain funds to develop single family homes that are subsequently sold (or assumed) by eligible borrowers or to create rental housing.

Eligibility is limited to single family housing (1-4 units), and fixed rate loans for 30 years or less.

The 184 Program can **not** be used on commercial structures or with adjustable rate mortgages.

LENDER PARTICIPATION



Loans are originated and serviced by:

- Lenders approved by HUD/FHA for participation in the single family mortgage insurance program; or
- Lenders authorized by the US Department of VA to originate automatically guaranteed housing loans; or
- Lenders approved by the US Department of Agriculture to make loans for single family housing; or
- Lenders supervised, approved, regulated, or insured by any agency of the Federal Government; or
- Any lender approved by HUD to originate Section 184 loans

LENDER APPROVAL REQUIREMENTS

Lenders interested in originating Section 184 loans must submit the following to the Office of Loan Guarantee for review:

1. Evidence of Federal approval, supervision, regulation or insurance. For example, all HUD/FHA approved lenders must submit the HUD/FHA lender identification number for each approved HUD/FHA branch office that will originate Section 184 loans.
2. The address, telephone number and name of the branch manager for each branch office that will originate Section 184 loans. HUD/FHA approved lenders must provide the HUD/FHA lending area for each branch office.

3. If the originating lender has an approved HUD/FHA correspondent/sponsor relationship, a copy of the HUD/FHA approval for the correspondent/sponsor relationship, including the sponsor's HUD/FHA lender identification number, must be submitted for each sponsor that will be purchasing the Section 184 loans.

4. All other lenders must provide the name and location of the entity that will service its Section 184 loans.

Approved lenders will be added to our "Interested and Participating Lenders List" available on our website and by mail.

GUARANTEED LOANS ARE MARKETABLE

Any Section 184 guaranteed loan, including the security given for the loan, may be sold or assigned by the lender to any financial institution subject to examination and supervision by an agency of the Federal Government or of any state.

A strong secondary market exists for Section 184 loans. Fannie Mae, Freddie Mac, Ginnie Mae, and state housing finance agencies purchase Section 184 loans.





SECTION 184 HIGHLIGHTS

100 % Guarantee: HUD guarantees 100% of the outstanding principal and interest due and the payment of other necessary and allowable expenses in the event of foreclosure and claim.

Low Cost 1% Guarantee Fee: Never more and never less—the borrower pays a 1% guarantee fee (1% of the mortgage amount) that can be financed or paid in cash at closing. It is the lowest cost of any government or conventional guarantee or insurance program in Indian Country. Borrowers are *not* required to pay a *monthly* premium for a 184 loan.

Flexible Underwriting: Section 184 Program has statutory and regulatory parameters for the maximum loan amount and term for the loan. Within these parameters, lenders have significant latitude to approve loans. The 184 Program Office encourages a flexible approach in a wide variety of situations while ensuring that prudent underwriting practices (industry standards) are followed. Our published underwriting guidelines, including credit history, source/adequacy of income and assets to close, offer greater flexibility than standard conventional guidelines. The Section 184 Program uses one qualifying ratio—41% total debt-to-income ratio.

Single Construction Loan: Only one closing is required. At closing the amount allocated for construction or rehabilitation is placed in an escrow account and is drawn down as the work is satisfactorily completed. Monthly mortgage payments will begin as on an existing home purchase. The loan amount can include an escrow of up to six monthly mortgage payments (the maximum construction period).

Low Down Payment: 1.25% or 2.25% down payment requirement depending on the value or cost to acquire the home.

Secondary Markets: A strong secondary market exists for Section 184 loans. Section 184 loans, including the security given for the loan, may be sold or assigned by the lender to any financial institution subject to examination and supervision by an agency of the Federal Government or by any state. Fannie Mae, Freddie Mac, Ginnie Mae and state housing finance agencies purchase Section 184 loans.

CONTACT US:

<http://www.codetalk.fed.us/loan184.html>
1-800-561-5913
(303) 675-1600

A Banker's Quick Reference Guide to CRA



This publication is a guide to the CRA regulation and examination procedures.

It is intended for bank CEOs, presidents, and CRA and compliance officers as a tool for accessing CRA information quickly. Regulation BB and agency examination procedures should be referred to for more detailed information.

Large Banks—Lending Test

Performance Standards

Number and amount of loans in the assessment area(s)

Geographic distribution of loans

- proportion of loans in assessment area(s)
- dispersion of lending in assessment area(s)
- number and amount of loans by geography classification (low-, moderate-, middle- and upper-income)

Distribution based on borrower characteristics

- number and amount of home mortgage loans to low-, moderate-, middle- and upper-income individuals
- number and amount of small business and small farm loans by loan amount at origination and to small businesses and small farms with gross annual revenues of \$1 million or less
- (optional) number and amount of consumer loans to low-, moderate-, middle- and upper-income individuals

Community development loans

- number and amount
- complexity and innovativeness

Innovative or flexible lending practices

(Optional) affiliate lending and lending by a consortium or third party will be considered

Examiner Review

Identify loans to be evaluated by reviewing

- HMDA and CRA disclosure statements
- interim HMDA and CRA data collected
- sample of consumer loans (if a substantial majority of business)
- other loan information provided by the bank

Verify accuracy of loan data collected and/or reported

- affiliate loans may be claimed by only one affiliate
- community development loans meet definition
- the amount of third party, consortia or affiliate lending may not account for more than the percentage share of the bank's participation or investment
- if reported, consumer loans must include all loans in a particular category (*i.e.*, motor vehicle)

Evaluate lending volume both in number and dollar amount of loans within the assessment area for each type of loan, giving consideration to the performance context

Analyze the geographic distribution of lending

- review information provided by the bank for insight into the reasonableness of its geographic distribution
- perform independent analysis as necessary. The analysis should consider number and dollar volume of loans:
 - made inside and outside assessment area
 - made in each geography and each income category of geography.
 - by number of geographies penetrated in each income category
 - for housing in each geography compared with the number of housing units in each geography
 - for small businesses or farms in each geography compared with the number of small businesses or farms in each geography
 - for any gaps in lending activity for each income category by identifying groups of contiguous geographies that have no or low loan penetration relative to the other geographies
- if contiguous geographies have abnormally low penetration, the examiner may compare the bank's performance with that of other area lenders. Note: Banks are not required to lend in every geography.

Analyze distribution of lending by borrower characteristics

- review information provided by the bank for insight into the reasonableness of its lending distribution
- supplement with independent analysis of lending distribution by borrower characteristics as necessary and applicable, giving consideration to the number and dollar volume of loans:
 - for home mortgages made to low-, moderate-, middle- and upper-income borrowers, and make a percentage comparison of total home mortgage loans with the population in each income category
 - made to small businesses or farms by loan size of \$100,000 or less, more than \$100,000 but less than or equal to \$250,000 and more than \$250,000
 - made to small businesses or farms having annual revenues of less than \$1 million and compare with total small business and farm lending
 - made outside the assessment area if borrowers within the assessment area are adequately served and it would enhance the assessment of the bank's performance

Review community development lending to determine the community development lending opportunities, the bank's responsiveness and the extent of its leadership

Determine whether lending performance is enhanced by offering innovative or more flexible loan products by considering:

- if LMI borrowers are served in new ways or the loans serve creditworthy borrowers not previously served
- the success of each product

Large Banks—Investment Test

Performance Standards	Examiner Review
Dollar amount of qualified investments	Identify qualified investments <ul style="list-style-type: none"> – review investment portfolio – at bank's option, review affiliate's investment portfolio – include qualified investments made since previous examination and may consider qualified investments made prior to last exam still outstanding – include qualifying grants, donations or in-kind contributions of property made since last examination that are for community development purposes
Innovativeness and complexity of qualified investments	
Responsiveness of qualified investments to credit and community development needs	Evaluate investment performance <ul style="list-style-type: none"> – benefit to assessment area or broader area that includes assessment area – has not been considered under lending or service test – if reported, that affiliate investments have not been claimed by another institution – dollar volume of investments made considering performance context – use of innovative or complex investments, particularly those not routinely provided by other investors – responsiveness to available opportunities and degree to which they serve LMI areas or individuals
Degree to which qualified investments are not routinely provided by private investors	
Qualified investments must benefit the assessment area(s) or a broader statewide or regional area that includes the assessment area(s)	
(Optional) qualified investments made by an affiliate bank will be considered if not claimed by any other institution	

Large Banks—Service Test

Performance Standards	Examiner Review
Retail Banking Services	Retail Banking Services
Distribution of branches among each geography classification	Determine from the bank's public file the distribution of branches among each geography classification in the assessment area(s) and the banking services provided, including hours and available products
Record of opening and closing branches, particularly those located in LMI geographies or primarily serving LMI individuals	Identify any material differences in hours or services available at each branch
Availability and effectiveness of alternative systems for delivering retail banking services in LMI geographies and to LMI individuals	Evaluate the record of opening and closing branch offices and its effect, particularly on LMI geographies or individuals
Range of services provided in each geography classification and the degree the services are tailored to meet the needs of those geographies	Evaluate the accessibility and use of alternative systems for delivering retail banking services in LMI areas and to LMI individuals
Community Development Services	Assess the quantity, quality and accessibility of service-delivery systems provided in each geography classification <ul style="list-style-type: none"> – consider the degree to which services are tailored to the convenience and needs of each geography
Extent of community development services provided	Community Development Services
Innovativeness and responsiveness of community development services	Identify community development services of the bank and, at its option, services through affiliates
	Ensure community development services meet definition
	Evaluate community development services using performance context information and consider: <ul style="list-style-type: none"> – innovativeness and whether they serve LMI customers in new ways or serve groups of customers not previously served – the degree to which they serve LMI areas or individuals and their responsiveness to available service opportunities

Large Banks—Data Collection

General

Collect and maintain data on loans to small businesses or farms captured in Schedule RC-C of the Call Report (loans originated or purchased)

- unique loan number or alpha-numeric symbol
- amount of the loan
- location of the loan
- indicate whether the gross annual revenues of the business or farm are \$1 million or less

Submit annually by March 1 the following data:

- for each geography, loans to small businesses and farms (loans originated or purchased), including
 - aggregate number and amount of loans at origination in loan size categories of \$100,000 or less, more than \$100,000 but less than or equal to \$250,000 and more than \$250,000
 - aggregate number and amount of loans to businesses and farms with gross revenues of \$1 million or less
- aggregate number and amount of community development loans (originated or purchased)
- home mortgage loans as required under Regulation C (Home Mortgage Disclosure Act)
- a list for each assessment area showing the geographies within the area
- affiliate lending if affiliate lending is being considered
- consortium or third-party lending if consortium or third-party lending is being considered

Optional

Collect and maintain data for consumer loans (originated and purchased)

- unique loan number or alpha-numeric symbol
- amount of the loan
- location of the loan
- gross annual income of the borrower that is considered in making the credit decision

Collect and maintain any other information concerning lending performance the bank may choose

Public File

General

Written comments (prior two calendar years)

- received from the public that specifically relate to bank's CRA performance
- any response to the comments by the bank

CRA performance evaluation

Branch information

- list of branches with their street addresses and geographies
- list of branches opened or closed
- list of services generally offered and any material differences in availability or cost of services at particular branches
- (optional) information regarding availability of alternative systems for delivering retail banking services

Map of each assessment area

- showing boundaries of the area
- identifying the geographies contained within the area (either on the map or in a separate list)

Any other information the bank chooses

If applicable

- HMDA disclosure statement (prior two calendar years)
- strategic plan
- efforts to improve performance if bank received a less than satisfactory rating

Specific

Large Banks

CRA disclosure statement (prior two calendar years)

(Optional) number and amount of consumer loans (prior two calendar years)

- to low-, moderate-, middle- and upper-income individuals
- located in each geography classification
- located inside/outside the assessment area(s)

Small Banks

Loan-to-deposit ratio

- for each quarter of the prior calendar year
- (optional) additional data on its loan-to-deposit ratio

Small Banks

Performance Standards

Loan-to-deposit ratio

- given the bank's size and financial condition
- credit needs of the assessment area(s)
- other lending-related activities
- considering seasonal variations

Percentage of loans and other lending-related activities in the bank's assessment area(s)

Record of lending and other lending-related activities to

- borrowers of different income levels
- businesses and farms of different sizes

Geographic distribution of loans

Action taken in response to written complaints with respect to CRA

Examiner Review

Loan-to-deposit analysis

- using Call Reports, TFRs or UBPR/UTPRs data, calculate an average loan-to-deposit (LTD) ratio using quarterly LTDs since the last exam
- determine the reasonableness of the average LTD ratio in light of the performance context
- if the LTD ratio does not appear reasonable, additional consideration will be given to
 - number and dollar volume of loans sold to the secondary market
 - innovativeness or complexity of community development loans and qualified investments

Compare credit extended inside and outside assessment area(s)

- if available, use HMDA data, bank loan and other reports to analyze the extent of lending inside and outside assessment area(s), after testing the reports for accuracy
- if loan data are not available, accurate or comprehensive, sample loans originated, purchased or committed to, and calculate the percentage of loan volume within the assessment area(s)
- if majority of the loans are not in the assessment area, thus not meeting the standards for satisfactory, give additional consideration to the performance context

Geographic distribution of credit

- determine if there is a sufficient number and income distribution of geographies to provide meaningful analysis. If yes,
 - determine distribution of loans among low-, moderate-, middle- and upper-income geographies using available bank loan data or sample. Identify groups of geographies, by income categories, where there is little or no loan penetration

Income and revenue distribution of credit

- if available, use data about borrower income (individuals) or revenues (businesses) to determine the distribution of loans by borrower income and by business revenues. Identify categories of borrowers by income or business revenues that have little or no loan penetration

If sufficient geographic or income/revenue data are not available to do an analysis of the distribution of credit, consider alternatives such as analyzing geographic distribution by street address rather than geography

If there are geographies or income categories of low penetration, form conclusions about the reasons in light of the performance context

Review complaints relating to the bank's CRA performance

- evaluate the bank's record of taking action, if warranted, in response to written complaints about its CRA performance

If the bank chooses, review its performance in making qualified investments and providing services. Note: Performance with respect to qualified investments and services may be used to enhance a satisfactory rating but may not be used to lower a rating

- consider dollar volume, impact and innovativeness or complexity of qualified investments
- consider number of branches and ATMs and the services they provide, accessibility to LMI geographies, alternative service delivery systems and record of opening and closing branches

The Strategic Plan Option

Performance Standards

A strategic plan assessment may be chosen as an alternative assessment method by any bank if the plan has been submitted and approved by the bank's supervisory agency. The plan must be in effect, and the bank must have been operating under the approved plan for at least one year.

In general, a plan must meet the following criteria:

- maximum term is five years, and multiyear plans must have annual interim goals
- banks with multiple assessment areas may prepare a single strategic plan or multiple plans and may have assessment areas not covered by a plan
- affiliated institutions may submit a joint plan if the plan provides measurable goals for each institution

Bank must seek public participation in plan development by

- informally seeking suggestions from the public in the assessment area(s) covered by the plan during its development
- formally soliciting public comment for at least 30 days by
 - publishing notice in a general circulation newspaper in each assessment area covered by plan
 - making copies of plan available for review

Requirements for submission of the plan include

- submitting to supervisory agency at least three months prior to proposed effective date
- providing a description of efforts to seek suggestions from the public
- providing any written public comments received
- if initial plan was revised based on public comment, submitting initial plan

The plan must contain the following:

- measurable goals for helping to meet credit needs, particularly of LMI areas and individuals
- address lending, investment and service performance categories with an emphasis on lending and lending-related activities
- specify measurable goals that constitute a satisfactory rating
- for consideration of an outstanding rating, must specify outstanding goals

Examiner Review

Review the following:

- the approved plan and any approved amendments
- the agency's approval process files
- written comments from the public since the effective date of the plan

Determine if the bank achieved goals for each assessment area by

- reviewing plan's measurable goals
- identifying the bank's actual performance
- comparing goals with actual performance

Evaluate any unmet goals and identify if they were "substantially met" based on

- number of goals not met
- degree to which goals were not met
- relative importance of unmet goals to the overall plan
- why the goals were not met

CRA Ratings

Large Banks

Component test ratings that reflect the bank's lending, investments and services are assigned.

Component Test Ratings	Lending	Investment	Service
Outstanding	12	6	6
High Satisfactory	9	4	4
Low Satisfactory	6	3	3
Needs to Improve	3	1	1
Substantial Noncompliance	0	0	0

Preliminary composite rating is assigned by summing the component test ratings for lending, investment and service tests and referring to the chart below.

Points	Composite Assigned Rating
20 +	Outstanding
11 – 19	Satisfactory
5 – 10	Needs to Improve
0 – 4	Substantial Noncompliance

Adjustments to preliminary composite rating:

- no bank may receive a composite assigned rating of satisfactory or higher unless it receives at least low satisfactory on the lending test.
- evidence of discriminatory or other illegal credit practices adversely affects the evaluation of a bank's CRA performance.

A final overall CRA rating is assigned.*

Small Banks

Satisfactory

- if the bank meets each of the standards for a satisfactory rating or
- if exceptionally strong performance with respect to some of the standards compensates for weak performance in others

Outstanding

- if the bank meets each of the standards for a satisfactory rating and materially exceeds the standards in some or all of the criteria or
- if the bank generally exceeds the standards for a satisfactory rating and its performance in making qualified investments and providing branches and other services and delivery systems supplements its performance sufficiently to warrant an outstanding rating

Evidence of discriminatory or other illegal credit practices adversely affects the evaluation of a bank's CRA performance.

A final overall CRA rating is assigned.*

Strategic Plan

Bank must identify satisfactory measurable goals and, to be considered for an outstanding rating, must identify a separate group of outstanding measurable goals that substantially exceed the satisfactory level.

A satisfactory rating will be assigned if the bank substantially achieves its plan goals for a satisfactory rating.

An outstanding rating will be assigned if the bank exceeds its plan goals for a satisfactory rating and substantially achieves its plan goals for an outstanding rating.

A needs to improve or substantial noncompliance rating will be assigned if the bank fails to substantially meet its plan goals for a satisfactory rating, unless the bank elects in its plan to be evaluated under the appropriate alternative large or small bank assessment method.

Evidence of discriminatory or other illegal credit practices adversely affects the evaluation of a bank's CRA performance.

A final overall CRA rating is assigned.*

* Banks with branches in just one state will receive one set of component ratings. Banks with branches in two or more states and banks with branches in multistate MSAs will be assigned component ratings for each state or multistate MSA reviewed.

Large Bank—Lending Test

Characteristic	Outstanding	High Satisfactory	Low Satisfactory	Needs to Improve	Substantial Noncompliance
Lending Activity	Lending levels reflect EXCELLENT responsiveness to assessment area credit needs.	GOOD	ADEQUATE	POOR	VERY POOR
Assessment Area(s) Concentration	A SUBSTANTIAL MAJORITY of loans are made in the bank's assessment area(s).	HIGH PERCENTAGE	ADEQUATE PERCENTAGE	SMALL PERCENTAGE	VERY SMALL PERCENTAGE
Geographic Distribution of Loans	The geographic distribution of loans reflects EXCELLENT penetration throughout the assessment area(s).	GOOD	ADEQUATE	POOR	VERY POOR
Borrower's Profile	The distribution of borrowers reflects, given the product lines offered, EXCELLENT penetration among customers of different income levels and businesses of different sizes.	GOOD	ADEQUATE	POOR	VERY POOR
Responsiveness to Credit Needs of Low-Income Individuals and Geographies and Very Small Businesses	Exhibits an EXCELLENT record of serving the credit needs of low-income individuals and areas and very small businesses.	GOOD	ADEQUATE	POOR	VERY POOR
Community Development Lending Activities	A LEADER IN MAKING community development loans.	MAKES A RELATIVELY HIGH LEVEL	MAKES AN ADEQUATE LEVEL	MAKES A LOW LEVEL	MAKES FEW, IF ANY
Product Innovation	Makes EXTENSIVE USE of innovative and/or flexible lending practices in serving assessment area credit needs.	USE	LIMITED USE	LITTLE USE	NO USE

Large Bank—Investment Test

Characteristic	Outstanding	High Satisfactory	Low Satisfactory	Needs to Improve	Substantial Noncompliance
Investment and Grant Activity	An EXCELLENT level of qualified community development investments and grants, OFTEN in a leadership position, particularly those not routinely provided by private investors.	SIGNIFICANT OCCASIONALLY	ADEQUATE RARELY	POOR NOT	FEW, IF ANY NEVER
Responsiveness to Credit and Community Developments Needs	Exhibits EXCELLENT responsiveness to credit and community development needs.	GOOD	ADEQUATE	POOR	VERY POOR
Community Development Initiatives	Makes EXTENSIVE USE of innovative and/or complex investments to support community development initiatives.	SIGNIFICANT USE	OCCASIONALLY USES	RARELY USES	DOES NOT USE

Large Bank—Service Test

Characteristic	Outstanding	High Satisfactory	Low Satisfactory	Needs to Improve	Substantial Noncompliance
Accessibility of Delivery Systems	Delivery systems are READILY ACCESSIBLE to ALL portions of the bank's assessment area(s).	ACCESSIBLE ESSENTIALLY ALL	REASONABLY ACCESSIBLE ESSENTIALLY ALL	ACCESSIBLE LIMITED	INACCESSIBLE SIGNIFICANT (particularly LMI geographies and/or LMI individuals)
Changes in Branch Locations	Record of opening and closing of branches has IMPROVED the accessibility of its delivery systems, particularly to LMI geographies and/or LMI individuals.	NOT ADVERSELY AFFECTED	GENERALLY NOT ADVERSELY AFFECTED	ADVERSELY AFFECTED	SIGNIFICANTLY ADVERSELY AFFECTED
Reasonableness of Business Hours and Services in Meeting Assessment Area(s) Needs	Services ARE TAILORED TO CONVENIENCE AND NEEDS of the assessment area(s), particularly LMI geographies and/or LMI individuals.	DO NOT VARY IN A WAY THAT INCONVENIENCES CERTAIN PORTIONS	DO NOT VARY IN A WAY THAT INCONVENIENCES PORTIONS	VARY IN A WAY THAT INCONVENIENCES CERTAIN PORTIONS	VARY IN A WAY THAT SIGNIFICANTLY INCONVENIENCES MANY PORTIONS
Community Development Services	A LEADER IN PROVIDING community development services.	PROVIDES A RELATIVELY HIGH LEVEL OF	PROVIDES AN ADEQUATE LEVEL OF	PROVIDES A LIMITED LEVEL OF	PROVIDES FEW, IF ANY

Small Bank

Characteristic	Outstanding	Satisfactory	Needs to Improve	Substantial Noncompliance
Loan-to-Deposit Ratio (considering seasonal variations and taking into account lending-related activities)	MORE THAN REASONABLE given the bank's size, financial condition and assessment area(s)' credit needs.	REASONABLE	LESS THAN REASONABLE	UNREASONABLE
Assessment Area(s) Concentration	A SUBSTANTIAL MAJORITY of loans and other lending-related activities are IN the assessment area(s).	MAJORITY IN	MAJORITY OUTSIDE	SUBSTANTIAL MAJORITY OUTSIDE
Borrower's Profile	EXCELLENT penetration among individuals of different income (including low- and moderate-income) levels and businesses and farms of different sizes.	REASONABLE	POOR	VERY POOR
Geographic Distribution of Loans	The geographic distribution of loans reflects EXCELLENT dispersion throughout the assessment area(s).	REASONABLE	POOR	VERY POOR
Response to Substantiated Complaints	The bank has taken NOTE-WORTHY, CREATIVE action in response to substantiated CRA complaints.	APPROPRIATE	INADEQUATE	UNRESPONSIVE
Investments	The investment record ENHANCES credit availability in assessment area(s).	N/A	N/A	N/A
Services	Record of providing branches and/or other services ENHANCES credit availability in assessment area(s).	N/A	N/A	N/A

Definitions

Assessment Area(s) — One or more of the geographic area(s) that is delineated by the bank and used by the regulatory agency in evaluating the bank's record of helping to meet the credit needs of its community. It must, in general, consist of one or more MSAs or one or more contiguous political subdivisions, such as counties, cities or towns. It must include geographies in which the bank has its main office, branches and deposit-taking ATMs, as well as the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans. A bank may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve. An assessment area must consist only of whole geographies, may not reflect illegal discrimination, may not arbitrarily exclude LMI geographies and may not extend substantially beyond a CMSA boundary or beyond a state boundary, unless the assessment area is located in a multistate MSA.

Community Development — Encompasses affordable housing (including multifamily rental housing) for LMI individuals; community services targeted to LMI individuals; activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs or have gross annual revenues of \$1 million or less; or activities that revitalize or stabilize LMI geographies.

Community Development Loan — A loan that has as its primary purpose community development; (except for wholesale or limited purpose banks) has not been reported or collected by the bank or an affiliate for consideration in the bank's assessment as a home mortgage, small business, small farm or consumer loan, unless it is a multifamily dwelling loan; *and* benefits the bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area.

Community Development Service — A service that has as its primary purpose community development, is related to the provision of financial services, has not been considered in the evaluation of the bank's retail banking services, benefits the bank's assessment area(s) or a broader statewide or regional area that includes the bank's assessment area and has not been claimed by other affiliated institutions.

Geography — A census tract or a block numbering area delineated by the U.S. Bureau of the Census in the most recent decennial census.

Income Level – Geography

Low-Income — Median family income is less than 50 percent of the area median income

Moderate-Income — Median family income at least 50 percent and less than 80 percent of the area median income

Middle-Income — Median family income is at least 80 percent and less than 120 percent of the area median income

Upper-Income — Median family income is 120 percent or more of the area median income

Income Level – Individual

Low-Income — Less than 50 percent of the area median income
Moderate-Income — At least 50 percent and less than 80 percent of the area median income

Middle-Income — At least 80 percent and less than 120 percent of the area median income

Upper-Income — At least 120 percent or more of area median income

Limited Purpose Bank* — A bank that offers only a narrow product line, such as credit card or motor vehicle loans, to a regional or broader market and has received designation as a limited purpose bank from its supervisory agency.

Performance Context — A bank's performance is judged in the context of information about the bank and its assessment area(s), including

- demographic data on median income levels, distribution of household income, nature of housing stock, housing costs and other relevant data
- lending, investment and service opportunities
- the bank's product offerings and business strategy, capacity and constraints, past performance and the performance of similarly situated lenders
- the bank's public file and any written comments about the bank's CRA performance
- any other relevant information

Qualified Investment — A lawful investment, deposit, membership share or grant that has as its primary purpose community development.

Small Bank — A bank that, as of December 31 of either of the prior two calendar years, had total assets of less than \$250 million and was independent or an affiliate of a holding company that, as of December 31 of either of the prior two calendar years, had total banking and thrift assets of less than \$1 billion.

Wholesale Bank* — A bank that is not in the business of extending home mortgage, small business, farm or consumer loans to retail customers and has received designation as a wholesale bank from its supervisory agency.

* Additional information regarding wholesale and limited purpose banks is available upon request.

Federal Reserve Bank of Dallas
Community Affairs Office
P.O. Box 655906
Dallas, Texas 75265-5906
(214) 922-5377

LIHTC: Learning from a New Mexico Success Story



Working Together to Build Programs and Opportunities

Slide 1



Agenda for Today

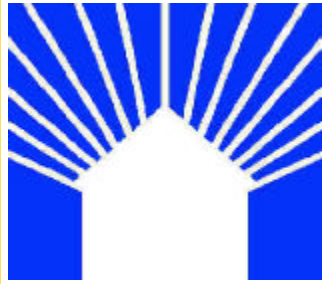
1. Introductions
2. Tax Credit Basics
3. Financial Structuring
4. Planning for Development: Santo Domingo's SDY2k Development

Deborah Webster, Director Native American Program, The Enterprise Foundation

Michael Bowman, Partner, Native Nations Consulting, Inc.

Patrick Wagner, Senior Development Officer, ESIC





Enterprise in New Mexico

*a Partnership with New Mexico
Mortgage Finance Authority*

- Planning
- Mortgages
- Development
- Economic Development
- Systems Change

Working Together to Build Programs and Opportunities

Slide 3



Planning

- Indian Housing Plans/Strategic
 - **1998/1999**
 - Santa Domingo
 - Isleta
 - Jicarilla
 - Acoma
 - SWIHA
 - **2001**
 - San Juan
 - Taos
- Santa Domingo Trading Post-2001
 - **Enterprise PDD**
 - vision/planning/research/project identification
 - **Main Street**
 - vision, marketing, financing, and development



Mortgages

Training and organizational assistance on the procedures and resolutions required to access private and government guaranteed mortgages

- Partners
 - Tribes/TDHEs
 - NMMFA
 - HUD
 - Rural Housing Services
 - Fannie Mae
 - Banks
- Mortgage Codes
 - Training for tribal councils
 - NM Curriculum for “One Stop” mortgage centers
 - Model code in place
 - 15 of 21 Tribes/Pueblos enacted codes since 1999
- Team
 - New Mexico Tribal Homeownership Coalition
 - Tribal/Agency Attorneys



Housing Development

Assist tribes access and package the public and private financing sources

- 1999 - 3 LIHTC developments financed (61 homes total) (LIHTC, NAHASDA, AHP, RHEDI)-- one unable to meet LIHTC/investor requirements
 - **Santo Domingo-today's session**
 - Picuris
- 2000 - 3 homeownership developments (MRB's, state construction loan guarantees, HOME down-payment assistance, AHP, RHEDI)
- 2001 - 1 LIHTC development 40 units mixed with master planned 6 acre site



Economic Development & Systems Change

- The Native American Lending Group, Inc.: A Native American CDFI.
 - Planning/Start-Up
 - Treasury T/A/EDA/RHED grants awarded 2000
 - Capitalization
 - 1 million from Bank of Albuquerque and BEA application for equity
 - 1st Loan 2001
- Grants and T/A for Small Business w/McCune



2. Tax Credit Basics

- Established by Congress in 1986 to encourage private investment in the construction and rehabilitation of affordable housing.
- Since 1987, the program has produced over 1,000,000 homes.
- Largest single funding source for affordable housing production in the U.S.
- Housing subsidy created in Federal tax code - administered by Internal Revenue Service and State Housing Finance Agencies.
- Rental homes (in essence, for families who are not otherwise ready or qualified for home ownership).



How Low Income Tax Credits Work

- States receive an annual allocation of \$1.75 per capita. Uses competitive application to allocate to projects.
- State allocating agencies issue an Qualified Allocation Plan (QAP)
 - Applications rated by allocating agency on a point system
 - Application procedures vary from state to state
 - Sponsors/Developers apply for LIHTCs
- Credits can be allocated a project or to individual buildings within a project



How Low Income Tax Credits Work

- Credit is based on acquisition (for building, not land) rehabilitation, and/or new construction costs incurred in the 24 months previous to rent-up and begins when units are occupied by low income families.
- Credit only received for units with tenants earning under 60% of median income
- Owner deducts from tax liability the credit - a portion of cost to build/rehabilitate project - over 10 years
- Requires 15 year compliance period and reporting to the IRS and state HFA and minimum 30 years affordability
- Some tax credits are recaptured by the IRS if the project does not operate for 15 years
- Sources for development include equity, debt, and grants



What Can Be Developed With the LIHTC?

- Most types of housing can be developed with LIHTC but must be rental
 - Rehab or new construction
 - Single family or multi-family
 - Limited equity coops (limited equity coop net leases the units from the Limited Partnership)
 - Elderly or special needs housing
 - Transitional housing



What Cannot Be Developed With the LIHTC?

- Owner occupied buildings of four or fewer units
- Employer provided housing
- Nursing homes
- Retirement homes
- Limited Equity Coops
- Hospitals
- Dormitories
- Trailer Parks



How Does a TDHE or Nonprofit Use a Tax Credit?

- Since nonprofits and TDHE's do not pay taxes, they form partnerships with for-profit to own project
- For profit provides funds - considered equity since they are part owner - in exchange for the tax credit
- Typically partnership is structured as a "limited partnership"



Ownership Structure

The Limited Partnership

- Limited Partnership made up of two partners
 - Limited Partner and General Partner
- Sponsor/developer acts as General Partner (GP):
 - Oversees development team, construction
 - Obtains funding, applies for LIHTCs
 - Coordinates supportive services
 - Maintains LIHTC compliance and reporting
 - Asset management issues



Ownership Structure

The Limited Partnership

- Syndicator acts as Limited Partner (LP). LP interested in financial and tax benefits - liability is limited to capital investment. LP forms a partnership with the GP and provides equity in exchange for a 99% interest in the LIHTCs and the operational losses that flow from a given project.
 - NOTE: IRS requires tax loss follow ownership - thus LP has 99% interest in ownership since GP cannot use tax credits.
 - NOTE: As long as the TDHE is the sole or managing General Partner, then units remain in stock for calculation of Indian Block Grant during limited partnership ownership.



What Is A LIHTC Syndicator?

- Syndicators such as ESIC act as the limited partner and thus provide cash equity in exchange for a 99% interest in project and thus 99% of the:
 - LIHTCs
 - Cash flow - *Syndicator typically provides a substantial portion of cash flow to General Partner as an “asset management fee” or through other means.*
 - Tax losses
 - Depreciation
 - Amortization
 - Mortgage interest paid or accrued
 - Real estate taxes paid or accrued
 - Operating losses

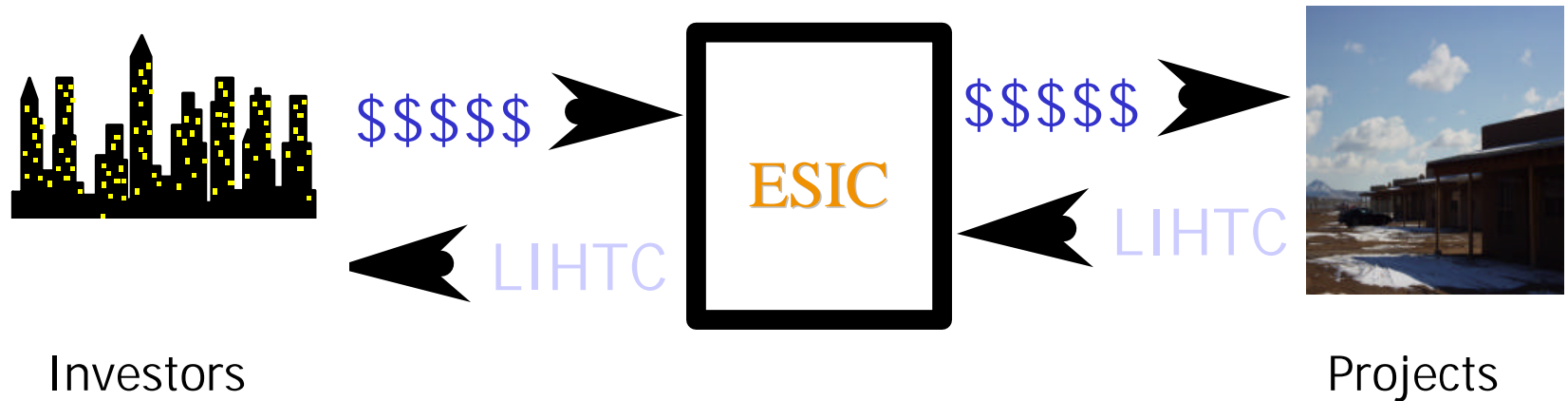


General Partner Guarantees

- Construction Completion: General Partner must guarantee to complete construction
- Operating Deficit: GP must pay operating losses until reserves are funded to adequate levels
- Tax Credit Reduction: GP will have to repay limited partner a portion of equity if project is not completed on time OR if annual reports to IRS do not properly document tenants at eligible income
- Replacement Reserves: GP must guarantee that replacement reserves will be funded each year to adequate level



Low Income Housing Tax Credits



Tax Credit vs. Tax Deduction

- Tax CREDIT - *dollar-for-dollar reduction in tax payer taxes*

\$1,000,000 - Gross Income

34% - Tax Bracket

\$340,000 - Gross Tax Liability

\$300,000 - Tax Credit

\$ 40,000 - Adjusted Tax Liability

- Credits include:
 - Low Income Housing Tax Credit
 - Historic Tax Credit

- Tax DEDUCTION - *reduction in tax payer taxable income*

\$1,000,000 - Gross Income

300,000 - Tax Deduction

\$ 700,000 - Taxable Income

34% - Tax Bracket

\$ 238,000 - Tax Liability

- Deductions come from Tax Losses
 - Depreciation/Amortization
 - Mortgage interest



Developer's Tax Credit Timeline

- Apply for tax credits
- Get a tax credit reservation
- Incur more than 10% of costs in year 1 (*if allocation before July 1 of application/carryover year*)
- Receive carryover allocation; obtain financing commitments
- Close on Equity
- Complete project and place it in service
- Cost Certify Project/Final Application
- Apply for 8609s for all buildings
- Record extended use agreement (LURA)
- Rent tax credit units to qualified tenants
- Elect when to start tax credits
- Keep tax credit units in compliance (*leasing, audits, tax returns*)



3. Financial Structuring

- Using the 9% and 4% Tax Credit Rates
- Calculating Tax Credit Basis & Computing Equity
- Analyzing Rent and Income Restrictions
- Understanding Using NAHASDA (*different treatment in 1999 versus 2001*), HOME Funds
- Filling the Financing Gap



Types of Tax Credits

- **9% New Construction/ Rehab Credit**
 - The standard kind of tax credit-SDTHA
- **4% New Construction/ Rehab Credit**
 - Used when there is federally-subsidized financing-not structured for SDTHA
- **4% Acquisition Credit**
 - Used when you purchase an existing building that qualifies-N/A for SDTHA



Low Income Housing Tax Credits - Basis

- What is eligible basis?
 - Eligible Basis is the costs incurred by a owner/taxpayer to make a residential property ready for its intended use.
 - New construction: costs associated with building the property.
 - Renovation: costs associated with the repair of building.
 - Only costs paid in the 24 months prior to placing the building in service (receiving certificate of occupancy) can be used in basis.
- Basis can be boosted 30% if in a “qualified census tract” or “difficult to develop” area
- Careful structuring is needed if federally-subsidized HOME/NAHASDA or other funds are used



What costs count as “eligible basis”?

- Permitted in Basis
 - Construction contract
 - Architect fees
 - Survey and Engineering
 - Insurance
 - Legal fees (except costs of setting up LP)
 - Bond/letter of credit
 - Pre-development and construction loan interest & fees
 - *Interior* (but not building) demolition
 - Accounting/Audit
 - Market/feasibility studies
 - Appraisal
- Permitted in Basis
 - Consultant fees
 - Fees and permits
 - Relocation costs
 - Tax credit fees (except up-front monitoring fees)
 - Appliances and personal property (*not permitted in historic tc basis*)
 - site work and landscaping (*not permitted in historic tc basis*)
 - Infrastructure/land preparation if it meets the *inextricable association or contemporaneous replacement of asset* tests



What doesn't count in "*eligible basis*"?

- Up front operating, replacement or rent up reserve and escrow accounts
- Permanent Mortgage Fees and related mortgage recording tax
- Partnership Organization Costs (Legal)
- Land Acquisition
- Marketing Expenses
- Syndication Costs
- Demolition of entire building
- Off-site improvements
- Up front tax credit monitoring fees
- Residential portion of Historic Tax Credit



Eligible basis is reduced by...

- Federal grants to building capital or operations
- Non low income residential units with costs >15% above low income rental units
- Extra costs of non low income residential units with costs <15% above low income rental units
- Historic Rehabilitation (residential portion) Credit
- Non residential space not for tenant use
- Fee related space (coin laundry, parking garage, etc.)



Low Income Housing Tax Credits - Basis

- What is qualified basis ?
- Qualified basis is the amount of *eligible* basis (less any federal financing) that is attributable to the low income units.
- Qualified basis is found by multiplying adjusted eligible basis by the lesser of:
 - (1) the percentage of low income units in building;
or
 - (2) the percentage of floor area attributable to low income units in the building.



Low Income Housing Tax Credits

- Basis Boost -- You can increase your qualified basis by up to 130% if your project is located in a qualified census tract (more than 50% of the residents earn less than 50% of median income) or a difficult to develop area (where costs are far above the national average). Annually, HUD publishes QCTs and DDAs eligible for basis boost.



Credit Rates

- Credit Rate
 - Published Monthly by the IRS
 - Rates are multiplied by the adjusted qualified basis to determine the annual LIHTC amount for which the project is eligible -- must “lock in” your rate either:
 - When notified of tax credit allocation
 - When building is “placed in service”
 - (In some states) when “carry over” credits to next year
 - Rehab/new construction credit rate is between 8% and 9% . The discount rate is the federal rate and that varies monthly, which is why the credit can change monthly.



Computing Tax Credits Using Basis and the Tax Credit Rate

Eligible Basis	\$1,000,000
x % of Qualified Units or Applicable Fraction	100%
= Qualified Basis	\$1,000,000
x Applicable Rate	9%
= Annual Low Income Housing Tax Credits	\$ 90,000



Computing Equity from Tax Credits

Annual Tax Credits	\$	90,000
x 10 Years		x 10
= Total Tax Credits		900,000
x Price Paid		x .75
= Equity	\$	675,000



Rent and Income Restrictions

- **Unit Restrictions**
 - **40/60 election**
 - **20/50 election**
- All tax credit units within election parameters
- Next available unit rule
- **Tenant Restrictions**
 - HUD area median income data
 - Adjust for rent election
 - Adjust for unit size
 - Rents are net of utility allowances



Rent and Income Restrictions

- Rents for low income units must not be more than 30% of targeted household income (note: NAHASDA requires that rents cannot exceed 30% of income)
- With HOME/NAHASDA funds, 40% of units must be reserved for families earning <50% of AMI, 20% of units reserved for families earning <50% of area median income (AMI) or 40% of units reserved for families earning <60%;
 - *NOTE: If a tenant qualifies when they move in, they continue to qualify even if their income increases, except in mixed income project - if a tenant's income increases above 140% of median the next available unit must be rented to a TC eligible tenant*
 - *NOTE: Students not eligible, unless enrolled in JTPA or related program or filing joint tax returns or having children*



Use of Federal Funds

- Federal funds used for construction or operations must be handled in one of three ways. This is to avoid double federal subsidy. HOME, NAHASDA, CDBG, Section 8, Shelter Plus Care, money from Federal Court Settlements, and FHLB AHP do not function as federal funds on this issue. Tax exempt bond financing, HOPWA, and SHP **do** count as federal funds.
 - Alternative I - subtract Federal funds from basis;
 - Alternative II - rather than subtracting federal dollars you can take 4% (but not 9%) credit on entire eligible basis.
 - Alternative III - Federal funds can be “loaned” to the project for at least the “applicable federal (interest) rate” and can be taken with the 9% credit. Loan can be non-amortizing, but must be realistic to pay back



Use of Federal Funds

- HOME/NAHASDA -- not viewed as “federal funds,” but cannot use with 30% basis boost
 - If funds are lent at an interest rate below AFR, can be used with 9% credit without deduction from basis, but must forgo using basis boost and 40% of units in the “HOME” project must be affordable to residents earning under 50% of median income
- OR
 - Use 4% credit with basis boost (and 20% of units must be affordable to tenants earning under 50% of median)
- OR
 - If funds are lent at interest rate above the AFR, can use 9% credit and basis boost together (and 20% of units must be affordable to tenants earning under 50% of median). However, check for “exit taxes”



Use of Federal Funds

- Projects with multiple federal subsidies will be subject to HUD 90-17 Subsidy Layering Review
- Rent Payments to owners under Section 8, Shelter Plus Care, and similar subsidies do not count toward rent. Only tenant paid portion is considered in determining maximum rent
- Section 8 Moderate Rehabilitation can only be used with LIHTC for SRO housing



What the Syndicator is Looking For

- Quality of the Development Team
- The Project Characteristics
- Evaluation of the Development Budget
- Rents/ Market/ Marketability
- Operating Costs
- Operating and Rent up Reserves
- Sponsor Guarantees



Quality of the Development Team

- Sponsor/ general partner experience
- Architect/ engineer - design, supervision
- General contractor - size and type of construction, capacity to produce on time
- Attorney and Accountant - experience with tax credit partnership structure and issues
- Property manager - experience with low-income tenants and management capability
- Consultants to fill in holes in experience



Evaluation of Project Characteristics

- **Need** - does it answer a real need in the community?
- **Finances** - does it meet the syndicator's financial threshold?
- **Quality** - will it continue to attract tenants?
- **Strategic Interest** - does it meet the syndicator's programmatic needs?
- **Geography** - is it located where syndicator and its investors want to invest?



Concerns Being Evaluated

- Reputations of the developer, general contractor and other members of the team
- Design considerations of the project
- Quality of materials to be used
- Timelines for construction and lease-up
- Useful life analysis - will it continue to attract tenants as it ages?
- Market analysis - are rents supported by outside analysis?



Evaluation of Development Budget

- What will it cost to build the project?
- How much is needed to place it in service?
- What are reasonable timelines?
- Do the developer, permanent lender and syndicator agree on costs and timing?
- What are the key risk areas to lenders and equity investors and how can the risks be ameliorated?



Rents/ Market/ Marketability

- Are rents realistic for the tribal area?
- What is demand for proposed housing?
 - Are tribal members willing and able to pay?
 - What demographics will project address?
- Are tax credit rents sufficiently below area market rents?
- Are NAHASDA, other requirements factored in?



Evaluation of Operating Costs

- Examine assumptions for proposed costs
- Are insurance, etc. costs confirmed by bid?
- Are repair and maintenance costs consistent with housing type and family size?
- Are legal, accounting and administrative costs high enough?
- Are reserves funded in a plausible way?
- Do costs need to be restructured for cash flow?



Structuring Project Reserves

- Reserves are a way to structure for the project's risks
- Operating and lease-up reserves protect against inadequate cash flow
- Replacement reserves provide funds for capital replacement when needed
- Other reserves (for tenant services, etc.) are structured for specific needs or risks



Sources of Funds for Reserves

- Operating reserves usually come from investor equity, but may come from cash flow
- Operating reserves are paid in over time to optimize the use of equity
- Replacement reserves usually are funded from cash flow, but may come from equity
- Some projects need replacements reserves earlier than cash flow permits, requiring equity
- Special-needs housing may not have cash flow for reserves, which may be funded from equity



GP Ability to Provide Guarantees

- Allocate costs related to specific risks to the developer and related parties
- Areas where guarantees apply may include:
 - Development cost overruns
 - Delays in construction completion and lease-up
 - Operating deficits until stable operations
 - Reduced or delayed tax benefits
 - Partnership management



What to Look for in an Investor

- Experience with Tribes
- Cents on Tax Credit Dollar
- Pay-in schedule
- Required Operating Deficit and other guarantees required of NP or GP
- Tax Credit Adjuster and structure of adjuster payments
- Fees
- Reporting requirements
- Reserve requirements
- Reputation with other developers and HFA
- Purchase Option
- Net Worth Requirement



4. Planning for Development: SDY2K



SDY2K Groundbreaking March 2000

Isodorio Hernandez (MFA), Joanna Donahoe, Michael Bowman, SDTHA board Secretary Juan Cate and Chair Howard Tenorio

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4. Planning for Development: SDY2K

- SDTHA
 - Created in 1995 when umbrella IHA dissolved
 - 71 unit Mutual Help was first new construction project (1997)
- SDY2K-the LIHTC Development
 - Was first LIHTC development on New Mexico Pueblo land
 - 20 unit development costing \$2,270,671 including infrastructure, or \$113,533 per unit
 - Using 1999 credits, project was completed and fully occupied by December 2000



Why Tax Credits for Santo Domingo ?

- Staff experience in LIHTC
- Small NAHASDA allocation--needed to leverage
- Motivated board, council
- Opportunity to earn developer fee
- Waiting list of over 400 families



Why Tax Credits for Santo Domingo ?

- Most families were not ready for mortgage programs
- “Ownership” timeline (15 years) familiar to tribal members under Mutual Help
- T/A available through EF, coalitions
- Interest of MFA to assist tribes
- Potential project “self-scored” well in MFA scoring-rents skewed to 40% AMI (county incomes)





New Mexico QAP Scoring Priorities 1999

SDY2K Highest Score in 1999

• Nonprofit	10	• Fed. Asst'd Pres.	15
• Underserved (20%+ pov)	15	• Gov. Target Area	15
• Acqu/Rehab	15	• Public Housing WL	5
• Low Ave. Rent	25-85	• DDA or QCT	5
• Extended Use	5-15	• No TC in 5 years	15
• Special Needs	15	• Senior Housing	15
• Native American Land	15	• MFA Board priority	15
• Cost < Average Cost	15	• Total Possible	290
• < 60 units	10	• <i>Typically need 190+ to be awarded</i>	
• 10%+ gov. leverage	10		



Structuring the Project

- Step 1: Estimate tax credit basis
- Step 2: Estimate tax credits generated
- Step 3: Estimate investor equity
- Step 4: Estimate first mortgage amount
- Step 5: Estimate the funding gap
- Step 6: Fill the gap with a combination of other funds



SDY2K Development Costs

Land	\$	-
Site Work	\$	55,385
Construction	\$	1,370,731
Bond		
Architect	\$	52,162
Real Estate Legal	\$	6,000
Insurances	\$	5,738
Interest		
Recording	\$	100
Legal Fees	\$	6,000
Market Study	\$	5,000
Environmental Study	\$	3,051
Tax Credit Fees	\$	11,184
Cost Certification	\$	9,000
Accounting	\$	1,942
Syndication Costs	\$	16,948
Developer Fee	\$	186,759
Operating Reserve	\$	25,000
Total	\$	1,755,000



Santo Domingo's LIHTC Calculation

	\$ 1,755,000	Total Development Cost
Less:	\$ 77,390	Ineligible Costs
Equals:	\$ 1,677,610	Eligible Basis
Times:	100%	Percentage of Qualified TC Units
Equals:	1,677,610.00	Qualified Basis
Times:	8.49%	Credit rate
Equals:	\$ 142,429	Annual Credit Amount
Times:		Ten (10) Years times .76 cents
Equals:	1,082,746	Equity



What if Santo Domingo was in a DDA and Used Basis Boost ?

	\$ 1,755,000	Total Development Cost
Less:	\$ 77,390	Ineligible Costs
Equals:	\$ 1,677,610	Eligible Basis
Times:	100%	Percentage of Qualified TC Units
Times:	130%	Basis "Boost"
Equals:	2,180,893.00	Qualified Basis
Times:	8.49%	Credit rate
Equals:	\$ 185,158	Annual Credit Amount
Times:		Ten (10) Years times .76 cents
Equals:	1,407,570	Equity



Ways to Fill the Gap

- **NAHASDA**, USDA 515, HOME funds
- **AHP Funds**
- Tribal Funds
- Deferred Development Fee
- Cost Savings (development or acquisition)
- Modification of First Mortgage Terms
- Income or Expense Modifications



SDY2K Financing

- Basic House
 - \$ 200,000
 - \$ 472,000
 - \$ 1,083,000
 - \$ 1,755,000**
 - Infrastructure
 - \$ 150,000
 - \$ 365,671
 - \$ 515,671**
- FHLB AHP:
NAHASDA IHBG:
EQUITY (Tax Credits)
Total \$87,750/unit
- HUD RHED
NAHASDA IHBG
Total \$25,783/unit



Key SDY2K Decisions

- Had Master Lease and Site identified before start
- Arranged for staff, board, council training as an ongoing feature--LIHTC development and compliance training
- Changed Development Model (from manufactured housing w/architect's review to stick built, architect/contractor)
- Evaluated MFA LIHTC Scoring and Self Scored before making development



Key SDY2K Decisions

- Bid out investors based on tribally approved criteria; board selected.
- Set-up “good” paper systems to reflect separate company--the Limited Partnership--with organized record keeping of LIHTC applications and tenant files



Issues and Solutions

Issues

1. Traditional, conservative Pueblo
2. Tribe had little exposure to "new" financing.
3. Need to integrate program into the SDTHA.
4. Meeting Carryover and the 10% test (no acquisition costs)-(*changes in meeting test applicable in 2001*)
5. High cost of infrastructure.

Solutions

1. Training plan and discussions with staff, Board, and Council.
2. Project's financing structured with no debt.
3. Pulled in partners--MFA, EF--to help with applications (first, carryover, final) budgets, pro-forma, and training.
4. Meetings w/Accountants on Carryover strategy. Included off-site stored materials (cat. exc., used elsewhere)
5. Found more sources of \$\$-RHED.



Issues and Solutions

Issues

6. Inconsistencies in financing “rules”.
7. Inconsistent payment and collection history
8. Need for consistent income to support operating costs
9. Change in Executive Director w/no LIHTC experience (construction 60%)

* *Rental subsidies for units developed under NAHASDA are a model activity, which requires HUD approval.*

Solutions

6. Follow most stringent rule, work on national level for change, e.g., *fair housing (see 2001 HUD Opinion)*.
7. With Council support, training, decrease delinquencies
8. Rental subsidy of \$200/month/unit from IHBG (renewable)*
9. More T/A to minimize slow down





SDY2K Ribbon Cutting October 2000

Governor Tortalita, Jim Stretz (MFA) Bart Harvey(EF), Lena Quintanna Family, Secretary Cuomo and Secretary Summer

Working Together to Build Programs and Opportunities

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Resources to Learn More

- NCSHA @ncsha.org
- The Enterprise Foundation Conference
November 7-9 2001 in DC 410.772.2418
- Deborah Webster @505.294.3588
- Patrick Wagner @800.624.4298 ext. 2519
- Michael Bowman @218.444.7899
- NAIHC 202.789.1754
- *Enterprise Native American Expanding
Program to Idaho/Utah July 2001*



THE DEVELOPMENT PROCESS for LIHTC

****Refer to Your State's LIHTC Development Timeline****

A PROGRAM PLANNING

- 1 Identify staff to manage the project/program
- 2 Evaluate needs/wants of tribal members
- 3 Identify tribal population to be served (*elderly, family*)
- 4 Define project concept (specific *use* of a designated sit for an identified *market* to a specific development *team* with a defined *financial* program)
- 5 Verify Tribal adoption of mortgage foreclosure, eviction, and lease procedures
- 6 Assess organizational capacity to do project
- 7 Obtain appropriate organizational technical assistance
- 8 Obtain appropriate project technical assistance
- 9 Identify political support for project
- 10 Identify possible sites
- 11 Identify and evaluate sources of (IHBG, FHLB, Tribal, USDA) financing
- 12 Identify services to be provided to residents
- 13 Identify sources of permanent financing based on mortgage program (s) adopted by Tribe.

B PROJECT FEASIBILITY

- 1 Evaluate and select project site
- 2 Identify development team
- 3 Create initial development budget
- 4 Create initial operating budget
- 5 Obtain Tribal and Board Resolutions
- 6 Prepare/amend IHP as needed
- 7 RFP/select Architect/Engineer
- 8 Get design concept/initial engineering
- 9 RFP/select Environmental Assessor
- 10 Perform Phase I Environmental Assessment
- 11 Perform HUD/other funding Environmental Assessments
- 12 Begin BIA approval for lease
- 13 Perform market study
- 14 Get rough cost estimates
- 15 Redefine project concept
- 16 Obtain BIA approved lease
- 17 Apply for predevelopment financing
- 18 Apply to HFA for LIHTC Reservation
- 19 Predevelopment financing funded
- 20 Apply for acquisition/construction financing
- 21 Apply for subsidy financing
- 22 Identify resident counseling/services
- 23 Predevelopment financing committed
- 24 Receive LIHTC Reservation from HFA

THE DEVELOPMENT PROCESS for LIHTC

****Refer to Your State's LIHTC Development Timeline****

C DEALMAKING

- 1 Acquisition/construction financing committed
- 2 Subsidy financing committed
- 3 Get final scope of work or plans and specifications
- 4 Hire tax credit lawyer/accountant
- 5 Create Limited Partnership (LP)
- 6 Get Federal ID number/checking account for LP
- 7 Identify possible project contractors
- 8 Establish project bidding process
- 9 RFP/hire property manager
- 10 Obtain EA Clearance
- 11 Hire general contractor
- 12 RFP/select syndicator/investor
- 13 Establish project construction draw process
- 14 Create final development budget
- 15 Create final operating budget
- 16 Prepare marketing plan
- 17 Obtain TSR and title insurance
- 18 LP incurs 10% of TDC (if HFA Allocation occurs before July 1)
- 19 Prepare/submit Carryover Allocation Package (LP)
- 20 Receive Allocation of Tax Credits (LP)
- 21 Complete Equity Financing Documents
- 22 Close on Equity Financing

D CONSTRUCTION

- 1 Construction financing funded
- 2 Subsidy financing funded
- 3 Construct homes
- 4 LP incurs 10% of TDC (6 mos post Carryover date if HFA Allocation occurs after July 1)
- 5 Monitor construction schedule/budget
- 6 Develop construction punch list
- 7 Update policies and procedures for LIHTC residents
- 8 Establish resident intake/qualifying procedures
- 9 Prepare marketing/counseling materials
- 10 Begin project marketing
- 11 Begin qualifying prospective residents
- 12 Prepare Cost Certification
- 13 Have a ribbon cutting !

THE DEVELOPMENT PROCESS for LIHTC
****Refer to Your State's LIHTC Development Timeline****

E PROJECT OPERATIONS and COMPLIANCE

- 1 Train staff in qualifying residents and compliance
- 2 Set up accounting/compliance software
- 3 Lease up homes to qualified residents
- 4 Prepare/submit Final Allocation of Tax Credits to MFA
- 5 Pay back construction financing
- 6 Conduct periodic inspections
- 7 Prepare operating budget (annual)
- 8 Prepare Partnership Tax Returns (annual)
- 9 Quarterly/annual audits of resident files
- 10 Re-certify residents (annual)
- 11 Arrange post-occupancy counseling
- 12 Perform follow-up services for residents
- 13 Perform maintenance on homes
- 14 Save the Files !!

Family of 5: two wage earners, 3 children
 Albuquerque MSA: \$49,000 Median Income
 100% Tax Credit Project serving 40% AMI

1 Estimated Family Income	\$ 20,880.00	Tax Credits and NAHASDA calculated the same NAHASDA: if less than 80% AMI federal limits (if higher than county) Tax Credits: maximim AMI per TC application--but no more than 60% AMI county--use HFA tables Is Family Income Eligible ? YES	
2 Allowances	\$ 3,940.00	NAHASDA: Subtract Allowances Tax Credits: No Allowances	
3 Gross Payment	\$ 16,940.00	Equals Family Income Adjusted Monthly Family Income NAHASDA: no more than 30% of Adjusted Monthly Income (w/ or w/o utilities) Tax Credits: no more than 30% of Monthly Income (including utilities)	
4 Monthly Utility Allowance	\$ 100.00	Utility Allowance	
5 Monthly House Payment	\$ 323.50	Rent	

\$ 441.00	What was maximum rent (to include utilities) per tax credits ? (using HFA tables, assuming a 3 bedroom unit for a family of 5)
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\$ 17.50	Difference in Maximum rent payment between Tax Credits and NAHASDA
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Scenario #2

Family of 5: two wage earners, 3 children
 Albuquerque MSA: \$49,000 Median Income
 100% Tax Credit Project serving 40% AMI

1	Estimated Family Income	\$ 35,000.00	Tax Credits and NAHASDA calculated the same	
		N/A	NAHASDA: if less than 80% AMI federal limits (if higher than county)	
			Tax Credits: maximum AMI per TC application—but no more than 60% AMI county—use HFA tables	
	\$ 21,160.00		Is Family Income Eligible for Tax Credits ?	
	NO			
2	Allowances		NAHASDA: Subtract Allowances	
			Tax Credits: No Allowances	
3	Gross Payment		Equals Family Income	
			Adjusted Monthly Family Income	
			NAHASDA: no more than 30% of Adjusted Monthly Income (w/ or w/o utilities)	
			Tax Credits: no more than 30% of Monthly Income (including utilities)	
4	Monthly Utility Allowance	\$ 100.00	Utility Allowance	
5	Monthly House Payment		Rent	

What was maximum rent (to include utilities) per tax credits ?
 (using HFA tables, assuming a 3 bedroom unit for a family of 5)

Difference in Maximum rent payment between Tax Credits and NAHASDA

Family of 5: two wage earners, 3 children
 Albuquerque MSA: \$49,000 Median Income
 100% Tax Credit Project serving 60% AMI

Scenario #3

1 Estimated Family Income	\$ 30,000.00	Tax Credits and NAHASDA calculated the same	
	N/A	NAHASDA: if less than 80% AMI federal limits (if higher than county)	
	\$ 31,740.00	Tax Credits: maximim AMI per TC application--but no more than 60% AMI county--use HFA tables	
	NO	Is Family Income Eligible for Tax Credits ?	
2 Allowances	\$ 2,500.00	NAHASDA: Subtract Allowances	
		Tax Credits: No Allowances	
3 Gross Payment	\$ 27,500.00	Equals Family Income	
	\$ 2,291.67	Adjusted Monthly Family Income	
	\$ 687.50	NAHASDA: no more than 30% of Adjusted Monthly Income (w/ or w/o utilities)	
		Tax Credits: no more than 30% of Monthly Income (including utilities)	
4 Monthly Utility Allowance	\$ 100.00	Utility Allowance	
5 Monthly House Payment	\$ 587.50	Rent	

\$ 793.00	What was maximum rent (to include utilities) per tax credits ? (using HFA tables, assuming a 3 bedroom unit for a family of 5)
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\$ 105.50	Difference in Maximum rent payment between Tax Credits and NAHASDA
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Family of 5: two wage earners, 3 children
 Albuquerque MSA: \$49,000 Median Income
 100% Tax Credit Project serving 60% AMI

1 Estimated Family Income	\$ 30,000.00	Tax Credits and NAHASDA calculated the same NAHASDA: if less than 80% AMI federal limits (if higher than county)
	N/A	Tax Credits: maximum AMI per TC application—but no more than 60% AMI county—use HFA tables
	\$ 31,740.00	Is Family Income Eligible for Tax Credits ?
	NO	
2 Allowances	\$ -	NAHASDA: Subtract Allowances Tax Credits: No Allowances
3 Gross Payment	\$ 30,000.00	Equals Family Income
	\$ 2,500.00	Adjusted Monthly Family Income
	\$ 750.00	NAHASDA: no more than 30% of Adjusted Monthly Income (w/ or w/o utilities)
		Tax Credits: no more than 30% of Monthly Income (including utilities)
4 Monthly Utility Allowance	\$ 100.00	Utility Allowance
5 Monthly House Payment	\$ 650.00	Rent

\$ 793.00	What was maximum rent (to include utilities) per tax credits ? (using HFA tables, assuming a 3 bedroom unit for a family of 5)
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\$ 43.00	Difference in Maximum rent payment between Tax Credits and NAHASDA
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New Mexico Mortgage Finance Authority

P. O. Box 2047

Albuquerque, New Mexico 87103

EFFECTIVE 3/29/01

INCOME LIMITS AND MAXIMUM RENTS FOR 2001

Maximum Gross Rents are to be reduced by tenant paid utilities. Pre 1990 means projects receiving credits prior to 1990, who did not elect to convert to bedroom size. Post 1989 means projects receiving credits after 1989, whose rents will always be by bedroom size.

ALBUQUERQUE MSA (Bernalillo, Valencia and Sandoval Counties)

Median Income	Hshld. #	1	2	3	4	5	6	7	8
49,000	30% AMI	10,300	11,750	13,250	14,700	15,850	17,050	18,250	19,400
	40% AMI	13,720	15,680	17,640	19,600	21,160	22,720	24,320	25,880
	50% AMI	17,150	19,600	22,050	24,500	26,450	28,400	30,400	32,350
	60% AMI	20,580	23,520	26,460	29,400	31,740	34,080	36,480	38,820
	80% AMI	27,450	31,350	35,300	39,200	42,350	45,450	48,600	51,750
	140% AMI	48,020	54,880	61,740	68,600	74,060	79,520	85,120	90,580
MAXIMUM GROSS RENTS BY HOUSEHOLD SIZE (PRE 1990)									
		1	2	3	4	5	6	7	8
	30% AMI	257	293	331	367	396	426	456	485
	40% AMI	343	392	441	490	529	568	608	647
	50% AMI	428	490	551	612	661	710	760	808
	60% AMI	514	588	661	735	793	852	912	970
MAXIMUM GROSS RENTS BY BEDROOM SIZE (POST 1989)									
		0	1	2	3	4	5	6	
	30% AMI	257	275	331	381	426	470	515	
	40% AMI	343	367	441	509	568	627	686	
	50% AMI	428	459	551	636	710	784	857	
	60% AMI	514	551	661	764	852	941	1,029	

SANTA FE MSA (Santa Fe and Los Alamos Counties)

Median Income	Hshld. #	1	2	3	4	5	6	7	8
60,700	30% AMI	12,750	14,600	16,400	18,200	19,700	21,100	22,600	24,050
	40% AMI	17,000	19,440	21,840	24,280	26,240	28,160	30,120	32,040
	50% AMI	21,250	24,300	27,300	30,350	32,800	35,200	37,650	40,050
	60% AMI	25,500	29,160	32,760	36,420	39,360	42,240	45,180	48,060
	80% AMI	34,000	38,850	43,700	48,550	52,450	56,300	60,200	64,100
	140% AMI	59,500	68,040	76,440	84,980	91,840	98,560	105,420	112,140
MAXIMUM GROSS RENTS BY HOUSEHOLD SIZE (PRE 1990)									
		1	2	3	4	5	6	7	8
	30% AMI	318	365	410	455	492	527	565	601
	40% AMI	425	486	546	607	656	704	753	801
	50% AMI	531	607	682	758	820	880	941	1,001
	60% AMI	637	729	819	910	984	1,056	1,129	1,201
MAXIMUM GROSS RENTS BY BEDROOM SIZE (POST 1989)									
		0	1	2	3	4	5	6	
	30% AMI	318	341	410	473	527	583	637	
	40% AMI	425	455	546	631	704	777	849	
	50% AMI	531	569	682	789	880	971	1,062	
	60% AMI	637	683	819	947	1,056	1,165	1,274	

*For counties with actual median income levels falling below the Non-Metro median, rents are calculated using the Non-Metro median of \$33,000 (EXCEPT Taos County).

Community Development Financial Institutions Fund



U.S. Department of the Treasury

CDFI Fund Background

- Created in 1994
- Supports financial institutions that provide credit and financial services to low-income persons or to distressed urban, rural, and Native American communities

CDFI Fund Initiatives

→ CDFI Program

→ Core Component

→ Intermediary Component

→ SECA Component

→ Bank Enterprise Award (BEA) Program

CDFI Fund Initiatives (Cont'd)

- ➔ Native American Technical Assistance Program
- ➔ Training Program
- ➔ New Markets Tax Credit (NMTC) Program

What is a CDFI?

A community-based non-profit or for-profit financing institution certified by the CDFI Fund to meet criteria including:

- Primary mission of community development
- Serving a target market or population
- Providing financing
- Providing development services (such as counseling or training)
- Accountable to those it serves
- Non-governmental entity

How Can a CDFI Benefit Your Community?

- ➔ Creates and Retains Jobs
- ➔ Creates and Grows Businesses
- ➔ Develops Housing
- ➔ Builds Financial Skills and Capacity
- ➔ Creates Community Based Institution

Types of CDFIs

- Community Development Banks & Bank Holding Companies (Blackfeet National Bank)
- Community Development Credit Unions
- Community Development Loan Funds (Alaska-Growth Capital BIDCO, Inc., Tlingit-Haida Regional Housing Authority, and Hopi Credit Association)
- Microenterprise Loan Funds (Lakota Fund)
- Community Development Venture Capital Funds

The CDFI field - how big is it?

As of April 1, 2001, the CDFI Fund has
certified over 412 CDFIs.

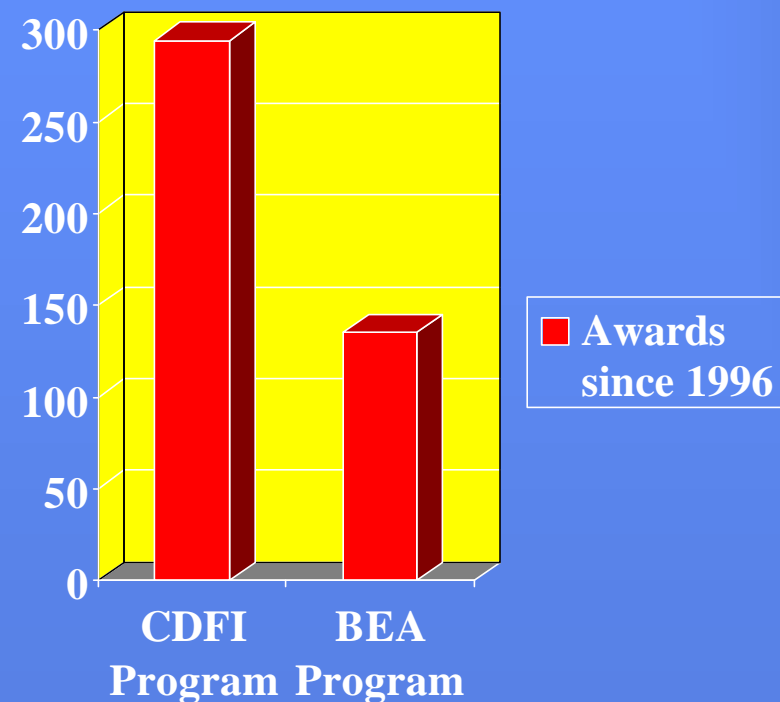
CDFI Fund Awards

CDFI Program

- 507 awards
- \$294.4 Million

BEA Program

- 432 awards
- \$135.2 Million



The CDFI Program

Core Component

Invests in and builds the capacity of CDFIs.

- flexible types of assistance: grants, loans, equity investments, deposits & technical assistance
- demonstrate market & institutional needs through a 5-year business plan
- required one-to-one non-federal match
- evaluation factors include: financial performance, management capacity and market analysis

The CDFI Program

Small and Emerging CDFI Assistance (SECA) Component

Technical Assistance for CDFIs to strengthen the capacity of the organization to serve its Target Market.

- anticipated max of \$ 50,000
- awards in the form of a grant to purchase TA
- no matching funds required
- eligible uses include: consultants; technology; staff training;
- and staff support for targeted activities

Financial Assistance for CDFIs to assist them to fulfill business plans.

- max \$150,000
- match required
- must request TA and FA, not FA alone

The CDFI Program

Small and Emerging CDFI Assistance (SECA) Component

Special eligibility requirements for applicants requesting financial assistance.

- no prior financial assistance awards from Fund
- max \$5 million in assets if not a bank/bank holding company
- if a bank/bank holding company, chartered for 3 years or less

Investments In Indian Country

- **Alaska Growth Capital BIDCO**, Anchorage, AK
- **First American Credit Union**, Window Rock, AZ
- **First Nations Oweesta Corporation**, Fredericksburg, VA
- **Hopi Credit Association**, Keams Canyon, AZ
- **Lakota Fund**, Kyle, SD
- **Native American Development Corporation**, Billings, MT
- **Nebraska Micro Enterprise Partnership Fund**, Walthill, NE
- **New Mexico Community Development Loan Fund**, Alb, NM
- **Rural Community Assistance Corporation**, Sacramento, CA
- **South Dakota Rural Enterprise, Inc.**, Sioux Falls, SD
- **Tlingit-Haida Regional Housing**, Juneau, AK

Services being provided

Across the country, CDFI Fund Awards are helping to:

Provide Affordable Banking Services

- Low-minimum savings accounts
- Direct deposit accounts
- Individual development accounts
- “Drive to work” programs providing used car loans and related training
- Consumer loans for home and car repair
- “School banking” programs

Provides:

- Technical Assistance
- Financial Literacy Programs
- Homebuyer Counseling

Services being provided

(continued)

Provide Financing For:

- Single- and multi-family housing
- New and creative low-interest mortgage products
- Special needs mortgage products such as for the disabled
- Neighborhood revitalization and planning services

Provide Venture Capital to Create and Maintain Jobs

- Provide seed and expansion capital for small businesses
- Develop partnerships and leverage other private capital

Provide Financing For:

- Day care centers, health care clinics and community centers
- Small business loans
- Micro business loans

Performance and Impact

\$3 billion in community development loans and investments made by 1996 & 1997 awardees have:

- supported up to 6,000 microenterprises & businesses;
- created or maintained up to 41,000 jobs;
- developed or rehabilitated up to 52,000 units of affordable housing;
- supported up to 823 community facilities, including childcare centers, health care centers, charter schools, and job training centers; and
- Provided 174,000 checking and savings accounts totaling over \$442 million.

The BEA Program

The BEA Program provides incentives to banks and thrifts to **invest in CDFIs** and/or increase their lending, investments and the provision of financial services within distressed communities.

Banks can receive CRA credit for these investments

Activities of BEA Awardees

The financial institutions awarded through the first five rounds of the BEA Program have provided:

\$683 million in equity investments and financial support to CDFIs; and

\$2.53 billion in direct lending and financial services in distressed communities.

Native American Training & TA Program

PROGRAM: \$ 5 Million for Training and Technical Assistance
for Native American Communities

PURPOSE: To Increase Access to Capital in Native American,
Native Hawaiian, and Alaska Native Communities

PROGRAM TO:

Enhance Capacity to Provide Access to Capital and Credit

Assist Financial Institutions Serving These Communities

Assist Tribes, Villages and Native Hawaiian Communities to
Establish CDFIs

Native American Lending Study/Action Plan

Congressionally authorized to:

Identify barriers to private financing

Identify impacts of such barriers on access to capital and credit for Native American populations

Recommend necessary **statutory** **and** **regulatory** **changes** to existing federal programs

Make policy recommendations for community development financial, insured depository, secondary market, and private sector capital institutions

Submit a **final report** to the President and Congress

NEW MARKETS TAX CREDIT

*Spurring Investment for Business
Growth in Urban and Rural
Communities*

New Markets Tax Credit

- Passed on December 21, 2000, as part of the Community Renewal Tax Relief Act of 2000
- Allows taxable investors that make equity investments in Community Development Entities (CDEs) to receive tax credits covering a portion of their investments

New Markets Tax Credit (cont'd)

- The credit provided to the investor covers a period of seven years
- The credit is valued at 5% of the total investment in each of the first three years, and 6% in each of the final four years
- The NMTC will spur \$15 billion in business investments in Low-Income communities over seven years.

How the NMTC Will Work

Step 1: CDFI Fund will designate Community Development Entities (CDEs)

Step 2: For-profit CDEs may apply to the Fund for allocation of tax credits

Step 3: Fund will select CDEs to receive tax credit allocations

Step 4: Selected CDEs will issue tax credits to equity investors

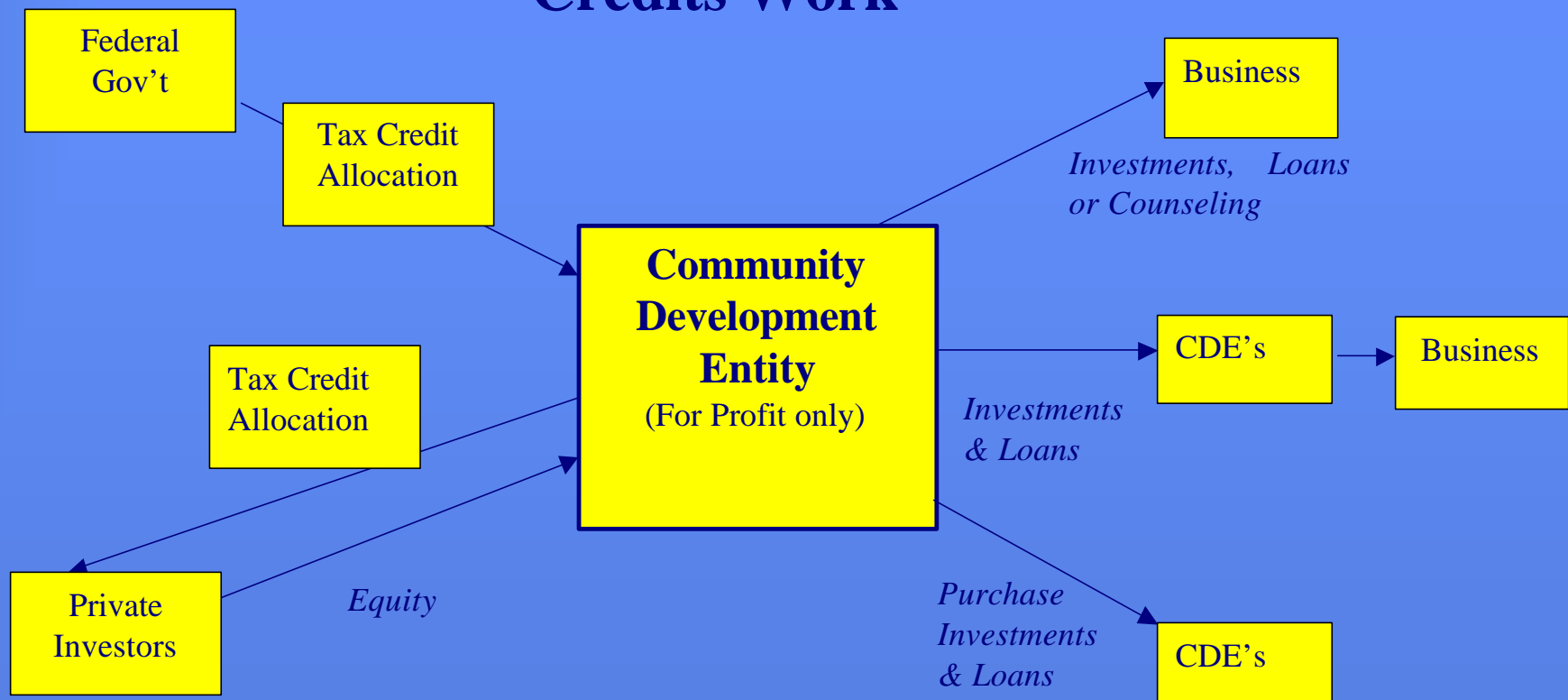
How the NMTC Will Work (cont.)

Step 5: CDEs will use the proceeds from the equity investment to:

- Invest in or lend to businesses located in Low-Income Communities;
- Provide technical assistance to such businesses; or
- Invest in, lend to, or purchase loans from other CDEs that support businesses in Low-Income Communities.

How the NMTC Will Work (cont.)

How New Market Tax Credits Work



What is a CDE?

- Has a primary mission of serving Low-Income Communities or persons
- Is accountable to residents of its Low-Income Communities
- Is designated as a CDE by the Fund

Note: CDFIs and SSBICs automatically qualify as CDEs, but must apply to the Fund to receive their designation.

Why Become a CDE?

→ For-profit CDEs may apply to the Fund for the authority to issue tax credits to equity investors

→ Certain CDEs (including non-profit CDEs) are eligible to receive loans and investments from those for-profit CDEs that have been allocated tax credits from the Fund

Current Status

- On May 1, 2001, the Fund and IRS each published documents for public comment in the Federal Register.
- The Fund is seeking comments relating to the designation of CDEs and the competitive allocation of tax credits.
- IRS is seeking comments relating to tax policy, including qualifying investment activities and recapture events.

Next Steps

- Comments are due to the Fund and to IRS no later than July 2, 2001.
- IRS will develop implementing regulations.
- The Fund will develop application materials.
- It is anticipated that the Fund will accept applications from organizations seeking designation as CDEs in the Fall.
- A Notice announcing the competitive allocation of tax credits will be published after IRS publishes the implementing regulations.

CONTACTING THE FUND

CDFI Fund's Main Number

Phone: (202) 622-8662

Fax: (202) 622-9184

(202) 622-7754

Main Website: www.treas.gov/cdfi

E-mail Address: cdfihelp@cdfi.treas.gov





The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

Summary of Existing Intermediary Services Available to Indian Country

NAME OF INTERMEDIARY	SERVICES PROVIDED BY INTERMEDIARY						
	Training	On-Site Technical Assistance (TA)	Loan Fund	Grant Making	Partnership Building	Advocacy at State/Federal	Information Services
<p>The Enterprise Foundation 10227 Wincopin Cir, Ste 500 Columbia, MD 21044 www.enterprisefoundation.org</p> <p>Contact: Jay Marcus 410-772-2474 FAX 410-964-1918 jmarcus@enterprisefoundation.org</p>	<p>Provides training to Tribes, Tribally Designated Housing Entities (TDHEs) and Tribal nonprofits in:</p> <ul style="list-style-type: none"> • organization management • housing development • housing/asset management • construction management • housing finance • land-use planning • nonprofit creation <p>Also provides trainings on a wider range of topics to nonprofit agencies that TDHE's and Tribal nonprofits can attend.</p>	<p>Provides TA to TDHE's and Tribal nonprofits in NM and Pine Ridge (soon in ID and UT) in:</p> <ul style="list-style-type: none"> • organization management • fiscal systems • housing development • construction management • housing finance • economic development • strategic planning • land-us planning • legal infrastructure • nonprofit creation • homebuyer education • grant writing 	<p>Provides short-term financing for pre-development and construction loans.</p> <p>Provides equity investments for low-income housing tax credit projects.</p>	<p>Has made limited, small grants to Tribes, TDHEs and Tribal nonprofits (\$5,000 – \$10,000, under \$50,000 total annually).</p> <p>Initiating small Tribes grant program with NAIHC and Amerind Risk Management for 20-30 Tribes for \$1 million.</p>	<p>Assists with partnerships with state housing finance agencies, Federal Home Loan Bank System (Affordable Housing Program), lenders and federal agencies.</p>	<p>Advocates at state level for use of tax credits, HUD HOME funds and mortgage revenues bonds on tribal land.</p> <p>At federal level, for increased federal resources for housing and economic development, including in Indian Country.</p>	<p>Publishing <i>Mortgage Manual for Indian Country</i>. Also, publishes wide variety of resources and publications targeted to community development organizations, including <i>Enterprise Quarterly</i>.</p> <p>Several publications and resources available on its website.</p>



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

NAME OF INTERMEDIARY	SERVICES PROVIDED BY INTERMEDIARY						
	Training	On-Site Technical Assistance (TA)	Loan Fund	Grant Making	Partnership Building	Advocacy at State/Federal	Information Services
<p>First Nations Development Institute 11917 Main Street Fredericksburg, VA 22498 www.firstnations.org</p> <p>Contact: Sherry Salway Black 540-371-5615 FAX 540-371-3505 info@firstnations.org</p>	<p>Provides training to Native people nationwide in:</p> <ul style="list-style-type: none"> • organization management • fiscal systems • housing development • construction management • housing finance • economic development • strategic planning • land-use planning • legal infrastructure • nonprofit creation • environmental • homebuyer and financial skills education • business lending • advocacy and research 	<p>Provides technical assistance to 50 Tribes and Tribal nonprofits annually in:</p> <ul style="list-style-type: none"> • organization management • fiscal systems • economic development • strategic development • land-use planning • legal infrastructure • nonprofit creation • environmental • homebuyer and financial skills education 	<p>Does not currently offer short-term or permanent financing, but planning \$25 million bond issue.</p> <p>Establishing a business financing program and a re-lending intermediary program for reservation-based financial institutions.</p>	<p>Awards 25-35 grants annually from \$1,000-\$150,000 mostly to Tribal nonprofits and Tribes.</p> <p>Has also made grants to business enterprises.</p>	<p>Assists to develop public and private partnerships within program or project.</p>	<p>Advocates at tribal, state, federal, international level and in specific industries as the need arises.</p>	<p>Publishes research specific to Indian Country and bi-monthly <i>Business Alert</i> on economic development issues and quarterly <i>Indian Giver</i> on philanthropy issues.</p>
<p>Housing Assistance Council 131 Camino Alto, Suite D Mill Valley, CA 94941 www.ruralhome.org</p> <p>Contact: Susan Peck 415-381-1706 FAX 415-381-0801 susan@ruralhome.org</p>	<p>Provides national and regional training for rural nonprofits. Tribes, TDHEs and Tribal nonprofits are invited to attend. Topics include:</p> <ul style="list-style-type: none"> • organizational management • fiscal systems • housing development • construction management • housing finance • strategic planning • environmental • homebuyer education 	<p>Provides TA through capacity-building partnerships with 12 Native American entities and to other Tribes, TDHEs and Tribal nonprofits upon request on:</p> <ul style="list-style-type: none"> • organizational management • fiscal systems • housing development • housing finance • strategic planning • homebuyer education • grantwriting 	<p>Has provided short-term financing for predevelopment, acquisition and infrastructure loans to Tribes, TDHEs and Tribal nonprofits nationwide from \$50,000-\$400,000.</p>	<p>Has awarded grants totally \$100,000 annually to TDHEs and Tribal nonprofits.</p>	<p>Facilitates partnerships with lenders, private foundations as well as with the U.S. Department of Agriculture (USDA).</p>	<p>Advocates for policy and legislative changes that improve tribal communities' access to USDA programs.</p>	<p>Offers bi-weekly newsletter <i>HAC News</i> and quarterly magazine <i>Rural Voices</i> as well as other studies and publications.</p>



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

NAME OF INTERMEDIARY	SERVICES PROVIDED BY INTERMEDIARY						
	Training	On-Site Technical Assistance (TA)	Loan Fund	Grant Making	Partnership Building	Advocacy at State/Federal	Information Services
<p>National Congress of American Indians 1301 Connecticut Ave, NW Suite 200 Washington, DC 20036 www.ncai.org</p> <p>Contact: Jacqueline Johnson 202-466-7767 FAX 202-466-7797 jacqueline_johnson@ncai.org</p>	Does not currently provide training in housing and community development.	Does not currently provide TA in housing and community development.	Does not offer loan services.	Does not award grants.	Facilitates partnerships between tribal governments to inform the public and federal government about tribal issues.	Monitors federal policy and coordinates efforts to inform federal decision-makers about issues that affect tribal government interests, including housing and community development issues.	Publishes issues papers and tribal directory.
<p>National American Indian Housing Council 900 2nd Street, NE #305 Washington, DC 20002-3557 www.naihc.indian.com</p> <p>Contact: Jane DeMarines 202-789-1754 FAX 202-789-1758 jdemarines@naihc.net</p>	<p>Provides training nationwide at its Training Institute to Tribes, TDHEs and Tribal nonprofits in:</p> <ul style="list-style-type: none"> • NAHASDA compliance • organizational management • fiscal systems • housing development • housing finance • strategic planning • legal infrastructure • environmental • homebuyer education 	Provides TA to 100 Member TDHEs and Tribes annually on a broad range of topics.	Does not offer loan services.	Initiating small Tribes grant program with Enterprise Foundation and Amerind Risk Management for 20-30 Tribes for \$1 million.	Facilitates partnerships with lenders, insurance companies, housing providers and other private sector partners.	Recently created the <i>Coalition for Indian Housing and Development</i> to monitor federal legislative and regulatory activities.	Publishes monthly <i>Native American Housing News</i> and various research studies regarding Indian housing.



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

NAME OF INTERMEDIARY	SERVICES PROVIDED BY INTERMEDIARY						
	Training	On-Site Technical Assistance (TA)	Loan Fund	Grant Making	Partnership Building	Advocacy at State/Federal	Information Services
<p>Neighborhood Reinvestment Corporation 1776 S. Jackson Street Suite 810 Denver, CO 80210 www.nw.org</p> <p>Contact: Steve Barbier 303-782-5463 FAX 303-782-5568 sbarbier@nw.org</p>	<p>Provides training nationwide to urban and rural organizations at its Training Institute. Tribes, TDHEs and Tribal nonprofits are invited to attend. Topics include:</p> <ul style="list-style-type: none"> • management and leadership • community building • neighborhood revitalization • community economic development • rural development • affordable housing • construction and production management • homeownership development and community lending 	<p>Provides TA to its two Native American member nonprofit organizations in:</p> <ul style="list-style-type: none"> • management organization • fiscal systems • housing development • construction management • housing finance • economic development • strategic planning • land-use planning • nonprofit creation • homebuyer and financial skills education 	<p>Offers short-term financing to its member nonprofit organizations.</p>	<p>Has awarded grants totaling nearly \$800,000 to its two Native American member nonprofit organizations.</p>	<p>Helps its member nonprofit organizations build relationships with local lenders and private sector partners.</p>		<p>Publishes <i>The NeighborWorks Journal</i>, a quarterly journal for community-based development and <i>Bright Ideas</i> for member organizations, along with a variety of resources and training materials.</p>
<p>Rural Community Assistance Program, Inc. 1522 K Street, NW, Suite 400 Washington, DC 20005 www.rcap.org</p> <p>Contact: Jeff Jeffers 202-408-1273 FAX 202-408-8165 jjeffers@rcap.org</p>	<p>Provides training at national conference to rural communities. Tribes, TDHEs and Tribal nonprofits are invited to attend. Topics include:</p> <ul style="list-style-type: none"> • community infrastructure • environment • housing • telecommunications • capacity building 	<p>Provides TA to rural communities, including tribal communities, on:</p> <ul style="list-style-type: none"> • drinking water supply • wastewater treatment • rural solid waste programs • housing • economic development • community assessment and planning • environmental regulations 	<p>Provides short- and long-term financing for community facilities, single- and multi-family housing and water and wastewater projects. Native American initiatives are eligible to apply.</p>		<p>Helps local communities build relationships with lenders, foundations and other local organizations.</p>		<p>Its six regional offices with multi-state service areas publish a wide variety of studies and publications.</p>



The 8th Native American Homeownership Summit: Working Together to Build Programs and Opportunities

NAME OF INTERMEDIARY	SERVICES PROVIDED BY INTERMEDIARY						
	Training	On-Site Technical Assistance (TA)	Loan Fund	Grant Making	Partnership Building	Advocacy at State/Federal	Information Services
Rural Local Initiatives Support Corporation (LISC) 1825 K Street, NW, Ste 1100 Washington, DC 20006 www.ruralisc.org Contact: Laura Garcia 202-739-9296 FAX 202-785-8030 lgarcia@liscnet.org	Hosts extensive national and regional training opportunities targeted to rural community development corporations (CDCs). Native American CDCs are invited to attend.	Provides TA to its four Rural LISC-supported CDCs.	Provides loans and equity and bridge financing to partner rural CDCs.	Provides grants to partner rural CDCs.	Helps partner rural CDCs build relationships with funders and lenders.	Coordinates <i>Stand Up for Rural America Campaign</i> , a national coalition effort to help rural CDCs gain resources and policy support.	Publishes <i>Rural Developments</i> , a newsletter dedicated to rural CDCs.



Native eDGE (economic Development Guidance and Empowerment)

The 8th National Homeownership
Summit:

Working Together to Build Programs
and Opportunities

St. Paul, Minnesota

July 2001

Slide 1



Presentation Overview

- Background
- Purpose and Role of Native eDGE
- Native eDGE Components
- Partnerships and Interagency Approach
- An Expansion



Background

Federal Interagency Strategic Plan to
Provide Access to Economic
Development Programs and
Opportunities



Interagency Strategic Plan

- The Interagency Strategic Plan proposed three specific elements:
 - Increase access to Federal economic development programs and assistance
 - Increase economic development opportunities within tribal communities; and
 - Identify gaps in Federal economic development efforts



Native eDGE Purpose

**Facilitate sustainable economic
development within American
Indian and Alaska Native
Communities**



The Role of Native eDGE

- Promote collaborative efforts among economic development entities
- Pursue innovative solutions to recurrent economic development problems such as unemployment and business capitalization
- Empower tribes and tribal organizations to pursue self-sufficiency and self-determination



Native eDGE Components

- Interactive Web Site
- Technical Assistance Call Center
- Publications Clearinghouse
- Interagency Coordination through Partnerships



Interactive Web Site

- Recipients register projects and request resource information
- Generates search of the Catalog of Federal Domestic Assistance (CFDA)
- Electronic capture of resource information
- On-line access to contact information, publications, technical assistance and guidance
- Client registered information is confidential



Technical Assistance Information Center

- Toll-Free number with 24-hour voice mail
- Economic development specialists provide personalized research and support
- Relationship and project building
- Caller follow-up and referrals to other agencies
- Walk-through of web site
- Parallel systems (web site and TA Center)



Clearinghouse

- Agency publications
- Informational brochures
- HUD distributes materials through eDGE clearinghouse
- Download information electronically
- More specific requests are forwarded to appropriate federal agencies



Partnership Approach

- Communication about tribal needs
- Collaboration on resource solutions
- Sponsorship of Native eDGE as a tool
- Support for field use of Native eDGE
- On-site training and technical assistance
- Solicitation of feedback
- Belief in joint responsibility for success



An Expansion

- Recent additions to Native eDGE include:
 - Business Development
 - Career Development
 - Educational Development, and
 - Economic Development Planning Links.



Future Enhancements

- Future enhancements will include links to:
 - Technology and telecommunications initiatives and sites
 - Trade and tourism programs, and
 - Federal government contracting opportunities.



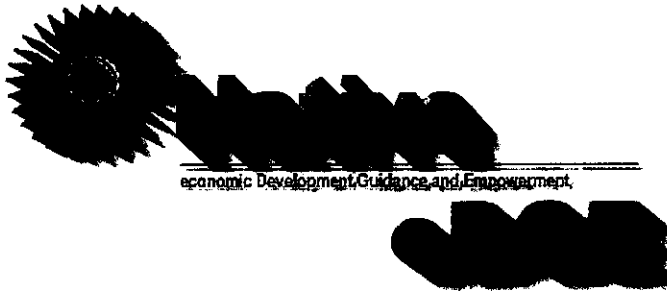
Native eDGE Contact Information

Toll-free telephone: 877.807.9013

Fax: 202.708.1362

Web site: <http://nativeedge.hud.gov>





<http://nativeedge.hud.gov>
1-877-807-9013

Native eEDGE is an interagency initiative of the Federal government to facilitate sustainable economic development within American Indian and Alaska Native communities. Coordinated by HUD's Office of Native American Programs, Native eEDGE links eighteen Federal agencies through a single economic development access center so that tribes, Native Americans, lending institutions, non-profits, foundations and private businesses can collaborate to promote economic growth in Indian Country.

Native eEDGE serves as a one-stop-shop for access to Federal and non-Federal grants, loans, loan guarantees, and technical assistance for American Indian and Alaska Native organizations and individuals. It includes an interactive Web Site, a Technical Assistance Call Center staffed by economic development specialists, and a publications Clearinghouse.

The Native eEDGE Web Site (<http://nativeedge.hud.gov>) houses a complete inventory of Federal programs available for economic development projects in American Indian and Alaska Native communities as well as links to multiple Federal agencies. Information on non-Federal resources is also available via direct links from the Native eEDGE page and electronic forms, publications and guidelines on economic development can be electronically downloaded from the site.

The Technical Assistance Call Center is accessible via a toll-free telephone number (1-877-807-9013) and economic development specialists are available for detailed discussions with tribes, tribal entities, individuals and others that have questions on doing business in Indian Country. The specialists provide information on Federal and non-Federal resources that are appropriate for the caller as well as basic advice on requirements of the economic development process.

The Publications Clearinghouse, established through HUD's customer service and distribution center, provides informational brochures, pamphlets, and reference materials on economic development. This library houses publications from many of the Federal agencies, as well as non-Federal documents. Users are able to call a toll-free number or log on to the Web Site to access this information.

Native eEDGE
451 7th St., SW, Rm 9245
Washington, DC 20410

Voice: (202) 708-1790
Fax: (202) 708-1362
Email: native_edge@hud.gov

Welcome to the Neighborhood!



Working Together to Build Programs and Opportunities

Slide 1



Neighborhood Networks →

Neighborhood Networks Mission

To create vibrant communities that foster lifelong learning and economic opportunity, primarily in HUD properties.



Working Together to Build Programs and Opportunities

Slide 2

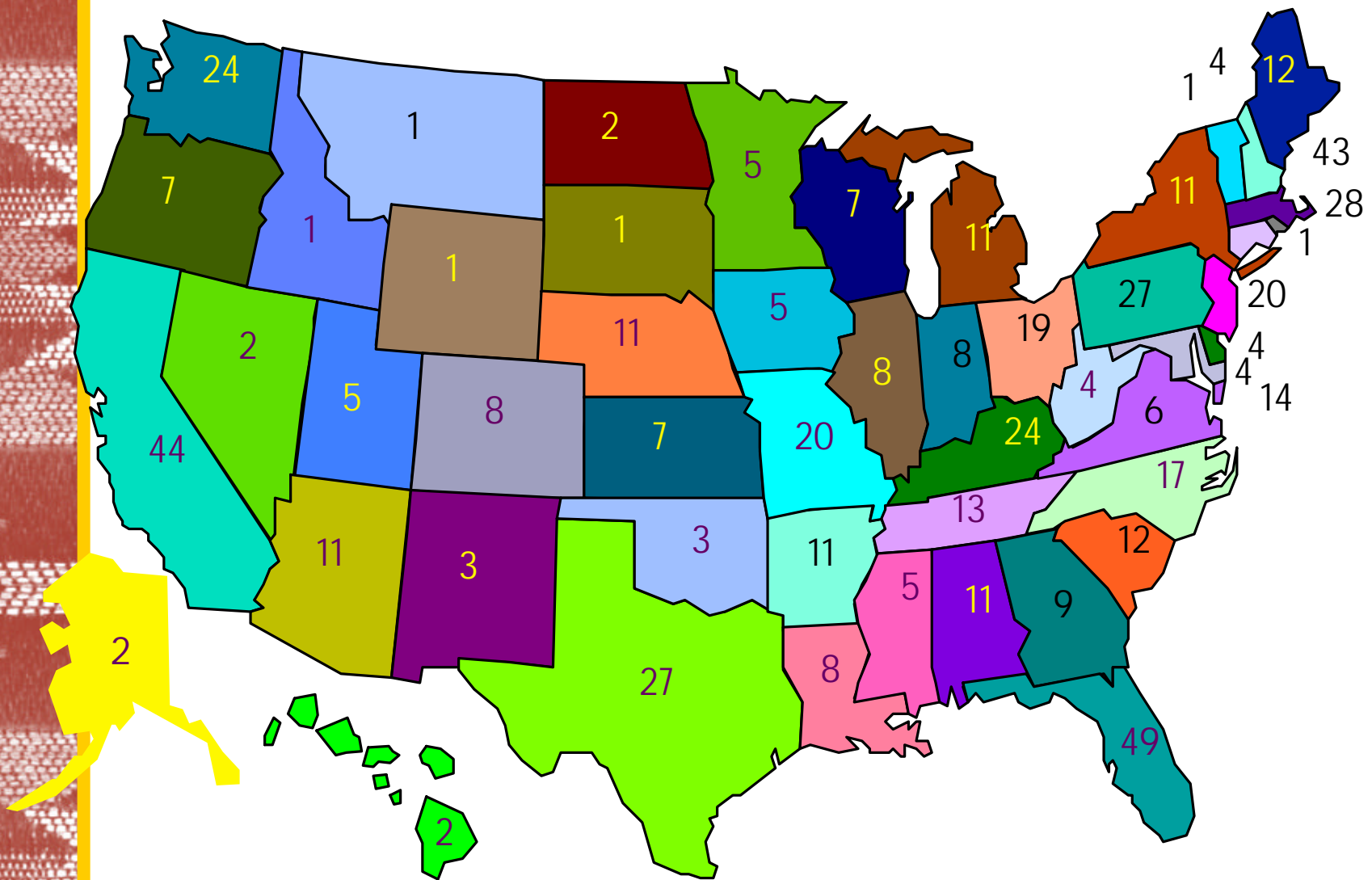


Neighborhood Networks →

Neighborhood Networks History

- Established by the U.S. Department of Housing and Urban Development (HUD) in 1995
- Development and sustainability of computer technology centers on HUD-properties
- Assist low-income families, seniors, and youth where they live
- Today, more than 700 centers in operation





OPERATIONAL CENTERS

Working Together to Build Programs and Opportunities

Slide 4





Neighborhood Networks

Employment and Educational Programs

- Job skills and readiness training
- Resume writing
- Educational Opportunities for Youth
- GED and English as a Second Language
- Small business opportunities
- Computer classes





Neighborhood Networks

Support Programs

- **Health care and wellness**
- **Education**
- **Youth development and senior activities**
- **Child care**
- **Transportation**





Neighborhood Networks →

Benefits to Youth and Adults

- **Improve and increase job skills**
- **Expand educational opportunities**
- **Access to technology**
- **Achieve self-sufficiency**





Neighborhood Networks →

Benefits to the Community

- **Enlarged sources of potential employees**
- **Increased economic self-reliance**
- **Opportunities to strengthen community relationships**
- **Expanded employment opportunities**





Neighborhood Networks →

Redesigned Web Site

www.neighborhoodnetworks.org

- Latest publications including funding alerts
- Links to centers and properties
- Development resources
- Contact information for HUD Coordinators





[NN HOME](#)

[FAQ](#)

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[HOUSING HOME](#)



topics

[site map](#)

[about neighborhood networks](#)

[news room](#)

[residents' corner](#)

[resources for existing centers](#)

[find a center](#)

[start a new center](#)

[business plan resources](#)

[get involved](#)

[success stories](#)

headline news

[More...](#)

- [Entry Call for HUD's Best Practices Award](#)
- [Neighborhood Networks Introduces Web Site Map](#)
- [Centers to Get New "START" This Spring](#)
- [Dept. of Ed. Provides \\$65M for Community Technology Center Efforts](#)
- [Send Us Your News!](#)

new resources

[More...](#)

- [Funding Opportunity of the Week](#)

new centers

[More...](#)

- [Neighborhood Networks Opens in Native Alaskan Territory](#)

This Week's Feature Story



Alaskan Expansion. The Bethel Neighborhood Network Center in Bethel, Alaska, is the first community technology center to open in a Native Alaskan community and the third to open on Native American soil. Children who use the center performed a skit during the center's dedication in January.

[Click Here for More...](#)



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hud's neighborhood networks



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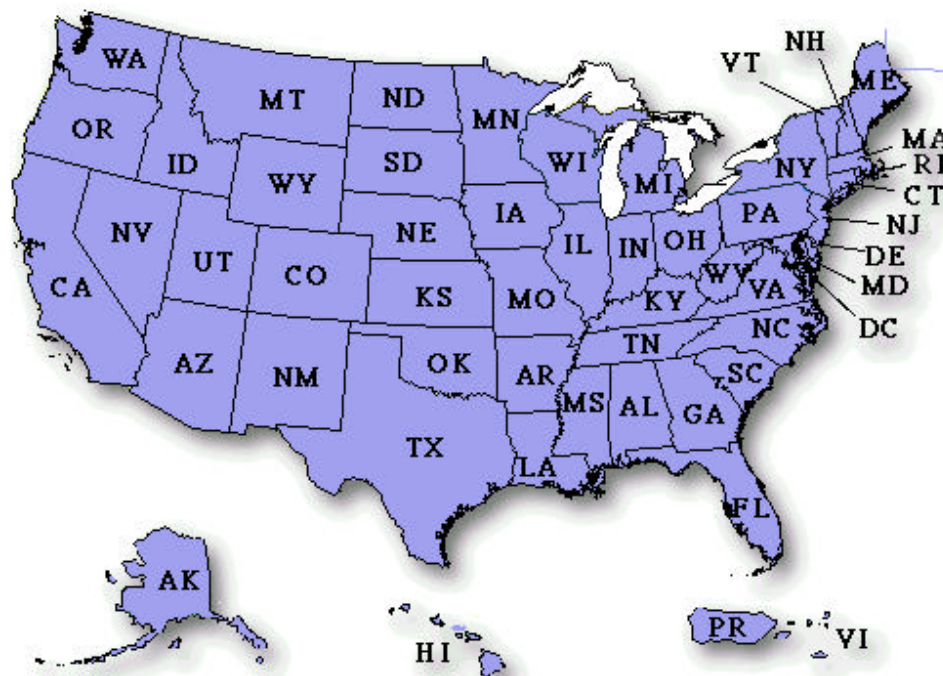
[get involved](#)

[success stories](#)

find a center

Select how you would like to "find a center". You can search by [state](#) or by using the [advanced search](#).

Select a state by clicking on map



Completing a Business Plan - Microsoft Internet Explorer

FileEditViewFavoritesToolsHelp

BackForwardStopRefreshHomeSearchFavoritesHistoryMailPrintReal.com

Addresshttp://www.hud.gov/nnw/startnewcenter/nnwbusiness.htmlGoLinks »



NN HOMEFAQCONTACT USHOUSING HOME



topics

site map

about neighborhood networks

news room

residents' corner

resources for existing centers

find a center

start a new center

business plan resources

get involved

success stories

start a new center

completing a business plan

Drafting and Submitting a Business Plan

Your business plan - an integral part of becoming a Neighborhood Networks center - is the framework for your center's operation. It will identify your financial plans and structure the day-to-day management of the center. It will also describe the programs and activities you plan to offer and their value to residents.

To get started, download our easy to use business plan template or contact your local HUD Neighborhood Networks Coordinator.

options

[Planning a Center Resources](#)

[Contacting HUD's Neighborhood Networks Coordinators](#)

[Download the Business Plan Template](#)

Internet

Bringing Technology to Indian Country's Doorstep

Creating Native American Community Technology Centers



Community Technology Centers

- Centers must be self-sustainable
- Centers have the flexibility to tailor their centers to the needs and resources at hand
- Centers thrive on local and national partnerships, both public and private
- Growing numbers in Indian Country

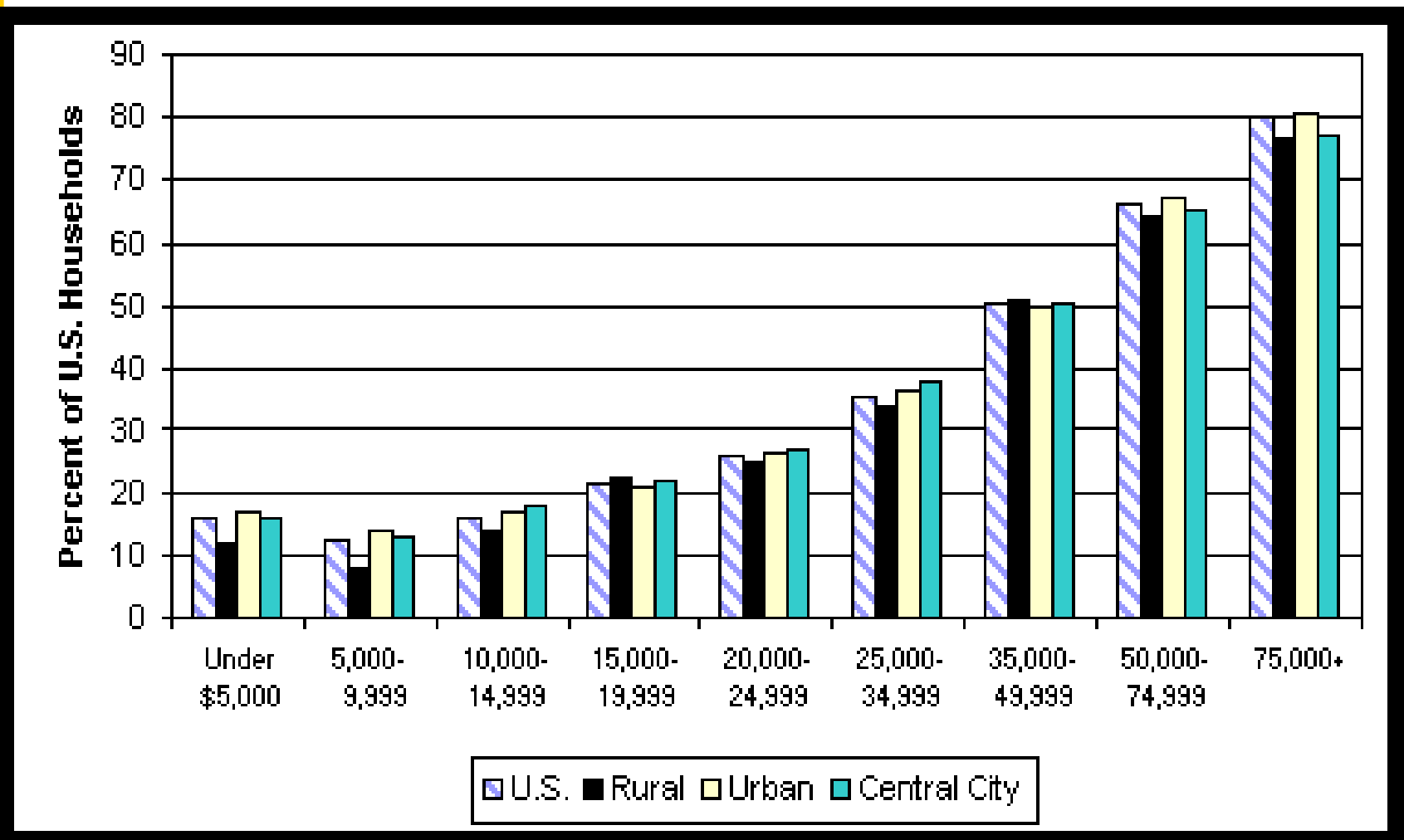


The Digital Divide and Rural America

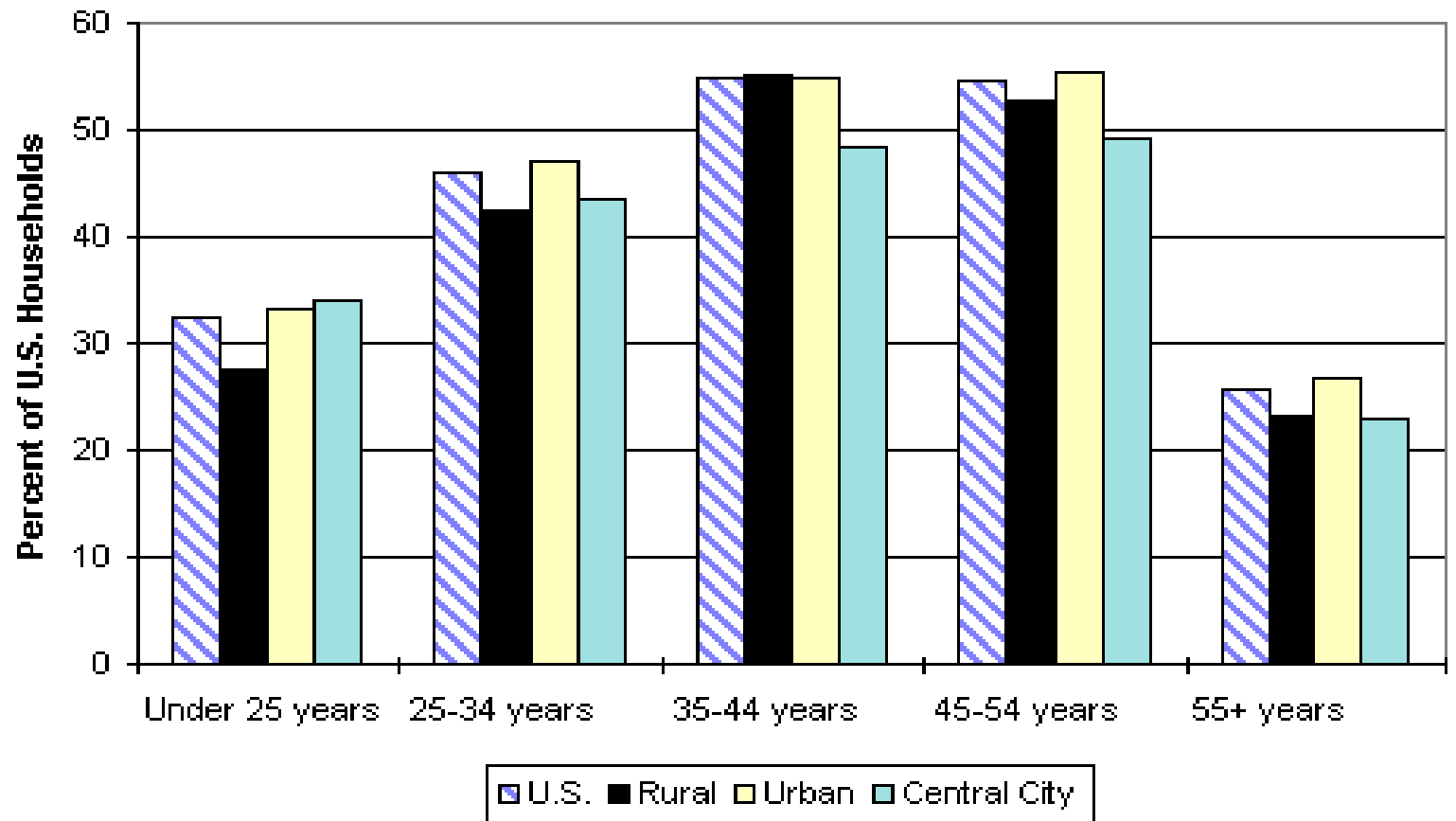
Low income rural Americans, more than any other group, lack access to computer resources and other technology, according to the U.S. Chamber of Commerce (1998). (Approximately 1 million Native Americans live in rural areas.)



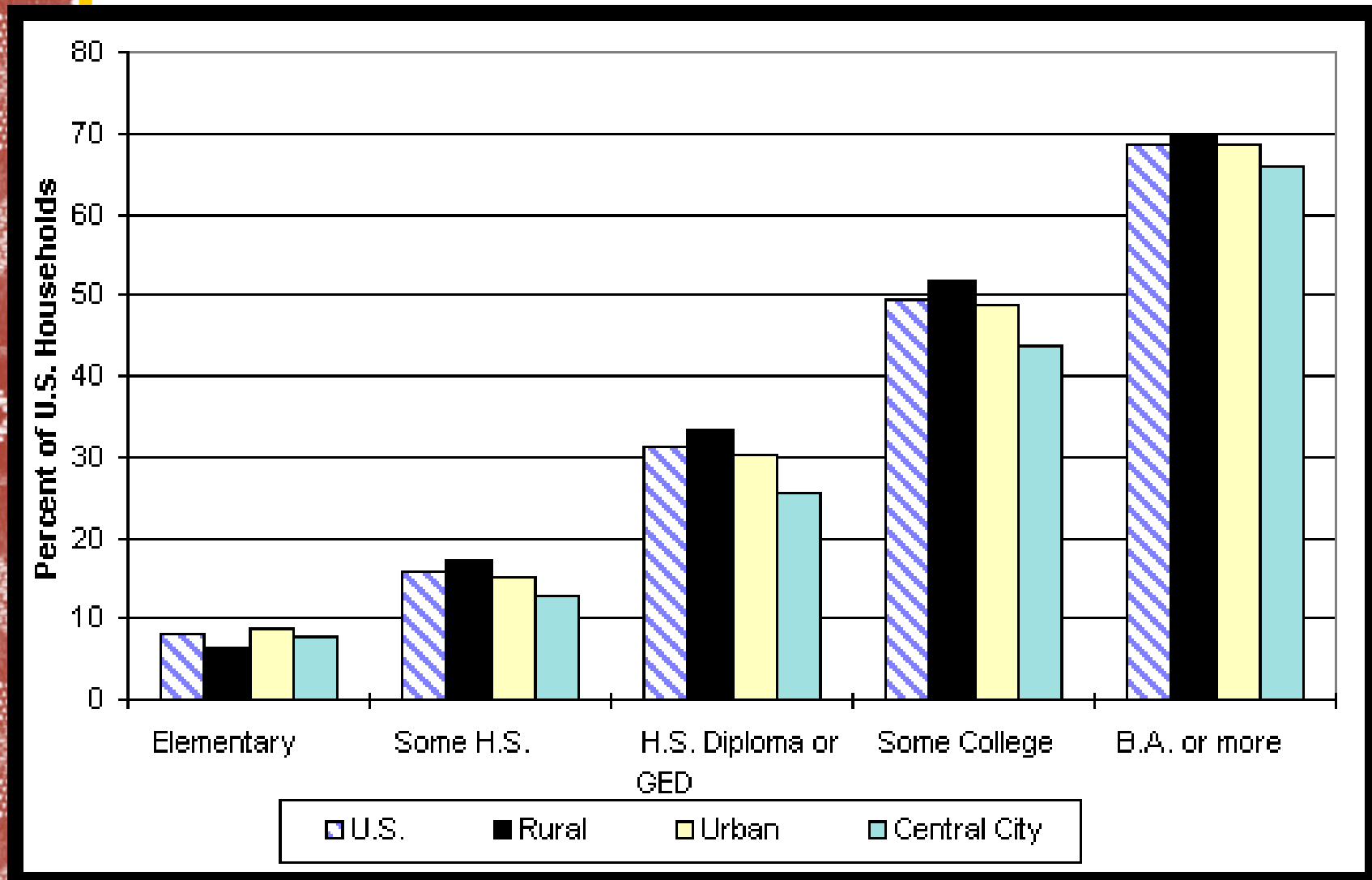
Percent of U.S. Households with a Computer By Income By U.S., Rural, Urban, and Central City Areas



Percent of U.S. Households with a Computer By Age By U.S., Rural, Urban, and Central City Areas



Percent of U.S. Households with a Computer By Education By U.S., Rural, Urban, and Central City Areas



CTCs in Indian Country face unique challenges

- Infrastructure (53% of Indian homes without phones; 9% in rural America; 5% in urban America)
- Demand for services spread over wide area.
- Scarcity of local resources
- Scarcity of funding
- Poverty



Benefits of Centers: For Native Americans

- Job skills training
- Cultural - A way to document oral history
- Intergenerational opportunities
- Tribal empowerment
- Programs for kids (after-school care)
- Reservation-wide Communication
- Health information and resources



Tools for the New Economy

Community Technology Centers

- Neighborhood Networks - HUD model program
- Funding at DOC - TOP
- HUD request \$80 million move from Dept. of Ed. CTC program
- USDA Distance Learning/Telemedicine Prg
- Community Reinvestment Act

Working Together to Build Programs and Opportunities

Slide 9





BUILDING A VISION

NEIGHBORHOOD NETWORKS CENTERS IN THE NATIVE AMERICAN COMMUNITIES

Working Together to Build Programs and Opportunities

Slide 1



BUILDING A VISION



**TO PROMOTE THE CREATIVITY FOR
“BRIDGING THE DIGITAL DIVIDE”
IN THE NATIVE AMERICAN COMMUNITY BY
UTILIZING THE FORMAT OF THE
*NEIGHBORHOOD NETWORKS INITIATIVE.***



BUILDING A VISION



GOALS:

1. IDENTIFY BENEFITS
2. DEVELOP STEP TO SUCCESS
3. COMPLETING THE REALIZATION OF THE VISION

**"ST. REGIS MOHAWK
RESERAVATION"**



BUILDING A VISION



BUILD BENEFITS

- **PROPERTIES**
- **COMMUNITIES**
- **PARTNERSHIPS**
- **CHILDREN & YOUTH**
- **ADULTS/SENIORS**



BUILDING A VISION

PROPERTIES

- **BUILD RELATIONSHIPS**
- **BUILD COMPETITIVE MARKETING
EDGE**
- **BUILD FINANCIAL STABILITY**



BUILDING A VISION

COMMUNITIES

- BUILD PARTNERSHIPS
- BUILD JOB TRAINING SKILLS
- BUILD THE WORKFORCE NEEDS
- BUILD ACADEMIC ADVANCEMENTS

Working Together to Build Programs and Opportunities



Slide 6





BUILDING A VISION

PARTNERSHIPS

- **BUILD COMMUNITY INVESTMENTS**
- **BUILD ECONOMIC HEALTH**
- **BUILD PHILANTHROPY COMMITMENTS**
- **BUILD THE LABOR FORCE**

Working Together to Build Programs and Opportunities

Slide 7





BUILDING A VISION

CHILDREN & YOUTH

- **BUILD EDUCATIONAL ASSISTANCE**
- **BUILD ACCESS OPPORTUNITIES**
- **BUILD EDUCATIONAL AND FUN ACTIVITIES**
- **BUILD BETTER CHOICES**

Working Together to Build Programs and Opportunities

Slide 8





BUILDING A VISION

ADULTS/SENIORS

- **BUILD EDUCATIONAL SKILL**
- **BUILD SELF-ESTEEM**
- **BUILD SELF-RELIANCE**
- **BUILD JOB OPPORTUNITIES**
- **BUILD ACCESS TO AUXILARY SERVICES**





BUILDING A VISION

STEPS TO SUCCESS

- ENLIST PARTICIPATION & ORGANIZE
- POLL RESIDENTS
- DESIGN A PROGRAM
- START-UP NEEDS

Working Together to Build Programs and Opportunities

Slide 10





BUILDING A VISION

STEPS TO SUCCESS

- **ESTABLISH CENTER'S OPERATIONS**
- **DEVELOP OPERATION BUDGET**
- **DRAFT A BUSINESS PLAN**
- **IDENTIFY POTENTIAL PARTNERS**
- **CREATE A CENTER**





BUILDING A VISION

STEPS TO SUCCESS

- **MARKETING AND EVALUATING YOUR CENTER**



*Akwesasne
Neighborhood Networks*



Computer Learning Center

BUILDING A VISION

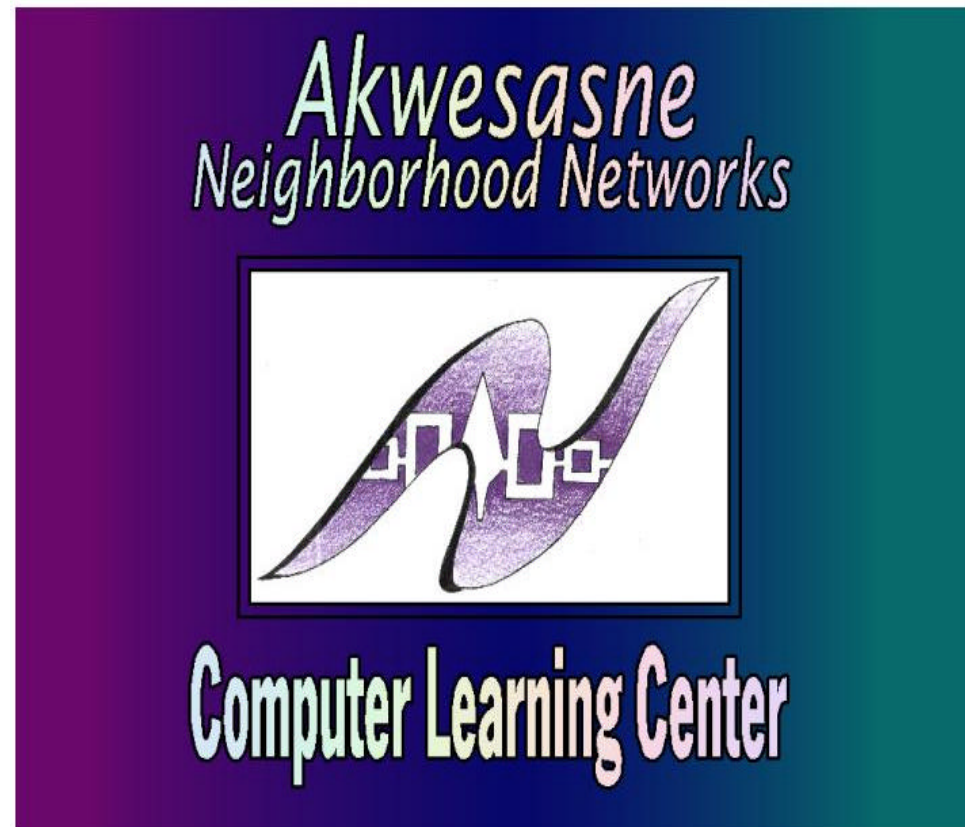
GRAND OPENING

Working Together to Build Programs and Opportunities

Slide 13



LIVING THE VISION ST. REGIS MOHAWK NATIONS



Working Together to Build Programs and Opportunities

Slide 14



LIVING THE VISION ST. REGIS MOHAWK NATIONS



EXECUTIVE SUMMARY

**...ENVISION FAMILIES, INCLUDING YOUTHS
AND ELDERS, BEING ABLE TO COME
TOGETHER, TO LEARN TOGETHER AND TO
ACHIEVE TECHNOLOGICAL INDEPENDENCE
TOGETHER, IN AREAS THAT THEY ONCE
COULD ONLY IMAGINE....**



LIVING THE VISION ST. REGIS MOHAWK NATIONS



MISSION:

TO MAKE A DIFFERENCE FOR INDIAN FAMILIES
BY INCREASING THE TECHNOLOGICAL
OPPORTUNITIES THAT WILL PROMOTE SELF-
DETERMINATION AND LONG-TERM FINANCIAL
INDEPENDENCE BY WAY OF COMMUNITY
DEVELOPMENT SERVICES.

Working Together to Build Programs and Opportunities

Slide 16



SEEING THE VISION



Working Together to Build Programs and Opportunities

Slide 17



SEEING THE VISION



Mrs. Cecilia Cook, Akwesasne Housing Authority Director
Introducing the Grand Opening of the Akwesasne Neighborhood
Networks



SEEING THE VISION



SEEING THE VISION



St. Regis Mohawk Tribal Chief, Mrs. Hilda Smoke - Giving the introductory speech and welcoming all in attendance



SEEING THE VISION



Kevin Fitzgibbons presenting the Tribal Certificate to Tribal Chiefs Hilda Smoke, Paul Thompson, and John Bigtree, Jr.



SEEING THE VISION



Presentation of Certificate to Director of Housing, Cecilia Cook



SEEING THE VISION



Advisory Committee member, Mr. Francis Boots, delivering the Opening Prayer, with Cecilia Cook

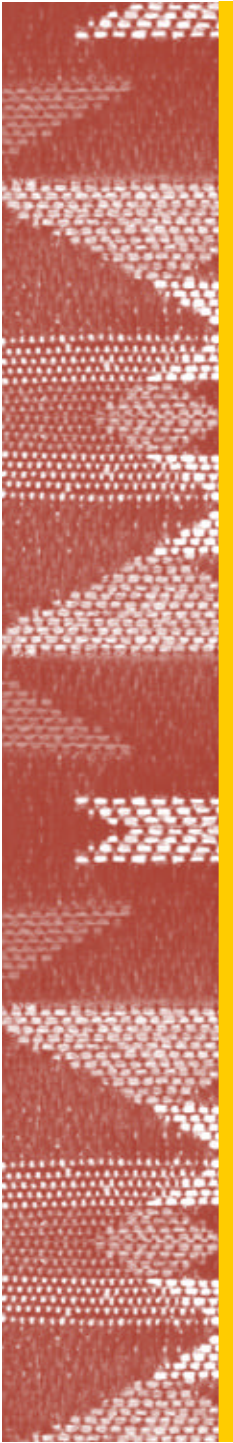


SEEING THE VISION



Chiefs Thompson, Smoke, Bigtree with Kevin Fitzgibbons and Cecilia Cook, cutting ribbon to the new Akwesasne Neighborhood Networks Computer Learning Center





SEEING THE VISION



General Motors Representatives, Mr. Dave Rourke, Mr. Bob Francis, and Mr. Larry Garrow

Working Together to Build Programs and Opportunities

Slide 26



SEEING THE VISION



The cake - designed by resident Jennifer Jock.



SEEING THE VISION



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SEEING THE VISION



Working Together to Build Programs and Opportunities

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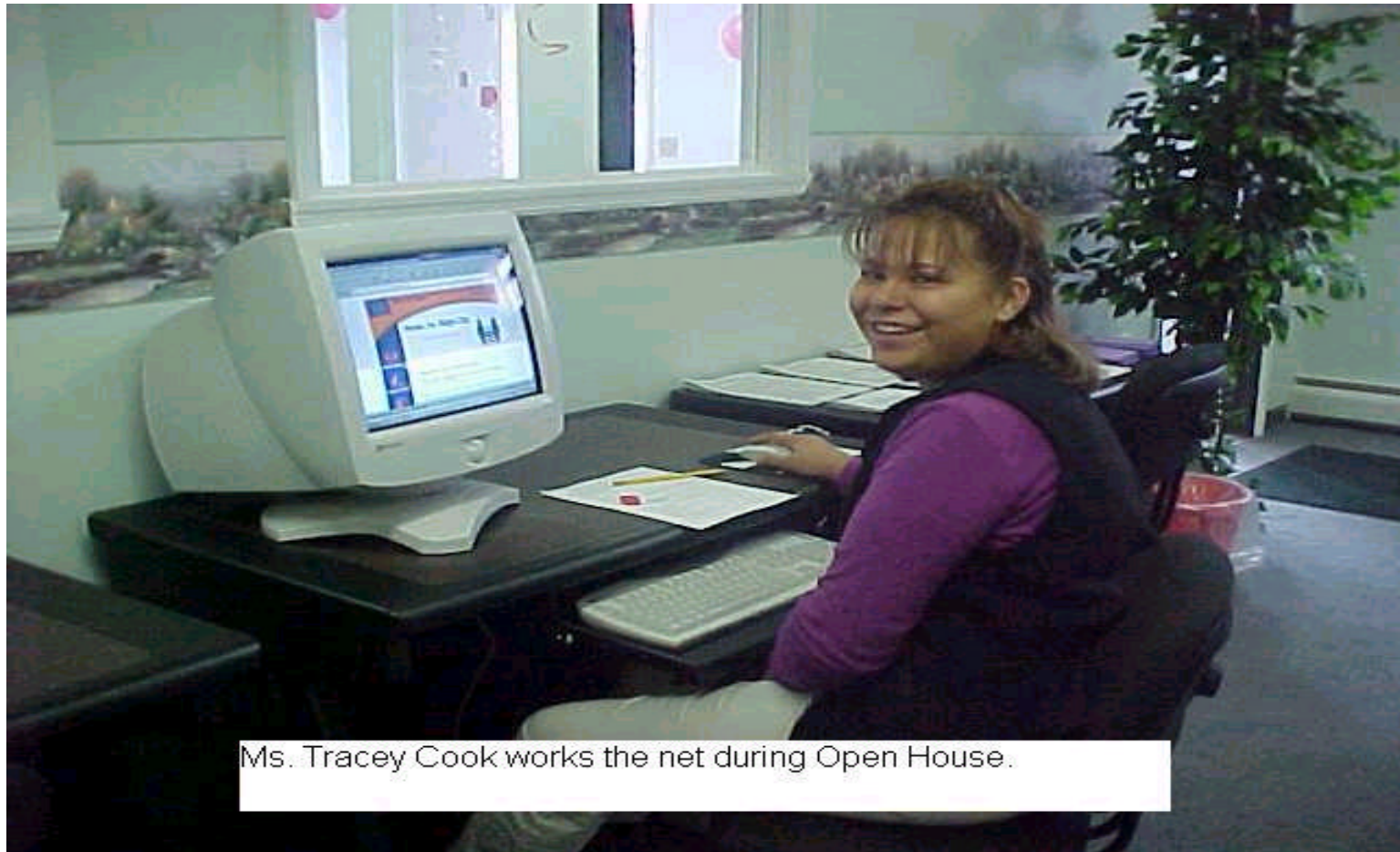
SEEING THE VISION



A community member and Chief John Bigtree, Jr. admiring the spread of food offered during Open House.



SEEING THE VISION



Ms. Tracey Cook works the net during Open House.



SEEING THE VISION



Working Together to Build Programs and Opportunities

Slide 32



SEEING THE VISION



Working Together to Build Programs and Opportunities

Slide 33



SEEING THE VISION

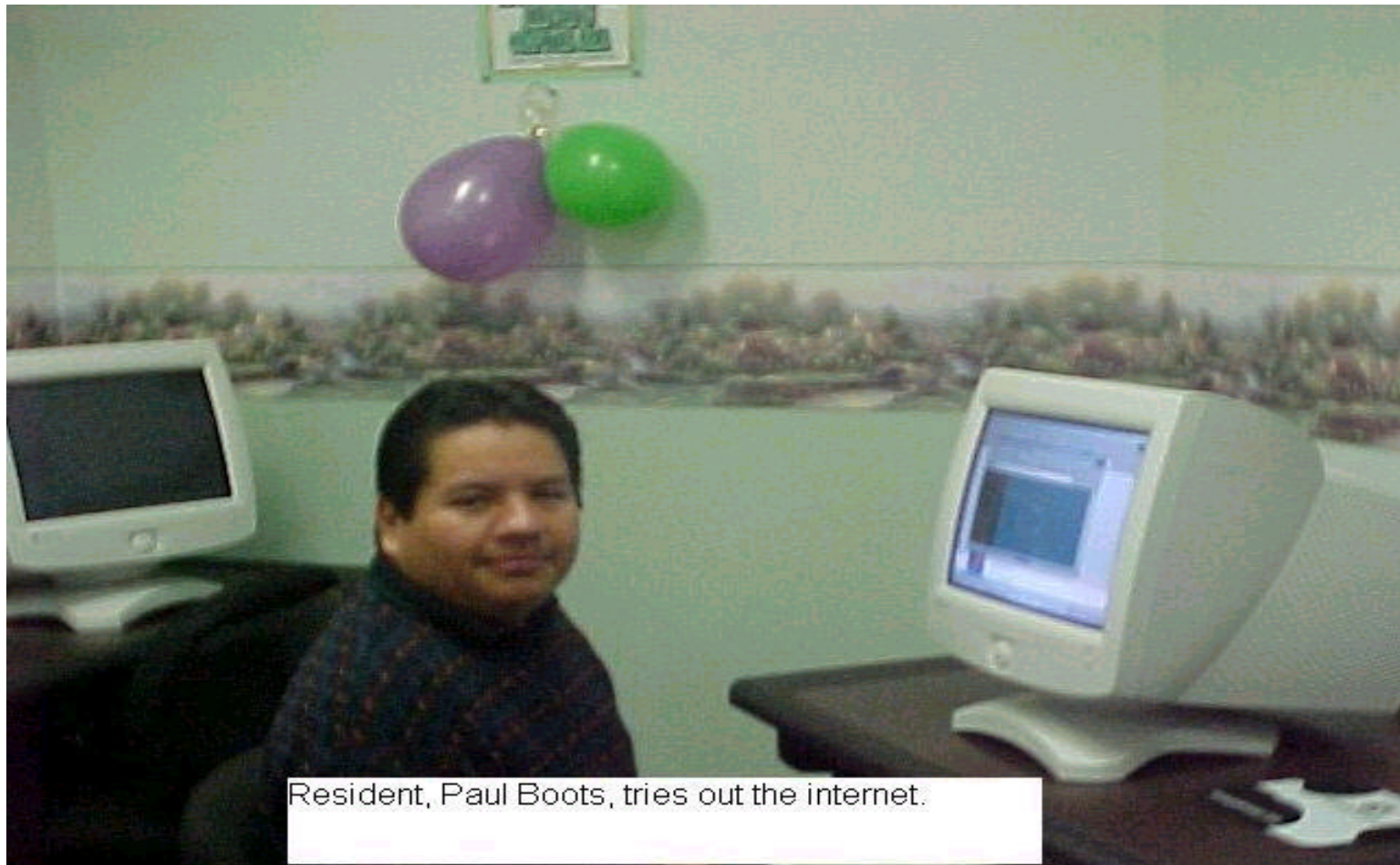


Working Together to Build Programs and Opportunities

Slide 34



SEEING THE VISION



SEEING THE VISION



Working Together to Build Programs and Opportunities

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SEEING THE VISION



Working Together to Build Programs and Opportunities

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SEEING THE VISION



Working Together to Build Programs and Opportunities

Slide 38



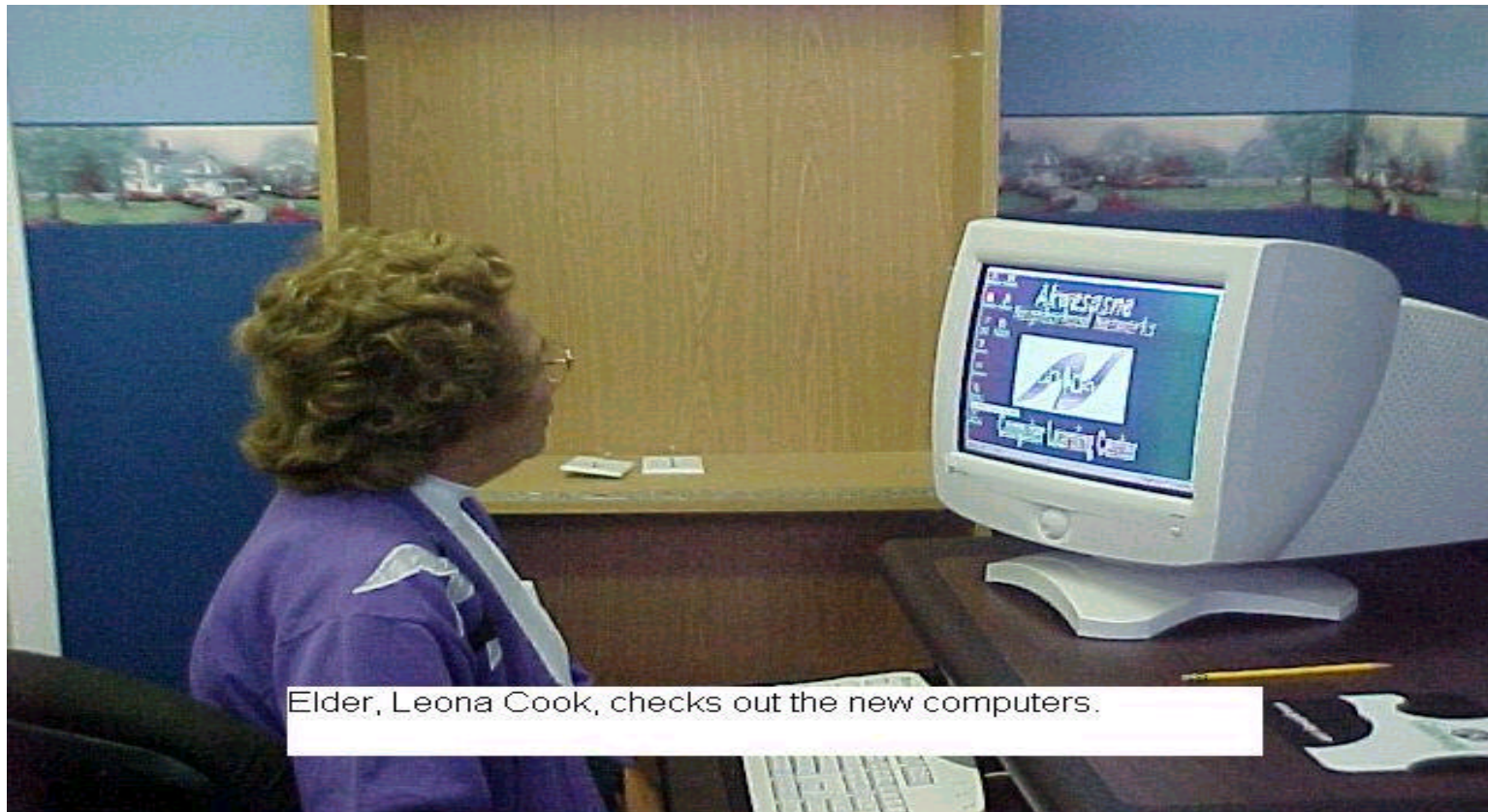
SEEING THE VISION



AHA Staff member, Millie Cook, shows girls a thing or two about the internet.



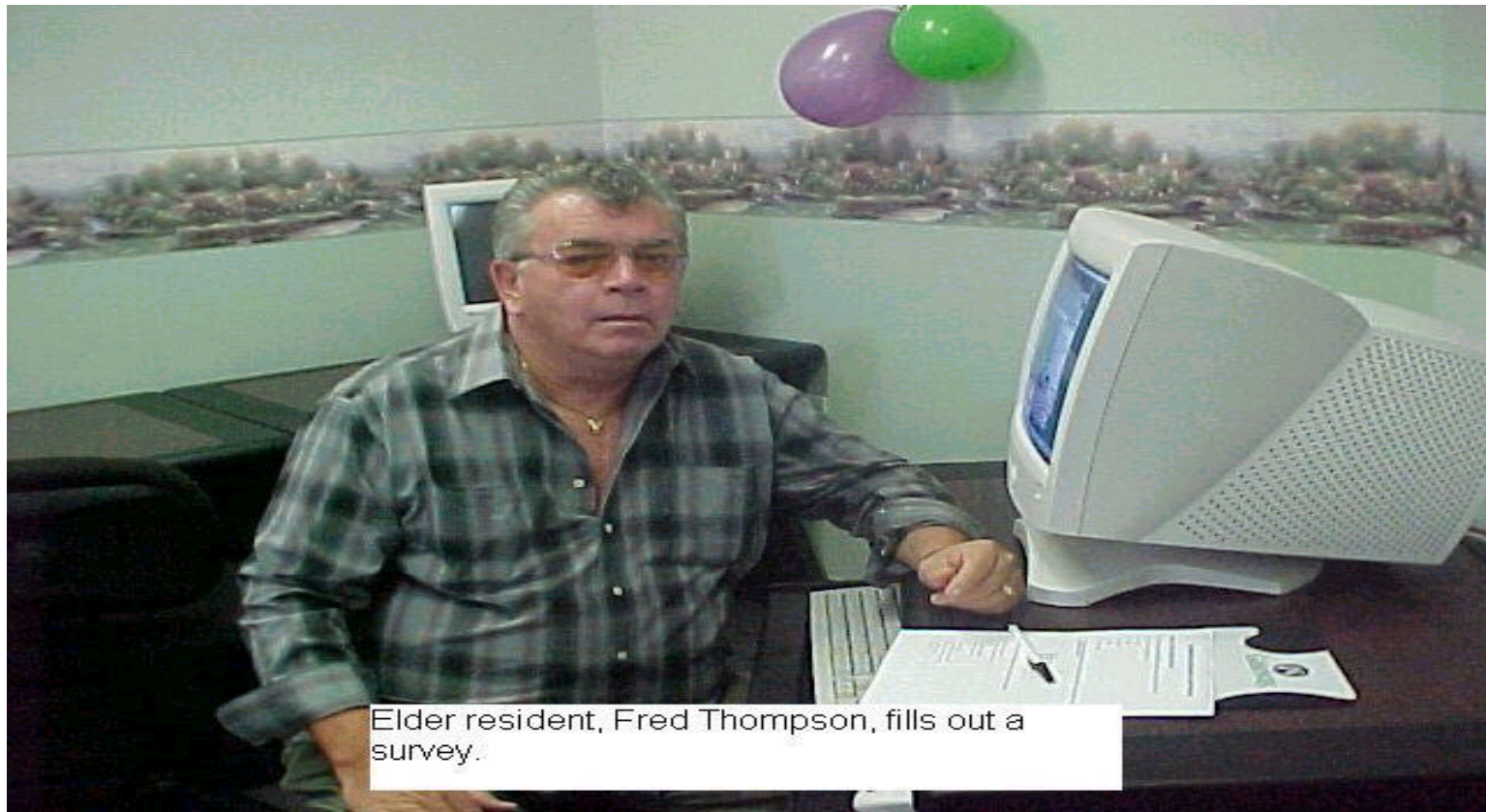
SEEING THE VISION



Elder, Leona Cook, checks out the new computers.



SEEING THE VISION



Creating a Nonprofit Homeownership Entity

Perry J. Pockros
PricewaterhouseCoopers LLP



Workshop Overview

- Introductions
- Why a Nonprofit Homeownership Entity?
- The Planning Process
- First Steps to Forming a Nonprofit
- Applying for IRS 501(C)(3) Recognition
- Development of a Nonprofit Organization
- Program and Organizational Operations



Introductions

- Perry J. Pockros, Principal Consultant
 - PricewaterhouseCoopers LLP
- Bill Picotte, Executive Director
 - Oti Kaga, Inc.
- Handout: Guide to Creating a Nonprofit Homeownership Entity



Your Expectations

- How many participants are aware of tribally chartered homeownership nonprofits?
- What would you like to learn from today's presentation?



Why a Nonprofit Homeownership Entity?

- Encourages tribal homeownership, private sector investment and economic development opportunities
- Provides tribal households financial assistance and advice in owning their home part from tribally-funding housing stock
- Lessens housing shortage and help increase TDHE capacity for low-income tribal families



Why a Nonprofit Homeownership Entity?

- Nonprofits enable tribes to develop market based frameworks regulating commercial and financial transaction
- Homeownership provides tribal households with a path to accrue wealth through equity investment in their own homes
- Advantages of nonprofit tax-exempt designation



New Opportunities

- New programs and initiatives
 - NAHASDA block grant
 - HUD Section 184 loan guarantees
- Interest in working with tribes
 - Lenders
 - Nonprofits
 - Secondary market



Nonprofit Vision and Mission

- To create tribal resident customer choice in obtaining affordable, decent, safe and sanitary housing
- To enhance affordable homeownership opportunities through private mortgage lenders on Native American trust lands



Nonprofit Business Objectives

- To provide pre- and post homeownership counseling and training
- To leverage private and public financial intermediaries in providing affordable homeownership products and services
- To a grow a homeownership market through referral of realtor services



Homeownership Counseling

- Assess homebuyer readiness
- Provide one-on-one pre-purchase and post-purchase counseling
- Help with homeownership maintenance responsibilities
- Refer homebuyer candidates to appropriate financial intermediaries
- Conduct educational workshops on affordable housing



Leverage Financial Intermediaries

- Establish loan product and service linkages with private and public financial intermediaries
- Enhance affordability of intermediary products through leveraging Partnership resources
- Raise financial capital through the development of a portfolio of financial products and the solicitation of donations



Homeownership Referral Services

- Maintain a resource list of private developers and housing contractors
- Serve as a listing and brokerage agent for homeownership transactions
- Act as a technical assistance referral service and provider for specialized homeownership programs



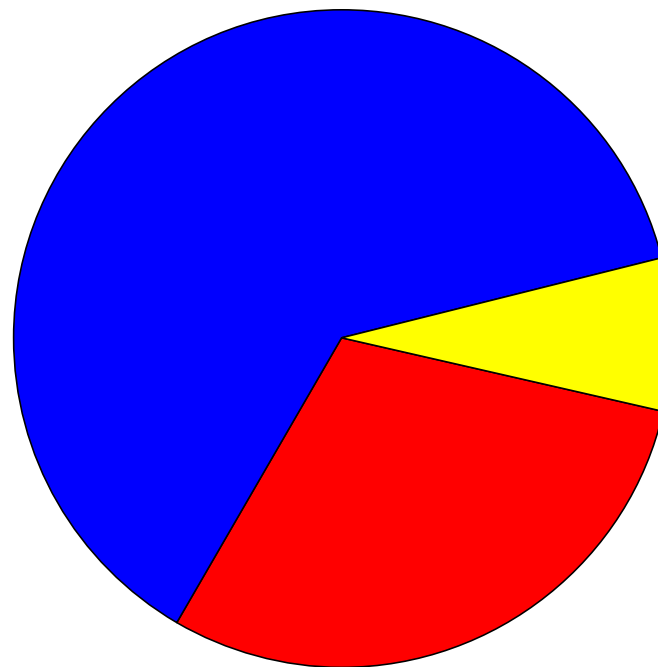
TDHE / Nonprofit Contrasting Missions

- **Housing Authority**
 - HA ownership
 - No individual wealth accretion
 - HUD controlled and dependent
 - Inflexible funding
 - Supply driven
 - Eviction
- **Nonprofit**
 - Individual ownership
 - Individual wealth accretion
 - Independently directed by Board
 - Flexible funding
 - Demand driven
 - Foreclosure



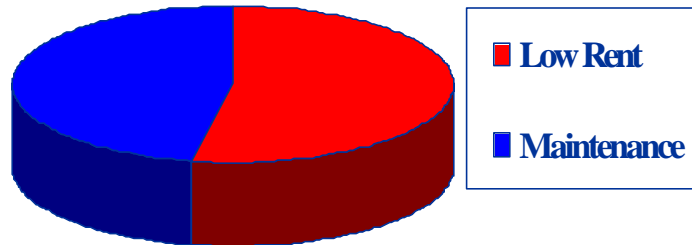
TDHE Housing Profile

(Notional 1937 Housing Act Inventory)

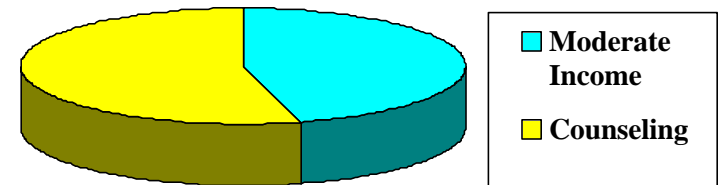


Redirecting Expanded Housing Resources (Notional)

Future TDHE
Resource Focus



Future Nonprofit
Resource Focus



The Planning Process

- Identification of Partners
- Homeownership Needs Analysis
- Land Analysis and Inventory
- Legal Assessment of Tribal Laws and Ordinances
- Determination of Response to Need
- Organizational Options



Identification of Partners

- Charter a working group to conduct research, analysis and planning
- Represent diverse interests, expertise and resources
 - Housing and economic development
 - TDHE board, tribal council and counsel
 - Private and nonprofit mortgage lenders



Homeownership Needs Analysis

- Market Description - research target homebuyers to understand potential market
 - Household size, income, debt and credit histories
 - Current housing expenses
 - Housing preferences
 - Accessibility requirements



Homeownership Needs Analysis

- Construction / rehabilitation standards
 - Design guidelines
- Financing
 - Pre-development, construction and permanent financing sources
- Homebuyer outreach and counseling requirements
- Internal staffing / system requirements
- Timeline



Land Analysis and Inventory

- Inventory of tribe's existing land base
 - Trust lands
 - Land assignments or lease
 - Allotted lands
 - Fractionalized parcels
 - Fee title lands
 - Individual ownership
- Willingness of tribe to set aside trust lands



Legal Assessment or Tribal Laws and Ordinances

- Identify legal benefits, barriers, contradictory policies or simply lacking:
 - Housing, landlord/tenant
 - Zoning, land distribution and use
 - Leasehold mortgage
 - Tribal corporations
 - Tribal taxes
- Understanding tribal legal requirements essential for nonprofits



Leasehold Mortgage Foreclosure Code

- Outlines the rights of a mortgagor and mortgagee on tribal lands
 - Tribal adoption of foreclosure rights and responsibilities is required by mortgage lenders if foreclosure proceedings are subject to tribal courts



Corporation Code

- Outlines the process to create a for-profit and nonprofit corporation
 - Reporting requirements, minimal provisions for Articles of Incorporation, responsibilities of Board of Directors and liabilities, provisions for dissolution



Housing or Land Code

- Outlines the relationships between landlords and tenants, and the distribution process for land either through land assignments or leases
- Outlines restrictions on land use activities that impact the natural environment, and utilities such as water and sewer options.



Determination of Response to Need

- Cultural context and tribal attitudes towards housing and homeownership
 - Resistance, ambivalence, or lack of interest
- Is there a willingness to pay more for housing to own their own home?



Organizational Autonomy

- Singular focused mission:
 - Independent nonprofit organization with specific mandate of promoting housing development and homeownership
- Operate semi-autonomously from tribe and TDHE
 - Provide flexibility in governance and operations



Forming a Nonprofit

- Nonprofit corporation formed under tribal law
- Nonprofit corporation formed under state law
- Unincorporated instrumentality of the tribe
- Corporation chartered under Section 17 of the Indian Reorganization Act
- Homeownership initiative under TDHE



Forming a Nonprofit

- **Tribal Law**
- Corporations code
- Ad Hoc chartering ordinance
 - Subject to tribal laws and regulations
 - Exempt from sovereign immunity
 - Eligible for tax-exempt status
- **State Law**
- State corporations code
- Consider “foreign corporation” on tribal reservation
 - Not subject to tribal laws and regulations
 - Eligible for tax-exempt status



Benefits to Nonprofit Incorporation

- Eligible for Federal tax-exempt status
- Receive Federal tax-deductible contributions
- Enables grants from public and private funders
- Lowers housing development costs
- Corporations protect against personal
- Gives greater sense of purpose and autonomy



First Steps to Creating a Nonprofit Corporation

- Prepare Articles of Incorporation
- Adopt Articles of Incorporation
- File Articles of Incorporation and/or have Tribal government charter organization
- File Articles of Incorporation with state's Secretary of State (if necessary)
- Draft and approve organizational bylaws



Key Elements of Articles of Incorporation

- Names / addresses of incorporators
- Name / address registered agent
- Statement of exempt purpose
- Statement prohibiting private inurement
- Statement prohibiting lobbying
- Duration
- Indemnification of directors, officers
- Voluntary / involuntary dissolution



Bylaws - Procedures

- Organization's primary governing document
 - Establishes how nonprofit will conduct business
- Adopted at first meeting of Board of Directors after filing of Articles of Incorporation
 - Required by IRS for tax-exempt status if they exist



Bylaws - Key Elements

- Name of organization
- Mission of organization
- Geographic area served
- Membership, if any (voting procedure)
- Board of Directors (duties, officers, meetings)
- Rules of order
- Fiscal year of operation
- Procedures for Amending bylaws



Applying to the IRS for 501(C)(3) Recognition

- An organization with 501(C)(3) tax exempt status from the Internal Revenue Service is exempt from payment of federal taxes
 - Resources required for application process
 - Annual filing requirements
 - Knowledge of federal, state, tribal laws related to charitable organizations



Qualifying as Charitable

- Charitable activities -“Providing services beneficial to the public interest”
 - Low-income housing safe harbor
 - Lessening the burdens of government
 - Combating community deterioration
 - Providing assistance to low-income families



Preparing the Application: Threshold Questions

- Have the Articles of Incorporation been prepared?
- Is the organization incorporated (or chartered) under tribal or state law?
- Have bylaws been adopted, if applicable?
- Does the organization have clarity of purpose and identified discrete activities?
- Does the organization have a clear sense of budget projections for next three years?



Preparing the Application: The Mechanics

- Obtain necessary IRS forms
- Write description of organization's activities
- Write organization's fund-raising plan
- Prepare balance sheet and 3 year statement of revenues and expenses
- Complete IRS form 1023 - Application for Recognition of Tax-Exemption



Preparing the Application: IRS Publications and Forms

- Publication 557 (Tax-exempt information)
- Form 1023 (Application for Recognition of Tax Exemption under Section 501 (C)(3))
- Form 8718 (\$500 user fee)
- Form 872-C (Advance ruling if operation for less than 8 months)
- Form 2848 (Power of Attorney and Declaration of Representative)



Preparing the Application Form 1023:

- Used to make determination of organization's exempt status
 - Detailed description of organization's activities past, present, and planned
 - How each activity furthers exempt purpose
 - Where and by whom the activity will be conducted



Preparing the Application Form 1023:

- Write fund-raising plan
 - Actual and planned
 - Attach copies of solicitations
- Prepare financial statements (Pro Forma)
 - Projections for two fiscal accounting periods



Development of a Nonprofit Organization

- The Board - Ten key duties:
 1. Determine vision and purpose
 2. Select the executive
 3. Support the executive and evaluate performance
 4. Ensure effective organizational planning
 5. Ensure adequate resources



Development of a Nonprofit Organization

- The Board - Ten key duties:
 6. Manage resources effectively
 7. Monitor organization's programs and services
 8. Enhance the organization's public image
 9. Serve as a court of appeal
 10. Assess its own performance



Development of a Nonprofit Organization

- The Board - Roles and responsibilities:
 - Duty of Care
 - Duty of Loyalty
 - Duty of Obedience
- The Board: Conflicts of interests
- The Board: Structure:
 - Selection, size, tenure, officers



Development of a Nonprofit Organization

- Strategic Plan formulation
 - Examines the environment in which the organization will operate
 - Explore factors that affect the way business will be conducted
 - Frame strategic issues that must be addressed
 - Develop specific goals and objectives
 - Establish performance indicators



Development of a Nonprofit Organization

- Policies and Procedures:
 - Budget formulation and execution
 - Financial management and internal control procedures (accounting to auditing)
 - Personnel policies and procedures
 - Procurement policies and procedures



Program and Organizational Operations

- Housing Development
- Housing Counseling
- Resource Referral Services
- Marketing
- Fundraising
- Monitoring and Evaluation



Program and Organizational Operations

- Housing Development
 - Serving as a developer
 - Purchasing manufactured homes
 - Facilitating self-help housing
 - Launching a lease-to-purchase program
 - Coordinating a “building blitz”
 - Facilitating private mortgage network
 - Using tax credits



Program and Organizational Operations

- Funding resources in the stages of development
 - Predevelopment financing
 - Acquisition financing
 - Construction financing
 - Permanent financing
- Working capital and gap financing
 - Grants and subsidies



Program and Organizational Operations

- Housing Counseling
 - Determine homebuyer readiness
 - Provide pre- and post-purchase counseling to all households receiving assistance from nonprofit
 - Homebuyer clubs



Program and Organizational Operations

- Resource Referral Services:
- One-stop mortgage center model
 - Provide information on process of buying home, financial intermediaries, builders and contractors, housing counseling and programs



Program and Organizational Operations

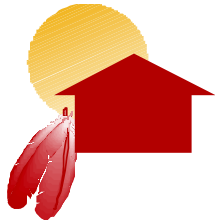
- Marketing
 - Need to expand customer base to mitigate financial risks
- Fund-raising
 - Grants from foundations, corporations and government entities
- Monitoring and Evaluation
 - Assessing and learning



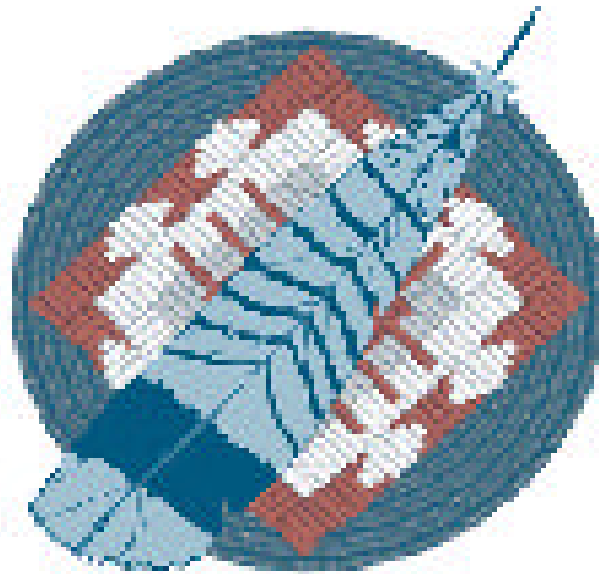
Creating a Nonprofit Homeownership Entity

- Wrap -up
- Questions
- For more information, contact:





Guide to Creating a Nonprofit Homeownership Entity



June, 2001

U.S. Department of Housing and Urban
Development
Office of Native American Programs

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Benefits of a Nonprofit Homeownership Model

1.0 Executive Summary

Important opportunities for affordable housing in Indian Country have been created by NAHASDA, Section 184 loan guarantee, and other new programs. In addition, mortgage lenders, nonprofits, and the secondary mortgage market are increasingly interested in working with tribes. However, in order to take full advantage of these opportunities, tribes need legal, technical, and program design infrastructure.

Significant and sustainable benefits will arise from the nonprofit homeownership model:

- A one-stop nonprofit homeownership model provides tribal households financial assistance or advice in owning their home apart from tribally-funding housing stock.
- Homeownership opportunities will provide tribal households a way to accrue wealth through increasing equity investment in their own homes.
- Tax-exempt nonprofits can take advantage of donations from foundations, individuals and others; thereby reducing dependence on limited public sector funding.
- As tribal households move into their homes, housing capacity provided by tribally designated housing entities will increase for very low-income tribal families.
- Nonprofits will assist tribes in developing the regulatory jurisdiction over financial and commercial transactions that will provide predictability to both borrowers and lenders – thereby stimulating both homeownership and economic development opportunities.
- Nonprofit approach promotes greater tribal control and accountability since the entity's Board of Directors usually consists of tribal members with expertise in housing, economic development, and tribal governance.

Guide to Creating a Nonprofit

The guide should serve as a reference tool for a working group interested in launching a nonprofit with the mission of developing affordable housing and promoting homeownership opportunities. The guide walks the

Guide to Creating a Nonprofit Homeownership Entity

working group through the planning stages, the legal creation of an entity, the application process for Internal Revenue Service (IRS) 501(c)(3) status, the development of the organization, and the program operations. It concludes with a case study on the Oglala Sioux Tribe Partnership for Housing, Inc.

Before launching a nonprofit organization, it is crucial for the tribe to engage in extensive housing research and planning to determine if this is the best response to identified needs. A working group of committed community leaders and housing industry practitioners should come together to provide leadership and conduct or commission the necessary research. Specifically, it should conduct a homeownership needs analysis to gauge the tribe's demand and capacity for homeownership, a land analysis to assess what land is available for development of new homes, and a legal assessment to identify what relevant tribal codes and ordinances are in effect.

The working group should examine the organizational options and decide how best to structure the new initiative or entity. It should also evaluate existing organizations and entities that may be able to launch an initiative without the creation of a new organization. The working group should identify partners and funding sources for the initiative.

The creation of a nonprofit organization is a multi-step process involving many decisions, documents, and players.

Once the working group has determined that it should form a nonprofit, it should generate a strategic plan, a vision statement, and a business plan. Next, the group should prepare and adopt Articles of Incorporation, file them with the tribal government and/or have the tribal government charter the organization, file them with the state Secretary of State (if necessary), and draft and approve organizational bylaws. Details on all of these steps are included in this document.

The Board of Directors is the body that governs the nonprofit organization. It makes decisions, sets policies, and plans in order to ensure the organization's success. Further information on the Board's roles, responsibilities, and structure is included in this document.

After an organization has worked through the land, legal, tax, and financial packaging issues confronted in the planning stages, and has organized itself legally as a nonprofit, it is ready to embark on its program operations.

Planning Process

First Steps to Creating a Nonprofit Organization

Board of Directors

Program and Organizational Operations

Pine Ridge Case Study

Section 6 details a preliminary sketch of what the program operations may include.

As soon as possible, the nonprofit should begin working with prospective homebuyers. The entity would market and reach out to find families interested in homeownership and provide group and individual pre- and post-purchase and credit counseling. It is from these efforts that the organization identifies and nurtures its future homebuyers.

One component of the organization's operations is housing development. The entity may be involved in site selection, deciding on the appropriate form of housing delivery, type of home and building materials, securing construction gap financing, leveraging with financial intermediaries, procuring services, and closing on a property.

In addition, the organization should provide resource and referral services. As a one-stop resource referral center, the organization would be a single source where interested parties could obtain information on the process of buying a home, as well as information on credit counseling, mortgage lenders, real estate brokers, builders and contractors, and local housing options and programs.

HUD's Office of Native American Programs (ONAP) proposed to the Oglala Sioux Tribal President that a nonprofit entity – separate and independent from the tribal governance structure – could serve as a national pilot project in developing affordable housing and designing homeownership opportunities. In response, the tribal council created the Oglala Sioux Tribe Partnership for Housing, Inc. (OSTPH), to serve as the pilot for the Initiative. As a nonprofit organization, OSTPH would:

- Promote the concept of homeownership among tribal members and identify interested homebuyers
- Create a housing development and financing plan that reflects the preferences and circumstances of the homebuyers
- Assess homebuyer readiness
- Deliver personal financial management and housing counseling services
- Serve as a conduit between lending institutions and the homebuyers

Guide to Creating a Nonprofit Homeownership Entity

- Market-shop and negotiate for the best lending packages for tribal members
- Maintain funding sources to close the gap on down-payment and monthly mortgage costs
- Seek out and secure other sources of gap financing
- Develop sources of housing and housing-related products
- Serve as a resource and referral center for tribal members interested in homeownership

In essence, the nonprofit homeownership entity will bridge the gap between Pine Ridge borrowers and the private market that provides the services needed to facilitate on-reservation homeownership.

OSTPH is a tax-exempt, 501(c)(3) nonprofit organization governed by an eight-member Board of Directors and managed by a full-time Executive Director.

The creation and mission of OSTPH represent an achievement of the Oglala Sioux Tribe in creating a new opportunity for tribal families to the finance and obtain affordable housing. OSTPH's success at attracting housing development funding from numerous public, private, and nonprofit sources and its ability to implement a variety of housing initiatives help reduce tribal dependency on unpredictable and limited public funding. For the first time in its history, the Tribe is able to build new housing and provide wider housing choice to homebuyers and renters; especially those with lower incomes and physical disabilities.

2.0 Planning Process

2.1 Introduction

To help lessen housing shortages, many tribes are forming nonprofit organizations to promote housing development and affordable homeownership opportunities in Indian Country. This approach may not be appropriate for each tribe, in all situations. This is why it is crucial to engage in extensive research and planning to determine if launching a new organization is the best course of action for its members.

Specifically, the tribe should conduct a homeownership needs analysis to gauge the tribe's demand and capacity for homeownership, a land analysis to assess what land is available for development of new homes, and a legal assessment to identify what relevant tribal codes and ordinances are in effect. This section discusses each of these assessments and explains how to proceed once this information has been gathered.

2.2 Identification of Partners

To determine whether or not a tribe should launch a housing development and homeownership program and charter an organization to undertake this initiative, a working group should be formed to conduct the necessary research, analysis, and planning. Such a working group should be comprised of committed individuals who represent different interests in the community and/or who bring a variety of expertise and resources. The role they will play includes brainstorming, visioning, and conducting or commissioning surveys and analysis on homeownership needs, land issues, and legal issues. Ultimately, this group of people will determine whether there is sufficient need and capacity to launch a housing development and homeownership program. The working group will also choose what type of organization will operate such a program. Some members of the working group may go on to serve as members of the organization's Board of Directors.

It is helpful if at least some of the working group members have a background in housing, construction and development, law, land issues, and/or finance. These individuals can provide professional expertise to the group at no cost, saving the initiative considerable costs. Working group members may or may not be required to be tribal members to participate – this is to be determined by the group. It may be helpful to involve, as members or associate members, local staff of HUD's Office of Native American Programs (ONAP), the Bureau of Indian Affairs (BIA), Indian

Guide to Creating a Nonprofit Homeownership Entity

Health Services (IHS), state housing officials, tribally elected officials, and representatives of mortgage lenders and secondary market participants. These individuals will have contributions to make at different points in the planning and development processes.

2.3 Homeownership Needs Analysis

For many tribes, most of the information required to create a housing development and homeownership program will be contained in their Indian Housing Plan. However, it is preferable to pull this information together in a three to four page document describing the program. Such a write-up would likely include six sections:

1. Market description (target homebuyers)
2. Construction/rehabilitation standards and design guidelines
3. Financing (pre-development, construction and permanent financing, and financing sources) and pro-forma project statements
4. Homebuyer outreach and counseling
5. Internal staffing and systems required
6. Timeline

Unlike rental housing, homeownership requires a long-term commitment from the homebuyer and, if the working group intends to utilize bank financing, an ability to be underwritten by conventional banking practices. Since this will be a new venture for many tribes, a short written program description will help funders to understand the market. It will also assist the tribe and tribal council to understand the program's goals, and it will enable the organization's future staff to understand the process and their role.

The first level of analysis is to research potential homebuyers. These are people who would be interested in becoming homeowners and have sufficient income to pay a mortgage. The research required typically includes:

- Household income
- Household size
- Debt and credit history
- Current housing expenses

Know the Market

- Housing preferences (single family, multi-family, townhouse, manufactured, modular, etc.)
- Accessibility requirements for the elderly and persons with disabilities

Income information, household size, and current housing expenses are available through Census data and BIA. Since the Census is conducted only once every 10 years and generally undercounts Native American households, some tribes carry out surveys to gather more current and reliable information. Incorporating the surveys into the Indian Housing Plan also promotes the tribal participation that HUD seeks for these Plans.

Based on this information the working group can begin to analyze the market for homeownership that will guide all the rest of the project – the financing, design, development costs, purchase prices, and counseling required by the homebuyers.

2.4 Land Analysis and Inventory

Along with the homeownership needs analysis, it is important to consult or conduct a land inventory of the tribe's existing land base. This inventory will identify the tribal land available for the development of homeownership units. In some cases, there may be an existing land inventory that may need to be updated. This exercise can also highlight any issues or problems that may exist with tribal lands.

A land inventory will categorize all the land of the tribe by type, including trust lands, allotted lands, and lands held in fee simple. BIA will most likely play a key role in this inventory, as the BIA issues Title Status Reports (TSRs) on all tribal trust land.

The term "fee land," "fee title" or "fee simple title" generally denotes an estate in land that is absolute and unrestricted. The owner is entitled to dispose of the entire property or various interests in the property during his or her lifetime without hindrance. Upon his or her death, the land or his or her remaining interest passes to his or her heirs, or those to whom he or she has given it by will. The homeownership nonprofit entity can work easily with fee simple land to develop and build homes. Tribes sometimes own land in fee within the boundaries of the reservation or off the reservation, and they may be willing to lease or assign such land to tribal members for homeownership. In addition, tribal members may own their own undeveloped land in fee simple, and the homeownership organization could assist such tribal members in building and financing their own homes on their land.

Guide to Creating a Nonprofit Homeownership Entity

Trust land is land or any interest therein held in trust by the United States of America for the benefit of a tribe or individual Native American. A tribe may distribute such land to its tribal members either by land assignment or lease. A lease requires the approval of BIA and must comply with certain federal regulations. A land assignment, which is an action by tribal government, is another means for the tribal government to distribute land for the use of tribal members. BIA approval is not needed for a land assignment. However, tribes may choose to have their land assignments approved by BIA or recorded in one of BIA's title offices. This choice might be attractive if the tribe does not have a title office.

In some cases, the tribe may be willing to set aside some of its trust lands for affordable homeownership opportunities. The working group should contact the tribal council to inquire about such a possibility. A land analysis should also include a review of the forms of lease or assignment that the tribe uses to convey land, along with any applicable restrictions on the land.

During the 1800s, the U.S. government gave individual allotments to individual Indians. The allotment is land held in trust by the United States for the benefit of an individual Indian. These allotted lands have passed down through the generations. A consequence of the inheritance feature of allotments is the fractionalization of a parcel of land. In some instances, the parcel may have multiple heirs holding an interest in it. This is a problem because it is not clear who owns what part of the land, and it is difficult to build a home on such land. Depending on the size of the allotment, the options available to tribal members include some sort of division or consolidation of the allotment, or an assignment by the other heirs of their rights to the land to a single owner. To date, there has been no comprehensive means to deal with the fractionalization issue. These parcels may be the most bothersome and challenging trust lands to deal with under a nonprofit entity's homeownership initiative.

2.5 Legal Assessment of Tribal Laws and Ordinances

As tribes consider launching a housing development and homeownership program and establishing a nonprofit organization to operate the initiative, they should be careful to consider the legal and tax implications on the nonprofit and the future homeowners. The working group should conduct an assessment of the existing tribal codes, ordinances, and/or laws in the following areas: housing, zoning, land distribution and use, corporations, leasehold mortgage, landlord/tenant, and taxes. This assessment will assist

Trust Lands

Allotted and Fractionalized Lands

Tribal Government

the nonprofit to identify the legal benefits and legal challenges resulting from the proposed activities on and off the reservation. A legal assessment will also identify in what areas tribal law is lacking, contradictory, or raises issues for the proposed activities.

Legal and tax implications exist on multiple levels, including the tribe, state, and federal government bodies. Normally state law does not apply to a tribe, its activities or its tribal lands. However, the nonprofit organization may make decisions that would fall under the jurisdiction of state law by choice for tax advantages or governance advantages. Normally, the implications of the legal and tax consequences vary by tribe and by state. The implications also differ from the perspective of the homebuyer and the nonprofit organization.

To begin, the working group should consider the kind of governmental, legal, and tax codes needed so the nonprofit can accomplish its goals in a cost-efficient manner. Understanding tribal law and what it requires is essential to the nonprofit organization. An awareness of the legal relationship with the federal government is also important as federal laws regulate tribal land.

The working group needs to consider the impact of the tribal laws on the homeowner, for example, what happens if the buyer must sell, default, or vacate the premises for a period of time. For example, some tribal constitutions have provisions that result in the loss of a lease on land or land assignments if the occupant vacates the property for more than two years.

The tribal constitution is a fundamental organizing instrument. The specificity and complexity of tribal laws vary by tribe. Tribes have either Indian Reorganization Act constitutions adopted in the 1930s or more recent constitutions. Tribal constitutions usually include provisions about land use and the distribution of land to tribal members. The bylaws that accompany a tribal constitution govern the activities of a tribal council and tribal government divisions, departments, and committees. The documents are instruments of the tribal laws and federal law depending on whether the tribe uses a land assignment or a lease.

The working group must identify all tribal ordinances, codes, or laws that will have an impact on the nonprofit entity and any requirements the tribal council and its departments may have on the organization. For example, some tribes may impose certain reporting requirements on the nonprofit. Identifying, understanding, and explaining tribal laws, codes, and

Guide to Creating a Nonprofit Homeownership Entity

ordinances facilitate relationships with lenders and others and provide them with a comfort level to deal with the tribe and tribal members. The working group should also consider whether existing tribal laws, codes, and ordinances would violate any of the requirements that exist among a lending institution's requirements or those of federal mortgage loan programs. Under these circumstances, the working group may wish to consider a recommendation to the tribal council that the ordinances be amended so that tribal members can take advantage of the programs.

The following types of tribal laws, codes, or ordinance can facilitate the nonprofit's ability to promote homeownership:

- Leasehold Mortgage Foreclosure Code - outlines the rights of a mortgagor and mortgagee on tribal lands. Tribal adoption of foreclosure rights and responsibilities is required by mortgage lenders if foreclosure proceedings are subject to tribal courts.
- Corporation Code - outlines the process to create a for-profit and nonprofit corporation, any ongoing reporting responsibilities, minimal provisions of Articles of Incorporation, responsibilities of Board of Directors and liabilities, as well as provisions for the dissolution of a corporation.
- Housing Code or Land Code - outlines the relationships between landlords and tenants, and the distribution process for land either through land assignments or leases.
- Environmental/Land Use Code - outlines the restrictions on land use activities that impact the natural environment and utilities such as water and sewer options.

The working group should become familiar with federal, state, and tribal tax laws. In some cases, the tribe may have entered into a special tax agreement with the state that is relevant to the organization. The implications of relevant tax laws on future homebuyers should also be identified and shared with homebuyers.

In some cases, certain tax structures may create additional costs or benefits to the organization and its mission and goals. For example, most tribes have a tribal employment rights office (TERO), which requires those who do business on the reservation to show Indian preference in hiring. TERO imposes fees to subsidize the cost of regulating the tribal employment rights ordinances. Sometimes exemptions are available from the state and may be available from the tribe.

Tax Laws

Build the Case for Homeownership

2.6 Determination of Response to Need

The working group should take into account the cultural context and tribal attitudes regarding housing and homeownership. There may be resistance, ambivalence, or a lack of interest in homeownership among tribal members. Tribal members may not be interested in paying more to own their own home.

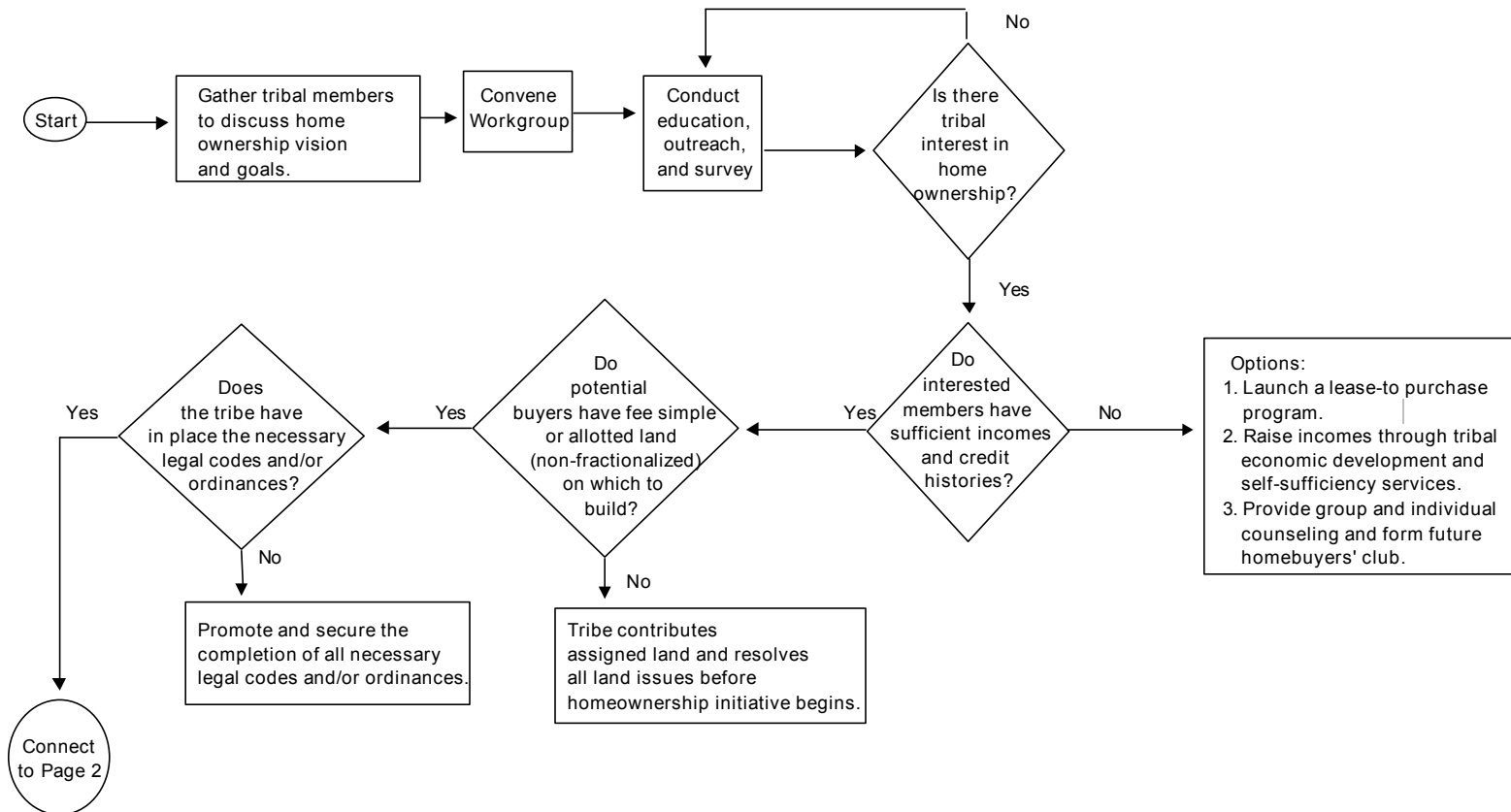
The working group must develop ways to communicate the value of individual homeownership choice above the existing model of housing owned and managed by the tribe or the tribally designated housing entity (TDHE). As articulated earlier, homeownership provides the key benefit of wealth accretion, and is a vehicle for investment and saving.

Synthesizing Analyses

The Homeownership Needs Analysis, the Land Analysis and Inventory, and the Legal Assessment of Tribal Laws and Ordinances should provide the necessary data to the working group to reach a decision regarding the formation of a nonprofit or the launch of a housing development and homeownership initiative.

Exhibit 2.1 illustrates the homeownership process path for deciding what kind of housing and homeownership products are most feasible for the tribe. The illustration incorporates the major points presented thus far and shows the sequencing of tasks required for launching a homeownership program.

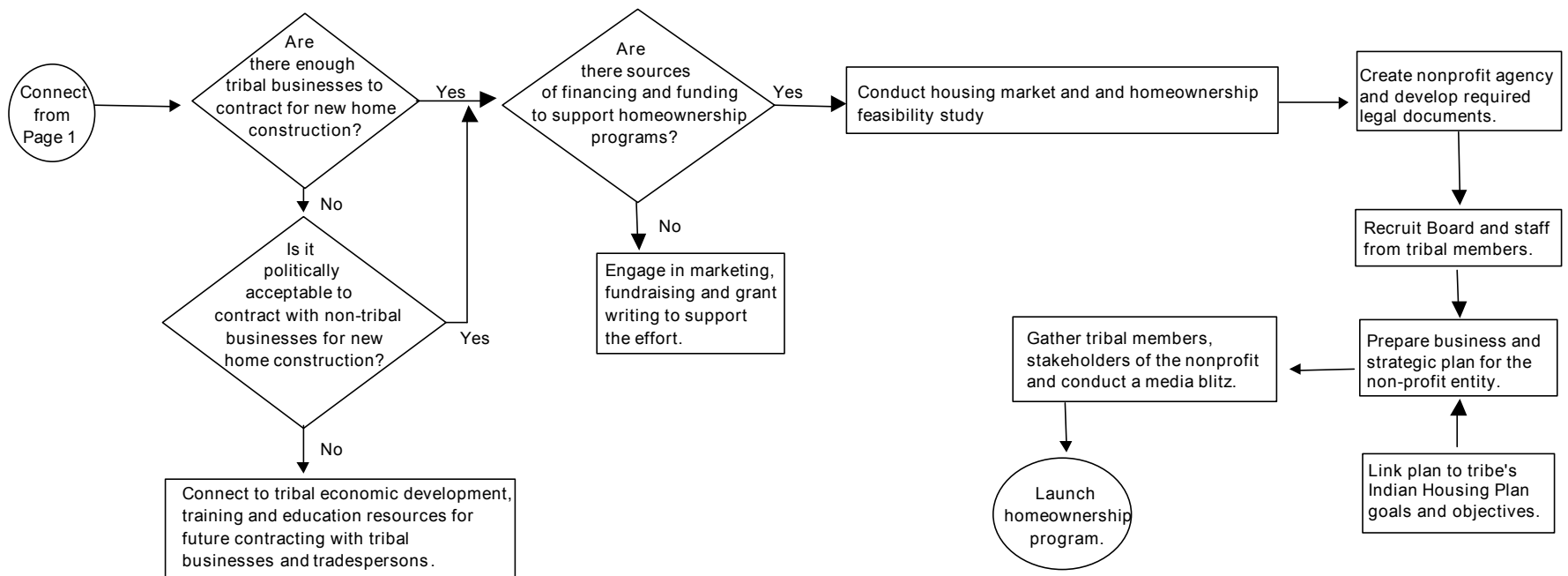
Exhibit 2.1 Homeownership Process Path Page 1



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Exhibit 2.1 Homeownership Process Path

Page 2



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2.7 Organizational Options

The Shared Visions Initiative encourages tribes to establish independent nonprofit organizations with the specific mandate of promoting housing development and homeownership. There are several advantages to this independent nonprofit organizational model.

Forming a separate organization dedicated to housing development and homeownership can support the delivery of other housing services by the TDHE. Unlike the tribal government and TDHE, a new entity will have a singular and focused mission to develop housing and promote homeownership. This will enable the TDHE to channel more of its resources into other areas. A new organization can step in and help when a TDHE is “spread too thin.”

With a separate identity, the nonprofit organization will operate independently from the tribal government and TDHE. This will provide the organization with flexibility in its governance and operations. It also gives tribal members, prospective homebuyers, funders, and others the perception that the organization is separate and apart from tribal government. In some cases, this can be an important benefit. It is possible to incorporate the organization under the tribal laws, so the organization would still be part of the tribe in the sense that it is subject to tribal laws and regulation, but not with any sovereign immunity.

There are several benefits to incorporating as a nonprofit organization, as outlined in Exhibit 2.2.

Why a Nonprofit?

Exhibit 2.2: Benefits to Incorporating as a Nonprofit Organization

- Corporations provide more legal liability protection for those involved in the organization, including officers, directors, and volunteers. Individuals generally will not be personally liable if the entity is sued. Further, nonprofit corporations can obtain reasonably priced insurance to protect members of the Board of Directors.
- Nonprofit corporations can apply to become exempt from federal and state income taxes. If tax-exempt status is granted, the entity will not have to pay taxes on income earned from the organization's activities (e.g., development of properties).
- A tax-exempt nonprofit corporation can receive tax-deductible contributions. This serves as a great incentive for charitable giving. In fact, many large corporate donors will not make a gift without receiving a tax deduction.
- Most public and private grant money is only available to nonprofit organizations; many funders limit eligibility to those nonprofits that have been recognized as tax-exempt by the IRS.
- Nonprofit housing corporations do not include profit in their total development costs and this can lead to lower purchase prices and greater affordability.
- Going through the process of incorporation can strengthen an organization. It requires careful planning about the entity's purpose and how this purpose will be accomplished.
- Incorporation establishes minimum accountability and standard operating procedures for management.
- Incorporation helps to formalize decision-making and ownership among those involved.
- Incorporation can give the group a greater sense of purpose and legitimacy, to both external and internal stakeholders.
- Incorporation can give the entity greater independence from other organizations and governmental units.

Guide to Creating a Nonprofit Homeownership Entity

There are two main ways to form a nonprofit organization in Indian Country: under tribal law or under state law.

Tribal governments have the power to establish subordinate entities under tribal law, including government instrumentalities and corporations. While it is less common for tribes to establish nonprofit corporations than business corporations or government instrumentalities, there is no reason why tribes could not provide for the establishment of nonprofit entities under tribal law.

If a tribe has a corporation code of general applicability, or a Uniform Commercial Code with a section on corporations, it should be relatively simple to establish a nonprofit organization under tribal law. If such codes do not exist, it is still possible to set up a nonprofit through an ad hoc chartering ordinance specific to the entity being created. In the case of an ad hoc chartering, it is important that the organization's incorporating documents (Charter and Articles of Incorporation) include certain language. These necessary elements are discussed in further detail in Section 3.

By incorporating the entity under the tribal laws, the corporation would be subject to tribal laws and regulation. Depending on individual tribal law, the organization would most likely not share in the tribe's sovereign immunity. This means that the entity would be able to sue and be sued.

The corporation would also have the option of filing with the state as a foreign corporation and as a charity. This step, while not always required, may provide several key advantages:

It enables the organization to avoid any argument that it has ventured off the reservation and is engaged in business without properly filing or qualifying. This could mean avoiding fines.

- It ensures that the desired name of the organization is available and permitted (some states do not permit the use of names similar to those of already established nonprofits).
- It may be necessary if the nonprofit plans to engage in fundraising efforts off the reservation.
- The nonprofit may be able to obtain a state sales tax exemption certificate, to avoid sales tax on purchases made off the reservation.

Organizational Options

Nonprofit Corporation Formed under Tribal Law

Nonprofit Corporation Formed under State Law

This would create an organization that could apply to the Internal Revenue Service for tax-exempt status as a 501(c)(3) organization.

The tribe could form the nonprofit organization under state law rather than tribal law. In this case, the entity would not be part of the tribe, but would operate on tribal land; it would be considered a “foreign corporation” on the reservation, but a regular corporation off the reservation. The working group may opt for this route if it desires the greatest amount of independence, distance, and autonomy from tribal government. In cases where the tribe lacks a Uniform Commercial Code and/or corporation code, this option provides the advantage of clearer protections for the nonprofit.

An organization created under this option would also be able to apply to the Internal Revenue Service for tax-exempt status as a 501(c)(3) organization.

Other Organizational Options

The Shared Visions model encourages tribes to use the approach of incorporating as a nonprofit organization, whether under tribal or state laws, because this organizational option provides several key benefits, as outlined earlier. In some circumstances, a different organizational option will be more desirable due to local conditions and needs. These may include:

- Unincorporated instrumentality of the tribe
- Corporation chartered under Section 17 of the Indian Reorganization Act
- Homeownership initiative under the Housing Authority/TDHE
- Each of these options is described in greater detail below.

Unincorporated Instrumentality of the Tribe

The tribe may form an unincorporated instrumentality to address housing development and homeownership issues. Depending on tribal laws and requirements, such an entity may not have to draft Articles of Incorporation or apply to the state or IRS for tax-exempt status. As an instrumentality of the tribe, it would still be able to receive tax-exempt contributions, and it would share in the tribe’s sovereign immunity. Setting up an entity under this option is less time-consuming and complex than creating a nonprofit organization.

The key disadvantage of this option is a lessened sense of independence (both actual and perceived) from the Tribal Council, the Housing Authority/TDHE, and other entities. This lack of independence could undermine the entity’s credibility and may impede financing, fundraising and popular support.

Guide to Creating a Nonprofit Homeownership Entity

Under Section 17 of the Indian Reorganization Act of 1934 (the IRA) (25 U.S.C. 477), a tribe may obtain a charter from the Secretary of the Interior incorporating a federal corporation. Many Section 17 corporations exist, but most have been inactive since creation. This is the result of the use, in the early years after passage of the IRA, of standard form corporate charters promulgated by BIA. These charters were quite restrictive in what a Section 17 corporation could do and quite expansive in the oversight and approval powers granted to the Secretary of the Interior. The restrictive nature of the BIA-generated charters is not required by the statute, and some tribes have adopted new charters for their Section 17 corporations that are designed to make those entities useful tools for tribal business activity.

Section 17 corporations are creatures of federal law, but the law governing their nature, powers and authorities is quite thin. The early analysis of the nature of Section 17 corporations was that they were corporate alter-egos of the tribes themselves; that the Section 17 charter “cloned” the tribe resulting in two parallel entities: a governmental entity (the federally recognized Indian tribe) and a corporate entity (the Tribe, Inc.). More recent Section 17 charters describe a corporation established under federal law but owned by the tribe, more in the nature of a subordinate entity owned by the tribe rather than an entity on a par with the tribe. Examples of such charters include:

- Umpqua Indian Development Corporation, whose charter was issued to the Cow Creek Band of Umpqua Tribe of Indians in Oregon.
- Coushatta Empire, Inc., whose charter was issued to the Coushatta Tribe of Louisiana.
- Laguna Construction Company, Inc., whose charter was issued to the Pueblo of Laguna (New Mexico).

Because there is no general law addressing the structure, powers and activities of Section 17 corporations, those issues are generally dealt with in the charter itself. The Section 17 charter spells out the authorized purposes of the Section 17 corporation, its ability to borrow money, to encumber its assets, to sue and be sued and to waive its sovereign immunity, and how autonomous it is from tribal governmental control or, conversely, which of its actions require approval of the tribal government—or the Secretary of the Interior—before they can be undertaken.

Corporation Chartered Under Section 17 of the Indian Reorganization Act

Homeownership Initiative Under the Housing Authority/ TDHE

Summary

A final option is to forego creating a brand-new entity and promote a housing development and homeownership initiative under the auspices of existing entities, such as the Housing Authority/TDHE, or tribal government (e.g., tribal council housing committee or subcommittee). The clear advantage to this alternative is that the considerable time, resources, and effort required to set up a new organization are avoided. The working group can simply partner with an existing entity to launch a housing development and homeownership initiative. The most obvious disadvantage of this option is limited independence from other entities. Further, the working group should study the existing tribal organizations to determine which one, if any, is an appropriate partner. The partner organization should have sufficient capacity, or be able to expand its capacity to take on the housing development and homeownership initiative.

These organizational options have many implications. Exhibit 2.3 presents the implications for tax liability, application of state law, and jurisdictions for dispute resolution. Exhibit 2.4 shows the effect on tax-exempt contributions, grant eligibility, organizational independence, and sovereign immunity.

Exhibit 2.3
Overview of Tax and Legal Implications

	Federal Income Taxes	State Income, Sales and Use Taxes	Tribal Taxes	Application of State Law	Court Jurisdiction
Nonprofit organization chartered under tribal law, with 501(c)(3) status	Exempt	Possibly exempt; varies by state	Depends on tribe	No	Tribal or federal
Nonprofit organization chartered under state law with 501(c)(3) status	Exempt	Possibly exempt; varies by state	Depends on tribe	Depends on state	State court
Unincorporated instrumentality of the tribe	Exempt	Depends on state-tribe agreement	May not apply, depends on tribe	Probably not	Tribal or federal
Section 17 corporation	Exempt	Depends on state-tribe agreement	May not apply, depends on tribe	Only with respect to activities off reservation	Tribal or federal
HA/TDHE	Probably exempt	Possibly exempt; varies by state	Depends on tribe	Probably not	Tribal or federal

Guide to Creating a Nonprofit Homeownership Entity

Exhibit 2.4 Overview of Funding, Independence & Sovereign Immunity Implications

	Tax-Exempt Contributions	Grant Application Eligibility	Independence from Tribal Government, TDHE	Sovereign Immunity
Nonprofit organization chartered under tribal law, with 501(c)(3) status	Yes	High	High	No
Nonprofit organization chartered under state law with 501(c)(3) status	Yes	High	High	No
Unincorporated instrumentality of the tribe	Probably not	Low; higher for Indian Country-specific funds	Low	Probably yes
Section 17 corporation	If obtains private letter from IRS	Depends on charter	Depends on charter	Yes, if included in charter
TDHE/HA	Probably not	Low; higher for TDHE-specific funds	None	Depends on tribe

2.8 Fundraising and Finance¹

In the development process for any real estate project, planning is critical. Determining the type of financing to be used for the project is an essential piece of the planning process. Housing developers and lenders often are presented with unique and complex financing structures that are required to bring most projects to completion. On the other hand, nonprofits must be knowledgeable of development practices to provide financial assistance and advice to tribal families that desire to build their own home.

The complexity of the financing structure is primarily determined by the type of project that the developer undertakes and what resources are available in the community to develop the project. In many circumstances, housing developments, whether homeownership or rental, require specific funding programs that lower the costs associated with the development and ongoing operation of the property. The nonprofit developer must be creative and knowledgeable of all resources that are available for a specific project, and the restrictions those resources may have.

Because of its tax status, the nonprofit developer has a toolkit of development resources and capital that are not typically available to a traditional real estate developer. These types of capital can include loans from private and public resources, grants from the public and private

Loans and Lenders

sector, and equity in various forms, often through the Low Income Housing Tax Credit (LIHTC). As most of these financing sources vary from state to state and within specific communities, it is extremely important that the developer, sponsor or consultant understand housing development practices particular to the community or state before contemplating the development of a property or site.

The nonprofit organization should investigate the types of lenders that may be available to provide financing to individual homebuyers. These lenders can include public lenders, private for-profit lenders, and private nonprofit lenders. The goal of the nonprofit is to match these lenders in the best possible combination for the project.

Public lenders include tribal, state and local governments (cities, counties and municipalities) as well as the federal government. Many state and local programs are the direct result of allocations passed at the federal and state level to the tribal government. Public lender participation in the development of affordable housing is critical as these resources can provide attractive lending terms to the nonprofit developer. Local jurisdictions can often provide longer term financing than is available in the conventional market (up to 50 years), below market interest rate or no interest loans, disappearing (no-pay) second mortgages on property, and higher loan-to-value ratios than the conventional market. More specific examples and programs are listed below and described very generally:

- **Indian Community Development Block Grant Program (ICDBG):** ICDBG funds may be used to support nonprofit operating expenses and housing development costs. ICDBG funds can be in the form of loans, grants, and loan guarantees. Activities funded by ICDBG funds include planning, acquisition of real property, rehabilitation of residential and nonresidential property, provision of public facilities and improvements, and assistance to for-profit businesses to help with economic development activities. Many ICDBG communities use these funds to provide low-or no-interest property acquisition, construction and/or permanent financing for affordable housing development and/or homeownership. Sponsors must check with their tribe or TDHE to determine the availability of ICDBG funds for nonprofit housing development and homeownership.
- **HOME Program:** HOME was designed to stimulate the formation of creative local, state and federal partnerships for the purpose of meeting community development housing needs, targeting resources toward community-based nonprofit developers. HOME provides

Guide to Creating a Nonprofit Homeownership Entity

resources to communities so that tenants and other low-income families can purchase public housing, troubled federally-subsidized rental housing, and single family government housing.

HOME also provides federal grant funds to the states and various sectors of local government to implement local housing strategies that are targeted toward increasing homeownership and affordable housing opportunities for low- and very low-income residents. HOME funds can be utilized in a broad array of strategies to meet the needs of the local community including loans, grants, interest rate subsidies, and equity.

Additionally, HOME funds can be used for property acquisition, site development work, demolition, rehabilitation, new construction, relocation of housing, and other necessary and reasonable activities related to the development of HOME-eligible housing including tenant-based rental assistance and assistance for first-time home buyers. HOME funds are restricted to specific income levels depending upon the type of property developed with these funds and have matching requirements. Depending upon location, matching requirements may vary.

HOME funds are available for projects that meet a need identified in the state's or region's *Consolidated Plan*. Consolidated Plans are prepared every five years and since most were prepared when Indian Home was still in existence, many states do not permit HOME funds on tribal land. It is important for tribes and TDHEs to be involved in the next Consolidated Planning process to encourage the state to invest HOME funds on tribal land.

- **Bonds** issued by state and local governments can provide valuable resources to the nonprofit developer of affordable housing. Bonds typically provide the permanent financing for the project. Bonds also can be used to cover the construction/ rehabilitation period on a project, if these activities are clearly defined within the financing documents.

The issuance costs for bonds can be substantial. The nonprofit will need to thoroughly consider these issues when looking at the overall cost of developing the project. The credit enhancement of the bond, provided by a commercial lending institution or governmental entity, will also be an additional cost to the project.

Bond issues will be specific to local and state guidelines. Affordable housing developments can be financed by various types of bond

issues, including taxable and tax-exempt entities, mortgage revenue, general obligation and private activity bond issues. Bond structures can be inordinately complex and the developer should be adequately represented by knowledgeable professionals when looking into these types of financing structures.

- **Other Federal Programs** available to the non-profit housing developer include: Section 202 (supportive housing for the elderly), Section 811 (supportive housing for people with disabilities), Homeless SuperNOFA, Rural Housing Development, and other sources.
- **Housing Trust Funds:** Over 100 states, cities, and counties have Housing Trust Funds which are dedicated sources of funds for affordable housing development. These funds typically are governmentally created and have on-going revenue from a source (often fees related to real estate transactions) that does not require annual approval. Funds are typically distributed by a governmental agency with input from a broad-based Advisory Board.

Commercial Banks typically provide shorter-term market rate loans to the nonprofit organization. These loans would include acquisition, site development and construction loans. Commercial banks are also mini-permanent (“mini-perm”) lenders typically structuring three to five year term loans, with longer amortization periods (15 to 30 years).

Savings and Loans (S&L) and Thrifts historically have been the primary providers of permanent financing for homeowners. Another product unique to S&Ls is their ability to access funds from the Federal Home Loan Bank system to establish affordable housing programs. The Community Investment Program (CIP) is a non-competitive program that allows any member of the FHLB system to borrow funds on a permanent basis at below market rates.

Additionally, the Affordable Housing Program (AHP) provides resources to developers in a competitive round program, with priority given to nonprofit and tribal developers. These resources can be used to “buy down” the interest rates or act as a direct grant to the project to make it affordable to very low-income households.

Private Nonprofit Lenders would include such organizations as the following:

- **The Enterprise Foundation** is a nonprofit intermediary organization whose mission is to see that all people have access to decent and

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affordable housing and can move up and out of poverty. The Foundation provides resources to communities through its loan fund, providing primarily predevelopment and acquisition loans, as well as technical assistance to address organizational needs, physical development issues, and community services. The Foundation's subsidiary organizations include: The Enterprise Social Investment Corporation (ESIC), a syndicator of the Low Income Housing Tax Credit; Enterprise Mortgage Investments (EMI), Enterprise Senior Ventures; and other developing organizations established to assist the nonprofit organization in the revitalization of its community. The Foundation currently has offices in 16 cities across the country, an office for Native American projects in Albuquerque, New Mexico and a network of over 700 nonprofit organizations.

- **Local Initiative Support Corporation (LISC)** works with Community Development Corporations (CDC's) to help local people rebuild and revitalize deteriorated neighborhoods across America by providing loans, grants, and technical assistance to groups. LISC currently has programs in 30 cities.
- **National Community Development Initiative (NCDI)** works through a consortium of funders that include large national commercial banks, private foundations, and corporations. NCDI provides resources to CDC's through the Enterprise Foundation and LISC to approximately 23 cities across the country. This consortium has made available approximately \$90 million available to CDC's since its inception in 1991. NCDI was designed to increase and support the role of CDC's nationwide.
- **The McAuley Institute** provides financial assistance and technical assistance to affordable housing projects across the country through its revolving loan fund. The Institute makes interim short-term loans with a maximum length of five years not to exceed \$200,000. Loans must be fully collateralized by real estate, loan-to-value ratios can not exceed 80% and debt service ratios must be at least 1.2/1.0
- **The Low Income Housing Fund (LIHF)** provides an array of programs to nonprofit housing developers to serve low income residents. These include direct lending, providing direct loans, packaging loans, and providing interest rate subsidies. LIHF provides working capital loans, lines of credit on a limited basis, and non-housing loans for nonprofit facilities.

Grants

- **National Association of Community Development Loan Funds (NACDLF)** was established in 1986 to serve as a financial intermediary. NACDLF works through its member organizations to pool resources and provide loans for community development and low-income housing. NACDLF provides loans up to \$350,000 to nonprofit housing organizations.
- **Other resources** which should be investigated by the nonprofit developer include Community Development Financial Institutions, local community land trusts, national nonprofit foundations, and other local community foundations.

Each of these organizations can be contacted individually to gain a better understanding of the types of products they offer the nonprofit developer. Please refer to the Appendices for contact information.

Federal Grant programs that promote development of affordable housing include:

- Hope for Youth: Youthbuild
- Enterprise Zone Homeownership Opportunity grants
- Low-Income Housing Preservation and Resident Homeownership (LIPRHA)
- Supportive Housing for the Elderly: Section 202
- Housing for Persons with Disabilities: Section 811
- Rural Housing Service Single Family Housing Program and Rural Rental Housing
- Developing Emergency Shelters for the Homeless
- Supportive Housing Demonstration Program-Traditional Housing Component
- Developing Permanent Housing for the Homeless

Each of these programs requires the nonprofit to understand the regulatory requirements to participate in these very specific grant programs.

Private Nonprofit Foundations, both on a local and national basis can be an excellent source of grant funding for the nonprofit housing developer. Local community foundations are typically more targeted toward improving a specific community or area. The Foundation Center publishes *The Foundation Directory* that lists foundations with assets over \$2 million or annual contributions in excess of \$200,000. The directory identifies which foundations are community foundations.

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Equity

In 1986, Congress established the **Low Income Housing Tax Credit (LIHTC)**. Tax credits are specifically defined as tax benefits, granted to organizations for engaging in qualifying low income or historic preservation projects. Organizations can purchase tax credits on behalf of a project and receive a dollar-for-dollar tax benefit while the funds are used as equity for the project.

Through the 1986 Tax Reform Act, the LIHTC acts to reduce the tax liability of the taxpayer dollar-for-dollar. As opposed to a tax deduction, which reduces the net taxable income of the taxpayer, the tax credit is applied directly to the tax liability. This vehicle has been directly responsible for bringing significant corporate investors and wealthy individuals into the investment arena for the development of affordable housing through their purchase of these credits. These investments typically act as source of equity in the development process. Calculating the value of individual credits related to a particular project must be fully understood by the nonprofit that ventures into the tax credit arena. Additionally, the project itself will have certain requirements and standards that will need to be met on a LIHTC property. These include low-income usage, rent restrictions on low-income units, and a specified compliance period for the property (typically 15 years). The LIHTC can be used to develop a range of properties, including rental housing, single-room occupancy housing, and certain homeless housing developments.

Once a nonprofit developer reaches the point that the tax credits are awarded to the site, they can negotiate how the equity will flow into the property with its partners and investors in the transaction. Many nonprofits will utilize this equity in their project to leverage other resources necessary to keep the project moving forward.

3.0 First Steps to Creating a Nonprofit Organization

3.1 Introduction and Overview of Steps to Establishing a Nonprofit

The creation of a nonprofit organization is a multi-step process involving many decisions, documents, and players. This section outlines the initial steps to incorporating as a nonprofit entity, either under tribal or state law.

Once the working group has determined that it should form a nonprofit and has generated a vision statement, strategic plan, and business plan, the group should:

- Prepare Articles of Incorporation
- Adopt Articles of Incorporation
- File Articles of Incorporation with tribal government and/or have tribal government charter organization
- File Articles of Incorporation with the state's Secretary of State (if necessary/warranted)
- Draft and approve organizational bylaws

Each of these steps is described below.

3.2 Articles of Incorporation

Purpose

The purpose of the organizational charter or Articles of Incorporation is to establish the name and purpose of the nonprofit organization, as well as any limitations on its activities.

A sample Articles of Incorporation is included in Appendix 3.2. The document should include the following elements:

- Names and addresses of incorporators – The incorporators are individuals who sign the Articles of Incorporation. Being an incorporator has no particular legal significance, but generally they are individuals involved in the creation of the nonprofit entity. The number of incorporators required varies by state law.

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- Name and address of registered agent – The registered agent is the person who receives formal communications (e.g., notices from the Internal Revenue Service) on behalf of the corporation.
- Statement of exempt purpose – Nonprofit organizations must have an “exempt” purpose, establishing that they are organized and operated exclusively for charitable, religious, scientific, literary (and a few other) purposes. In most cases, a nonprofit that promotes affordable housing and homeownership is organized for charitable purposes.
- Statement prohibiting private inurement – Nonprofit organizations cannot engage in “private inurement,” i.e., distribute assets or profits to individuals for personal purposes.
- Statement prohibiting lobbying – The IRS will not exempt from taxes any organization that engages in substantial political lobbying.
- Duration – The duration of most nonprofits is perpetual.
- Statement of indemnification of directors and officers – If a director is indemnified, and if he or she is sued for something he or she did on behalf of the organization, then the organization pays the director's associated expenses (e.g., legal fees and judgments). Usually, indemnification only protects a director if the organization has the money needed to pay the director's expenses.
- Distribution of assets upon dissolution – In the event that the entity is dissolved, outline the procedure for distribution of organization's assets.

Early on, the working group should have identified which tribal laws, codes, and/or ordinances might impact the creation and operation of nonprofit organizations on the reservation. When forming a nonprofit it is important to be aware of all the laws that may impact a new entity. In many cases, however, the tribe will not have a comprehensive governing law on corporations. In this case, it is important to include specific language in the Articles of Incorporation, as outlined in Exhibit 3.1 below:

Language

Figure 3.1
Language for Articles of Incorporation

Language for Articles of Incorporation	Needed even if tribal corporation code exists	Needed if no tribal corporation code exists
Name and duration of corporation	✓	
Corporation is organized and operated exclusively for charitable and educational purposes permitted by Section 170(c)(2) and 501(c)(3) of IRS Code	✓	
Detailed purposes of corporation, including general business procedures (e.g., "enter into contracts, partnerships, joint ventures," "solicit, hold, use, invest, and dispose of money, personal property," "incur debt obligations")		✓
No private inurement	✓	
Registered agent, incorporator(s)	✓	
Provision for Bylaws	✓	✓
Provision for governing Board of Directors	✓	✓
Description of the procedures for voluntary and involuntary dissolution of the organization		✓
Distribution of assets after dissolution	✓	
Indemnification of directors, officers, employees, and agents		✓
Amendments to Articles of Incorporation and Bylaws		✓

3.3 Bylaws

Bylaws are the organization's primary governing document. They establish the rules by which the nonprofit will conduct business. They outline details such as how officers and directors will be elected or appointed, how board meetings will be conducted, and what responsibilities officers will have.

Bylaws are usually adopted at the first meeting of the Board of Directors, which is held after filing the Articles of Incorporation. Usually, states do not require filing of Bylaws to form a corporation; the IRS requires bylaws to be included in the application for tax-exempt status only if they exist.

A sample bylaws document is in Appendix 3.2. Elements of the bylaws include:

- The name of the organization
- The mission of the organization
- The geographic area served by the organization
- Membership, if any (responsibilities, dues, quorum, voting procedure)
- Board of Directors (duties, officers, meetings)

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- Committees
- Rules of order
- Fiscal year of operation
- Procedures for amending the bylaws

4.0 Applying to the IRS for 501(c)(3) Recognition

Once the organization has conducted its needs analysis and has been incorporated, the next step is to apply for tax-exempt status from the Internal Revenue Service (IRS). This chapter will give an overview of the 501(c)(3) application process, including an explanation of what 501(c)(3) means, advantages and disadvantages, who qualifies, and tips on how to complete the application packet. Please note that this chapter will not provide everything needed to apply to the IRS for 501(c)(3) status; the organization will need to become familiar with the IRS materials on tax exemption. The process of applying for tax exempt status is a legal process, and it is highly advisable to obtain legal counsel to assist the organization. This chapter does not present itself as legal advice.

What it Means

An organization with a 501(c)(3) tax exemption from the Internal Revenue Service is exempt from payment of federal taxes. The term “501(c)(3)” refers to the section of the IRS Tax Code that governs these organizations.

Advantages

There are many advantages to having this tax-exempt status:

Exemption from taxes. Organizations that are exempt from payment of corporate income tax can save substantial amounts, particularly since federal corporate tax rates are 15 percent on the first \$50,000 of taxable income, 25 percent on the next \$25,000 and 34 percent and higher on income over \$75,000.

Grant eligibility. Most grant funds that are available from foundations and charities are only open to IRS 501(c)(3) nonprofit corporations.

Tax-deductible contributions. Donations made to organizations with a 501(c)(3) tax exemption are tax-deductible to the donor. This makes giving more attractive to potential donors, particularly when they have several charitable organizations to choose from, most of which will have the 501(c)(3) tax exemption.

Discounts. 501(c)(3) organizations also qualify for many discounts, such as:

- Lower postal rates on bulk mailings
- Cheaper Internet access or space from Internet service providers
- Lower classified rates from newspapers and other publications
- Lower membership fees for wholesale stores (such as Price Club)

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- Access to free radio and television public service announcements

There are also drawbacks to being a 501(c)(3) organization.

Resources required for application process. It takes time and money to incorporate and apply to the IRS for 501(c)(3) status. Many documents must be prepared, and it is advisable to have an attorney review these.

The application cost for 501(c)(3) is \$500.

Subject to rules. After incorporation, the organization is subject to tribal and/or state rules, depending under which authority it has incorporated. Once the corporation files for federal tax-exemption, it is subject to federal government rules.

Annual filing requirements. After incorporation, the organization must file annual tax returns and perform the other record-keeping and reporting chores associated with ongoing corporate activities, such as double-entry accounting and payroll tax withholding and reporting.

Knowledge. The process requires a minimum knowledge of laws related to charitable organizations, at the tribal, state and federal level. If the organization does not have this knowledge, it is highly advisable to involve people who do, such as attorneys and accountants.

There are certain requirements for qualifying for this tax exemption. In order to qualify for exemption from federal income tax, an organization must be operated exclusively for an exempt purpose, which includes: charitable, religious, scientific, literary, testing for public safety, fostering national or international amateur sports competition, or the prevention of cruelty to children or animals. In the case of a nonprofit promoting housing development and homeownership, the exempt purpose would be charitable.

As used in Section 501(c)(3) of the tax code, charitable is broadly defined as “providing services beneficial to the public interest.” Examples of charitable activities and purposes from IRS regulations include lessening the burdens of government, combating community deterioration, providing assistance to low income families.

There are a couple of ways that housing organizations can qualify as charitable as defined in Section 501(c)(3). The IRS has released a revenue procedure that sets forth a safe harbor under which organizations that provide low-income housing will be considered charitable because they

Disadvantages

Who Qualifies

Qualifying as Charitable

Charitable Housing Organizations

relieve the poor and distressed. However, this clause has many income restrictions in terms of the population served. For example:

- At least 75 percent of the organization's housing units must be occupied by residents that qualify as low-income, **and**
- Either (1) at least 20 percent of the units must be occupied by residents that also meet the very low-income limit for the area or (2) 40 percent of the units are occupied by residents that also do not exceed 120 percent of the area's very low-income limit.

These restrictions limit the activities of the organization and may prove onerous, particularly in the promotion of homeownership. To qualify for a mortgage, the homebuyer must have a particular level of income, which may exceed the limits set forth above. This would severely restrict the nonprofit's ability to engage in homeownership programs.

A less restrictive way for housing organizations to qualify as charitable is to make the case for another exempt purpose, including:

- Combating community deterioration. According to the IRS, an organization that combats community deterioration must operate in an area with actual or potential deterioration, and directly prevent or relieve that deterioration. Constructing or rehabilitating housing has the potential to combat community deterioration.

Most reservations are subject to deterioration, either actual or potential. The development of new housing for homeownership or the rehabilitation of existing housing stock would qualify as an exempt and charitable purpose, thus making the nonprofit engaging in these activities eligible for 501(c)(3) status.

- Lessening the burdens of government. An organization lessens the burdens of government if there is an objective manifestation by the governmental unit that it considers the activities of the organization to be the government's burdens, and the organization actually lessens the government's burdens.

Since the majority of housing on Indian reservations is provided by the federal government, the promotion of homeownership and the provision or rehabilitation of housing clearly lessens the burdens of government. One of the main components of the homeownership program laid out in this guide is to leverage private dollars from the

Guide to Creating a Nonprofit Homeownership Entity

mortgage industry, using a small amount of public funds. By involving the private sector in the provision of housing on reservations, such a program would lessen the burdens of government.

The IRS considers all 501(c)(3) nonprofit corporations as private foundations unless it is notified that the corporation is in fact a public charity. It is much more desirable to be considered a public charity than a private charity due to the greater flexibility and benefits associated with this status. To qualify as a public charity, the organization must prove that it is publicly supported, by passing the *one-third support test* or the *facts and circumstances test*.

Under the one-third support test, an organization is considered publicly supported if it normally receives one-third of its total support from governmental units, from contributions made directly or indirectly by the general public, or from a combination of these sources.

If an organization fails the one-third support test, it may qualify under the facts and circumstances test. One way is if the total amount of governmental and public support normally received is at least 10 percent of the total support normally received. Another way is if the organization is organized and operated in a manner to attract new and additional public or governmental support on a continuous basis.

If the organization desires to seek 501(c)(3) status, it is ready to begin preparing the IRS application:

- Have Articles of Incorporation been prepared?
- Is the organization incorporated under tribal or state law?
- Have bylaws been adopted, if applicable?
- Does the organization have a clear sense of the proposed activities?
- Does the organization have a clear sense of its finances, including budget projections for the next three years?

If the IRS application is filed within 15 months of the incorporation date, the organization's tax-exempt status becomes effective as of the date of incorporation. If the organization applies after operating for more than 15 months, the exemption applies as of the date that the IRS received the application.

Also note that if the organization has been in operation for less than 8 months, it will request an "advance ruling" from the IRS. This advance ruling is good for five years, during which period the organization will be

Public Charity

Preparing the Application

Choose Name

treated as a public charity. After five years, the organization must submit financial data to the IRS to show that it is indeed a public charity.

Preparing the 501(c)(3) application:

- Obtain necessary IRS forms
- Write description of organization's activities
- Write organization's fund-raising plan
- Prepare Balance Sheet and Statement of Revenue and Expenses
- Complete IRS Form 1023 – Application for Recognition of Tax-Exemption under Section 501(c)(3) of the Internal Revenue Code

Before the organization is chartered, think carefully about its name. To avoid confusion, it is advisable to choose a name that is not too similar to a pre-existing organization. It is also helpful to avoid use of certain words; for example, the term “partnership” used in the name of an organization can be interpreted as a legal term, signaling that you are a limited liability partnership rather than a nonprofit corporation.

Prepare Articles of Incorporation

See Chapter 3. The IRS wants a “conformed copy” of the Articles, meaning a version that reflects the original language plus all amendments.

Incorporate Organization

The organization must be incorporated or chartered. Take care that the organization is incorporated under tribal law. The IRS issued a general information letter to the First Nations Development Institute stating that a corporation organized under tribal law could qualify for tax exemption as an organization described under section 501(c)(3). To qualify, the organization must be regarded as separate from the tribal government. According to the IRS, a “corporation” is “a business entity created under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic.”

Adopt Bylaws

See Chapter 3. Bylaws are not required to create or charter a corporation, but you desire to choose at the outset to write bylaws to govern the organization.

Obtain IRS Forms

The organization will need to obtain:

- Publication 557 (Tax-Exempt Information)
- IRS Form 1023 and Instructions (Application)
- Form 8718 (User Fee)
- Form 872-C (Advance Ruling)

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- Form 2848, Power of Attorney (optional)

These may be obtained at a post office, by mail, or on the Internet at www.irs.ustreas.gov. If the organization does not have an employer identification number (EIN), it will also need Form SS-4, *Application for Employer Identification Number*. One quick way to obtain this number is to apply by telephone, calling the number given in the form's instructions. After completing the form, call and wait for the organization's number. Then simply mail the original form within 24 hours.

Publication 557 provides extensive information on tax-exemption; **IRS Form 1023-Application for Recognition of Tax Exemption under Section 501(c)(3) of the Internal Revenue Code** is the actual form that the organization must complete. Before beginning to compile information or attempt to complete Form 1023, read the form and its instructions thoroughly, in addition to Publication 557. This will give a good sense of what to expect.

To apply for 501(c)(3) status, the organization must also file a user fee of \$500. Send a check along with **Form 8718**.

If the organization has been in operation for less than 8 months, it will need to request an advance ruling through **Form 872-C**. As noted earlier, if the IRS grants an advance ruling, the organization will be treated like a public charity for five years. At the end of this period, the organization will submit financial data to the IRS to show that it is indeed a public charity.

The organization has the option of delegating power of attorney to another party. The IRS examiner who handles the organization's case will contact this person directly with questions or requests for further information. This may be especially helpful if the case has particular legal details that the organization is not completely clear on. It may also prove helpful if the IRS examiner assigned to the case is unfamiliar with nonprofit corporations chartered by Indian tribes.

If the organization elects to do this, it will need to complete and submit **Form 2848, Power of Attorney and Declaration of Representative**. In any case, whether the organization delegates power of attorney or not, it is a good idea to have legal counsel to advise you in the application process.

The first section of IRS Form 1023, Identification of Applicant, is fairly self-explanatory. Line 1c asks for a street address; some applicants on Indian reservations may not have a street address, and may use a P.O. Box, indicating no street address is available.

Complete Part I

Write Description of Activities

IRS Form 1023, Part II, Question 1 asks the organization to provide a detailed narrative description of all the organization's activities past, present, and planned. List each activity separately in the order of importance based on the relative time and other resources devoted to the activity, indicating the percentage of time for each activity. The IRS asks that each description should include, as a minimum:

- a) A detailed description of the activity, including its purpose and how each activity furthers the organization's exempt purpose
- b) When the activity was or will be initiated
- c) Where and by whom the activity will be conducted

The purpose of this section is to enable the IRS to make a proper determination of the organization's exempt status. Therefore, it is important to explain thoroughly and clearly the organization's activities – proposed or actual. If there is insufficient space on the form, use extra sheets as attachments. Label these with the name of the organization, address, EIN, attachment number, and page number.

Complete Part II

Page 3, "Activities and Operational Information continued," asks for basic information on the organization's governing body. Line 4b asks for annual compensation of the officers, directors, or trustees. If the organization is providing its directors with a stipend or reimbursement for travel and related expenses, be sure that these are in line with local costs.

Line 4c asks if any of the organization's officers, directors, or trustees serve as members of the governing body by reason of being public officials or being appointed by public officials. An affirmative answer does not necessarily signal a conflict of interest; rather, it indicates public interest in and support for the organization, building the case for its exempt purpose.

Write Fund-raising Plan

IRS Form 1023, Part II, Question 2 asks for a description of the organization's fundraising program, both actual and planned, and to explain to what extent it has been put into effect. Include details such as selective mailings, formation of fundraising committees, use of volunteers or professional fundraisers, etc. The IRS also asks that the organization attach representative copies of solicitations for financial support.

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IRS Form 1023, Part IV requires financial statements, including a balance sheet and a statement of revenue and expenses. If the organization has not been in operation long enough to have this type of financial data, the IRS requires the organization to include financial projections for two fiscal year accounting periods.

Before beginning to prepare these financial statements, read the accompanying instructions carefully, as they will not always correspond with the traditional way organizations record their revenues and expenses. For example, line 1 asks for “gifts, grants, contributions received” yet the instructions indicate that the organization should not include in contributions from the general public or a governmental unit for the performance of the organization’s exempt function. It is highly advisable to have an accountant or bookkeeper complete this form, or at least check the work.

Review the application packet for errors, inconsistencies or omissions. It is often helpful to ask a third party to review the materials, as this person may have “fresher eyes” than those who have been working on the application.

Be sure to make copies of the entire application for your records before it is mailed to the IRS. This includes all the forms, attachments, and the user fee check.

The IRS will acknowledge receipt of the application. An IRS examiner may contact the organization or its attorney with a request for further or clarifying information. It can take anywhere from several weeks to several months to obtain a ruling. The more complete and clear the application is, the fewer questions the IRS will have, increasing the likelihood of obtaining a timely approval.

Prepare Financials

Submitting the Application

5.0 Development of a Nonprofit Organization

5.1 The Board

The Board of Directors is the governing body of the nonprofit organization. It makes decisions, sets policies, and plans to ensure the organization's success. Members of the Board are often called Directors or Board members; these terms are synonymous.

Ten Key Duties of the Board¹

1. *Determine the Organization's Vision and Purpose:* The Board of Directors is responsible for developing the organization's vision or mission statement. This statement should articulate the organization's goals, means, and primary constituents served. Each individual Board member should fully understand and support it, and the Board should periodically review it for accuracy and validity.
2. *Select the Executive:* The Board must reach consensus on the chief executive's job description and undertake a careful search process to find the most qualified individual for the position.
3. *Support the Executive and Evaluate Performance:* The Board should ensure that the chief executive has the moral and professional support needed to further the goals of the organization. The chief executive, in partnership with the entire Board, should decide upon a periodic evaluation of the chief executive's performance.
4. *Ensure Effective Organizational Planning:* As stewards of an organization, the Board must actively participate with the staff in an overall planning process and assist in the implementation of the plan's stated goals.
5. *Ensure Adequate Resources:* One of the Board's most important responsibilities is to provide adequate resources for the organization to fulfill its vision. The Board should work in partnership with the chief executive and development staff, if any, to raise funds from all available sources.
6. *Manage Resources Effectively:* The Board, in order to remain accountable to its donors, tribal members, and to safeguard its tax-exempt status, must assist in developing the annual budget and ensuring that proper financial controls are in place. The Board also

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should review periodic (monthly) financial reports and provide guidance to the chief executive on project revenues and expenditures.

7. *Determine and Monitor the Organization's Programs and Services:* The Board should determine which programs are the most consistent with the organization's mission and monitor their effectiveness.
8. *Enhance the Organization's Public Image:* The Board is the organization's primary link to the community, including homebuyers, tribal members, the public, funding entities, and the media. The Board, as a body and as individuals, should be able to clearly articulate the organization's vision, accomplishments, and goals to the public and gain support from important members of the community.
9. *Serve as a Court of Appeal:* The Board must serve as a court of appeal in personnel matters. Solid personnel policies, grievance procedures, and a clear delegation to the chief executive of hiring and managing employees will reduce the risk of conflict.
10. *Assess its own Performance:* By evaluating its performance in fulfilling its responsibilities, the Board can recognize its achievements and reach consensus on which areas need to be improved.

There are three major responsibilities of Board members—duty of care, duty of loyalty, and duty of obedience.

Duty of Care²

Under the duty of care, a director must be familiar with the organization's finances and activities and participate regularly in its governance. In carrying out this duty, directors must act in "good faith" using the "degree of diligence, care, and skill" which prudent people would use in similar positions and under similar circumstances.

In exercising the duty of care, responsible Board members should, among other things, do the following:

- Attend Board meetings regularly and actively participate in discussions and decision-making. Board members should strive for cohesion and agreement in all deliberations.
- Stay fully informed with changing conditions, needs and opportunities that exist in the community.

Roles and Responsibilities

- Read the minutes of meetings and all reports, including financial reports. Also, read reports prepared by employees and outside professionals, and have a general knowledge of the information contained in those reports.
- Read any literature produced as part of the organization's programs.
- Make sure that the Board spends some of its time on “visioning” and strategic planning.
- Insure that the organization has proper financial controls and policies to safeguard, promote and protect the organization's funds and other assets.
- Engage in careful oversight of the organization's finances.
- Question any activity or transaction that is unclear or troubling.
- Encourage diversity among Board members. Diversity will help ensure a Board committed to serve the organization's vision with a range of appropriate perspectives, skills, and interests.
- Be involved in the selection and compensation of the organization'sThe Board also s and other key employees responsible for its the day-to-day activities. The Board is responsible for such individuals having the appropriate education, skills, and experience to assume a key position.
- Be familiar with all issues addressed by the Board. Ask for additional information if any issue is not clear.

Duty of Loyalty³

Directors must place the interest of the corporation above any private interests. This duty of loyalty requires that any conflict of interest, real or possible, be disclosed to the Board. Board members must avoid transactions in which they or their family members benefit personally to the detriment of the organization.

In order to exercise the duty of loyalty, the Board must be careful to examine all transactions that involve Board members or members of their families. The Board must not approve any transaction that serves a private interest at the expense of the interests of the corporation.

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It is recommended that a Board have a written "conflicts of interest policy" so that all members are aware of the type of transactions that may prohibit them from joining a Board. Some such policies require that members of the Board disclose all possible conflicts and prohibit Board members from engaging in any transaction that may result in even the appearance of a conflict of interest.

Duty of Obedience⁴

The duty of obedience is an obligation to carry out the organization's vision and comply with the law. The Board has a duty of obedience to insure that the organization fulfills its purposes. These include the following:

- Dedicating the organization's resources to its vision statement.
- Ensuring that the corporation carries out its purposes and does not engage in unauthorized activities.

The Board also has a duty to comply with all appropriate laws, including:

- Reporting to tribal council or other tribal government entity, as required by tribal law.
- Registering with and reporting to the Attorney General or Secretary of States' Office or other relevant state office, as required by state law (if applicable).
- Paying all taxes such as payroll and unrelated business tax.
- Providing copies of its financial report to members of the public who request it.
- Maintaining complete and accurate records.
- Complying with registration and reporting laws and other applicable laws of all states in which it conducts activities and/or solicits contributions.
- If a 501(c)(3), complying with all provisions of the IRS Code, including those that govern compensation and disclosure so as not to subject the organization to "intermediate sanctions."

Compensation

By common definition, serving on a nonprofit Board is a volunteer commitment. Tying compensation with service may raise issues that should be studied carefully. There are circumstances when reasonable compensation is acceptable, but it is always critical that Board service neither leads to personal gain nor violates the public trust.

Generally speaking, compensation of Board members is rare. A survey of more than 1,000 nonprofit organizations conducted by the National Center for Nonprofit Boards found that only one percent of organizations paid Board members a fee or honorarium for Board service. For a majority of that one percent, the fees were nominal. However, in Indian Country, Board member compensation appears to be more common.

While rare, Board member compensation is not illegal. Reasonable fees for service are allowed if it is clearly stated in the bylaws or the majority of the Board has so determined. Compensation can make it possible for individuals of very limited financial means to participate in Board service.

According to the tenets of nonprofit law, directors and officers should not make any monetary profit from the organization; they should not benefit in any personal way. Paying a fee in specific circumstances can be defended, but fees that are out of scale with the market price of that good or service are always unacceptable. Unreasonable compensation can be a cause for a fine or for the organization to lose its tax-exempt status.

Conflict of Interest⁵

Board service in the nonprofit sector carries with it important ethical obligations. Nonprofits serve the broad public good, and when Board members fail to exercise reasonable care in their oversight of the organization they are not living up to their public trust. In addition, Board members have a legal responsibility to assure the prudent management of an organization's resources. In fact, they may be held liable for the organization's actions. A 1974 court decision known as the "Sibley Hospital Case" set a precedent by confirming that Board members can be held legally liable for conflict of interest because it constitutes a breach of their fiduciary responsibility.

Conflict of interest does not involve only financial accountability. It relates broadly to ethical behavior, which includes not just legal issues but considerations in every aspect of governance. A recent statement by Independent Sector, an organization dedicated to promoting philanthropy and volunteerism, describes three levels of ethical behavior:

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- Obeying the law.
- Decisions where the right action is clear, but one is tempted to take a different course.
- Decisions that require a choice among competing options.

The third level of behavior can pose especially difficult ethical dilemmas for nonprofit Board members.

To prevent conflict of interest situations, the Board should institute self-monitoring. This should include a system of checks and balances to circumvent actual or potential conflict of interest, beginning with well-defined operating policies on all matters that might lead to conflict. Most important, the Board should create and approve a carefully written conflict of interest policy based on the needs and circumstances of the organization as illustrated in Exhibit 5.1. Each Board and staff member should agree in writing to uphold the policy. Finally, the conflict of interest policy should be reviewed regularly as part of Board self assessment.

Exhibit 5.1 **Essential Elements of a Policy on Conflict of Interest**

1. Full Disclosure

Board members and staff members in decision-making roles should make known their connections with groups doing business with the organization. This information should be provided annually.

2. Member Abstention from Discussion and Voting

Board members who have an actual or potential conflict of interest should not participate in discussions or vote on matters affecting transactions between the organization and the other group.

3. Staff Member Abstention from Decision-making

Staff members who have an actual or potential conflict should not be substantively involved in decision-making affecting such transactions.

A Word on Contracts

Attorneys, accountants, and other professionals can contribute valuable expertise to a Board. Due to the potential for conflict of interest, their contributions should be voluntary. At the very least, a Board member who is associated with a firm competing for a contract should abstain from discussion and voting in the selection process. If a competitive bidding process results in the selection of that Board member's firm, he or she should disclose the affiliation and abstain from voting on future Board actions connected with that firm's contract with the organization.

Individual Board Member Responsibilities

Individual members of the Board have the responsibility to:

- Attend all Board and committee meetings and functions, such as special events.
- Be informed about the organization's vision statement, services, policies, and programs.
- Review agenda and supporting materials prior to Board and committee meetings.
- Serve on committees and offer to take on special assignments.
- Make a personal financial contribution to the organization, if able.
- Inform others about the organization.
- Suggest possible nominees to the Board who can make significant contributions to the work of the Board and the organization.
- Keep up-to-date on developments in the organization's field.
- Follow conflict of interest and confidentiality policies.
- Refrain from making special requests of the staff.
- Assist the Board in carrying out its fiduciary responsibilities, such as reviewing the organization's annual financial statements.

Liability

As stated earlier, directors of a nonprofit organization generally will not be held personally liable for their actions on behalf of the organization, provided they are in good faith. Further, directors and officers of the organization can be covered by an officers' and directors' liability insurance policy purchased from an insurance company. (This type of insurance is in addition to any other liability insurance the organization

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may carry, such as car insurance or general liability insurance.) Insurance offers more protection because the insurance company's money will be used to pay any judgments and legal fees.

Board Structure⁶

A carefully laid out structure will encourage an effective Board. Thought should be given to matters such as member selection, Board size, length of members' terms, officers, and committees.

Member Selection: When selecting Board Members, look for a diversity of skills and experience in relevant areas, such as housing, construction and development, law, land, and/or finance. A professional such as an attorney or accountant serving on the Board can provide pro bono services to the entity, which will save the entity money and time. It is also important to have Directors who represent different areas and interests in the community.

Board Size: The organization's structure and needs are among the factors that determine Board size. In considering the size of the Board, it is helpful to keep these points in mind:

- Every Board needs a sufficient range of expertise to accomplish the organization's mission.
- If a Board is too small, its members may be overworked and unproductive.
- If a Board is too large, every member may not have the opportunity to participate actively.

Length of Board Members' Terms: There are no hard and fast rules for determining Board members' tenure. Many organizations do, however, limit members to two consecutive terms and require a hiatus of one year before a Board member may be re-appointed. Many organizations also stagger terms of service so that one half or one third of the Board is elected every one or two years for terms of two to four years. Such policies encourage institutional renewal because a Board can profit from the experience of veteran Board members while welcoming the fresh perspective that new members offer.

Officers: Typically, the Board of Directors is led by four officers: a President or Chairperson; a Vice-President or Vice-Chairperson; a

Secretary; and a Treasurer. Job descriptions for each officer can be found in the Appendix 5.1.

Committees: Much of the work that a Board does is accomplished through its committees. With the exception of the Executive Committee, which acts on the Board's behalf, committees recommend action to the full Board for discussion and action. Committee structure usually parallels the administrative structure of the organization. Standing committees are established in the bylaws and often include the following:

- Executive Committee
- Nominating Committee
- Finance Committee
- Audit Committee
- Development Committee
- Strategic Planning Committee
- Personnel Committee

In the case of a homeownership nonprofit, it may be helpful to establish the following committees:

- Financial Intermediaries Committee
- Housing Counseling Committee
- Resource Referral Committee
- Construction and Development Committee

Resources on Boards: An excellent resource for further information is the National Center for Nonprofit Boards. They provide publications, advice, and seminars on nonprofit boards. Their website is www.ncnb.org.

5.2 Strategic Plan⁷

The creation of a strategic plan is an important step in the development of an organization. It defines the organization and establishes goals. It provides an opportunity for the organization to:

- Examine the environment within which it will operate
- Explore the relevant factors that affect the way it will do business
- Frame strategic issues that must be addressed
- Develop specific goals and objectives based on the strategic issues
- Establish a realistic timeline for attaining the goals

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The benefits of strategic planning include increased effectiveness, efficiency, improved understanding and better learning, better decision-making, enhanced organizational capabilities, improved communication and public relations, and increased political support.

Strategic planning enables an organization to think and act strategically. Throughout the strategic planning process there are three fundamental questions that an organization must ask itself: Who are we? What do we want to be? How do we get there? As the answers to these questions unfold, new answers to one question can be expected to change previous answers to another question. This is part of the natural course of planning.

There are ten basic steps to creating and implementing a strategic plan:

1. Initiate and agree on an inclusive, open and recurring strategic planning process.
2. Clarify the organizational mandates.
3. Identify and understand the organization's stakeholders; and develop and refine the vision and values of the organization. Successful nonprofits satisfy important stakeholders according to each stakeholder's criteria for satisfaction. Therefore, the vision and values of the nonprofit should be thought about in relation to those stakeholders.
4. Establish an effective organizational vision for the future.
5. Assess the environment to identify strengths, weaknesses, opportunities, and threats. Identify the entity's internal strengths and weaknesses and external opportunities and threats. This kind of analysis is known by the acronym SWOT, and is very useful in clarifying the conditions within which the organization operates. See Exhibit 5.2 for an example of a SWOT analysis.
6. Identify and frame the strategic issues. Strategic issues are fundamental challenges that affect an entity's mandates, vision, product, or service level and mix, clients or users, costs, financing, organization, or management.
7. Formulate strategies to manage the issues according to resource availability.

8. Review and adopt the strategic plan.
9. Develop an effective implementation process.
10. Establish and evaluate performance measures to document strengths and weaknesses.
11. Reassess strategies and the strategic planning process.

In managing the strategic planning process it is important to begin only when the organization is ready, has strong leadership and support from stakeholders, and has the resources necessary for a successful planning effort.

Exhibit 5.2 SWOT Analysis

MAXIMIZE	OVERCOME
<i>Strengths</i> Internal strengths are resources or capabilities that help an organization accomplish its mandates or vision.	<i>Weaknesses</i> Internal weaknesses are deficiencies in resources and capabilities that hinder an organization's ability to accomplish its mandates or vision.
<i>Opportunities</i> External opportunities are outside factors that can affect the organization in favorable ways.	<i>Threats</i> External threats are outside factors that can affect the organization in a negative way.

The strategic planning process first should focus on internal issues that can be controlled and second it should develop a course of action to influence and mitigate external threats.

5.3 Business Plan⁸

The business plan is a written summary of what the organization hopes to accomplish and how it intends to organize its resources to meet its goals. It is the road map for operations and for measuring progress along the way. The business plan identifies the funding or financing required and when it is needed. The business plan is often the first impression a donor, sponsor, or lender has of an organization. A well-organized plan is essential for donors, sponsors, or lenders to assess the organization. The business plan encourages realism and improves the Executive Director's ability to manage the organization.

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Structure of the Plan

A business plan should include several key components, including an executive summary, business concept, description of the industry and business venture, business goals, marketing plan, production plan, organization structure, and more. Each element is detailed below.

Executive Summary. The format should begin with an executive summary describing the highlights of the business plan. Although the organization is described in detail later in the report, a crisp, one or two page introduction helps to capture the immediate attention of the potential donor, sponsor, or lender. The introduction should include:

- Name of the organization (include address and phone number)
- Contact person (presenter's name and phone number)
- Paragraph about organization (nature of business and market area)
- Business loans sought (term loan, operating line of credit)
- Highlights of business plan (the project)

Table of Contents. A standard table of contents section titles and page numbers.

Business Concept. The business concept identifies the organization's market and the market need for the organization, and outlines the organization's action plan for the coming year.

Elements of the organization's strategic plan can be contained in this section, particularly the planned activities and funding sources and needs of the organization to complete the activities. This section also contains an assessment of business risks and a contingency plan.

Description of the Industry. This section will contain:

- Industry outlook and growth potential
- Markets and customers
- Similar organizations (serving the same purpose and market)
- Regional and economic trends (population shifts, relevant economic indicators)

Description of Business Venture. This section will contain:

- Products or services (pictures, drawings, characteristics, quality)
- Target market
- Business location and size
- Staff and equipment needed (overall requirement, capacity)
- Brief history (principals involved, development work done)

Business Goals. This section will contain specific goals for the current year and over the longer term.

Marketing Plan. This section will contain the fundraising strategy.

Production Plan. Depending on the kind of housing development the organization intends, this section may contain:

- Brief description of production process
- Suppliers (volume discounts, multiple sources)
- Raw materials (readily available, quality, sources)
- Personnel required (full-time, part-time, skill level, availability, training required)
- Costs (facilities, equipment, and materials, estimates and quotations)
- Capital estimates (one time start-up or expansion capital required)

Production Plan. Depending on the services to be provided by the organization, this section may contain:

- Purchasing plans (volume discounts, multiple sources, quality, price)
- Space requirements (office space, improvement required, expansion capability)
- Staff and equipment required (personnel by skill level, fixtures, office equipment)

Organization Structure. This section will contain:

- Legal form (proprietorship, partnership, corporation, nonprofit)
- List of contracts and agreements in force
- Directors and officers (names and addresses and role in company)

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- Background of key management personnel (brief resumes of active owners and key employees)
- Contract professionals/consultants (possible outside assistance in specialized or deficient areas)
- Organization chart (identify reporting relationships)
- Duties and responsibilities of key personnel (brief job descriptions – who is responsible for what)

Risk Assessment. This section will contain:

- Competitors' reaction
- What if... list of critical external factors
- What if... list of critical internal factors
- Dealing with risks (contingency plan to handle the most significant risks)

Action Plan. This section will contain:

- Steps to accomplish this year's goals (flow chart by month or by quarter of specific action to be taken and by whom)
- Checkpoints for measuring results (identify significant dates and decision points)

Financial Plan. The financial plan outlines the level of present financing and identifies the financing sought. It contains pro-forma financial forecasts. In carrying out the action plan of the organization, the operating forecasts are the organization's guide to business survival.

Financial Statements. This section will contain previous years' balance sheets and income statements (past two to three years if applicable).

Financial Forecasts. This section will contain:

- Opening balance sheet (for a new business only)
- Projected income statements (detailed operating forecast for next year of operation and less detailed forecast for following two years)
- Cash flow forecast (budget of cash inflow and outflow on a monthly basis for next year of operation)

References. This section will contain:

- Partnering organizations (contact name and phone number)
- Name of present lending institution (branch, type of accounts)
- Lawyer's name (include address and phone number)
- Accountant's name (include address and phone number)

Appendices. This section will contain:

- Letters of intent (potential home buyers)
- List of inventory (type, age, value)
- List of fixed assets (description, age, serial numbers)
- Description of insurance coverage (insurance policies, amount of coverage)
- Accounts receivable summary (include aging schedule)
- Accounts payable summary (include schedule of payments)
- Copies of legal agreements (contracts, leases, mortgage)
- Appraisals (property, equipment)

5.4 Organization Structure⁹

Nonprofit organizations are governed by a Board of Directors that represents the community served by the organization. Some Boards consist exclusively of community representatives while other Boards achieve a mix of community representatives and non-residents who bring valuable skills to the Board. Board members should be selected based on the reputation, expertise and experience they've gained in life. The members should share the organization's vision and be prepared to contribute their time, advice and skills to the organization.

Some nonprofit organizations augment their Board with an Advisory Committee which provides periodic expert advice on issues such as fund-raising and community-building. In these structures, the Board remains ultimately accountable for the performance of the organization.

The Board of Directors recruits and hires the chief executive who is responsible for hiring and firing the organization's staff and any consultants. The Board has direct control over the chief executive only and should have no authority to manage or direct the organization's staff.

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5.5 Budget and Financial Procedures

Budget Procedures¹⁰

At least two or three months before the beginning of the organization's fiscal year, attention should focus on developing a budget for the next year. Staff and Board members should participate in each phase of the budgeting process so that the final product reflects the organization's priorities, capabilities and capacities.

The first phase in the budget process is a review of program and management achievements and fiscal performance for the year just ending. This includes, but is not limited to, reviewing objectives achieved, comparing budget to actual figures, and examining the number of people served.

Estimate the costs required to achieve the organization's objectives, including staff, supplies, and other resources. Make sure to take into account upcoming changes, especially in areas such as insurance, which are subject to significant fluctuations.

Estimate all possible sources of income, financing and funding which would advance the organization's objectives. Base these estimates on past experience or that of comparable organizations. Grants from governments, foundations and corporations can be difficult to predict; however, staff and Board members should be able to make a reasonable assessment of funding likelihood.

Compare revenue and expense projections. If revenues and expenses are not balanced, programs and management activities must be re-evaluated and adjusted. If expenses need to be reduced, determine which funding priorities are highest and make reductions in areas of lower priority or lower productivity. Once the revenues and expenses are in proper balance, the Board must approve the budget.

The chief executive and staff use the budget as a guide and submit monthly financial reports to the Board comparing actual revenues and expenses to the budget. Budgets and the budgeting process can be an important vehicle for better programmatic and financial management and can help the organization better achieve its vision and goals.

Financial Procedures¹¹

Financial procedures designed to promote and protect sound management practices, both general and financial. Adherence to financial procedures will significantly increase the likelihood that:

- Financial information is reliable, so that managers and the board can depend on accurate information to make programmatic and other decisions
- Assets and records of the organization are not stolen, misused, or accidentally destroyed
- The organization's policies are followed
- Government regulations are met

Developing an Internal Accounting Control System The first step in developing an effective internal accounting control system is to identify those areas where abuses or errors are likely to occur. Many accountants can provide a checklist of areas and questions to consider when planning financial procedures. At a minimum, the following areas and objectives in developing an effective internal accounting control system should be addressed:

- **Cash receipts:** To ensure that all cash intended for the organization is received, promptly deposited, properly recorded, reconciled, and kept under adequate security.
- **Cash disbursements:** To ensure that cash is disbursed only upon proper authorization of management, for valid business purposes, and that all disbursements are recorded properly.
- **Petty cash:** To ensure that petty cash and other working funds are disbursed only for proper purposes, are adequately safeguarded, and recorded properly.
- **Payroll:** To ensure that payroll disbursements are made only upon proper authorization to bona fide employees, that payroll disbursements are properly recorded and that related legal requirements (such as payroll tax deposits) are complied with.
- **Grants, gifts, and bequests:** To ensure that all grants, gifts, and bequests are received and properly recorded, and that compliance with the terms of any related restrictions is monitored adequately.

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- **Fixed assets:** To ensure that fixed assets are acquired and disposed of only upon proper authorization, are adequately safeguarded, and recorded properly.

Additional internal controls are required to ensure proper recording of donated materials, pledges and other revenues, accurate, timely financial reports and information returns, and compliance with other government regulations.

Achieving these objectives requires the organization to clearly state procedures for handling each area, including a system of checks and balances in which no financial transaction is handled by one person from beginning to end. This principle, called segregation of duties, is central to an effective internal controls system. Even in a small nonprofit, duties can be divided up between paid staff and volunteers to reduce the opportunity for error and wrongdoing. For example, in small organization, the chief executive might approve payment and sign checks prepared by the bookkeeper or office manager. The Board treasurer might then review disbursements with accompanying documentation each month, prepare the bank reconciliation, and review canceled checks.

The Board and chief executive share the responsibility for setting a tone and standard of accountability and conscientiousness regarding the organization's assets and responsibilities. The Board fulfills that responsibility in part by approving many aspects of the internal control accounting system. Common areas requiring Board attention include:

- **Check issuance:** The number of signatures on checks, dollar amounts which require Board approval or Board signature on the check, who authorizes payments and financial commitments, etc.
- **Deposits:** How many payments made in cash (for admissions, raffles, etc.) will be handled, etc.
- **Transfers:** If and when the general fund can borrow from restricted funds, etc.
- **Approval of plans and commitments before they are implemented:** These include the annual budget and periodic comparisons of financial statements with budgeted amounts, contracts, leases, loans and other major commitments.

- **Personnel policies:** These include salary levels, vacation, overtime, compensatory time, benefits, grievance procedures, severance pay, evaluation, and other personnel matters.

The Accounting Procedures Manual: The policies and procedures for handling financial transactions are best recorded in an Accounting Procedures Manual, describing the administrative task and who is responsible for each. The manual does not have to be a formal document, but rather a simple description of how functions such as paying bills, deposit cash, and transferring money between funds are handled. As you start to document these procedures, even in simple memo form, the memos themselves can be kept together to form a very basic Accounting Procedures Manual. A good opportunity to see whether adequate controls are in place. In addition, such a manual facilitates smooth turnover in financial staff.

Maintaining Effective Controls: The chief executive is commonly responsible for overseeing the day-to-day implementation of these policies and procedures. Due to the number of detailed requirements involved if the organization receives government funding, there should be one person in the organization (possibly the grant administrator) with the responsibility of understanding and monitoring those specific regulations and compliance factors.

The auditor's management's letter is an important indicator of the adequacy of the organization's internal accounting control structure, and the degree to which it is maintained. The management letter, which accompanies the audit and is addressed typically to the Board for the organization, cites significant weaknesses in the system or its execution. By reviewing the management letter with the chief executive, asking for responses to each internal control lapse or recommendation, and comparing management letters from year to year, the Board has a useful mechanism for monitoring its financial safeguards and adherence to financial policies.

As the organization changes and matures, and funding and programs change, the organization will need to periodically review the internal accounting control system and modify it to include new circumstances (bigger staff, more restricted funding, etc.) and regulations such as receiving federal awards with increased compliance demands.)

A-133 Audit: In 1990, the Office of Management and Budget (OMB) issued Circular A133, Audits of Institutions of Higher Education and Other

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Nonprofit Institutions, which defines audit requirements even if the federal money the organization receives is passed through another agency. For example, a housing authority may make a grant to a local nonprofit housing developer which contains HUD funding. The local housing developer is subject to A-133 audit requirements even though the grant was not directly from HUD.

Fortunately for smaller nonprofits, the federal guidelines permit to the agency to combine a regular audit of the whole agency with a program-specific A-133 audit of the program receiving federal funding. The amount of the combined federal funding will determine the type of audit the organization is required to have under A-133. Exhibit 5.3 shows when an A-133 is not required, when a program-specific A-133 audit may be elected, and when an organization must have an agency-wide federal audit.

Exhibit 5.3
Federal Audit Requirements

Total Amount of Federal Awards	One Program	More than One Program
\$0-- \$24,999	No Audit	No Audit
\$25,000-- \$299,999	Program Specific or A-133 Single Audit	Program Specific or A-133 Single Audit
\$300,000 or More	Program Specific or A-133 Single Audit	A-133 Single Audit

A-133 audits like non-federal audits, they test financial statement information. However, the A-133 audit looks more closely at tracking and classifying revenue from federal sources. In addition, the auditor looks for compliance with general and specific government audit requirements, which cover both financial and non-financial factors such as program effectiveness, client eligibility, efficiency with which resources are used, etc.

The auditor must also test internal control procedures more rigorously than in a standard audit, making sure that adequate systems are in place for complying with the requirements noted above. Because of the expanded

procedure involved and increased reporting requirements for the auditor, the audit may cost substantially more than a traditional audit and involve more staff time. The organization should be allowed to build these additional audit costs into the grant.

5.6 Personnel Policies and Procedures

Whether the nonprofit organization has five or five hundred employees, properly written personnel policies and procedures can save considerable time and money. The primary goals of a personnel policy are to reduce litigation and promote good communication among staff. It provides both a means for new employees to orient themselves with their new working environment, and a policies and procedures refresher for others.

The essentials of a personnel policy include:

- A disclaimer, at the beginning and the end of the document, to ensure that it does not create nor imply a contract.
- An Equal Employer Opportunity statement.
- Employer rules, regulations, and procedures.
- Employer policies that are designed to help employees.
- Employee benefits.
- Guidelines for termination of employment and disciplinary actions.
- State, local and tribal requirements. (Family Medical Leave Act, workers compensation, harassment, etc.)
- An acknowledgement of receipt by the employee.

Keep it short and simple. A personnel policy should be easy to read and only as long as necessary to get the job done. Common pitfalls include:

- Overpromising
- Inconsistency
- Poor organization
- Inadequate disclaimers

If a personnel policy is not going to be followed or utilized, it might be better not to have one at all. However, there is even greater danger of lawsuits with government agencies when there is no written policy.

5.7 Staffing

Appropriate staffing is a key determinate of the success or failure of a nonprofit organization. Having the right number of staff who have the

Guide to Creating a Nonprofit Homeownership Entity

required skills and competencies and who can work collaboratively in a team environment is central to an organization's productivity, accountability and cost structure.

Organizations located in remote, sparsely populated areas may find that recruiting and hiring qualified staff can be a difficult process. These organizations have options including hiring highly motivated staff and providing them with the training and technical assistance they require to gain the competencies needed for the position. Another alternative is to rely on contracted consultants who work as temporary staff until the organization can hire and train permanent staff. In other instances, the organization may negotiate to borrow staff from another organization until permanent staff is hired and trained.

Newly formed nonprofit organizations may not have the funds to hire many, if any, staff and could rely on a core of dedicated volunteers until funding is secured. Other organizations may elect to use volunteer staff as a way to minimize personnel expenses.

It is critical for an organization to use a staffing process that mirrors the organization's vision, programs and budget. A staffing process includes:

- Conduct a job analysis to define its purpose and requirements.
 - Evaluate the organization's need for the position.
 - Define the position's specific functions, duties, responsibilities, compensation and benefit package.
 - Define the characteristics a person needs to succeed.
- Create a list of applicant requirements.
 - Education
 - Experience
 - Skill sets
 - Knowledge and expertise
 - Personal behavior
- Recruit qualified applicants.
 - Word of mouth
 - Direct contact
 - Advertising
 - Employment agencies
 - Job fairs
 - Professional associations
 - Community organizations
- Screen and interview applicants.

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- Time-saver questions: Determine at the outset if an applicant meets very basic job requirements.
- Behavior-based questions: Applicant describes past behavior in circumstances similar to the job.
- Skill-based questions: Applicant demonstrates the basic skills needed for the job.
- Hire most qualified applicant(s)
 - Be objective and impartial.
 - Evaluate all applicants and select the most qualified based on demonstrated competencies, commitment and willingness to learn.
 - Negotiate the employment offer until both parties are satisfied. The new hire should sign a letter of hire as prepared by the chief executive.
 - Each new hire should receive and sign a copy of the organization's personnel policy.

The organization should provide each staff person with opportunities for receiving training and technical assistance to improve performance and develop new skills. The organization should foster a constructive and supportive working environment that encourages staff to "do their best" and promotes effective teamwork.

6.0 Program and Organizational Operations

6.1 Introduction

This section discusses the concepts and issues involved in housing development from the site selection to the actual closing on a new home. This section also provides a brief overview of the process involved in working with interested families and providing pre- and post-homeownership counseling. A third key function of the nonprofit, serving as a resource referral center, is briefly summarized as well. This section includes discussions on marketing and fundraising strategies and the monitoring and evaluation of the organization's performance.

Many factors are involved in the process of creating affordable housing and homeownership opportunities. In some instances, many of these factors must happen concurrently in the overall process to make for a successful program. For instance, as the nonprofit decides on the kind of housing approach to adopt and begins to move forward in the development of housing, it must also market and work with interested families to bring them through the mortgage application process successfully and in a timely fashion.

Exhibit 6.1 provides a simplified overview of the process and concurrent activities in the case of a nonprofit working with a manufactured home builder while simultaneously identifying and preparing qualified families to purchase the manufactured homes. The process in the diagram assumes that the nonprofit entity has already worked through most of the legal, land, and financial packaging issues required before embarking on a housing delivery program. All of these issues are detailed in earlier chapters.

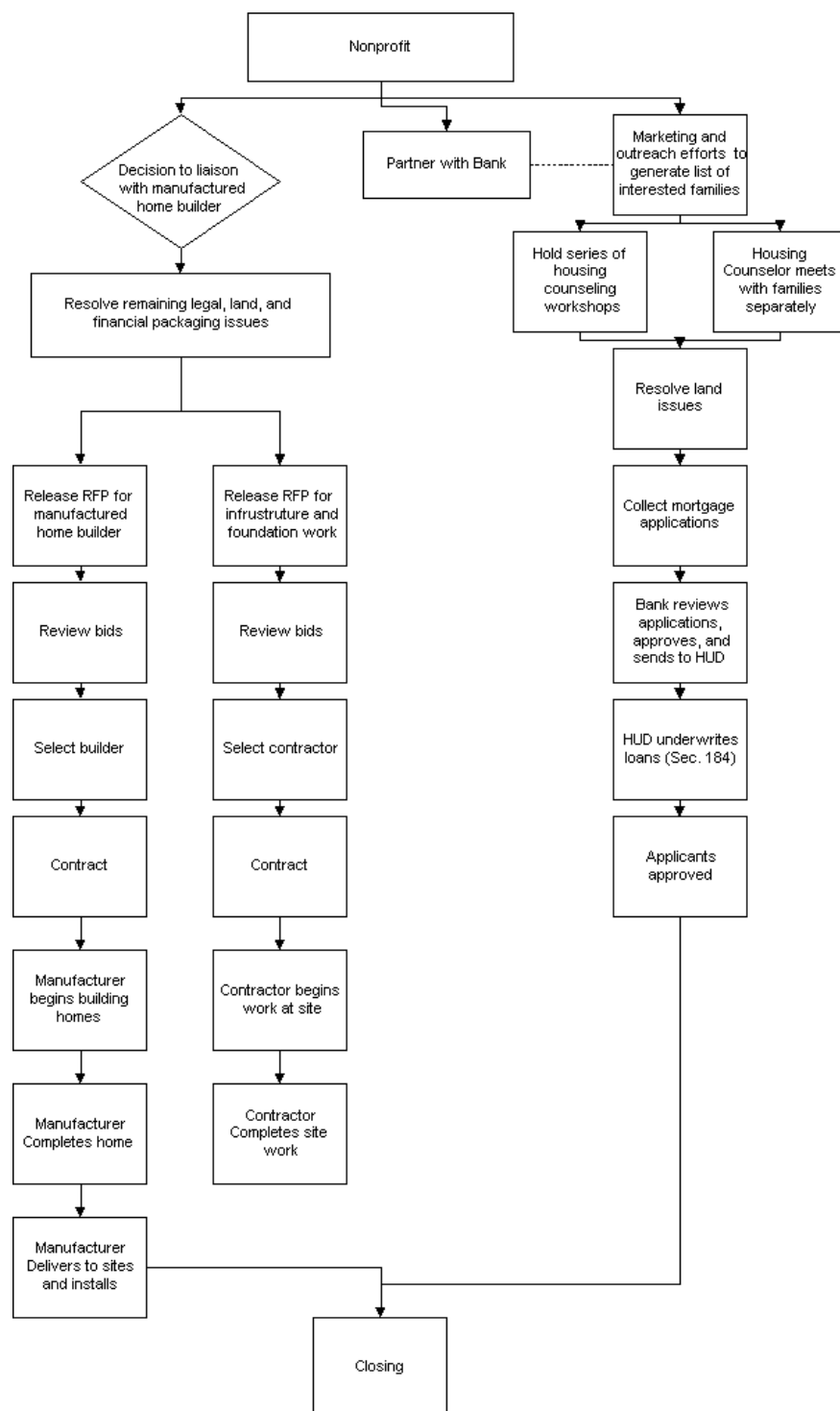
6.2 Housing Development

It is important to begin the process of site selection early because obtaining the proper reviews and title clearance can be time-consuming. The process for environmental reviews and title searches will vary depending on the type of land, the kind of funding or financing used for construction, and form of tribal governing body involved. Generally, the tribe or HUD performs environmental reviews if NAHASDA or Section 184 funding is involved. Title searches are handled by either BIA for tribal trust or individual allotted lands for non-self-governing tribal bodies, by title companies that utilize records in the county court house for fee simple lands, or by self-governing tribal bodies.

Site Selection

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Figure 6.1.A
Housing Delivery System: Liaison with



Housing Delivery Systems

Manufactured Home Builder

A variety of housing delivery systems are available to a nonprofit organization with the vision of expanding homeownership opportunities. The approaches vary from the tangible – actually building the housing, to the intangible – developing relationships with financial intermediaries. The examples highlighted below include coordinating a “Building Blitz,” facilitating a self-help housing construction model, serving as a developer, functioning as a liaison for the purchase and installation of manufactured homes, facilitating private mortgage networks, launching a lease-to-purchase program, and using tax credits.

The most appropriate approach for each entity will vary depending on the resources available to that organization as defined in the strategic plan and the business plan. Resources include not only financial streams, but also personnel with the applicable experience, available land, a supportive community, and committed government and private partners.

Facilitating Self-help Housing. Self-help housing is a term for new housing construction in which the future homeowners contribute a percentage of the labor costs through “sweat-equity.” The level of “sweat-equity” will depend on the health and skill of the families involved. When families assist in the construction of their homes labor costs are reduced and the home becomes more affordable. In addition, it provides an opportunity for participants to develop new skills in the construction industry.

Coordinating a “Building Blitz”. A Building Blitz, a term used by Habitat for Humanity, is an approach to housing development that depends on the efforts of volunteers and the homebuyers, through “sweat-equity,” for the construction of the homes. The coordination of the volunteer effort may be handled by the nonprofit or volunteers. Volunteers perform the bulk of the actual construction labor. Construction materials are funded through whatever means possible, with an emphasis on charitable in-kind donations or monetary contributions. Volunteer efforts can be an effective means to build new relationships and draw new resources into the community.

A number of logistical factors need to be considered when planning a volunteer effort, particularly if the volunteer effort is in a rural area requiring volunteers to camp for the duration of the Building Blitz. The logistical concerns vary according to the size of the effort. For a large effort, the logistical concerns may include:

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- Identifying what tasks can be performed by volunteers of varying skill levels
- Legal waivers that release the organizing parties from any liability
- Medical preparedness at camping and work sites
- Locating camping and sleeping arrangements for volunteers
- Locating dining areas and food service
- Establishing a protocol for observers
- Orchestrating vendors and in-kind contributions that relate to the logistical aspects of the volunteer effort (not construction in-kind contributions)
- Location of portable toilets
- Locating volunteer car parking areas
- Transportation for volunteers to and from work site and camp site
- Garbage collection and removal
- Security

Serving as a Developer. If the demand for housing is strong enough, the nonprofit organization may choose to become a developer. In this case the organization acquires property or leases land from the tribe, builds homes, and sells them after completion. This model likely requires a large cash flow and certainty that the homes could be sold soon after completion.

Functioning as a Liaison for Manufactured Homes. As a liaison for manufactured homes, the nonprofit organization facilitates the process of purchasing manufactured homes for a group of mortgage approved families. As creditworthy families become approved for mortgages, the nonprofit entity negotiates with the most qualified manufactured home builder for the construction and installation of quality homes. The nonprofit also coordinates the construction of necessary infrastructure, foundations, septic, and utilities.

Housing Selection

Facilitating a Private Mortgage Network. In facilitating a private mortgage network the nonprofit would reach out to and develop relationships with financial institutions. The nonprofit would work with the lending institutions to overcome barriers that prevent lending in Indian Country.

Launching a Lease-to-Purchase Program. In launching a lease-to-purchase program, the nonprofit organization enables a family to live in their new home while they work to clear up their credit. The homeowner gains full title to their home after their credit has met the standards required by the bank. The nonprofit is required to develop the home and package the financing, own the home and lease the land during the lease period with the family, and enter into and enforce a lease and home purchase agreement with the participating family. The nonprofit Board should discuss the type of lease-to-purchase program that works for the tribe/nonprofit. Items to consider include the term of the lease and maintenance on the home.

Using Tax Credits. Low Income Housing Tax Credits are designed to stimulate private sector investment in the development of affordable rental housing. The nonprofit entity would partner with a developer interested in obtaining tax credits through the development of low-income rental housing. The units must be new construction or substantially rehabilitated and restrictions of income limits vary by state and the location of the development.

In selection of the types of homes to build, the nonprofit must take into consideration the affordability of the target population, product quality, energy efficiency, durability, climate needs, and local expectations and desires. In addition, the nonprofit needs to consider the financial resources that it plans to utilize, as certain loan products may not be available for certain types of housing. All of these variables should be addressed in the organization's strategic plan. Three possible housing types that can meet the needs of most locations through specific customization are manufactured homes, modular homes, and stick-built homes.

Manufactured homes are produced in manufactured home builder plants to specifications agreed upon in a contract between the nonprofit and the builder. Homebuyers can usually select from a variety of color schemes for the interior and exterior of the home and select cabinetry for the kitchen and bath(s) to customize their homes. When the home is completed, it is delivered to the location site and installed on a pre-constructed foundation or crawl space, or it is anchored and skirted if there is no foundation.

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Contractors build **modular homes** at modular home plants to specifications agreed upon prior to construction. When the home is complete it is delivered to the location site and installed on a pre-constructed foundation or crawl space, or it is anchored and skirted if there is no foundation. These houses differ from manufactured homes in the construction process. As with manufactured homes, homebuyers can customize their homes through the selection of color schemes and cabinetry from a variety of options.

Stick-built homes are built on location usually with a combination of contractors and volunteers. When volunteers provide labor, the cost of the homes can be greatly reduced. Contractors supervise the work to ensure quality is maintained. In the case of the Self-help Program, some of the volunteers will be family members. The opportunity to customize a stick-build home during its construction will depend on the particular project. In some cases, paint, carpet, siding, cabinetry, and appliances may be in-kind contributions, which may preclude color selection.

There are a number of significant barriers that hinder lending on reservations. One barrier stems from lenders' reluctance to lend in situations where collateral for the mortgage is not a home and property, as in conventional lending. On reservations, tribal trust lands and allotted lands cannot be used as collateral on a mortgage. A number of government products have been designed to overcome this barrier. They include HUD Section 184, HUD Section 248, the U.S. Department of Agriculture's (USDA) Rural Housing Native American Pilot (RHNAP) Loan Program, and the U.S. Veteran's Affairs Direct Home Loans for Native American Veterans Living on Trust Lands. Each of these is described in detail below.

The **Section 184 Loan Guarantee Program** addresses the issue of collateral on trust lands. Section 184 loans are underwritten by HUD and provide lenders with a government guarantee on the mortgage. The lenders receive a leasehold interest as collateral. ONAP will work with nonprofit homeownership entities to identify lenders with an interest in the Section 184 program.

Like the Section 184 program, **Section 248** is under written by HUD and provides lenders with a government guarantee on the mortgage. Section 248 differs from Section 184 in that it can only be used on tribal trust land with a leasehold mortgage. Section 248 is eligible to individuals, families, and the tribe, but not the TDHE. Section 248 can also be used for refinancing.

Mortgages

The U.S. Department of Agriculture's Rural Housing Service (RHS) offers the **Rural Housing Native American Pilot (RHNAP) Loan Program**, which guarantees loans made on tribal land. The loans are 30-year fixed rate loans and can be for the purchase of existing homes or for new construction. The loan can be for 100 percent of the value of the property. Lenders who have been approved by both RHS and Fannie Mae can originate RHSAP loans. Eligible borrowers include individual members of federally recognized tribes that have been approved by RHS to participate in the pilot program.

The U.S. Department of Veteran Affairs offers the **VA Direct Home Loans for Native American Veterans Living on Trust Lands**. This direct loan can be used to purchase, construct, or improve a home on Native American trust land. These loans generally are limited to the cost of the home or \$80,000, whichever is less. VA direct loans are available to all eligible Native American veterans who meet credit and income qualifications.

In addition, eligible veterans may apply for loans guaranteed by the VA. The guarantee program is intended to encourage lenders to offer all veterans loans with more favorable terms. VA-guaranteed loans are made by private lenders such as banks, savings and loans associations, or mortgage companies.

Funding Resources in the Stages of Development¹

Predevelopment Financing. As noted in Section 2.0, planning is critical to a successful project. During the predevelopment stage or conceptual stage of development, developers must put their "dream" project to paper. The determination of funds needed during the predevelopment stage requires the organization to identify specific tasks and the associated costs that need to be completed to move the project forward. Pre-development funds then become the resources that cover such activities and include, but are not limited to:

- Option payments
- Architectural expenses
- Engineering
- Legal services
- Environmental and soil studies
- Application and origination fees
- Consultant fees
- Title search

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- Market studies
- Appraisal preparation

Predevelopment activities can be funded by a variety of sources in the form of grant, equity and/or loans to finance the project's up-front costs.

The organization should research the costs associated with each of these activities and plan the timing for accomplishment of these tasks to ensure that the project moves smoothly to the next stage of development.

Given the early stage in the development process, predevelopment funds and or predevelopment lending are considered a high risk by potential funders. As a result, predevelopment loans are typically a non-traditional loan product, not offered by most traditional lenders.

Acquisition Financing. Once the entity has determined that the project is feasible, and has completed a majority of the predevelopment activities, additional resources may be necessary to address the acquisition of the property, particularly if the land is not currently on trust land.

Acquisition funds are used to acquire the site. These costs include the contractual purchase price of the property, any applicable fees associated with the property specific to the project, and any associated closing costs.

Acquisition funds are resources that usually come in the form of loans ranging from non-conventional lending sources to private financing. Lenders usually require that the loan be secured by the property as collateral for the loan. Depending upon the condition of the property, these funds have a more moderate risk than the predevelopment loan because the lender will have some form of collateral.

However, if it is trust land, alternative sources of collateral will be required. Some states have programs that will provide guarantees, or the reserve accounts of the TDHE can be used. Traditional lenders will often require borrowers to provide some equity into the transaction (10 percent) and will not finance 100 percent of the acquisition cost of a property.

Through the appraisal process, the value of the collateral is established and the loan amount can be projected. For instance: If an organization wanted to acquire a property and the appraised value was \$100,000, a lender may be willing to lend up to \$90,000 on the property. An appraisal is almost always required by a lender to obtain the value of the property.

On tribal trust land, or land near trust land appraisals can be more difficult, since market comparables are hard to find. In the example listed above, the organization, through its own capital, would be required to provide the remaining resources necessary to acquire the site.

Construction Financing. Once a project has reached the stage where construction is ready to start, the entity should have identified all of the funding resources. Construction lenders generally will not issue a financing commitment until all permanent financing sources have been identified. (Single family home construction or rehab would be the exception.) Depending upon the resources within a community, some lenders provide both the construction and the permanent loan. Generally, the phases are separately outlined in lending documents. In addition, settlement on the construction loan may take place simultaneously with the acquisition of the property if all construction related tasks have been completed by the organization.

Construction funds provide the financial resources to fund costs associated with the construction process. These costs can include the physical development of the building “hard construction costs” and other costs necessary to engage the construction process, or “soft costs.” Soft construction costs can include all predevelopment-related expenses, such as appraisal costs, environmental expenses, legal costs, consultants’ fees, and other fees or costs associated with the development of the property, such as interest expense, which are not related to the project’s physical development.

Construction funds can be provided from a variety of sources but are usually in the form of loan funds from both non-conventional lenders and private banks. Equity providers, construction loan funds, trust funds, and the developer/organization can also fund construction-related activities. The risk of these types of loans center on the ability of the developer to complete the project on time and at the projected cost. Unlike other resources provided to the developer, construction funds are provided in “draws” submitted to the developer on a regular basis. The lender will often limit the draws based on the percentage of completion, in order to mitigate their risk and to closely monitor the construction process.

Construction loans on trust land present additional obstacles, since the lender cannot take a lien on the land – or use the value of the land to reduce their risk to the loan. To overcome this obstacle, the entity may need to identify other sources of collateral or receive a guarantee from another source. One option is HUD’s Section 184 mortgage loan which

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provides for a permanent mortgage loan that can be used for construction financing as well. Since there is only one loan closing, certain costs noted above are substantially reduced.

Permanent Financing. Upon completion of the construction phase, the project requires permanent financing on the property. This type of financing will typically stay in the project until all of the debt or principal on the primary loan is repaid. In most circumstances, the loan will be amortized over a long period of time, and extends for a time period ranging from five to fifty years. Permanent loans will generally “take-out” or replace the other financing that has been placed on the property. As such, the permanent financing source is commonly referred to as the “take-out” lender.

The term of the permanent loan usually commences at the completion of construction and upon compliance with other requirements of the permanent lender, such as debt-service coverage ratios, lease-up requirements and stabilized occupancy. Permanent loans can come from either private or public sources, including commercial banks and thrifts, insurance companies, and federal, state and local governments. It is important to emphasize that resources for permanent financing will generally be defined at the community level. The entity is encouraged to investigate as many options for permanent financing as possible.

For homeownership projects the ability to identify permanent financing is defined by the homebuyer—their income and their credit—and the perceived value of the structure. Again, the value of the structure can be difficult to define on trust land, since there is a lack of comparables and the extra “market” restrictions related to resale. For the Section 184 program, lenders will typically accept the “cost” method for the appraisal. The homebuyer’s income and creditworthiness determines the mortgage amount. Subsidy financing depends on the homebuyer’s income.

For rental projects the permanent financing available is defined by the income of the renters, by the “cash flow” the project provides and the value of the property.

Working Capital and Gap Financing. During the course of the development of the property, it is not unlikely that the entity will have cash flow challenges. If the developer or sponsor miscalculates the flow of any financing source into the project, a “gap” in the financing can occur. In these circumstances, an organization may draw upon its own internal resources to bridge this gap.

Many nonprofit organizations and housing authorities/TDHEs sustain themselves through the fees that they earn in the development process, in managing properties or in consulting for other organizations. The income generated through these activities provides the necessary capital for the organization to operate. The utilization of these resources to fund gaps in the project financing structure is commonly referred to as working capital.

An infusion of working capital into a project during any of these time periods allows the project to continue to move forward until the identified source flows into the project. If the requirements for funds are permanent, i.e., cost overruns, the organization may need to find additional equity to infuse into the project to cover the increase in the total development cost of the project.

An effective tool for monitoring the financial status of a project is a Pro Forma. (See sample in Exhibit 6.2). This is a template that brings all of the costs together and offsets them against known financing sources (grants, donations, and loans). When project data is entered into an electronic version of the sample in Exhibit 6.2, it becomes clear whether the project is affordable to the applicants and whether the current level of financing is sufficient.

Grants and Subsidy. As mentioned earlier, the nonprofit organization has access to additional resources that a typical real estate developer may not have. These resources are made available through a number of different sources to allow the developer to keep the project targeted for a certain income level resident. Grants infuse capital into a project and lower the amount of debt the project will need to carry, ultimately lowering the total development cost of the property. Grants typically specify how the sponsor can use the proceeds.

Federal grant programs have been created to stimulate very specific types of housing development, including single family homeownership, housing people with special needs or Native American initiatives. In addition, grants can be related to the development process, targeting specific costs such as feasibility expenses. It is very important that the nonprofit entity understand what granting organizations (private, state and local) exist in their specific community.

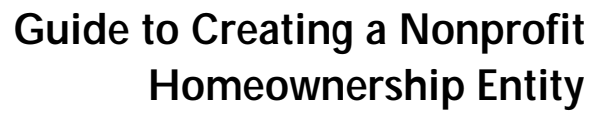
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Figure 6.2. Project Information for Pro Forma

	<u>Answers?</u>
What is the name of your project?	<input type="text"/>
Developer Name?	<input type="text"/>
How many units will your project have?	<input type="text"/>
What is the average income you expect resident to have?	<input type="text"/>
Area Median Income	<input type="text"/>
Source of Home Buyer First Mortgage	<input type="text"/>
Interest Rate	<input type="text"/>
Term	<input type="text"/>
Percent of Income to housing expenses	<input type="text"/>
Percent of Income to Total Debt	<input type="text"/>
Is the Down Payment a set cash amount? If so amount.	<input type="text"/>
Is the Down Payment a percent of first mortgage amount? If so %.	<input type="text"/>
Is the Down Payment a percent of total purchase price? If so %	<input type="text"/>
Will the home buyer have any monthly taxes or fees? If so, amount	<input type="text"/>
Will the home buyer have monthly required reserve payments? Amount?	<input type="text"/>

Financing Sources	Source	Amount/Unit	Total Amount	Acq./Pre- development	Construction	When Available
						Permanent
What are the subsidy sources? <i>Please place in order the funds are available</i>	1		\$ -			
	2		\$ -			
	3		\$ -			
	4		\$ -			
	5		\$ -			
	6		\$ -			
	7		\$ -			
	8		\$ -			
Do any of the financing sources require homebuyer repayments or liens? If "Yes" which ones? <i>(in order or lien priority)</i>						I=Interest Only N=Nonamortizing A="Amortizing"
				Interest Rate	Term	
				Yes		
				0.0%		N
				0.0%		N
				0.0%		N

What are construction financing sources?	<input type="text"/>	<input type="text"/>	\$ -
	<input type="text"/>	<input type="text"/>	\$ -
	<input type="text"/>	<input type="text"/>	\$ -



# of units*			
Project Name		<i>fill in shaded areas only</i>	

DEVELOPMENT COSTS

ACQUISITION

	total	per unit
Land	\$ -	\$ -
Title and Recording	\$ -	\$ -
TOTAL	\$ -	

PRE-DEVELOPMENT

Appraisal	\$ -	\$ -
Soil tests	\$ -	\$ -
Filing Fees	\$ -	\$ -
Architect	\$ -	\$ -
Survey	\$ -	\$ -
Phase I/Phase II Environmental	\$ -	\$ -
Pre-development interest	\$ -	
Pre-development legal	\$ -	\$ -
Other	\$ -	\$ -
TOTAL	\$ -	

OTHER SOFT COSTS

Architect/Engineer	\$ -	
Construction Supervision	\$ -	
Water and Sewer Design		
Construction Interest	\$ -	
Civil Engineering	\$ -	
Insurance	\$ -	
Market Study	\$ -	\$ -
Legal and Accounting	\$ -	\$ -
Marketing	\$ -	\$ -
Home Buyer Preparation	\$ -	
Other	\$ -	\$ -
Development Fee 0.0%	\$ -	
TOTAL	\$ -	

New Construction/Rehabilitation

Landscaping & Site Work	\$ -	\$ -
Water and Sewer/Roads	\$ -	
Basements/Crawl Space	\$ -	
Construction	\$ -	
Contingency 0.0%	\$ -	
TOTAL	\$ -	

TOTAL Costs	\$ -
<i>If purchase price is different from TOTAL COSTS then enter amount</i>	
	No.

BUYER'S CLSING CSTS 0.0% \$ -

TOTAL	\$ -
-------	------

Are buyer's closing costs in financing?
 OR paid by the home buyer?

Construction Loan Assumptions

Percent of Developer's fee paid after construction?	
Percent of Attorney's fees paid after construction?	
Percent of Home Buyer Prep. paid after construction?	
Other Costs not needed for Construction Loan?	
Average percent of Construction loan(s) outstanding	

FINANCING

ACQUISITION/PRE-DEVELOPMENT

term	mths	\$ -	int. rate	0.0%
-	0 mths	\$ -	int. rate	0.0%
term	0 mths	\$ -	int. rate	0.0%
TOTAL				

CONSTRUCTION FINANCING*

term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
term	0 months	\$ -	int. rate	0.0%
TOTAL		\$ -		

PERMANENT FINANCING/TOTAL

First Mortgage (40 houses)	\$ 0
Lease/Purchase OSHA Mortgage (10 houses)	\$ 0
0	\$ -
0	\$ -
0	\$ -
0	\$ -
0	\$ -
0	\$ -
0	\$ -
Home Buyer DP	
Closing Csts frm hme byr	\$ 0
TOTAL	

PERMANENT FINANCING/PER UNIT AVRGE

0	\$ 0
0	
0	
0	
0	\$ 0
0	\$ 0
0	\$ 0
0	\$ 0
Home Buyer paid dp & cc	
TOTAL	\$ 0

AFFORDABILITY ANALYSIS

	Payment
First Mortgage	\$ 0
Second Mortgage	\$ -
Third Mortgage	\$ -
Fourth Mortgage	\$ -
Monthly Fees/Taxes	\$ -
Reserve Fund	\$ -
Total Housing Costs	\$ 0.00
MP/Income	0.00%
INCOME REQUIRED	
Median Income	\$ -
% Median	

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A subsidy acts much like a grant in that it allows the nonprofit to provide additional resources to a particular project. The primary difference is that a subsidy typically is funding over time and works to lower the ongoing expenses of a project or increase its revenues, as opposed to a direct infusion of capital into the property. Subsidies are very effective in making the project available to a wider range of residents.

Subsidies can be a challenge for the nonprofit to plan around if the subsidy is short term. For instance, if there are annual renewal features within the subsidy or the subsidy travels with the recipient (as opposed to being project based), the developer cannot be assured the operating subsidy will be continuous. In these cases, a prospective lender will adjust their underwriting accordingly.

Irrespective of the housing delivery system, at some point in the process the nonprofit will have to procure the services of some vendor or contractor. It is likely that the nonprofit will use the Request for Proposal (RFP) process. The first step in the RFP process is for the nonprofit to draft an RFP, which is a document that details the services sought, any necessary specifications, and how and when the bidder should respond. (See sample in Appendix 6.0).

When the nonprofit has completed the RFP, it can advertise a notice in local papers to alert prospective bidders of the opportunity to bid. The notice identifies the nonprofit entity, the services it seeks, and where/how prospective bidders can obtain the RFP. A notice generally runs for a period of two to four weeks. The nonprofit should have a protocol established for receiving, tracking, and responding to the requests for the RFP.

A protocol for receiving, reviewing, and scoring bids or responses to the RFPs must also be established. Bids will likely be received before the actual close date. After the close date and time has arrived, the bids can be reviewed and scored. The ranking criteria should include a category that rates the completeness or responsiveness of the bid as well as other specific characteristics relevant to the needs of the project. Exhibit 6.3 depicts a sample proposal rating for construction services.

Procurement

Figure 6.3
Sample Proposal Rating

	Proposal A	Proposal B	Proposal C
Criteria	Percent of Total	Rating Scale (1 to 5)	Final Score
Responsiveness to RFP	25%	4	1.0
Cost	20%	3	.6
General Performance	15%	4	.6
Plans	10%	2	.2
Technical Specifications	10%	2	.2
Warranty	10%	3	.3
Delivery/Sale	10%	5	.5
Totals	100%	23	4.0

When all of the proposals have been reviewed and ranked, the information will be presented to the nonprofit's Board of Directors and the Board will make a decision on vendor selection. If no suitable bids are received, the Board can reject all proposals and opt to negotiate a sole source contract.

When a vendor is selected, the nonprofit negotiates final details on the services to be rendered and a legal contract is forwarded to the vendor. The details of the contract may require further negotiations until both parties are satisfied. Once negotiations are complete, letters are sent to the unselected bidders to notify them of the nonprofit's decision.

In some instances, the nonprofit may not conduct negotiations with vendors. Rather, the organization accepts the lowest, most responsive bid and enters into a fixed price contract with the vendor.

6.3 Housing Counseling

Housing counseling is a critical piece of a homeownership initiative. Tribal families often know little about homeownership, its benefits, and requirements. Further, they may have poor or no credit histories, may not be familiar with the mortgage lending process and terminology, nor required home maintenance activities. Education and counseling can be crucial in demystifying the process and helping an individual or family to become and remain a homeowner.

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An important initial step for the nonprofit is to determine homebuyer readiness and tailor counseling to the individual needs of households. It is recommended that the nonprofit provide housing counseling to all households receiving services from the entity.

An on-site counselor should be available to provide extensive pre-purchase and post-purchase counseling, in-group and one-on-one settings. The counseling can cover such topics as:

- Budgeting for mortgage payments
- Money management
- Home selection
- Housing care and maintenance
- Referral to community resources
- How to apply for and complete the mortgage loan process
- Alternatives for financing the purchase
- Real estate and mortgage lending terms
- How to develop a plan to accumulate down payment and closing costs
- If appropriate, credit counseling which may include assistance in improving credit-worthiness and consolidating debt
- Avoiding mortgage default and foreclosure
- Importance of routine and preventive maintenance to preserve house value
- Role of the homeowners' association

Default and foreclosure counseling are important parts of the services offered. Due to the unique status of tribal land and the use of tribal courts, there are particular procedures and processes on reservations for default and foreclosure, making counseling of this type very important. It may include such activities as:

- Determination of whether the mortgagor, with assistance from the nonprofit, might bring the account current within a time period and payment plan acceptable to the lender
- Working out repayment plans with the homebuyer's other creditors
- Follow-up counseling if the loan is brought current or the lender proceeds with foreclosure
- Alternatives to foreclosure

Homebuyer's Club

Another way the nonprofit can assist, train, and educate homebuyers is by establishing a Homebuyer's Club designed to develop an open forum group of all interested homebuyers. The club can be open to those residents who are interested in homeownership in the future, as well as those residents who are currently involved in the mortgage process. If this club includes an opportunity for the participants to have open discussions regarding their questions, fears, and hesitations, the club can assist those participants in overcoming some of their personal concerns.

The Club can sponsor various speakers on topics of interest to the individual homebuyers. These speakers may discuss topics regarding the legal closing process, insurance issues, tax issues, landscaping programs, and other issues that will assist participants understand the homeownership process. The club may also provide the opportunity for individual work sessions on topics such as budgeting, credit counseling, and financial planning.

6.4 Resource Referral Services

A critical role for a nonprofit organization promoting homeownership opportunities is to function as a resource referral center – a single location where interested parties can obtain information on the process of buying a home, financial intermediaries, real estate brokers, builders and contractors, and local housing options and programs. The path to homeownership can seem daunting because of the paperwork, the involvement of multiple government agencies, and the need to obtain large amounts of financing.

The organization's goal is to address each family's concerns and questions about homeownership and assist the family through the process if it decides to pursue homeownership. The entity will provide families with housing counseling, serve as a liaison between families and lending institutions, assist in finding the best lending package, and assist applicants in finding an affordable home for purchase or construction. Assistance also should be offered to homeowners seeking home improvement loans or grants or mortgage refinancing.

The kinds of information the nonprofit entity will have available includes:

- HUD ONAP "Our Home" brochures
- Housing Counseling process
- Standard mortgage loan applications
- Financing options

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- Real estate options
- Listing and brokerage services
- Contractors and builders
- Manufactured home builders
- Modular homes
- How to resolve land title questions

6.5 Marketing²

Marketing is an essential part of nonprofit business operations. It oftentimes determines how successful the nonprofit organization will be. The organization's aim is not only to attract and keep a steady group of loyal customers, but also to expand the customer base by identifying and attracting new customers and to reduce risks by anticipating market shifts that can affect the organization's bottom line.

An organization's marketing plan should include strategies typical of any marketing plan. The plan should especially include what marketers dub as the 4 P's of Marketing (Product, Price, Place and Promotion) Include a brief explanation for each strategy.

- Describe the target market by
 - Age
 - Sex
 - Profession/career
 - Income level
 - Educational level
 - Residence

Since the organization will have limited resources target only those customers who are more likely to purchase the organization's product or service. As the organization grows and its customer base expands, then, it may need to consider modifying this section of the marketing plan to include other customers.

- Identify competition
 - Market research data
 - Demand for product or service
 - Nearest direct and indirect competitors
 - Strengths and weaknesses of competitors
 - Assessment of how competitors are doing
 - Description of the unique features of the organization's product or service

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- Similarities and dissimilarities between the organization's product or service and competitor's
- Pricing strategy for and comparison of the organization's and the competition's
- Describe product/service
 - Describe the organization's product or service

Try to describe the benefits of the organization's goods or services from the customer's perspective. Emphasize its special features -- i.e., the selling points. Successful business owners know or at least have an idea of what their customers want or expect from them. This type of anticipation can be helpful in building customer satisfaction and loyalty.

- Develop marketing budget
 - Advertising and promotional plan
 - Costs allocated for advertising and promotions
 - Advertising and promotional materials
 - List of advertising media to be used

Operating an effective marketing plan requires money, so the organization will have to allocate funds from its operating budget to cover advertising, promotional and all other costs associated with marketing. Develop a marketing budget based on the cost for the media to be used, and the cost for collecting research data and monitoring shifts in the marketplace.

- Describe location (Place)
 - Description of the location
 - Advantages and disadvantages of location
- Develop pricing strategy
 - Pricing techniques and brief description of these techniques
 - Retail costing and pricing
 - Competitive position
 - Pricing below competition
 - Pricing above competition
 - Price lining
 - Multiple pricing
 - Service costs and pricing
 - Service components
 - Material costs
 - Labor costs
 - Overhead costs

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The key to success is to have a well-planned strategy, to establish the organization's policies and to constantly monitor prices and operating costs to ensure profits. Keep abreast of changes in the marketplace because these changes can affect the organization's bottom line.

- Develop an effective promotional strategy
 - Advertising media
 - Print media (newspaper, magazine, classified ads, Yellow Pages advertising, brochure)
 - Radio
 - Television
 - Networking
 - Business cards
 - Tee shirts, hats, buttons, pens

Develop a promotional strategy that uses various media for promoting the organization and its products. Monitor the different media identifying those that most effectively promote the organization.

Financial institutions weigh the soundness of an organization's marketing plan when deciding whether the organization is a good risk for their money. It is important that the organization prepare and present credible market data that shows there is a need in the community for the organization and its products and that demonstrates the organization's ability to compete successfully.

6.6 Fund-raising³

Fund-raising and grantsmanship are skills crucial to the nonprofit organization. Generally, the Board and chief executive are active in fund-raising activities. It is not necessary for a small organization to seek out the expertise of a professional fund-raiser. Many of the most successful fund-raisers learned the fine art of grantsmanship as they struggled to find funds for their fledgling programs.

Fund-raising can take many forms ranging from bake sales and telemarketing to requests for sizeable grants from foundations, corporations or government entities. Fund-raising activities should be guided by the organization's strategic plan and business plan. A growing number of organizations receive some or all of their funds from one or more government agencies. Public funding differs from private funding in

the proposal process, accountability requirements, and guideline compliance in such areas as hiring practices and client targeting.

The first step in securing a large grant from a foundation, corporation or government entity is a simple one: make sure the proposed program is worthy of funding and that the appeal is directed to the appropriate funder. Proposals should be written only after the purpose and scope of the program have been delineated in detail, its relationship to existing community services outlined, and the methods and target population defined.

While most funders have explicit proposal requirements, most proposals contain the following basic components:

- Cover Letter
- Proposal Summary
- Organization Qualifications
- Statement of Need
- Goals and Objectives
- Approach to Addressing Need
- Staffing
- Evaluation
- Future Funding
- Budget
- Appendix (Supporting Documentation)

The proposal review process can be a lengthy one, especially for government agencies. Be patient. If funds are not awarded, the funder should provide a technical debriefing to identify where the proposal was deficient. This information will help create a stronger proposal for the next funding cycle or for another funder. If funds are awarded, the organization and funder will sign a contract, sometimes after negotiation, which stipulates the terms and conditions associated with the award.

Many successful organizations generate numerous funding appeals and proposals in a year. The rationale is simple: the larger the number of appeals, the greater the chances for success.

6.7 Monitoring and Evaluation

Program and staff monitoring is critical for ensuring that the organization and its programs are operating according to approved policies, contracts and legal requirements. Each staff person is responsible for monitoring

Monitoring

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their own performance, the chief executive is responsible for monitoring staff performance and program operations and the Board of Directors is responsible for monitoring the overall organization to ensure goal attainment, budget adherence, quality control and compliance with legal and regulatory requirements.

On the staff level, the chief executive monitors staff performance through regular staff meetings, document review and annual staff evaluations. The Board monitors the organization's operations by reviewing documents provided by the chief executive at each Board meeting and through informal discussions with the chief executive at any time.

Monitoring results should be documented, kept on file, and include specific recommendations and timeframes for improving staff performance and/or program operations. These results should be linked to program evaluation, budgeting, and planning activities.

Evaluation⁵

Program evaluation is a careful collection of information about a program or some aspect of a program in order to make necessary decisions about the program. The type of evaluation used to improve the organization's programs depends on what the organization wants to learn about the decisions that need to be made. There are three types of program evaluation:

- **Goals-based Evaluation:** Are the programs achieving their overall and measurable goals?
- **Process-based Evaluation:** How do the programs really work and what are their strengths and weaknesses?
- **Outcomes-based Evaluation:** To what extent did the programs actually provide benefits to the clients?

Outcomes-based evaluation increasingly is important to nonprofits and their funders because of the need to know the actual impact of a program or a grant. Exhibit 6.4 provides an overview of the major methods used to collect data during evaluations.

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Exhibit 6.4
Program Evaluation Methods

Method	Overall Purpose	Advantages	Challenges
Questionnaires Surveys Checklists	When need to quickly and easily get lots of information from people in a non-threatening way.	<ul style="list-style-type: none"> • Can complete anonymously • Inexpensive to administer • Easy to compare and analyze • Can get lots of data • Many sample questionnaires exist already 	<ul style="list-style-type: none"> • Might not get careful feedback • Wording can bias client responses • Are impersonal • May need sampling expert • Doesn't capture full story
Interviews	When want to fully understand client impressions or experiences, or learn more about their questionnaire responses	<ul style="list-style-type: none"> • Get full range and depth of information • Develops relationship with the client • Can be flexible with the client 	<ul style="list-style-type: none"> • Can be time-consuming • Can be difficult to analyze and compare • Can be costly • Interviewer can bias client responses
Document review	When want impression of how program operates without interrupting the program; includes review of applications, finances, memos, minutes, etc.	<ul style="list-style-type: none"> • Get comprehensive and historical information • Doesn't interrupt program or client's routine in the program • Information already exists • Few biases about the information 	<ul style="list-style-type: none"> • Often takes much time • Information may be incomplete • Need to be clear about what looking for • Not a flexible means for getting data • Restricted to document availability
Observation	When need to gather accurate information on actual program operations.	<ul style="list-style-type: none"> • View program operations in action • Adaptable to changing events 	<ul style="list-style-type: none"> • Can be difficult to interpret actions • Can be complex to categorize observations • Can influence behaviors of program participants • Can be expensive
Focus groups	When need to explore a program in depth through group discussions and can be useful in marketing.	<ul style="list-style-type: none"> • Quickly and reliably get common impressions • Can be efficient way to get a range and depth of information quickly • Can convey key information about the program 	<ul style="list-style-type: none"> • Can be hard to analyze responses • Need good facilitator for safety and closure • Difficult to schedule 6-8 people together
Case studies	When need to fully understand a client's experiences in the program and to conduct comparison with similar programs.	<ul style="list-style-type: none"> • Fully depicts client experiences • Powerful means to portray program to outsiders 	<ul style="list-style-type: none"> • Usually quite time consuming to collect and describe • Represents depths of information rather than breadth

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A nonprofit may elect to conduct informal evaluations at any time and some form of evaluation should be conducted annually. Formal evaluations should be conducted by an contracted independent entity to assure the integrity of the results. Further, formal evaluations require advanced skills that may be beyond the organization's capabilities.

Introduction

7.0 Pine Ridge Case Study

During the summer of 1998, Secretary Andrew Cuomo of the United States Department of Housing and Urban Development (HUD) visited the Pine Ridge reservation. Secretary Cuomo examined first-hand the severe housing and economic development challenges facing the Oglala Sioux Tribe and met with tribal leaders to listen to their concerns.

Tribal leaders discussed their interest in promoting homeownership, articulated in the Tribe's Indian Housing Plan. They pointed out the need for a philosophical change in the delivery of housing services. Since the 1960s, the Tribe's Housing Authority has provided rental and other federally assisted housing options, but it has not had the capacity to provide extensive homeownership services.

In response to these discussions and the poor housing conditions he witnessed, the Secretary sought to partner with the Tribe to bring more homeownership opportunities to the families living on reservations through the Shared Visions Initiative.

Shared Visions seeks to create comprehensive approaches to developing affordable low- and moderate-income homeownership housing and to increase the investment of both private and nonprofit capital. The Initiative will build a framework for future homeownership, legal and economic development efforts throughout Indian country. To serve as a national catalyst, HUD designated the Pine Ridge reservation as a pilot project centered on public and private partnerships to make homeownership a reality for Native Americans nationwide.

Since the Secretary's visit last summer, the partners involved in the Pine Ridge pilot of Shared Visions have made enormous strides. They have established a nonprofit entity, identified and counseled homebuyers who have since qualified for mortgages, and have been intimately involved in the development of new housing units on the reservation. This section details these exciting developments.

Pine Ridge, South Dakota

The Pine Ridge reservation, located in southwestern South Dakota, is the home of the Oglala Sioux Lakota Tribe. The reservation spans an area that roughly equals the size of the state of Connecticut. The reservation population is estimated to be 38,000.

Pine Ridge is located in Shannon County which has been the poorest county in the United States for the past 30 years. According to the 1990

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Census, the per capita income in Shannon County is approximately \$11,000 per year. The reservation faces severe housing and economic development needs. The unemployment rate reaches 85 percent at certain times of the year. Little infrastructure exists and commerce is minimal. An estimated 4,000 families need homes. In many cases, three or four families share a single house and many houses are in substandard condition and lack complete plumbing.

The Oglala Sioux Lakota Housing (OSLH) has been identified by the Oglala Sioux Tribal Council as the Tribally-Designated Housing Entity (TDHE). The OSLH was established in 1961 and was the first Indian Housing Authority in the nation. The OSLH currently manages a total of approximately 1,700 reservation housing units, consisting of 1,200 low-income rental units and roughly 500 homeownership units. In its most recent Indian Housing Plan, the OSLH identified a need for 4,000 additional units on the reservation. The waiting list for housing includes more than 1,200 families.

In testing innovative and comprehensive approaches to addressing the housing challenges that face Pine Ridge, HUD's Office of Native American Programs (ONAP) partnered with Oglala Sioux Tribe to develop a national pilot project in designing homeownership opportunities. In consultation with the Tribal Council, OSLH, and other reservation partners, ONAP awarded the tribe a grant to create a non-profit entity that would be separate and independent from the tribal governance structure. Its functions include:

- Assess homebuyer readiness and provide pre- and post-homeownership counseling
- Develop personal financial management and housing counseling services
- Serve as a conduit between lending institutions and tribal members
- Market-shop and negotiate for the best lending packages for tribal members
- Develop housing that is desired and affordable by homebuyers
- Maintain funding sources to close the gap on down payment and monthly mortgage costs
- Seek out and secure other sources of gap financing

Organizational Development of OSTPH

Creation of a Nonprofit Corporation

- Develop sources of housing and housing-related products
- Serve as a resource and referral center for tribal members interested in homeownership

In essence, the nonprofit homeownership entity will bridge the gap between Native American borrowers and the private market that provides the services needed to facilitate on-reservation homeownership.

The Oglala Sioux Tribal Council unanimously enacted Ordinance No. 99-04 on January 28, 1999 (see Exhibit 7.1), adopting a charter for Oglala Sioux Tribe Partnership for Housing, Inc., a nonprofit corporation chartered under the laws of the Oglala Sioux Tribe.

Exhibit 7.1 Tribal Ordinance

Ordinance of the Oglala Sioux Tribal Council Approving the Oglala Sioux Tribe Partnership for Housing, Inc.

WHEREAS, there continues to be housing crisis on the Pine Ridge reservation for its residents, and

WHEREAS, a part of the efforts to address the housing shortage is to develop new models and new methods to provide housing to the residents of the Pine Ridge reservation, and

WHEREAS, the Oglala Sioux Tribe Partnership for Housing, Inc. will have the capacity to assist tribal members to find affordable, decent and safe housing by improving access to the lending market, and

WHEREAS, the Oglala Sioux Tribe Partnership for Housing, Inc. will have the ability to work with private and public agencies to develop affordable, decent, and safe housing through cooperative efforts of tribal, federal, private and public agencies, foundations, associations and groups, and

WHEREAS, the establishment of the nonprofit entity is in the long-term best interest of the Oglala Sioux Tribe, and its families, and members, now

THEREFORE BE IT ORDAINED, that the Oglala Sioux Tribe does hereby adopt the attached Not-For-Profit Charter of the Oglala Sioux Tribe for Partnership for Housing, Inc. and its by-laws.

OSTPH formally adopted its interim Articles of Incorporation and By-laws on February 17, 1999. Recently, the OSTPH Board of Directors adopted a

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revised and amended Charter and Articles of Incorporation to clarify its purpose and authority. (See Appendices 3.1 and 3.2)

After the tribal ordinance was enacted, an interim Board of Directors was established. Currently, eight members of the tribe comprise the OSTPH Board of Directors: President Paul Iron Cloud, Vice President Wilbur Between Lodges, Vice President Melvin Cummings, Treasurer Mike Graham, Secretary Bim Pourier, Harold Dean Salway, Elsie Meeks, and Gerald One Feather. The Board meets at least once a month and a held a strategic planning retreat in late May.

During February and March 1999, office space was obtained and a temporary Administrative Assistant was hired. In May 1999, the Board of Directors hired Roger Campbell as the Executive Director. As envisioned by the Board, OSTPH would maintain a staff comprised of a housing counselor, a specialist in tribal land assembly issues, and a construction manager to coordinate development activities.

A two-year operational budget has been developed by OSTPH. The budget identifies sources and uses of funds for the organization's administrative functions and programmatic initiatives related to homeownership counseling, leveraging financial capital, and developing new housing stock for ownership.

To further its mission and obtain additional sources of support, OSTPH secured official recognition from the Internal Revenue Service as tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986. Recognition under Section 501(c)(3) allows contributions made to OSTPH to qualify for charitable deductions under the rules set forth in Section 170 of the Internal Revenue Code. OSTPH operates exclusively for charitable and educational purposes, by providing homeownership to low and moderate income tribal members. This promotes the general welfare of the tribe and combats community deterioration while lessening the burdens of government.

In early fall 1998, discussions began on the preliminary plans for the construction of new homes by early August 1999. It was determined that OSTPH would work to identify interested families and provide counseling and training to help them become homebuyers. Families would have the option of a manufactured or a stick-built home. The organization would serve as a liaison with the mortgage bank and manufactured home dealers.

Board of Directors

Executive Director and Staff

Filing for IRS Designation as a 501(c)(3) Tax-exempt Organization

The Pine Ridge Building Summit

Construction Philosophy

OSTPH decided to hire local contractors to lay foundations and build the modular homes. This creates employment opportunities on the reservation, and helps build local skills and capacity for future construction-related jobs. In fact, use of local labor is one of the key principles underlying the construction planning for the Building Summit.

Two principles underlie the construction planning for the Building Summit:

- As a corporate citizen of the Pine Ridge reservation, OSTPH seeks to use its building project to stimulate the local economy and to use local service and materials providers to the greatest extent possible.
- As a nonprofit organization with limited funds working in an area with great need, OSTPH seeks to keep all costs as low as possible in order to provide greater housing options to the largest number of families.

The Building Summit Partners

Collaboration by many public, private and nonprofit partners is making the Building Summit a reality. All have committed to work together to make OSTPH a successful model for replication throughout Indian Country. Developing the Shared Visions model and preparing for the Building Summit have been an excellent example of interagency coordination on the ground at Pine Ridge. OSTPH has coordinated closely with BIA on construction preparation for homes to be built, including streamlined approval of sites for preparation. Indian Health Services conducted the design and infrastructure development oversight at no cost. In addition, the U.S. Navy Seabees have donated the labor to construct and pave the roads. Recent designation of Pine Ridge as an Empowerment Zone also complements the efforts through coordination with Rural Development at the U.S. Department of Agriculture. HUD and the Tribe have worked to incorporate private interests into the initiative, including Norwest Mortgage, Inc., the First National Bank of Gordon, and Amerind Risk Management Corporation. Ginnie Mae is participating by guaranteeing the security that Norwest Mortgage, Inc. is creating.

Exhibit 7.2 lists the key partners that have contributed funds, resources, and people to the first phase of the Building Summit.

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Exhibit 7.2
Pine Ridge Building Summit Partners

Public	Private	Nonprofit	Tribal
U.S. Dept. of Housing & Urban Development and Ginnie Mae	Norwest Mortgage, Inc.	Oglala Sioux Tribe Partnership for Housing, Inc.	Oglala Sioux Tribal Council & President
U.S. Dept. of Agriculture	First National Bank of Gordon	The Enterprise Foundation	Ogala Sioux Lakota Housing (TDHE)
Indian Health Service	Amerind Risk Management Corporation	The Communities Group	The Lakota Fund
Bureau of Indian Affairs			Oglala Lakota College
Federal Home Loan Bank Board of Des Moines			
Department of Defense (U.S. Navy Seabees)			

OSTPH worked to identify potential homebuyers through community education and outreach including hosting homebuyer fairs, sending mailings, holding informational meetings, and collecting pre-applications. This activity started soon after Secretary Cuomo's visit, when tribal leaders began working with ONAP to plan and sponsor a homebuyer fair to begin to determine the level of interest in homeownership on the reservation.

A couple of months later, the newly-created OSTPH partnered with the ONAP Denver office to sponsor a second homebuyer fair and follow-up meeting to discuss homeownership opportunities on the reservation with interested parties.

Over 300 people attended both homebuyer fairs held on the reservation. These were attended not only by prospective homebuyers, but also by parties interested in becoming partners in the initiative. These included financial institutions, builders, and manufactured home providers such as Norwest Mortgage, Inc., FHA, USDA Rural Housing Service, Habitat for Humanity, Rapid City Housing Coalition, Centennial Homes, Legend Homes, I-Deal Homes, Omaha Steelheart, Stockmens National Bank, KILI Radio, and the Manufactured Housing Institute.

Establishing a Pool of Applicants

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In January 1999, a mailing was sent to nearly 3,000 tribal families, which included attendees of the homebuyer fairs, homebuyer meeting, and families with postal addresses in the three targeted districts of the reservation.

OSTPH and ONAP reviewed the responses to the mailing in which families answered basic questions on debt and income. Based on the survey information provided, OSTPH and ONAP invited those families thought likely to apply for a mortgage to a homebuyer meeting. At this meeting, families had the opportunity to complete a mortgage application with Norwest Mortgage, Inc. and select a preference for a site option and home construction type.

Housing counseling was made available to those families that were determined not to be "homebuyer ready," to help them take steps to prepare for homeownership. Families that completed a mortgage application but did not qualify were referred to Norwest Mortgage's Homebuyers Club for housing counseling. In addition, these families were offered housing counseling from OSTPH. The families that were pre-qualified for a mortgage and targeted for underwriting were required to attend a series of housing counseling workshops.

These housing counseling workshops covered a variety of topics, and were offered multiple times, during the week and on weekends. Different partners offered these sessions free of charge.

- Norwest Mortgage, Inc. offered a session covering "Understanding Mortgages and Land Status" and "Waiting for Loan Approval," as well as another session on "What Happens at Loan Closing?," "Documents You Will be Signing," and "What is Hazard Insurance?"
- The Rapid City Housing Coalition offered a session on "Why Own a Home?," "Budgeting – A Plan for Spending," and "Importance of Good Credit."
- Legend Homes and the Regional Vice President for the National Association of Realtors presented on "Caring for Your Home," "Good Neighbor Policy," "Importance of Making Your Payments on Time," and "What to Do if You Can't Make Your Payment?"

In September 1999, OSTPH engaged an experienced homeownership counselor to deliver individual and customized counseling to interested homebuyers who need to resolve specific debt, income and mortgage application issues. This one-on-one counseling has proven highly effective

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in reassuring the homebuyers during the mortgage application and closing phases and in resolving specific problems that require strict confidentiality.

A commitment from the United States Department of Agriculture (USDA) to fund 75 percent of the infrastructure costs for 50 homes was obtained. OSLH committed to fund the remaining 25 percent of infrastructure costs and to provide up to \$100,000 in NAHASDA funds for down payment and closing cost assistance (\$2,000 per family).

For the currently qualified mortgage applicants, Norwest Mortgage, Inc. is offering 30-year fixed rate mortgages underwritten by HUD Section 184 loan guarantees. OSTPH has budgeted grant funds to assist further with principal and closing cost buy-downs as necessary.

To help offset the cost of the homes, OSTPH received a grant under the Affordable Housing Program offered by the Federal Home Loan Bank of Des Moines to assist in the buy-down of housing construction costs.

Through the combined efforts of the Tribal government, BIA, and the Enviro-Tech Team, fifty-seven sites in seven locations were identified for the construction of these units. Three districts on the reservation are targeted for the new homes: the Wakpamni District, Oglala in White Clay, and Pine Ridge Village. Sites for this project were chosen from set-aside lands and were limited to a 35-mile radius of Pine Ridge. In the future, OSTPH plans to undertake building efforts in all districts.

In May 1998, President Clinton launched the Partnership for Advancing Technologies in Housing (PATH), an initiative designed to dramatically reduce carbon emissions from houses. Under PATH, the federal government is working with the private sector and state and local governments to deploy technologies that curb greenhouse gas emissions. Technologies that promote energy efficiency, such as better insulation and building materials, benefit the homeowner and the environment.

The houses built during the Pine Ridge Building Summit incorporate PATH components to maximize efficiency and minimize homeowner utility costs.

Homebuyers had two basic options from which to choose: modular homes assembled at a facility located in Kyle, on the Pine Ridge reservation, or manufactured homes assembled off the reservation but delivered directly to the building sites. Homebuyers selected three and four bedroom models.

Leveraging Financial Resources to Make Homeownership Affordable

Site Selection

Partnership for Advancing Technologies in Housing

Housing Options

Construction Management

To proceed with the first phase of the development of the new homes, OSTPH procured manufactured homes from dealers in Rapid City and contracting with local labor to assemble modular homes at a facility located in Kyle, on the reservation.

The Building Summit project is owned by OSTPH which has general oversight responsibility for all aspects of the project. To facilitate the day-to-day management of construction activities, OSTPH entered into a memorandum of understanding with OSLH to provide construction supervision and inspection of the installation of foundations, utilities, construction of modular homes, pre-closing inspection and project budgeting and accounting. OSTPH reimburses OSLH for actual services performed by its employees on an hourly rate.

Manufactured Homes

For the manufactured homes, OSLH managed the site preparation and infrastructure development. In May 1999, OSTPH issued Requests for Qualifications/Proposals with PATH compliant specifications, selected the two best-qualified manufactured home builders, and entered into negotiations regarding price, quality, performance, and delivery schedule. Contracts were signed in June 1999 with Iseman Corp. and Foothills Homes Inc. During June the manufactured home builders met with the homebuyers, who made their final determination on options related to floor plans, house color, and finishes. The homes were delivered and completed during the summer and fall of 1999.

Modular Homes

For the modular homes, OSLH managed all aspects of the construction of the homes at the Kyle modular home facility, including the selection of labor contractors, mechanical and electrical contractors, and materials procurement policies and procedures. This delivery mechanism was identical to that employed by OSLH in constructing 18 modular homes for housing authority inventory and relies primarily on tribally-based contractors. The OSTPH held a contractors' pre-bid meeting to describe the construction plan. OSTPH then issued a Request for Proposals for subcontractors for the modular units and construction of foundations. OSTPH entered into multiple contracts with local contractors for the construction of foundations for all homes.

Financing

Many financial resources needed to be leveraged to enable tribal families to purchase their first homes. Building homes or transporting manufactured homes is more expensive because of the remote location of the Pine Ridge Reservation. For example, infrastructure costs – paving new roads, creating access to water and sewer– are high at over \$17,000 per

Guide to Creating a Nonprofit Homeownership Entity

home. Total development costs are over \$100,000 per home. Financing has been obtained to address two issues: lower interest rates on the mortgages and gap financing for construction.

To keep homeownership affordable, it is important to obtain lower interest rates on the mortgages. The lower the interest rate, the higher mortgage amount each homebuyer can receive. Two techniques were used to reduce interest rates – guarantees and mortgage revenue bonds. Norwest Mortgage, Inc. originates the mortgages and packages them into a “security.” The mortgages are then underwritten by the HUD Section 184 loan guarantee program and the “security” was then guaranteed by Ginnie Mae. The State of South Dakota Housing Development Agency plans to purchase the mortgage-backed security with proceeds from the Mortgage Revenue Bond program. The result – 30-year mortgages with only 5.95 percent interest rate.

Even with the lower interest rates, the low incomes of tribal members means the average mortgage a buyer can afford is less than \$65,000 – nearly \$40,000 short of total development costs. This gap is similar to other rural and inner city regions. Several financing sources were tapped to “fill the gap”:

- *Federal Home Loan Bank of Des Moines Affordable Housing Program (FHLBDM)*: The FHLBDM awarded OSTPH a grant to provide \$10,000 per home to help “fill the gap.” While the program is very competitive (they receive over 5 times the applications they can fund), they have a priority for rural projects and for projects for those with very low incomes.
- *Rural Development Program of the U.S. Department of Agriculture (RDUSDA)*: RDUSDA pledged almost \$10,000 per home to install water and sewer infrastructure. To save on the costs of hiring specialists to oversee the design and installation of the water and sewer systems, the Indian Health Service performed the design and infrastructure development oversight at no cost. In addition, the U.S. Navy Seabees donated the labor to construct and pave the roads.
- *U.S. Department of Housing and Urban Development Rural Housing and Economic Development Initiative Program*: The Oglala Sioux Tribe Partnership for Housing, Inc. has obligated \$20,000 per home of HUD Rural Housing and Economic Development grant funds toward “filling the gap.” The program provides grants to innovative projects that promote development in distressed rural communities.

Lower Interest Rates

Construction Gap Financing

Homeownership Agreements

- *Native American Housing Assistance and Self-Determination Act Block Grant:* The Tribe's TDHE, Oglala Sioux Lakota Housing, has committed \$2,000 in NAHASDA funds to each homebuyer to cover their down payment and closing costs.
- *Foundation support:* OSTPH has been actively seeking Foundation support for this project. An estimated \$2,500 per home came from Foundation support.

OSTPH and other partners are subsidizing portions of the Building Summit – from the construction of roads and water and sewer lines to buying mortgage principal and closing costs. In order to maintain these subsidy amounts on the new homes, OSTPH is taking a “soft” second mortgage against the value of the subsidy placed in the home. The outstanding balance of the second mortgage declines over a ten-year satisfaction period – whereby the homebuyer agrees to make first mortgage payments in a timely manner and participates in a homeowner association that develops rules related to homeownership maintenance and occupancy.

After the ten-year satisfaction period, the homebuyer can sell the home at its market value with no repayment of subsidy investments. OSTPH also retains the first right for refusal to purchase a home if one of the homebuyer decides to sell the structure prior to the end of the ten-year period.

Accomplishments in the First Year

In its first year of operation (Phase 1), OSTPH constructed and sold 19 new homes to qualified buyers who had received homeownership training and counseling. These first homes brought in financing unique to the Tribe, including the first use of state mortgage revenue bonds. The total development cost for these new homes was \$2,346,379 of which \$671,000 was funded by a 1998 Rural Housing and Economic Development grant which leveraged \$1,675,379 in other funds.

Shared Visions Court Homeowners Association: The owners of nine clustered houses have formed the Shared Visions Court Homeowners Association in an effort to preserve home values, maintain safety and security, and promote a healthy living environment. OSTPH encouraged the formation of the association and provided training and technical assistance so that the homeowners could develop and enforce the rules and regulations. The association is awaiting approval from the Tribe for its Articles of Incorporation and Bylaws. Additional homeowners associations are planned at all other clustered housing developments to promote neighborhood cohesion and collaboration.

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Future Housing Development Plans

OSTPH will continue to work with interested families to become eligible for private mortgages and to purchase a home. As enough families qualify for mortgages and additional funding is secured, OSTPH will facilitate the construction of new homes. OSTPH plans on using a variety of approaches to bring homeownership opportunities to the Pine Ridge reservation.

In Phase 2, OSTPH plans to:

- Construct and sell 10 houses in collaboration with the Department of Defense and the Walking Shield American Indian Society
- Construct and sell 8 houses under the Shared Visions Initiative
- Implement a Self-Help Housing Initiative to build and sell 6 homes
- Construct and sell 1 house using low-cost, advanced steel frame technology
- Construct 20 rental units using Low Income Housing Tax Credits
- Provide homeownership training and counseling to over 50 potential homebuyers and homeowners

In October 1999, OSTPH entered into an agreement with Global Modular Home Builders to purchase a demonstration unit for location on the Pine Ridge reservation. Global modular has designed a steel-framed, pre-fabricated modular assembly unit with a technically advanced Viroc board for high resistance factor sheathing. These homes are also fire, termite and rodent-resistant. The first 1,152 square foot three- bedroom unit will be completed by May 2000 and stored at a warehouse (at no cost to OSTPH) by the First National Bank of Gordon. This home will be moved in July to the Oglala development site.

Over an approximately 8-week period beginning in May 2000, the U.S. Navy Seabeas 3rd Construction Brigade of roughly 14 people will construct two homes. In an intensive 21-day period beginning on July 6, 2000, the U.S. Army Reserve 980th Engineer Battalion of more than 550 Army Reservists will construct 8 homes. The Department of Defense estimates the value of donated military personnel to be \$1,934,000.

Beginning in June 2000 six families will begin building their homes over a twelve-week period. The families will assist each other in building their homes, using volunteer-friendly design and materials brought from self-help models completed in Texas, with modifications defined by community design "charrettes" held at Pine Ridge in November 1999 and March 2000. Since self-help requires specialized oversight skills, OSTPH

Conclusion

will hire a construction manager specifically for the self-help initiative in May, 2000.

In September 2000 OSTPH will release an RFP for builders for 8 manufactured homes to be delivered to Pine Ridge in November 2000 (4 homes) and March 2001 (4 homes). The homes will be built to energy-efficient and durability standards developed by OSTPH over the last year. OSTPH will release an RFP in September 2000 for local contractors to complete the installation and finishes for these houses, to be completed in a two month period after homes are delivered.

OSTPH is conducting on-going marketing for Phase 2 homes. On average, three to four applicants call or come to the OSTPH offices each day. Thirty-seven people, who are income eligible but have credit or other obstacles to home-ownership, are enrolled in classes designed to improve their credit and prepare for home ownership. About half of these families will be eligible in time to purchase one of the houses.

The OSTPH Board will consider implementing a lease-to-purchase program on a pilot basis. The program, called Path-to-Purchase, will enable tribal members with uneven credit to move into their new homes while working to clear up their credit. The homebuyer would gain full title to the home after their credit has met the standards required by OSTPH.

The creation and mission of OSTPH represent an achievement of the Oglala Sioux Tribe in exerting greater control and sovereignty over a fundamental human need: the financing and development of decent and affordable housing.

OSTPH's success at attracting housing development funding from numerous public, private and nonprofit sources and its ability to implement a variety of housing initiatives help reduce tribal dependency on unpredictable and limited HUD funding. For the first time in its history, the Tribe is able to build new housing and provide wider housing choice to homebuyers and renters, especially those with lower incomes and physical disabilities.

End-Notes

Section 2.0

1. 1. Marcus, Jay. "The Development Process: Funding Sources through the Development Process," The Enterprise Foundation, 10227 Wincopin Circle, Suite 500, Columbia, Maryland 21044. Presented at the 10th Annual Oweesta Conference.

Section 5.0

1. "Ten Basic Responsibilities of Nonprofit Boards." Washington, DC: National Center for Nonprofit Boards, 1988. <http://www.ncnb.org/html/faq.html>
2. "Right from the Start: A Handbook for Not-For-Profit Board Members," State of New York Attorney General, <http://www.oag.state.ny.us/charities/duties.html>.
3. Ibid.
4. Ibid.
5. From National Center for Nonprofit Boards (NCNB) Webpage, Frequently Asked Questions (FAQ), <http://www.ncnb.org/html/faq.html#question2>. For a sample conflict of interest policy and disclosure form, see National Center for Nonprofit Boards' booklet, "How to Manage Conflicts of Interest: A Guide for Nonprofit Boards."
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7. Bryson, John M., Alston, Farnum K. Creating and Implementing Your Strategic Plan. San Francisco, CA: Jossey-Bass Inc., 1996.
8. Canada/British Columbia Business Service Centre, Online Small Business Workshop, <http://www.sb.gov.bc.ca/smallbus/workshop/busplan.html>
9. Hummel, Joan. Starting and Running a Nonprofit Organization. Minneapolis: University of Minnesota Press, 1980.
10. "How Do We Prepare a Budget?" Alliance for Nonprofit Management Webpage. <http://www.allianceonline.org/faqs/fmfaq20.html>
11. "What is an Internal Accounting Control System and How Can We Make Ours Effective?" Alliance for Nonprofit Management Webpage. <http://www.allianceonline.org/faqs/fmfaq24.html>

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Section 6.0

1. Marcus, Jay. "The Development Process: Funding Sources through the development process," The Enterprise Foundation, 10227 Wincopin Circle, Suite 500, Columbia, Maryland 21044. Presented at the 10th Annual Oweesta Conference
2. "The Marketing for Success Workbook". U.S. Small Business Administration Webpage. <http://www.sbaonline.sba.gov:70/11/Business-Development/Business-Initiatives-Education-Training/Marketing-Plan>
3. Hummel, Joan. Starting and Running a Nonprofit Organization. Minneapolis: University of Minnesota Press, 1980.
4. McNamara, Carter. "Basic Guide to Program Evaluation". Management Assistance Program for Nonprofits Webpage. http://www.mapnp.org/library/evaluation/fnl_eval.htm#anchor1586742

Appendix 3.2 – Sample Articles of Incorporation

AMENDED AND RESTATED

CHARTER

AND

ARTICLES OF INCORPORATION

OF

OTLALA SIOUX TRIBE PARTNERSHIP FOR HOUSING, INC.

The undersigned, who is a citizen of the United States and enrolled member of the Oglala Sioux Tribe, acting as an incorporator of a nonprofit corporation, hereby adopts the following Articles of Incorporation:

ARTICLE I

The name of the corporation is "Oglala Sioux Tribe Partnership For Housing, Inc." and its period of duration is perpetual.

ARTICLE II

The initial place on the Pine Ridge Reservation where the principal office of the Corporation is to be located is:

The Old Ambulance Building
Pine Ridge, South Dakota

Its mailing address is:

Oglala Sioux Tribe Partnership For Housing, Inc.
PO Box 3001
Pine Ridge, SD 57770

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ARTICLE III

- A. This Corporation is organized and shall be operated exclusively for charitable and educational purposes as contemplated and permitted by Sections 170(c)(2) and 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"). All references in these Articles of Incorporation to a particular section of the Code shall include the corresponding provisions of any future federal tax law. Within the framework and limitations of the foregoing, the specific primary purposes of the Corporation include:
- 1) To improve the community physically, socially, and economically by the coordinated efforts of the citizens of the Oglala Sioux Tribe, the business community, and government representatives, thus promoting the general welfare and combating community deterioration while lessening the burdens of government.
 - 2) To promote and develop affordable, decent, safe, and sanitary housing for residents of the Pine Ridge Reservation.
 - 3) To enhance affordable home ownership opportunities among residents of the Pine Ridge Reservation.
 - 4) To establish linkages and partnerships with public and private financial intermediaries and to provide financial services and assistance, including, but not limited to, home ownership loans, down payment buy-downs, lease-purchase options, revolving loan funds, and loan loss reserve services.
 - 5) To provide information, technical assistance, and housing counseling to the residents of the Pine Ridge Reservation concerning the methods and resources available for construction of new housing and the rehabilitation of substandard housing. The Corporation is also formed for the educational purposes of instructing the residents of the Pine Ridge Reservation on how to prepare for home ownership, purchase a home, and maintain and rehabilitate a home, which will improve or develop the capabilities of the community.
 - 6) To provide grants, loans, guarantees, or other arrangements to individuals or organizations working to develop the community, and to enter into lawful agreements to secure and enforce the performance and payment obligations of such financial assistance.
 - 7) To enter into contracts, partnerships, joint ventures, or other arrangements to provide or secure services, funding, or other assistance which serve the purposes of this Corporation.

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- 8) To solicit, hold, use, invest, and dispose of money, personal property, or real property and collect and use proceeds of such money or property, including interest, rent, sale proceeds, and other types of income, for the purposes for which this Corporation is formed.
 - 9) To acquire, hold, use, invest, and dispose of money, personal, and real property, and exercise any lawful right to make use of that property, including, but not limited to, renting, leasing, assigning, exchanging, selling, mortgaging, or otherwise encumbering, improving, converting, or altering such property.
 - 10) To acquire, hold, use, and dispose of through any lawful means or instrument, shares in stock, bonds, notes, debentures, mortgages, and other securities.
 - 11) To incur debt obligations and secure such debt or obligations through any lawful instrument which is reasonable and appropriate to achieve the purposes of the Corporation.
 - 12) To sue and be sued.
 - 13) To communicate with residents and government regarding capital improvements, needed services, available programs, and resources that currently or potentially impact the Oglala Sioux Tribe.
 - 14) To work in cooperation with other organizations having aims similar to those of Corporation.
 - 15) To do any and all lawful things which a natural person might find necessary and desirable for the general purposes for which the Corporation is organized, as permitted by a nonprofit corporation organized under Oglala Sioux tribal law and exempt from federal income tax under Section 501(a) of the Code as an organization described in Section 501(c)(3) of the Code.
- B. The Corporation (1) is a separate entity from the Oglala Sioux Tribe, (2) does not share the sovereign immunity of the Oglala Sioux Tribe, its officers, employees, agents, or attorneys, and (3) has no power to waive the sovereign immunity of the Oglala Sioux Tribe, its officers, employees, agents, or attorneys.

ARTICLE IV

- A. The Corporation is organized exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Code. Notwithstanding any other provision of these Articles of Incorporation, the Corporation will not carry on any other activities not permitted

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- to be carried on (1) by a corporation exempt from federal income tax under Section 501(a) of the Code as an organization described in Section 501(c)(3) of the Code, or (2) by a corporation contributions to which are deductible under Section 170(c)(2) of the Code.
- B. This Corporation is not organized nor will it be operated for pecuniary profit and no part of this Corporation's net income, earnings, or assets shall, directly or indirectly, ever inure to the benefit of, or be distributed to, any member or person having a personal and private interest in the activities of the Corporation, except that the Corporation may pay reasonable compensation for services rendered to this Corporation in furtherance of its purposes set forth in Article III. The property of the Corporation is irrevocably dedicated to charitable and public purposes. No substantial part of the activities of this Corporation will be conducting propaganda or attempting to influence legislation, except pursuant to an election under, and as permitted by, Section 501(h) of the Code, nor will this Corporation participate in or intervene in any political campaign on behalf of or in opposition to any candidate for political office.

ARTICLE V

The initial registered agent will be:

Paul Iron Cloud
PO Box C
Pine Ridge, SD 57770

ARTICLE VI

The name and address of the incorporator of the Corporation is:

Harold Dean Salway
PO Box H
Pine Ridge, SD 57770

ARTICLE VII

Provisions for the regulation of the internal affairs of the Corporation will be set forth in the Bylaws of the Corporation. The Corporation shall have no members.

ARTICLE VIII

The Corporation will abide by all criminal, civil, and regulatory laws of the Oglala Sioux Tribe.

ARTICLE IX

A. The affairs of the Corporation will be managed by its Board of Directors. The number, qualifications, terms of office, method of selection or election, powers, authority, and duties of the directors of this Corporation, the time and place of their meetings, and such other provisions with respect to them as are not inconsistent with the express provisions of these Articles of Incorporation shall be as specified in or prescribed pursuant to the Bylaws of the Corporation.

B. The current Board of Directors will consist of :

Harold Dean Salway	PO Box H	Pine Ridge, SD 57770
Paul Iron Cloud	PO Box C	Pine Ridge, SD 57770
Michael Graham	HCR 49, Box 2	Wounded Knee, SD 57794
Wilbur Between Lodges	PO Box H	Pine Ridge, SD 57770
Melvin Cummings	P.O. Box 109	Manderson, SD 57776
Warren (Bim) Pourier	Box 1987	Pine Ridge, SD 57770
Elsie Meeks	PO Box 340	Kyle, SD 57752
Gerald One Feather	PO Box 109	Oglala, SD 57764

They will serve until the first annual election of directors or until their successors are elected and qualify.

ARTICLE X

A. The Corporation may be dissolved in accordance with the following:

- 1) Involuntary dissolution. The Oglala Sioux Tribal Council ("Tribal Council") may involuntarily dissolve the Corporation by a resolution, only if it is established that (a) the Corporation procured its nonprofit corporation status under Oglala Sioux tribal law through fraud, (b) the Corporation has continued to exceed or abuse the authority conferred upon it by the Tribal Council, (c) the Corporation fails to submit financial reports to the Tribal Council in the manner and at the times described in Oglala Sioux tribal law, or (d) the Corporation fails to appear before the Tribal Council or its committees when requested. The Tribal Council shall provide the Corporation with written notice of its intent to dissolve the Corporation, and shall provide the Corporation 60 days in which to cure its breach of the above requirements. If the Tribal Council believes that such breach is not cured within such time, the Tribal Council shall give the Corporation, acting through its Board of Directors, an opportunity to be heard by the Tribal Council after providing the Corporation at least ten (10) days notice of the

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hearing before any vote is taken by the Tribal Council regarding whether to dissolve the Corporation pursuant to this Article X(A).

- 2) Voluntary dissolution. The Corporation may voluntarily dissolve for any reason at any time, after providing notice to its known creditors and claimants, and posting a notice of intent to dissolve on the Reservation for a period of one month. Upon the expiration of 90 days after the notice was posted, if there are no known creditors or claimants, then the Corporation may dissolve by submitting Articles of Dissolution with the Tribal Council, which shall be subject to the Tribal Council's approval and acceptance.
- B. Upon dissolution of the Corporation, and after the payment of all liabilities and obligations of the Corporation and all costs and expenses incurred by the Corporation in connection with such dissolution, any remaining assets shall be distributed to one or more nonprofit corporations that are organized under Oglala Sioux tribal law and that are organized and operated exclusively for charitable and/or educational purposes and that have established their tax exempt status under Section 501(c)(3) of the Code, or shall be distributed to the Oglala Sioux Tribe for housing and educational purposes, in the manner and in such amounts as may be determined by the Board of Directors. The Board of Directors shall make all reasonable efforts to distribute the Corporation's assets to one or more nonprofit corporations organized or operated exclusively for the purpose of promoting affordable, decent, safe, and sanitary housing for residents of the Pine Ridge Reservation and that have established their tax exempt status under Section 501(c)(3) of the Code. Notwithstanding anything apparently or expressly to the contrary contained in this Article X, if any assets are then held by the Corporation in trust or upon condition or subject to any executory or special limitation, and if the condition or limitation occurs by reason of the dissolution of the Corporation, such assets shall revert or be returned, transferred, or conveyed in accordance with the terms and provisions of such trust, conditions, or limitation.

ARTICLE XI

- A. The Corporation shall indemnify its directors, officers, employees, and agents, including persons formerly occupying such positions, and the heirs, executors, and administrators of such persons, against all expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred by them in connection with any action, suit, or proceeding relating to the Corporation, including an action by or in the right of the Corporation.
- B. No indemnification shall be provided for any person with respect to any matters as to which he or she shall have been adjudged in any proceeding not to have acted in good faith or in the reasonable belief that his or her action was in the best interests of the Corporation. If he or she has not been so adjudged, he or she shall be entitled to indemnification unless the Board of Directors determines that he or she did not act in good faith or in the reasonable belief that his or her action was in the best interests of the Corporation. To the fullest extent

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permitted by law, and except as otherwise determined by the Board of Directors in a specific instance, expenses incurred by a person seeking indemnification in defending any action, suit or proceeding shall be advanced by the Corporation before final disposition of the proceeding and upon receipt by the Corporation of an undertaking by that person to repay such amount unless it is ultimately determined that the person is entitled to be indemnified by the Corporation for those expenses.

ARTICLE XII

These Articles of Incorporation and the Bylaws of the Corporation may be amended to include any provision permitted by law, or may be restated in their entireties, at the times and in the manner provided in the Bylaws of the Corporation; provided that the Tribal Council shall approve any amendments, alterations, repeals, or restatements of the Articles of Incorporation.

IN WITNESS WHEREOF, I have hereunto set my hand this day of , 1999.

INCORPORATOR

Date

Wilbur Between Lodges

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Appendix 3.3 – Sample Bylaws

OGLALA SIOUX TRIBE PARTNERSHIP FOR HOUSING, INC.

BYLAWS

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OTLALA SIOUX TRIBE PARTNERSHIP FOR HOUSING, INC.

BYLAWS

TITLE ONE BOARD OF DIRECTORS

100 GENERAL AUTHORITY

The affairs of the Corporation shall be managed by its Board of Directors.

101 ELECTION, TERM, AND STRUCTURE OF THE BOARD

- a) The Board of Directors shall consist of eight (8) directors, but from time to time the number may be decreased to not fewer than three (3) or increased to not more than fifteen (15) persons, by a majority vote of the Board of Directors. Directors of the Corporation must be adult natural persons. A majority of the directors shall be members of the Oglala Sioux Tribe who reside on the Reservation. The Board of Directors shall strive to elect as directors representatives of the business community, representing businesses which are supportive of the purposes of the Corporation, representatives of Tribal and/or other governments and/or its/their agencies which are supportive of the purposes of the Corporation, and elder members of the Oglala Sioux Tribe.
- b) Directors shall be elected by a majority vote of the directors at the Annual Meeting of the Board of Directors, from the slate of nominees approved by the Nominating Committee. Voting shall be conducted by secret, written ballot.
- c) Directors shall serve for two years and until a successor is elected and qualified, or until the earlier death, resignation, or removal of the director. Their terms shall be staggered by electing a number equal to one half of the initial members plus one for a one-year term and the balance of the initial members for a two-year term at the first Annual Meeting or Special Meeting, whichever is first. Directors can serve up to two (2) consecutive terms. No director shall serve more than two (2) consecutive terms, but may serve additional non-consecutive terms.

102 POWERS AND DUTIES

- a) To fulfill its responsibilities set forth in Section 100, the Board of Directors shall have all the powers and duties necessary for the administration of the affairs of the Corporation and may take any action not forbidden by law or these Bylaws. Included among the duties of the Board of Directors are:

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1. To serve as the coordinating body that facilitates, networks, supports and catalyzes resources, and to expedite activities and to facilitate the establishment of any entities which will have a positive impact on the community;
 2. To identify governmental, foundation and private funding for economic, social and cultural development activities and to facilitate the establishment of entities which will further the Corporation's goals;
 3. To establish committees and assign members to serve on those committees pursuant to these Bylaws;
 4. To utilize expertise and resources to accommodate the Corporation's goals, pursuant to all applicable laws and ordinances; and
 5. To employ persons as may be necessary to carry out the Corporation's objectives, subject to the availability of funds.
- b) The Board of Directors may authorize any officers or agents of the Corporation, in addition to the officers authorized by these Bylaws, to enter into any contracts or execute and deliver any instrument in the name of and on behalf of the Corporation, and such authority may be general or specific.
- c) Directors shall, in addition to their general duties, communicate with the Tribal Council in the manner required under Oglala Sioux tribal law and distribute periodic reports regarding the activities of the Board of Directors and the Corporation to each District Office of the Tribe.

103 VACANCIES

The Board of Directors shall fill any Board vacancy resulting from the death, resignation or removal of any director. Each such vacancy shall be filled by a person from the same category as his or her predecessor, who shall serve for the remainder of his or her predecessor's term.

104 TERMINATION OF DIRECTORS

- a) A directorship shall terminate if any of the following occurs:
1. Two thirds (2/3) of the membership of the Board of Directors affirmatively vote to remove a director from office based on a determination that said director has failed to fulfill his or her fiduciary obligations to the Corporation, or has engaged in conduct seriously prejudicial to the purposes and interests of the Corporation. Before a termination under this sub-section, the subject director shall be given ten

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(10) days prior notice of the proposed termination and shall be given the opportunity to be heard by the Board of Directors before a vote is taken;

2. A director resigns from the Board of Directors;
 3. A director fails to attend three (3) consecutive meetings or more than four (4) meetings in a calendar year, unless such absences are excused by a majority vote of the other directors; or
 4. A director's term is completed and a successor is elected and qualified.
- b) A director removed under the provisions of this section shall not be eligible to serve on the Board of Directors for one year from the date of his or her removal.
 - c) The Board of Directors shall acknowledge in the minutes of its meeting any director who has been removed and/or replaced.

105 MEETINGS

- a) The Board shall meet annually for the purposes of organizing the Board, electing directors and officers, and transacting such other business as may properly come before the Board. The Annual Meeting of the Board of Directors of the Corporation shall be held at a date, time, and place as designated by the Board of Directors. If any necessary election of directors cannot be held at the Annual Meeting, the Board of Directors shall cause the election to be held as soon thereafter as convenient. Any such elections shall have the same force and effect as an election at an Annual Meeting. The Secretary of the Corporation shall give notice stating the place, day and hour of the Annual Meeting of the Board of Directors of the Corporation, which shall be sent to each board member not fewer than five (5) days nor more than thirty (30) days before the date of such meeting. The Board of Directors shall determine the method of notice.
- b) The Board of Directors shall meet monthly, or at such other interval determined by the Board from time to time and consistent with any requirements of tribal law. The Secretary of the Corporation shall give advance notice of a regularly scheduled meeting of the Board of Directors not fewer than five (5) days nor more than thirty (30) days before the date of such meeting. The Board of Directors shall determine the method of notice.
- c) The President or his or her designee may call a Special Meeting of the Board of Directors provided he or she gives twenty-four (24) hours notice personally, by facsimile, telephone, telegraph or electronic mail stating the time, date, place and purpose of the meeting stating. If one-third (1/3) of the directors request in writing

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that the President call a Special Meeting and state the time, date, place and purpose of the requested meeting, the President shall call that meeting in like manner.

- d) Attendance of a director at any meeting shall constitute a waiver of notice of such meeting except when a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened and does not participate thereafter in the meeting.
- e) Meetings shall be open to the public, but the Board of Directors shall maintain the right to adjourn into Executive Session by majority vote. Notice of such meetings shall be posted within the Reservation, as required by ordinance of the Tribal Council.
- f) If any meeting of the Board of Directors cannot be convened because a quorum is not present, a new notice of rescheduled meeting must be provided as set forth herein.

106 QUORUM AND VOTING FOR BOARD OF DIRECTORS MEETING

- a) At meeting of the Board of Directors the presence of a simple majority of directors, with at least one being an officer, shall constitute a quorum for the transaction of business. A quorum shall exist for the entire meeting once it is established, even if one or more directors leave the meeting with the result that less than a simple majority is present after the departure of such director or directors. Except as otherwise provided in these Bylaws, the acts done and decisions made by a majority of directors present at a meeting at which a quorum exists shall be the acts of the Board of Directors.
- b) A quorum established at the inception of any Board meeting, for the transaction of business, shall continue notwithstanding the subsequent departure of any member who was counted for the purposes of establishing a quorum.
- c) No director may vote by proxy.
- d) The Board of Directors may approve the following, only upon the affirmative vote of two-thirds (2/3) of the directors:
 - 1) The sale or disposition of the all or substantially all the Corporation's assets;
 - 2) Any merger, reorganization or restructuring involving the Corporation and the principal terms of such a merger;
 - 3) Any election to dissolve the Corporation;

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- 4) Any amendments to, or restatements of, the Articles of Incorporation of the Corporation or these Bylaws.

107 TELEPHONIC MEETINGS

Members of the Board may participate in a meeting through the use of a conference telephone or similar communications equipment, so long as all directors participating in such meeting can hear one another. Participation in a meeting pursuant to this paragraph constitutes presence in person at such meeting.

108 WRITTEN CONSENT

Any action required or permitted to be taken by the Board of Directors may be taken without a meeting and without prior notice, if all of the directors consent in writing to the action. The written consent shall be filed with the minutes of the proceedings of the Board of Directors. Action by written consent (to include facsimile) shall have the same force and effect as the unanimous vote of the Board.

109 CONFLICT OF INTEREST

- a) Any director, officer, employee of the Corporation, or member of a committee of the Corporation who is interested in a contract or transaction presented to the Board or a committee for action, authorization, approval, or ratification shall, without request, make a prompt, full, and frank disclosure of his or her interest therein to the Board or the committee, prior to action upon the contract or transaction. The disclosure (if required) shall include all material facts about the contract or transaction.
- b) The body to which the disclosure is made shall thereupon determine, by majority vote, whether a conflict of interest exists. A person shall be deemed to be "interested" in a contract or transaction if he or she is a party (or one of the parties) proposing to contract or deal with the Corporation, or is a shareholder, partner, employee, officer, trustee, or director of, or has a material financial or influential interest in, an entity proposing to contract or deal with the Corporation. A person shall not be deemed to be "interested" in a contract or transaction solely because it results in a benefit to a person or his or her family by virtue of their membership in the class of persons intended to be benefitted by a charitable program, as long as the contract or transaction is authorized by the Corporation in good faith and without unjustified favoritism.
- c) If the body determines that a conflict of interest does exist, the interested person shall not vote on, nor use his or her personal influence on, nor participate (other than to present factual information or to respond to questions) in, the discussion with respect to the contract or transaction. The interested person shall not be counted in

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determining the presence of a quorum at any meeting where the contract or transaction is considered or acted upon. The minutes of the meeting shall reflect the disclosure made, the vote on the existence of a conflict, and, where applicable, the interested person's abstention from voting and participation, and whether a quorum was present.

- d) This Section 109 shall not apply to the approval of compensation for a director's personal services to the corporation as a director.

110 COMPENSATION

Each attending director shall receive compensation of \$50 per meetings of the Board of Directors and committees (for all meetings of the Board of Directors and up to 12 committee meetings per calendar year), plus mileage. In the event that a quorum of directors or committee members is not present at a scheduled meeting at the noticed time of meeting, the directors and/or committee members that do attend shall receive mileage but not compensation.

Directors shall receive reimbursement for actual expenses incurred while attending conferences or other meetings when requested to attend such conferences or meetings by the President or a majority of the directors. Reimbursable expenses shall not exceed the current prevailing rates for federal employees.

TITLE TWO OFFICERS

200 OFFICERS

The officers of the Corporation shall be a President, Vice President, Secretary and Treasurer. These officers shall be appointed from among the members of the Board of Directors.

201 ELECTION AND TERMS OF OFFICE

- a) The officers of the Corporation shall be elected by majority vote of the Board of Directors at the first and each subsequent Annual Meeting.
- b) Officers may be removed from office pursuant to section 104 of these Bylaws. If an officer is removed, a successor shall be elected by the Board of Directors to serve until the next Annual or Special Meeting of the Corporation.

202 PRESIDENT

- a) The President shall be the Chief Executive Officer of the Corporation and shall preside at all meetings of the Board of Directors. The President is authorized to

Guide to Creating a Nonprofit Homeownership Entity



execute, in the name of the Corporation, all contracts and other documents authorized either generally or specifically by the Board to be executed by the Corporation, except when by law or these Bylaws the signature of another director or member is required.

- b) The President shall insure that all orders and resolutions of the Board of Directors are carried into effect, and in general perform all duties incident to the office of President.
- c) The President shall assure that preparations for meetings of the Corporation are in order.
- d) The President shall have such other duties and authority as may be prescribed by the Board of Directors from time to time.

203 VICE PRESIDENT

- a) The Vice President shall have the authority and perform the duties of the President in the event of the absence or inability of the President to act or when requested to do so by the President.
- b) The Vice President shall have such other duties and authority as may be prescribed by the Board of Directors from time to time.

204 TREASURER

- a) The Treasurer shall maintain adequate and correct accounts of the properties and business transactions of the Corporation, including accounts of its assets, liabilities, receipts, disbursements, gains, losses, capital, retained earnings, and other matters customarily included in financial statements.
- b) The Treasurer shall deposit all moneys or other valuables in the name and to the credit of the Corporation with such depositories as may be designated by the Board of Directors and shall disburse the funds of the Corporation as may be ordered by the Board of Directors. The Treasurer shall render to the Board of Directors, at each scheduled Board of Directors meeting, an account of all the transactions conducted by the Treasurer and of the financial condition of the Corporation. The Treasurer shall make available for inspection at reasonable times by any director or his or her representative, the financial reports, books and records of the Corporation. Inspection requests must be received in writing, by the Board of Directors, a minimum of fourteen (14) days before the inspection is to occur. All inspections must occur at the office of record during normal business hours.

- c) All checks and disbursements shall be executed on behalf of the Corporation by the Treasurer. No expenditure over one thousand dollars (\$1,000) may be made by the Corporation without the prior approval of the Board of Directors. The Treasurer shall have the authority and perform the duties of the President in the event of the absence or inability of the President or Vice President to act or when requested to do so by the President.

205 SECRETARY

- a) The Secretary shall cause the minutes of the meetings of the Board of Directors to be kept in a manner best suited to provide an accurate and complete record.
- b) The Secretary shall see that all notices of meetings are given in accordance with these Bylaws.
- c) The Secretary shall make available for inspection by any director the Corporation's relevant books and records of account, and minutes.
- d) The Secretary shall have the authority and perform the duties of the President in the event of the absence or inability of the President, Vice President, or Treasurer, to act or when requested to do so by the President. In such cases the Secretary shall designate a recorder of the minutes of that meeting.

TITLE THREE STAFF

300 EMPLOYEES

The Board of Directors shall employ an Executive Director and shall authorize the Executive Director to hire other employees to carry out the purposes of the Corporation. All salaries and other terms of employment shall be approved by the Board of Directors.

301 EXECUTIVE DIRECTOR

- a) The Executive Director shall serve at the pleasure of the Board of Directors and for such compensation as the Board may determine. He or she shall have general direction over the operation of the Corporation, may perform any duties delegated by the Board of Directors, and shall be its official representative. He or she shall comply with all rules and policies lawfully enacted by the Board of Directors and shall submit to the Board of Directors any reports or documents requested by them. He or she shall also provide whatever staff support is requested by the Board of Directors.

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- b) The Executive Director shall not be an officer of the Corporation but may be appointed as an ex-officio director without voting rights.
- c) All other staff are under the direct supervision of and shall be accountable to the Executive Director.

TITLE FOUR COMMITTEES

400 COMMITTEES

- a) The Board of Directors may, by resolution adopted by the affirmative vote of a majority of the directors, designate the officers of the Corporation as an executive committee.
- b) Prior to the Annual Meeting, the Board of Directors shall designate a Nominating Committee to prepare a slate of candidates to be presented for voting by the directors, for both vacant seats on the Board of Directors and officers of the Corporation.
- c) The Board of Directors may, by resolution adopted by the affirmative vote of a majority of the directors, designate standing and ad hoc committees. Each committee shall have at least one director as a member.
- d) Unless the Board of Directors shall otherwise provide, a committee's meetings shall be called and conducted in the same manner as provided in these Bylaws with respect to regular meetings of the Board of Directors. The Board of Directors shall have power at any time to fill vacancies in, change the membership of, or discharge any such committee at any time at its discretion.
- c) The designation of any committees and the delegation thereto of authority shall not relieve the Board of Directors of any responsibility imposed upon it by law or these Bylaws.

401 COMMUNITY INVOLVEMENT

The Corporation may invite the community to participate in its activities at its discretion from time to time. The Corporation may ensure citizen participation, community development and accountability of projects by using one or a combination of the following processes:

- a) Ad hoc or special committees of neighbors of a proposed development site;
- b) Neighborhood or District advisory councils; and/or

- c) One of a series of open meetings for the neighborhood, town or District.

TITLE FIVE MISCELLANEOUS

500 AMENDMENTS

The Articles of Incorporation of the Corporation, and these Bylaws may be altered, amended or repealed and new Articles of Incorporation or Bylaws may be adopted by the affirmative vote of two-thirds (2/3) of the Board of Directors; provided that the Tribal Council shall approve any amendments, alterations, repeals, or restatements of the Articles of Incorporation of the Corporation. Any director may propose an amendment.

501 SEAL

The Board of Directors may, by resolution, provide for an appropriate seal which shall include the name of the Corporation.

502 OFFICES

The registered office of the Corporation shall be as set forth in the Articles of Incorporation or in the most recent amendment of the Articles of Incorporation of the Corporation. The Corporation may have such other offices, within or without the Pine Ridge Reservation, as the directors shall from time to time determine.

503 BOOKS AND RECORDS

The Board of Directors shall cause to be kept at the registered office:

1. minutes of all meetings of the Board of Directors and committees;
2. all financial statements of the Corporation and other records and books of account necessary and appropriate to the conduct of the corporate business; and
3. the Articles of Incorporation and Bylaws of the Corporation.

504 AUDIT AND REPORTING

The Board of Directors may cause the records and books of account of this Corporation to be audited at least once in each fiscal year and at such other times as it may deem necessary or appropriate, and may retain such person or firm for such purposes as it may deem appropriate. The Corporation shall submit all financial documents and other required reports to the Tribal Council, in compliance with the ordinances of the Tribal Council.

Guide to Creating a Nonprofit Homeownership Entity



505 FISCAL YEAR

The fiscal year of the Corporation shall end on September 30.

Appendix 5.0 - Job Description for President/Chairpersonⁱ

- Oversee Board and executive committee meetings
- Serve as ex-officio member of all committees
- Work in partnership with the chief executive to make sure Board resolutions are carried out
- Call special meetings if necessary
- Appoint all committee chairs and with the chief executive, recommend who will serve on committees
- Assist chief executive in preparing agenda for Board meetings
- Assist chief executive in conducting new Board member orientation
- Oversee searches for a new chief executive
- Coordinate chief executive's annual performance evaluation
- Work with the nominating committee to recruit new Board members
- Coordinate periodic Board assessment with the chief executive
- Act as an alternate spokesperson for the organization
- Periodically consult with Board members on their roles and help them assess their performance

Job description for Vice-Presidentⁱⁱ

- Attend all Board meetings
- Serve on the executive committee
- Carry out special assignments as requested by the Board president
- Understand the responsibilities of the Board president and be able to perform these duties in the president's absence
- Participate as a vital part of the Board leadership

Job description for Secretaryⁱⁱⁱ

- Attend all Board meetings
- Serve on the executive committee
- Maintain all Board records and ensure their accuracy and safety
- Review Board minutes
- Assume responsibilities of the president in the absence of the Board president, president-elect, and vice president
- Provide notice of meetings of the Board and/or of a committee when such notice is required

Job description for Treasurer^{iv}

- Knowledge of the organization and personal commitment to its goals and objectives
- Understanding of financial accounting for nonprofit organizations
- Serves as financial officer of the organization and as chairperson of the finance committee.

Guide to Creating a Nonprofit Homeownership Entity



- Manages, with the finance committee, the Board's review of and action related to the Board's financial responsibilities.
- Works with the chief executive and the chief financial officer to ensure that appropriate financial reports are made available to the Board on a timely basis.
- Assists the chief executive or the chief financial officer in preparing the annual budget and presenting the budget to the Board for approval.
- Reviews the annual audit and answers Board members' questions about the audit.

Board Manual Components'

- the organization's annual report
- Mission statement
- Organization fact sheet (brief history and summary of current programs)
- Organizational chart
- Current strategic plan (or a summary)
- a Board organization chart
- a list of current Board members, titles, affiliations, and contact information
- Board Member Information Forms
- a description of Board members' responsibilities
- Board committee job descriptions
- Most recent minutes
- Annual calendar or program schedule
- Current annual calendar of Board and committee meetings
- the organization's newsletter, brochure, or other publications
- newspaper or magazine articles about the organization
- a brief biography of the executive director
- Articles of incorporation (corporate charter) and bylaws
- Current financial statements and budget for the current fiscal year
- Most recent audit report
- the long-range program and financial plan
- List of donors and sources of funding for two fiscal years
- Selected press releases and articles
- Promotional material (membership brochure, information brochure, advertisements, etc.)
- List of suggested resources (publications and organizations) related to the organization's area of interest

Appendix 6.0 – Sample Notice

REQUEST FOR PROPOSALS AND QUALIFICATIONS

The Oglala Sioux Tribe Partnership for Housing, Inc. (“**Purchaser**”) requests proposals and qualification statements (“**Proposals**”) for the following work (the “**Work**”):

Approximately 15 HUD Code Manufactured Homes Pine Ridge, South Dakota

The Work consists of manufacture, delivery, and installation on individual sites on the Pine Ridge Indian Reservation in and around Pine Ridge, South Dakota of approximately 15 HUD Code manufactured homes, with the following anticipated approximate specifications: 3 or 4 bedrooms, 2 baths, 1,288 square feet (28 x 46), installed on crawl space or basement (predominantly basement) foundations to be built by others. Homes must be delivered to individual sites no later than July 15, 1999 and be complete on foundations no later than July 30, 1999. There is the potential of further orders (up to approximately 100-250 homes), but there are no assurances there will be additional orders or that the supplier of the Work (“**Supplier**”) will be selected for any subsequent work.

Any potential Supplier may obtain the formal HUD Code Manufactured Homes Criteria (“**Criteria**”) by faxing a request to the Oglala Sioux Tribe Partnership for Housing, Inc. at fax number (605) 867-1522, requesting a copy of the Criteria and providing a fax number for return of the Criteria. Purchaser shall endeavor to fax back a complete set of Criteria within one business day of receiving a request, but shall not be liable if it does not do so. The Criteria will identify specific requirements of the Proposals, and identify contacts from which potential Suppliers may obtain additional information.

All Proposals must be received on May 17, 1999, at the place and in the manner set forth in the Criteria. Purchaser may, but shall have no obligation to, consider any Proposal which is not so received.

Following receipt of Proposals, the Purchaser anticipates negotiating with one or more proposed Suppliers to determine a final Supplier for the Work. Purchaser specifically reserves the right, in its sole discretion, to reject any or all Proposals, to purchase more or fewer homes with similar or different specifications than set forth in this Request or the Criteria, to request further information from any proposed Supplier, to negotiate terms different than provided in this Request or the Criteria, to have the purchases made by individual tribal members or other persons or entities, to select one or more Suppliers for any reason it deems reasonable, and to waive any nonconformity.

1. ml

ⁱⁱ From <http://www.ncnb.org/html/faq.html>

ⁱⁱⁱ *Ibid.*

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^{iv} From *The Finance Committee: The Fiscal Conscience of the Nonprofit Board*. Washington, DC: National Center for Nonprofit Boards, 1995. <http://www.ncnb.org/html/faq.html>

^v From NCNB, <http://www.ncnb.org/html/faq.html>



STANDING ALONE OR STANDING TOGETHER

**Advice And Materials To Use When
Deciding To Run Your Own Indian
Housing Program Or To Join Up
With Others**



STANDING ALONE OR STANDING TOGETHER

Presented at:

**The 8th National
Homeownership Summit:**

**Working Together to Build Programs
and Opportunities**

July 12, 2001

St. Paul, Minnesota



STANDING ALONE OR STANDING TOGETHER

Presented by:

Doug Schroeder
Steven Winter
Associates, Inc.
Buildings Systems
Consultants
Washington, DC
(202) 628-6100

Jim Wagenlander
Wagenlander &
Heisterkamp, LLC
Attorneys at law
Denver, CO
(303) 832-6511

With Support From:

Office of Native American Programs (HUD)

Working Together to Build Programs and Opportunities

Slide 3



STANDING ALONE OR STANDING TOGETHER

Session Outline:

What Is The Issue?	(10 min)
The Fundamentals Of Running A Successful Housing Program	(30 min)
Knowing Your Options On How To Administer A Housing Program	(30 min)
Case Study/Discussion	(30 min)
Review Supplemental Materials Handout	(10 min)
Closing Remarks	(10 min)



Building A Successful Housing Program

- Obtain The Right Resources
- Work With Government Agencies
- Develop Comprehensive Policies And Rules
- Implement The Right Controls
- Careful Management And Constant Vigilance



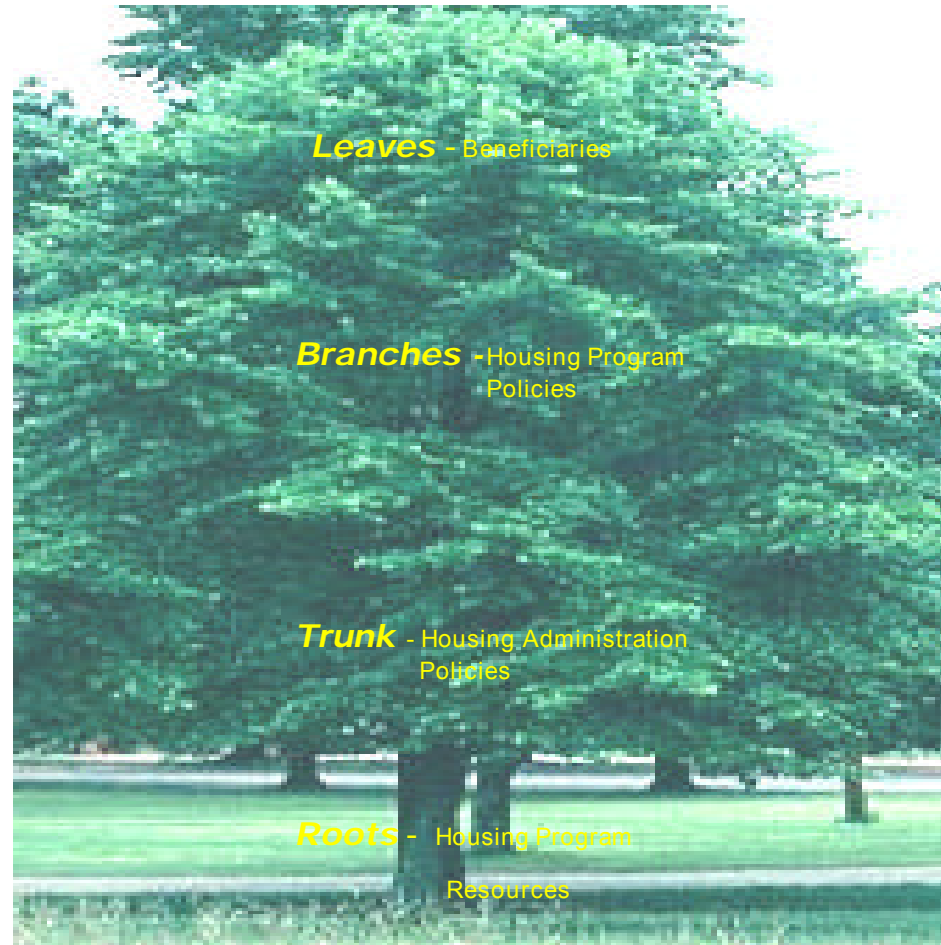
Running A Successful Housing Program

Four Pillars Of Good Housing Program Management

- *Requirements*
- *Responsibilities*
- *Success*
- *Fairness*



Running A Successful Housing Program



Working Together to Build Programs and Opportunities

Slide 7



Housing Program Resources

**The NAHASDA program began in 1997
and is administered by U.S. HUD**

**It is primarily a block grant program
for low-income Native Americans
that emphasizes self-determination**



Housing Program Resources

The Indian Housing Block Grant (IHBG) program was created by NAHASDA. It provides annual grants, on a formula basis, to all eligible Indian Tribes and Alaska Native Villages upon approval of an Indian Housing Plan

The funds may be used for a wide range of affordable housing activities



Housing Administration Policies

- Sets Out The Basic Rules For Running The Program
- Often Required By Funding Agencies
- Make Good Business Sense – They Help The Housing Office Manage Its Business Effectively



Housing Administration Policies

- **Strive To Avoid Redundancy And Contradiction With Those Policies Required By Funding Agencies**
- **The Tribe And Its Housing Office And Staff Must Follow The Policies At All Times**
- **No Individual Can Direct An Action That Conflicts With The Policies**



Housing Administration Policies

Exempt Programs

Housing Offices Can Establish Certain Activities That Are:

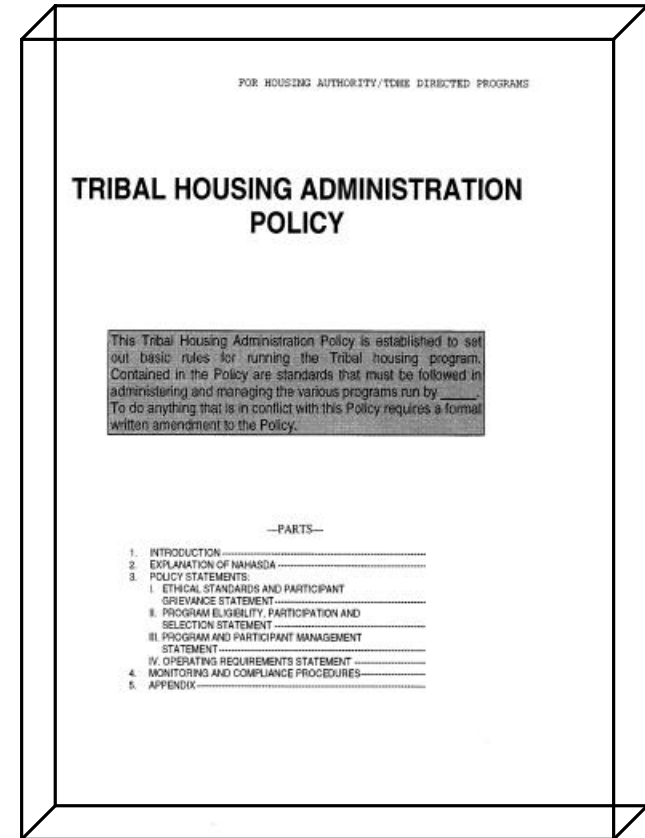
- 1) Not Funded With Restricted Money
- 2) For Which The Housing Office Wishes To Establish Special Policies



Housing Administration Policies

Example Statements

- **Ethical Standards and Participant Grievance Statement**
- **Program Eligibility, Participation and Selection Statement**
- **Program and Participant Management Statement**
- **Operating Requirements Statement**
- **Monitoring and Compliance Procedures**



Housing Program Policies

- Tribal Housing Programs Should Also Include Special Rules For Running Specific Activities
- While They Are Often Required By Funding Agencies, They Also Make Good Business Sense



Housing Program Policies

- **Whenever Individual Program Or Activities Are Conducted, The Housing Office Should Adopt A Written Program Explanation And Description Highlighting Special Requirements**
- **As The Program Grows, More Policies And Procedures Will Be Needed**



Housing Program Policies

Example Policies

Homeownership
(New Construction)

Rehabilitation

NOTE: This Program Policy shall remain on file at the Tribal Housing Office at all times.

Name of program/activity

Housing Office or TDHE name

PROGRAM TITLE:
AN ORIGINAL DESIGNATION ☐ OR A REVISED DESIGNATION ☐
DATE OF THIS DESIGNATION OR REVISION _____

This housing related program or activity has been established by the Housing Office (or TDHE) as one of the programs it will administer. What follows is a summary of the Program. These special rules along with the Tribal Housing Administration Policy must be followed. (This Summary shall be kept updated and revised when necessary.)

—SUMMARY OF KEY PROGRAM INFORMATION—

A. The date of the resolution establishing the Program is: _____

B. The anticipated duration of the Program is: _____

C. The following is a description of the type of Program: _____

D. The purpose and goal of the Program is: _____

E. A short description of the Program: _____



Housing Program Beneficiaries

- The Purpose Of A Housing Program Is To Help Individuals And Families With Housing
- All The Parts Of A Housing Program Produce Services For Tribal Members



When To Work With Other Tribes And When Not

- **What Does It Mean To Run Your Own Program?**
- **As An Alternative, You Can Join Up With Others To Jointly Run Programs**



Call Them What You Want

- **Consortia**
- **Regional Housing Authorities**
- **Cooperatives**
- **Umbrella Housing Authorities**
- **Contract Program Managers**



Determining Whether Or Not To Join

- **An Individual Decision**
- **No Right Or Wrong Answer**
- **The Process Of Deciding Can Be Helpful In Many Ways**





Some Reasons Why You Will Want To Stand Alone

- **Having Adequate Resources And Expertise To Run Your Own Program**
- **Not Wanting To Share The Decision-Making**
- **Wanting To Be Able To Focus On Your Own Tribe's Needs**





Some Reasons Why You Will Want To Stand Alone

- Not Wanting To Share Or Diminish The Tribal Or Village Power Or Authority
- Wanting Only To Be Impacted By Your Own Success And Failures, And Not By Others
- Wanting To Maximize The Ability To Locally Determine How To Spend Housing Assistance Resources
- Emphasizing Tribal Sovereignty





Some Reasons Why You Will Want To Stand Together

- Wanting To Strengthen The Ability To Run A Program
- Desiring To Improve The Program's Economy Of Scale And Provide More And Better Assistance
- Wanting To Expand Your Housing And Administrative Knowledge And Expertise
- Sharing The Benefit Of Combined And Increased Resources





Some Reasons Why You Will Want To Stand Together

- Wanting To Create Some Distance From Local Politics And Conflicts Of Interests
- Wanting To Improve The Program By Using Collaborative Decision-Making
- Sharing Geographic Or Tribal Similarities
- Desiring The General Benefits Of A Larger Program



Alaska Regional Housing Authorities



Aleutian Housing Authority
AVCP Regional Housing Authority
Baranof Island Housing Authority
Bering Straits Regional Housing Authority
Bristol Bay Housing Authority
Cook Inlet Housing Authority
Copper River Basin Regional Housing Authority
Interior Regional Housing Authority
Kasigluk Tribal Council Yup'ik Housing Authority
Kodiak Island Housing Authority
Metlakatla Housing Authority
North Pacific Rim Housing Authority
Northwest Inupiat Housing Authority
Tagiugmiullu Nunamiullu Housing Authority
Tlingit-Haida Regional Housing Authority

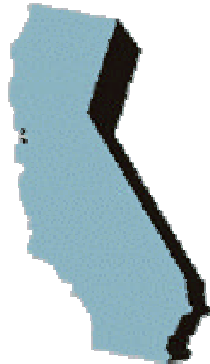
Working Together to Build Programs and Opportunities

Slide 25

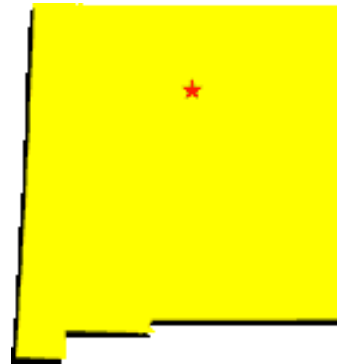


Regional Variations:

California



New Mexico



Types of Cooperative Organizations and Private Program Managers (full or limited services)

1. Regional or Umbrella Housing Authorities
(some authorized under state statute)
2. Other Cooperative Associations
1. Non Profit Management Companies
2. For Profit Management Companies



Questions To Ask A Private Manager

- What Will Be The Total Cost?
- How Much Control Will You Retain?
- What Is Their Style, Experience And Ability?
- What Can You Do For Us That We Cannot Do For Ourselves?



Manage Your Participation In A Cooperative, Or With A Program Manager

- There Is A Continuing Liability And Responsibility
- Periodically Evaluate Your Continuing Participation
- Keep Your Eye On The Big Picture



Evaluating Your Participation In A Cooperative

- **Would You Be Better Off Running Your Own Program?**
- **How Much Is This Association Costing You?**
- **Is This Relationship Comfortable?**
- **What Would Be The Consequences Of Withdrawing?**



Key Areas That Contracts And Compacts Should Cover

- Make Up Of The Membership
- Governing Board
- Duration Of Participation
- Withdrawal
- Disbanding The Organization

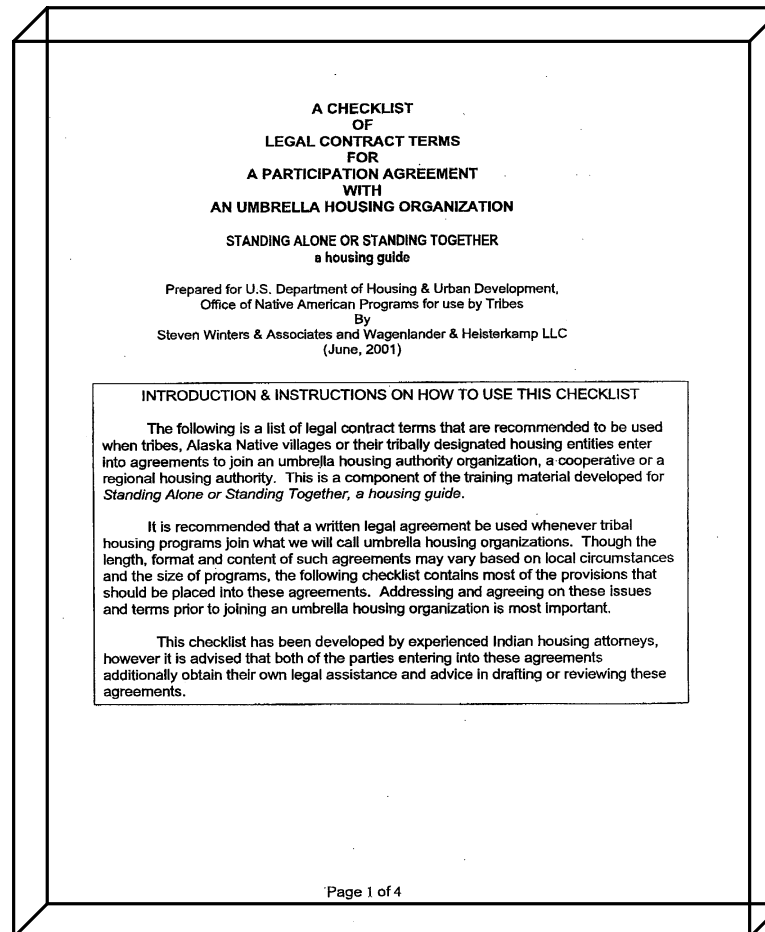


Key Areas That Contracts And Compacts Should Cover

- **Distribution Of Assets Upon Withdrawal Or Disbanding**
- **Contribution Requirements**
- **Liability Of Members**
- **Rights Of Individual Member**



Checklist for Contracts



Other Resources



Standing Alone or Standing Together: An Indian Housing Guide



Standing Alone or Standing Together

Case Study/Discussion – The White Bark tribe wrestles with deciding whether to manage their housing program alone or join a TDHE

The following is a case study description of a fictional tribe. By reading this case study you will identify some of the issues many tribes face when they consider the benefits and/or disadvantages of working cooperatively with other tribes to manage housing activities.

After reading the case study, a roll play exercise will be conducted between the fictional consultant and a tribal representative to demonstrate the deliberative process of deciding whether or not to become part of a cooperative organization.

During the role play the facilitator may ask for a pause in the deliberative process in order to ask the audience “what would you do in this situation?”

As you read the case description and listen to the discussion keep these questions in mind:

- Which approach will better suit White Bark’s needs, standing alone or standing together?**
- If they join the TDHE, what will happen to White Bark’s existing assets and how will they be maintained?**
- In selecting their program participants, White Bark has always given preference to their tribal members. How, if at all, would the TDHE allow them to exercise this preference?**
- With the loss of their longtime Director, do you think White Bark will have the in-house expertise to manage their housing program?**

Standing Alone or Standing Together

Case Study/Discussion – The White Bark tribe wrestles with deciding whether to manage their housing program alone or join a TDHE

White Bark is a small Indian tribe located in the Southwest U.S. Under the old-HUD program, White Bark received limited funds, but they still were able to construct ten units of rental housing. In selecting their program participants, the White Bark housing managers have always given strong preference to tribal members.

When NAHASDA and the IHBG (grant) program took effect, White Bark continued to manage the original ten units. They also began to: 1) plan to build ten more houses over the course of their current five-year Indian Housing Plan; and 2) establish a first-time homebuyer loan program. Recently the longtime White Bark housing program Director, which had run the housing program for the last ten years, resigned and left the reservation to take a job in a nearby city. The loss of this housing management expertise quickly became an issue of concern to the tribal leaders and members.

Nearby to the White Bark reservation the Three Pines TDHE manages the housing activities for four other local tribes. The Three Pines TDHE employs a Director and twelve professional staff members to develop housing and lending programs for its members.

Some White Bark tribal members who have been talking with their friends in the neighboring tribes have brought a petition to the tribal council asking them to consider joining the Three Pines TDHE. Here is a summary of their reasons to join the TDHE:

- To strengthen their ability to run a housing program;
- To realize an improved economy of scale with the TDHE and to provide better services;
- To have immediate access to expanded administrative knowledge and expertise;
- To share the benefit of combined and increased resources;
- To create some distance from local politics and potential conflicts of interests; and
- To improve their program by using collaborative decision making;

Another group of tribal members has petitioned the council to continue running an independent housing program. Here is a summary of their reasons for managing their program alone:

- To maintain autonomy in their decision-making;
- To focus on their own tribe's needs;
- To preserve their tribal authority over their housing program;
- To realize their own success and failures and not have results dependent on others; and
- To emphasize their tribal sovereignty.

The Council has hired you as a consultant to help them to decide the future of their housing program. What advice will you give them?

TRIBAL HOUSING ADMINISTRATION POLICY

This Tribal Housing Administration Policy is established to set out basic rules for running the Tribal housing program. Contained in the Policy are standards that must be followed in administering and managing the various programs run by _____. To do anything that is in conflict with this Policy requires a formal written amendment to the Policy.

—PARTS—

1. INTRODUCTION -----
2. EXPLANATION OF NAHASDA -----
3. POLICY STATEMENTS:
 - I. ETHICAL STANDARDS AND PARTICIPANT
GRIEVANCE STATEMENT-----
 - II. PROGRAM ELIGIBILITY, PARTICIPATION AND
SELECTION STATEMENT -----
 - III. PROGRAM AND PARTICIPANT MANAGEMENT
STATEMENT -----
 - IV. OPERATING REQUIREMENTS STATEMENT-----
4. MONITORING AND COMPLIANCE PROCEDURES-----
5. APPENDIX -----

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Board, the Tribal Chairman, and any Authority employee should receive a copy of this Policy when they take office or are employed. When possible the Policy will also be posted prominently in the meeting room in which the Authority conducts most of its meetings. Public knowledge of the Policy will help to insure that it is carefully followed and complied with by the Authority.

COMPLYING WITH THIS POLICY. The Authority must comply with this Policy without exceptions unless it is operating an Exempt Program (see Exempt Program below). Neither the Authority Board nor any individual member of the Board, Supervisory staff, tribal official or tribal employee can individually direct an action that is in conflict with this Policy.

CONFLICTING LAWS OR REGULATIONS. At the time this Policy is adopted there are no conflicting or contradictory tribal laws. However, should the Tribe formally adopt a Tribal law that conflicts with a provision of this Policy, and the Authority is aware of it, the Authority will amend the Policy. From time to time a funding source such as the U.S. Congress or the U.S. Department of Housing and Urban Development may adopt a new funding requirement that will conflict with a provision of this Policy. The Authority in these cases will determine whether to amend this Policy and add that new requirement or to forgo seeking additional funding from that agency or corporation.

OTHER AUTHORITY PROCEDURES, RULES OR REQUIREMENTS. The Authority will from time to time adopt other procedures and rules. Some of these requirements will be for specific programs and others might cover all Authority activities. These however will not be identified as policies. These rules and procedures however must not conflict with or violate the basic provisions and terms contained in this Policy.

EXEMPT PROGRAMS. It is possible that in the future the Authority might establish Exempt Programs that are (1) not funded with restricted money such as NAHASDA grants; and (2) that the Authority wishes to establish special policies for. If this should occur, the program shall be labeled an *Exempt Program* and this Policy and its provisions will not necessarily apply to it. A special policy shall be adopted to govern each Exempt Program and a resolution designating the exemption. Furthermore, this Tribal Housing Administration Policy shall be amended to identify each specific Exempted Program by name (see Appendix).

EXCEPTIONS AND WAIVERS. Except as expressly outlined elsewhere in this Policy, no exceptions or waivers of a Policy provision can be made by the Authority Board or anyone else to these Policy provisions.

AMENDMENT AND MODIFICATIONS. This Policy can only be amended by a vote of a majority vote of the designated number of Board members on the Authority Board and then only if (1) this is done in two consecutive regular meetings, and (2) a written notice that such an Amendment is to be considered is issued to each Board member at least 10 days prior to the first meeting where consideration of an amendment is to be voted on.

FORMAT OF THE TRIBAL HOUSING POLICY. In addition to a general Introduction, a short explanation of NAHASDA and Monitoring & Compliance Procedures, this Policy contains individual policy provisions or Statements which are organized under topical headings. Special Program Designation summaries and work sheets are also set to be used and are placed in the Appendix. For purposes of this Policy, Native American and Indian will be used interchangeably.

AN EXPLANATION OF NAHASDA

One of the ways the Authority receives funding is through the federal government's NAHASDA program. This program began in 1997 and is administered by the U.S. Department of Housing and Urban Development (HUD). It is primarily a block grant program for low income Native Americans that emphasizes self determination. It replaces a previous program that gave limited discretion and limited self-governance to tribes. Block grant money is allocated each year by a formula to our Tribe and to other federally recognized tribes. If a tribe has properly complied with the program's requirements in previous years, the Tribe is eligible to receive funding. The NAHASDA statute and HUD regulations set out the requirements that accompany acceptance of these moneys. Of course the Authority must also comply with tribal law and, where applicable, state law. It must also adhere to this *Tribal Housing Administration Policy*. Failure to do this could result in punitive actions against the Tribe, the Authority and in some cases individual Authority Board and staff members. In addition, in some cases HUD can take legal action to recover money improperly spent or determine the Tribe to be ineligible for funding in subsequent years and impose restrictions on the Authority's use of funds which are already awarded but not yet expended.

The Tribe is the government that HUD allocates this funding to and by direction of the Tribe the Authority is to be the recipient of the funds. The Authority administers the funds using the money on its own programs or it may grant some or all these funds to others for program eligible activities (Grantees). The Authority must develop one year and five year Indian Housing Plans each year for these NAHASDA funds which must be reviewed and approved by the Tribe. These plans are then submitted to HUD for a federal determination that the activities identified are eligible NAHASDA activities. The NAHASDA program encourages self-determination. Instead of dictating specific programs, it allows tribes to determine their low income housing needs and then develop their own ways of addressing those needs.

I. ETHICAL STANDARDS AND PARTICIPANT GRIEVANCE STATEMENT

The Authority is a public entity and it must carry out its programs and activities with highly ethical standards to insure good and honest government, to protect it and the Tribe's reputation, and to guard public moneys. The purpose of the Authority is to serve the interest of the Tribe and not the personal interests of Board Members, employees or tribal officials. In addition, funding agencies require the Authority to operate in an ethical manner when using its funds. The Authority also recognizes that its program applicants and participants should have the right to have Authority decisions reviewed a second time by the Authority as a matter of fairness. For all of these reasons the following ethical standards and participant grievance procedures are established.

1. **TRIBAL ETHICAL REQUIREMENTS.** If the Tribe has established formal ethical requirements for the Tribe, the Authority has decided that these standards shall also apply automatically to the Authority. They shall be enforced however by the Authority, not by the Tribe, as long as there is no tribal law stating otherwise. The following *additional* standards have been adopted by the Authority to govern its actions. In all cases the highest standard between the Tribe or Authority standards shall be applied and be adhered to.

2. **PROHIBITED CONFLICTS OF INTEREST.** In performing Authority activities, a person's duty shall always be to the Authority, or in the case of a Grantee to the Grantee, and it shall never be to the individual interests of Board members or to the individual interests of employees or agents of the Authority or Grantee. Therefore when individuals are involved in a decision-making process or gain inside information, neither they nor the people listed below are to personally benefit from or to obtain a personal or financial interest due to the individual's position at the Authority. Inside information is knowledge that is not suppose to be available to people outside the Authority. It is presumed that this information can always be shared with family and business associates or at least will appear so.

Improper conflicts of interest occur when any of the following individuals could benefit from either an Authority decision or from inside information:

- Authority or Grantee officer or Board member
- Authority or Grantee employee
- Authority or Grantee agent
- Any business partner to the above individuals
- An organization which employs or is about to employ any of the first three sets of the above individuals or his or her wife, husband, daughter, son, sister or brother.
- An immediate family member of an officer, board member, employee or agent (defined as wife, husband, daughter, son, sister, brother, mother, or father).

Except for situations involving inside information (where a conflict of interest cannot be avoided under any circumstance), a conflict of interest may be avoided if the individual who normally would make the decision does not participate in the decision-making process. This means he or she may not talk to decision makers about the matter, may not be present for any deliberations or decision making, may not have any say or vote, and may not be present at any decision making or vote. To avoid the conflict these rules must be carefully adhered to.

Conflicts include, but are not limited to, situations where an individual has an interest in any contract, subcontract or agreement (or a proceed from such an agreement) either for themselves, for people with whom they have business, or for their immediate family (wife, husband, daughter, son, sister, brother, mother or father).

Officers, Board members, employees and agents may participate in Authority and Grantee programs, including occupy their housing, as long as (1) they do not participate in their own selection, (2) there is no conflict with Tribal or state law, and (3) there is public disclosure of these interests and the basis for selection. Furthermore, if an officer, Board member, employee or agent is to benefit along with other program participants because of an Authority or Grantee decision solely because they are participants in an Authority or Grantee program, this shall not be a prohibited conflict. However, the individual's interest, when possible, should be publicly disclosed each time. The individual may also at any time elect at his or her discretion not to participate in the decision making process to avoid even the appearance of a conflict.

3. **GIFTS.** The Authority and Grantees and any of their officers, Board members, employees or agents may not personally seek any gifts or money from individuals or companies that are current or potential contractors, suppliers or program participants. They may however accept gifts, meals and favors so long as they have a value of less than \$20.00 per occurrence and so long as the total gifts, meals or favors from any such individual or company do not exceed \$100.00 per calendar year. Furthermore all gifts with a value of at least \$5.00 should be recorded by the officer, Board member, employee or agent and regularly disclosed to the Authority or Grantee. With Authority Board approval, certain traditional and non-cash ceremonial gifts, with a value larger than these limits, may also be accepted.

4. **DONATIONS.** The Authority and Grantees may solicit and accept donations to their programs. However, all solicitations and donations must be open, public, recorded and be for the sole benefit of the Authority or Grantee. Furthermore donations shall not be considered or accepted if they would influence or appear to influence the award of a contract.

5. **OTHER AUTHORITY AND GRANTEE PROHIBITIONS.** Authority and Grantee officers, Board members, employees and agents cannot do any of the following:

- They are prohibited during and after their relationship with the Authority or Grantee from disclosing or using for their personal benefit *confidential, inside and privileged information*.
- They are prohibited from using Authority and Grantee resources for personal *political activity*.
- They cannot be *delinquent* on housing or other payments owing the Authority.
- They cannot violate any Authority or Grantee *drug and alcohol* rules and requirements.

6. **DISCLOSURE OF VIOLATIONS.** All Authority and Grantee officers, Board members, employees and agents are required to promptly disclose to the Authority all acts or conduct by Authority officers, Board members, employees, agents, contractors, tenants, program recipients that are illegal or are in violation of this Policy. No retaliation or punitive actions shall be taken against an individual for merely making such a disclosure to the Authority.

7. **BOARD RESPONSIBILITY.** The Board is responsible for establishing goals, policies and practices for the Authority and providing an overview, direction and monitoring of programs. Therefore, Board members are to refrain from running the day to day activities of the Authority and from individually interjecting themselves in management decisions except when specifically authorized to do so in writing by the Board.

8. **TRIBAL INVOLVEMENT.** Elected Tribal officials are vitally important in carrying out the activities of the Authority and should be routinely updated. However, so long as the Tribe maintains the Authority as its Tribally Designated Housing Entity and a separate organization tribal officials are not to direct particular services, assistance or programs except for approving the Tribe's Indian Housing Plan. Furthermore, Tribal officials can never direct that this Tribal Housing Policy be violated.

9. **PARTICIPANT GRIEVANCE PROCEDURE.** Any applicant or participant in an Authority program is entitled to have any Authority decision affecting his or her participation reviewed if that person files a grievance in writing with the Authority within 10 days of the Authority decision. A hearing will then be conducted and a decision will be promptly made. The Board will determine in each case whether the hearing will be public or conducted in a closed session. This Grievance process does not apply to complaints filed by employees, vendors, contractors or bidders.

Complainants involved in evictions or lease terminations shall be informed of the opportunity to examine any relevant document, record or regulation that is directly related to an eviction or termination prior to any Grievance hearing.

When a Grievance is filed, it will be at the sole discretion of the Authority whether the implementation of the preceding Authority decision or action should be delayed until the Grievance can be heard and decided. Unless the Board states otherwise the filing of a Grievance shall not suspend, delay or disrupt the implementation of a decision or action.

At a Grievance hearing the complainant may designate and be represented by an advisor or representative. A Grievance hearing shall be an informal procedure and the Board shall determine the procedure by either establishing standing Grievance procedure rules or on a hearing by hearing basis. The Board, sitting as the Grievance panel, will make the final decision whether to sustain, reverse or modify the Authority decision or action and will notify the complainant of its determination. But nothing involving this Grievance procedure shall waive any sovereign immunity that the Authority may have.

II. PROGRAM ELIGIBILITY, PARTICIPATION AND SELECTION STATEMENT

From time to time the Authority and its Grantees will operate different housing assistance programs. When these programs involve selection of participants the following procedures will always be followed. The Authority tries, as best as it can, to establish a fair and workable method for allocating its assistance but, many times need will far exceeds the Authority's resources. Therefore, the Authority has set up these rules to fairly select its tenants and program recipients.

The U.S. Department of Housing and Urban Development's (HUD) NAHASDA limits in most cases who can be selected for programs operated with its funds. These rules must be carefully complied with or the Authority and Tribe risk losing HUD funds. NAHASDA requirements have therefore been incorporated into the following Policy provisions.

The Authority may also receive funds from other agencies or companies that have different eligibility and selection requirements. If these requirements do not conflict with the Policy provisions they may be further set out in the Authority's respective program requirements. If on the other hand they conflict with this Policy then the Authority must follow the Tribal Housing Policy rules for Exempt Programs and establish special eligibility rules in order to accept and use these funds.

1. **LOW INCOME INDIANS.** To be selected by the Authority or a Grantee for assistance, a program participant must be an Indian and low income. Low income is defined as being the total income of the family residing in an assisted housing unit or otherwise being assisted, not exceeding 80% of the median income for the area. The determination of median income is to be made by the Secretary of HUD with adjustments for smaller and larger families. In making this determination the HUD Secretary may make adjustments to reflect prevailing levels of construction costs or unusually high or low family incomes.

2. **NON-INDIAN EXCEPTION.** A non-Indian, who may be either low income or not, may be selected if his or her housing needs cannot be otherwise reasonably met and if the Authority determines that the non-Indian's presence in the Indian area is essential to the well being of Indians.

3. **NON-LOW INCOME INDIAN EXCEPTION.** The Authority may elect to have an Indian who is not low income eligible for a program but only in certain specific situations and programs and only if the standards established by HUD's NAHASDA regulations for non-low-income Indian participation can be satisfied.

4. **MODEL ACTIVITIES EXCEPTION.** When using NAHASDA funds, certain eligibility, participation and selection requirements imposed by this Policy may be modified but only when the program in which the participant wishes to participate in has been approved as a Model Activity by both HUD and the Authority

5. **NO TRIBAL PREFERENCE.** The Authority and its Grantees will not provide a tribal preference for their programs nor will they limit participation in their programs to tribal members. However because of certain land ownership restrictions some Authority programs may be only feasible for tribal members.

6. **CONTINUED PARTICIPATION BY NON-INDIANS.** The Authority was allowed to have non-Indians participating in its low rent program before October 26, 1996. In such cases those individuals are eligible to continue to participate in the program as long as they remain in their units.

7. **CONTINUED PARTICIPATION WHEN AN INDIVIDUAL OR FAMILY IS NO LONGER LOW INCOME.** Though participants in Authority programs must in most cases be low income to be selected as a

participant, once they begin their participation there is no ongoing requirement that they remain low income. The Authority does not wish to discourage its participants from increasing their incomes.

8. FAIRNESS IN SELECTION, INCLUDING SELECTIONS OFF THE TOP OF WAITING LISTS.

Authority and Grantee selection of program participants must be fair and determinations cannot be made based on family ties, political views or personal relationships. Selection will be made by Authority staff and not the Authority or Grantee Boards and always according to the written rules of the particular program. Those rules should be in writing and along with this Policy they must always be available to the public. The Board may however review selections for compliance with this Policy and other Authority requirements. When demand for participation in a particular program is anticipated to exceed availability, all eligible applicants are to be placed on written waiting lists as they apply for participation in a program. Participants must then be selected from that waiting list starting with the earliest applicant on the list.

9. APPLICATIONS. The Authority and Grantees shall publicly announce when it is taking applications for each of its programs and a written record with a date of application must be made of each application. Applicants are entitled to apply for as many programs as they wish.

10. SPECIAL NEEDS. If the Authority wishes to make a special effort to address special needs such as emergency housing, housing for people with disabilities, veterans, medical needs housing and temporary housing, the Authority will set up special programs instead of providing preferences for these special needs groups in its standard programs. However, no one with these particular special needs shall ever be discriminated against should they apply for a standard Authority program.

III. PROGRAM AND PARTICIPANT MANAGEMENT STATEMENT

To run its programs the Authority has established some basic management practices. These include a way to designate Authority programs, tenant occupancy rules, continuing program participation requirements, housing maintenance, rental and homebuyer payment requirements and other asset management requirements. These practices need to be formalized to insure that the Authority's programs are run in a responsible, uniform and consistent manner. Though the Authority will establish other written program and management procedures, the following are the basic requirements that always need be followed.

1. **PROGRAM DESIGNATION.** Whenever individual programs are established the Authority must adopt a written program explanation and description. These Program Designations shall summarize in a short statement the basic elements of each Authority program. (See Appendix for form and work sheet.)
2. **ASSET MANAGEMENT.** The Authority must keep a current inventory of all of its equipment and property. It will also take actions necessary to protect and retain all of property it owns unless the property has no significant value. In addition, Authority property will be adequately insured when insurance is available and reasonable.
3. **MAINTENANCE OF HOUSING AND OTHER STRUCTURES.** The Authority will make every reasonable effort to maintain all of its housing and other structures that it owns. This includes insuring that both routine and non-routine maintenance is performed by either the Authority or another party. Existing housing is an important tribal investment and asset and when practical and reasonable every effort should be made to maintain it.

When the Authority owns housing that was previously developed under the United States 1937 Housing Act (Low Rent and Mutual Help housing) the Authority shall use the block grant money it receives from HUD's NAHASDA program first to maintain and operate those units.

Whenever the Authority owns any housing units written Authority *Housing Maintenance Procedures* will be established and followed. This will not only establish the minimum standards that housing is to be maintained at, but also how the maintenance is to be accomplished. The Authority furthermore will not permit units that are not decent, safe and sanitary, as determined by local and tribal standards, to be occupied.

Apart from any Homebuyer program, and in some cases because of condition or location, Authority rental units may have to be conveyed, sold, abandoned or demolished. Every effort shall be made to avoid this but if this is necessary it shall only happen by a vote of the Board. It should also be done with the knowledge that if 1937 Housing Act funds were used to construct the unit, loss of Authority ownership is likely to reduce the amount of block grant money that the Tribe and Authority receives under NAHASDA. In order to dispose of or demolish 1937 Housing Act units certain HUD mandated preconditions may also have to exist.

4. **HOUSING RENTS & PAYMENTS.** Housing owned by the Authority may be operated by the Authority under one or more Authority programs. Each program will have its own rules including the requirements regarding rents or housing payments that are to be charged. If rent or housing payments are established by the Authority they shall be reasonable and appropriate. The Authority and Tribe are committed to collecting these charges from the tenants and homebuyers. The housing rents and payments to be imposed will be set out in the Program Designations and shall include who is to pay for heat and other utilities.

In no case however will the Authority charge any low-income rental tenant or homebuyer in a HUD NAHASDA assisted unit more than 30% of the adjusted income of the assisted family. To carry out this provision a procedure will be followed by the Authority, using applicable HUD mandated requirements, to determine and calculate adjusted income.

5. PROGRAM AGREEMENTS, RULES OF OCCUPANCY AND TERMINATION OF PARTICIPATION.

When the Authority or a Grantee program participant is renting or renting with an option to purchase an Authority owned unit (a Homebuyer program), the Authority will have a lease or homebuyer agreement with the tenant or homebuyer. Unless otherwise allowed under tribal law these leases and agreements shall:

- permit termination during the term only for serious or repeated lease violations, violation of applicable laws, or other good cause.
- not contain unreasonable terms
- require the housing to meet applicable housing codes and standards
- require notice of lease termination
- allow terminated or evicted individuals to examine records related to the termination
- permit termination for activity of the resident, resident's household, any guest or other person under the control of the resident that (1) threaten the health, safety or right to peaceful enjoyment of other residents, Authority or Grantee employee or agent, or persons residing in the immediate vicinity of the unit, or (2) is involved in criminal activity on or off the premises.

The Authority will also develop written *Occupancy Rules* governing the use of its housing units. Tenants and homebuyers will be required by their agreements, contracts and leases to comply with these Occupancy Rules. Though these rules may be changed from time to time by the Authority, they must always be posted for public display at the Authority or Tribal office.

Because most of the requirements of the different Authority programs are now basically determined and established by the Authority and not the federal government, tenants, homebuyers and other program participants are expected to comply with the requirements. The Authority needs to actively and firmly enforce them and if a participant violates a requirement the Authority may terminate assistance and that includes participants who are renting or purchasing a house. If participants refuse to move out of units after termination the Authority may take other legal actions including eviction or, if it is a loan program, foreclosure. In this process the Authority will strive to treat participants as fairly as possible under the particular circumstances. The Authority may also take action to recover delinquencies, damages or repayment of money. Participation and continuation of participation in an Authority program is not a right and participation may be revoked to protect the rights and interests of the Authority, Tribe and our communities.

IV. OPERATING REQUIREMENTS STATEMENT

In operating and running its programs, the Authority and Grantee Boards, staff, agents and, in some situations its contractors, need to follow certain standard operating practices and procedures. This statement establishes only the most basic requirements. They however shall apply to all Authority operations. Additional operating standards and procedures will from time to time be established by the Authority and Grantee Boards and the Authority's Executive Director. However, the following office practices must always be complied with. They are created to both protect the assets of the Authority and to better its programs.

1. **BOARD.** The Authority Board shall establish all Authority programs, create policies, provide oversight, monitoring and review, and have overall responsibility for the Authority and all of its activities. Unless the Authority has no staff, it is not the responsibility of the Board to manage the Authority.

2. **PERSONNEL.** The Authority may employ a staff to administer its programs. It may also contract for services. The Authority's chief executive officer shall be the Executive Director. When staff is required an Executive Director shall be hired, and may be later terminated, by the Authority Board. All other employees and contract personnel shall be hired, and may be later terminated, by the Executive Director but always in consultation with the Authority Board. In most situations the Executive Director will execute contracts for the Authority and, when appropriate, act as the Authority's contracting officer. The Board however shall always be kept fully advised.

In employment, the Authority shall give the following preference in the order listed: (1) tribal members and (2) Native Americans.

The Authority is required to have a *Personnel Handbook* if they have at least one employee. The Handbook shall be approved by the Board. The Handbook shall describe the Authority's personnel, employment and human resource requirement for the Board and the staff. The terms of this Handbook and other employment practices must always comply with the requirements set out in this Policy. From time to time the Handbook may be changed and updated and this can be without specific notice to employees but an updated Handbook must be available to any employee upon request. Each employee and Board member shall be provided a Handbook upon their beginning a relationship with the Authority. It should be understood however that the act of adopting a Handbook and any other employment standards does not itself establish an employment contract nor is it a waiver of the Tribe or the Authority's sovereign immunity.

Employment and promotion at the Authority is solely based on performance, merit and ability. Compensation and benefit shall be reasonable and additionally limited by the financial resources of the Authority.

The Executive Director may be dismissed with or without cause. The remainder of the staff may only be dismissed for cause and examples of those causes shall be set out in the Personnel Handbook. Staff may also be dismissed for reduction in force and insufficient funding at the Authority or individual programs. Employees may also be suspended, demoted or placed on probation, with or without pay. All termination and personnel action may be reviewed by the Board.

3. **DRUG FREE WORK PLACE.** No Authority or Grantee employee, Board member or agent shall manufacture, distribute, dispense, possess or use a controlled substance or alcohol in the work place. Board Members and employees may be required to take a drug test from time to time and the unlawful use of drugs may be grounds for termination. All Authority and Grantee Board Members, employees and agents shall report to the Authority any unlawful drug or alcohol possession, use or sale that is observed during working hours. Lastly, certificates acknowledging that the work place is a drug free environment will be signed by all of these persons and placed in appropriate files.

4. **EMPLOYEE GRIEVANCES.** If the Authority has employees, The Authority shall have an informal *Employee Grievance Procedure* that allows for review of personnel actions and complaints. Unless the issue involves the action or complaint of the Board or a Member, this informal review shall always be conducted and decided by someone at the Authority other than the decider of the original decision or the party being complained about. The Employee Grievance Procedure shall be summarized in writing and attached to the Personnel Handbook.

5. **PROCUREMENT AND CONTRACTING.** The Authority and its Grantees shall follow purchasing and contracting procedures for goods and services that will assure quality, value and competitive prices for the Authority and its programs. Competition and openness in selection as well as full compliance with applicable federal, tribal, and state law and Authority policies is required. When there are conflicts between laws and a procedure called for under this Tribal Housing Administration Policy, the procedure that is the most strict must be complied with. Money used by the Authority in procurement or contracting may be additionally restricted by funding agencies and sources. HUD and other federal funding agencies also have extensive regulation requirements that must be understood and carefully complied with. If the Authority accepts funds, it must be sure to comply with these additional requirements that accompany those funds.

The Authority is to enter into purchases and contracts only where adequate Authority funding is available. Furthermore, efforts will also always be made to contract only with responsible parties who have the ability to successfully and properly complete their agreements.

The Authority shall adopt a *Procurement and Contracting Handbook* that shall contain this Policy Statement, the Ethical Standards Statement and other critical contracting and procurement policies, procedures and requirements.

- *Minor purchases and contracts that are under \$1,000.00*, may be solicited and entered by the Authority's Executive Director using his or her discretion. Indian preference to the greatest extent feasible shall be applied.
- Solicitation of *small purchases and contracts that are under \$100,000.00* may be conducted by informally soliciting proposals, quotes or bids from a reasonable number of competitive sources. For awards based solely on price and with fixed specifications, awards can only be made to the qualified Indian-owned economic enterprise or organization with the lowest responsive quotations if they are not more than 10% higher than the lowest responsive quotation received and are from a responsible sources with the lowest responsive quotations or bids. For awards based on factors that include more than price (requests for proposals) solicitations shall explain the points or rating system that will be used to evaluate proposals and award contracts. 15% of the points shall always be given for qualified Native American proposers and up to 10% of the points for training and employment of Native Americans. Awards can then only be made to the best proposal as represented by the highest points.
- *Standard bidding practices with sealed bids* may be used for any fixed price procurement. However, it is required for any such award over \$100,000.00. Bids are to be publicly solicited and advertised. A firm, fixed-price contract (lump sum or unit price) will be awarded and only to responsible bidder whose bid is responsive as well as the lowest in price subject to Indian preference requirements. Specification and pertinent contract terms shall be provided to any interested bidders. The invitation or solicitation shall always state the time and place for both the receipt of bids and the public bid openings. Awards may only be made to qualified Indian-owned economic enterprises or organizations with the lowest responsive bids whose bids are within the identified range that the Authority has determined as the "x factor" (and expressed on a standard schedule adopted by the Authority Board by resolution). This shall be explained at the time the Authority makes any solicitation for bids.
- *Standard requests for proposals* may be used for any professional service and non-fixed price contracts where other factors, in addition to price, will be considered. However, it is required for any such award over \$100,000.00. The proposals are publicly solicited and advertised using a Request for Proposal (RFP). The solicitation shall explain the points or rating system that will be used to evaluate proposals and award contracts. 15% of the points shall be given for qualified Native Americans and up to 10% for training and employment of Native Americans. Awards can then only be made to the best proposal as represented by the highest points.

- *Non-competitive proposals* process may be used only when the award of a contract is not feasible using the above methods and when one of the following applies: (1) an emergency, (2) only one source of supply is available and the contracting officer so certifies, and (3) after solicitation competition is determined inadequate. In any of these cases a written record must be made and the awarded price must be determined reasonable after performing a cost analysis. State and local intergovernmental cooperative purchasing may also be utilized.

In any solicitation the Authority may reject any and all bids and proposals. Awards shall also only be given to responsible parties and in no case will an award be given to federal, tribal or Authority suspended or debarred contractors.

For contracts over \$100,000.00 100% performance and payment bonds or equivalent letters of credit in the amount of 25% are required.

Funding sources such as HUD often impose additional requirements on procurement when their funds are involved. The Authority must comply with these requirements. The Tribe may also establish procurement and contracting requirements. For HUD NAHASDA money these requirements include labor standards, non-discrimination, preferences, lead based paint prohibitions, environmental assessments and prevailing wage rates just to name a few. Prior to awarding a contract, the Authority will determine what additional requirements are required and insure that they are complied with.

6. **NATIVE AMERICAN PREFERENCE.** It is the policy of the Authority to develop and operate projects and awards grants with Indian preference. This is also required under NAHASDA. To the greatest extent feasible preference shall be given to Native American organizations and Native American owned economic enterprises in the award of all contracts and in all purchases. Those entities with more than 50% Native American ownership and control, as determined by the Authority shall be determined Native American owned. The Native Americans however must be members of federally recognized tribes, as defined by the HUD NAHASDA law.

Native American preference shall be placed by Authority and Grantee in their contracts and subcontracts. Furthermore, provisions requiring Native American employment and training shall also be set out in all contracts.

7. **CONTRACTING.** When feasible, all contracts and agreements shall include those clauses and provisions required by tribal funding sources. The Authority and Grantees will maintain a contract administrating system which will try to ensure that contractors perform in accordance with the terms, conditions and specifications of their contracts and purchase orders.

8. **GRANTEES.** The Authority may grant moneys to other organizations and entities (Grantees) who in turn will allocate the money. In these cases the Grantee is subject to the same obligations that the Authority has. The Authority may develop additional requirements for Grantees. Furthermore, The Authority will regularly monitor Grantees for compliance.

9. **FINANCIAL.** The Authority shall adopt a written *Investment Policy* along with a cash management and fiscal management procedure. One of the reasons for these procedures is to insure conformance to federal and tribal laws and requirements. They also are adopted to ensure effective and sound fiscal management of all Authority moneys and investments.

10. **AUDITS.** The Authority will obtain an annual audit in conformance with the Single Audit Act and OMB Circular A-133 whenever the Authority's annual budget or funds exceed \$300,000.00.

11. **INDIAN HOUSING PLAN.** Each fiscal year the Tribe, with the assistance of the Authority, will prepare an Indian Housing Plan containing the Tribal Housing Program's (1) goals and objectives, (2) needs, (3) affordable housing resources if NAHASDA funds are being used, (4) financial resources and (5) activities. This may be required by HUD under NAHASDA if NAHASDA funds are being used but it is also done because the Authority will utilize this Indian Housing Plan to organize and monitor its entire housing program. The Plan, or only that portion of the Plan required by HUD will then be submitted to HUD each year for its determination that the HUD funded activities meet with NAHASDA's requirements. The Plan may be amended during the year.

12. **AFFORDABLE HOUSING ACTIVITIES**. Except for a few special exceptions, any use of HUD NAHASDA money by the Authority and its Grantees must be limited to low income Native American housing activities.

13. **SOVEREIGN IMMUNITY**. The Authority as a tribal entity has sovereign immunity. It can waive that immunity in certain situations and contracts but only with an explicit and clear waiver and only when it believes it is in the interest of the Authority. The Authority cannot in any way waive the sovereign immunity of the Tribe.

MONITORING AND COMPLIANCE PROCEDURES

The success of the Authority and its programs is to a great extent based upon the Tribe and the Authority complying with this Tribal Housing Program Policy and following the Tribe's Indian Housing Plan. To be sure that the Authority does not violate the Tribal Housing Program Policy and that it follows the Indian Housing Plan, specific monitoring procedures have been established. These procedures are set out as follows.

IMPORTANCE OF MONITORING. To insure compliance, periodic checks and monitoring needs to be made. This is partially to insure that various funding requirements like NAHASDA's are not jeopardized. But it is also done to maintain a good and effective program.

SHARED RESPONSIBILITY FOR MONITORING. Monitoring the Tribal Housing Program for compliance is primarily the responsibility of the Authority. However it is also the responsibility of the Tribe and, to the extent that NAHASDA funds are involved, HUD as well.

SELF MONITORING PROCEDURE AND ANNUAL REPORT & CERTIFICATION. A *Self Monitoring Procedure* has been established which requires that the Authority conduct a compliance evaluation at least once a year. This self-monitoring is done for internal purposes. The procedure is attached to this Policy.. (See Appendix.)

A written *Annual Report and Certification* by the Authority is also required to be prepared and given to the Tribal Council and the Authority Board each year. Certain portions of this report must be in a form prescribed by HUD and include an Annual Performance Report on NAHASDA funded activities (which is also to be provided HUD). The Annual Report and Certification will be submitted no later than 60 days from the date of the program year. The report will be made available to the public prior to any submission of an Annual Performance Report so as to permit time for public comment.

HUD MONITORING. If NAHASDA funds are involved, HUD is to monitor the program at least annually to determine if activities funded with its funds (1) have been carried out in a timely manner, (2) are being conducted in accordance with the requirements and primary objectives of NAHASDA (including NAHASDA regulations and certain selected general HUD Administrative Requirements) and other applicable law and (3) there is a continuing capacity to carry out these activities in a timely manner. HUD will also check to see if the Indian Housing Plan has been complied with and if the Annual Performance Report is accurate.

POSSIBLE HUD ACTIONS. In performing its monitoring responsibilities HUD may, and in certain cases is required, to take actions against the Tribe and its NAHASDA funded housing programs if the above standards are not met. This can include reduction in future year NAHASDA grants, termination of current funding, restricted payments, suspension of funds, delivery of technical assistance and, in some cases, initiation of a civil lawsuit to recover moneys

and replacement of an Authority if one exists. The procedures for taking these actions and the procedural rights afforded the Tribe are set out in the NAHASDA regulations.

POSSIBLE ACTIONS BY OTHER FUNDERS. In addition to HUD's involvement other governmental agencies and funding sources may also have regulations and grant requirements involving monitoring the Authority's use of their money. They too may retain the ability to suspend, terminate and recover already funded projects if their program requirements are violated.

APPENDIX
TO
TRIBAL HOUSING ADMINISTRATION
POLICY

(attachments)

EXEMPT PROGRAMS

(Amendments to the Tribal Housing Administration Policy)

The Authority from time to time may establish special programs that (1) are not funded by HUD's NAHASDA program and (2) the Authority decides should not be subject to the Tribal Housing Administration Policy. These are called *Exempt Programs*. Such programs if established, shall have their own policies. If any *Exempt Program* is established, it must be listed by name below along with the date they were both created and designated an Exempt Program by the Authority Board.

Name of Exempt Program

Enactment Date

Cancellation Date (if any)

1.

2.

3.

PROGRAM POLICY

(Authority Name)

PROGRAM TITLE: _____
ORIGINAL DESIGNATION ☐ OR REVISED DESIGNATION ☐

This housing or housing related program has been established by the _____ Housing Authority as one of the programs administered by the Authority. As required by the Authority's Tribal Housing Administration Policy, a resolution has been passed by the Authority Board establishing the Program. What follows is a summary of the Program. (This Summary shall be kept updated and revised when necessary.)

—KEY PROGRAM INFORMATION—

- A. The date of the resolution establishing the Program is: _____
- B. The anticipated duration of the Program is: _____

- C. The following is a description of the type of Program: _____

- D. The purpose and goal of the Program is: _____

- E. A short description of the Program: _____

- F. Are Grantees involved or will someone other than the Authority do most of the administration or management of this Program, and if so explain:

G. The estimated cost for the Program (either annually or by project) is:

H. The sources of funding for the Program is: _____

I. NAHASDA money will be used for:

Program Development

☐ YES ☐ NO

Program Administration and Overhead:

☐ YES ☐ NO

Program Assistance or Grants:

☐ YES ☐ NO

J. The Tribal Housing Administration Policy will apply ☐ (Yes), or the Authority Board has decided, partially because no NAHASDA moneys are involved, that this is an Exempt Program and a special policy will be established

☐ (Yes).

K. Who will be eligible to participate in the Program: _____

L. Where will the Program be operated: _____

M. Who for the Authority will be responsible for administering the Program:

N. Has the Program been placed into the Tribal Indian Housing Plans (and if so which plans) ☐ YES ☐ NO: _____

(date)

Authority Board Chairman

(date)

Authority Executive Director

**CHECKLIST AND WORKSHEET FOR
TRIBAL HOUSING PROGRAM POLICY**

NAME OF PROGRAM/ACTIVITY: _____

DATE ESTABLISHED: _____ HOW LONG WILL THE PROGRAM LAST: _____

DESCRIBED IN INDIAN HOUSING PLAN FOR: _____ (year) AT PAGE: _____

TYPE OF PROGRAM: _____ ADMINISTERED BY: _____

PROGRAM LOCATION: _____ RESPONSIBLE TRIBAL OFFICIAL: _____

BRIEF DESCRIPTION OF PROGRAM (purpose and goals):

Funding Source(s)

Where will funding be obtained for this activity and how much will be contributed from each source?

NAHASDA funds will be used for (check all that apply):

- ☐ program development;
- ☐ program administration or overhead;
- ☐ program assistance, grants, or loans.

Estimate of total amount of NAHASDA funds required annually for this activity. \$ _____

Will the applicant be required to contribute land, labor, or matching funds for the development of their home? If so, how much?

Will this assistance be combined with other HUD or federal programs (e.g. Section 184 loan guarantee)?

If so, what are the regulatory requirements of those other programs?

Will the private lender or other funding source require the tribe to sign an agreement with the lender to provide the assistance? If so, what are the conditions of this agreement?

Costs and Budget

Estimate of annual administration costs of the program (including personnel time to run the program)?

Has an annual budget for the program been developed? [] yes; [] no. If so, a copy of the proposed budget should be attached to this worksheet. (NOTE: A construction budget is strongly recommended before beginning to operate the development program.)

Selection of Participants

Who can participate in this program?

What criteria and preferences will be used to select participants for the program?

Is a waiting list required for this activity (should be if it is anticipated that more applications will be received than the program can serve in one year)? [] yes; [] no

Will a point system be used to select participants? If so, a copy of the point values should be attached.

How long will applicants stay on the waiting list before re-certification is necessary?

Will applicants be allowed to stay on the list if they refuse participation the first time their name comes up (e.g., could be removed or sent to the bottom of the list)?

Will the waiting list be specific to a particular area where the service will be provided?

Will there be a separate waiting list for each particular sub-category of applicants (e.g., elderly, veterans, disabled, etc.)? If so, describe title for each list.

How will income verification be done?

What documents will applicants need to provide (including criminal conviction information)?

What information, if any, is required by private lender or other source of funds for an applicant to qualify for a loan or grant? Who will assist the applicant in filling out these documents?

Determination of Assistance to Individual Applicants

Will there be a limit on the amount of assistance awarded to an individual applicant? If so, how will this limit be calculated?

Contracting

What level environmental review, if any, is required? (NAHASDA always requires some level of review)

How will this review be completed?

Does the Tribe have the necessary lease or deed rights to the land where the project will be built or located? Describe what these are.

Using procurement standards, publish request for proposals and hire architect to design homes.

(Contract could be HUD standard A/E form.)

Will the homes be "stick-built," modular, manufactured, or other type?

How will insurance be provided to project?

Will the Tribe act as its own general contractor or hire someone? If the Tribe hires a contractor, procurement standards must be followed, a request for proposals must be published, and a construction contract must be signed.

If labor will be provided, contact Office of Labor Relations to get current Davis-Bacon wage rates.

If labor will be provided, how will workers be insured against injury?

If materials only are being provided, how will the tribe assure that they are used for the intended purpose and not sold?

What will the construction schedule be?

Participant Agreement

There needs to be a written agreement between the participant and the tribe describing the conditions of the assistance to be provided.

Will the home be granted to the participant or will the tribe collect home payments? How long will the participant be given to pay back the loan (if applicable)?

Will the applicant be required to contribute land, labor, or matching funds for the development of their home? If so, how much?

How will homebuyer payments be calculated (if applicable)?

Will the participant or the tribe pay utility costs (e.g., heat, light, water, etc.)?

Will the participant or the tribe pay for maintenance on the home?

What provisions will there be if the agreement is violated (e.g. participant fails to live in the house or repay loan, etc.)?

Other Requirements

Who will provide insurance for the home (needed if NAHASDA assistance is over \$5000 or if all or part of the assistance is to be repaid as a loan)? Will this expense be part of the loan to the participant?

What will the useful life of this home be?

**A CHECKLIST
OF
LEGAL CONTRACT TERMS
FOR
A PARTICIPATION AGREEMENT
WITH
A COOPERATIVE HOUSING ORGANIZATION

*STANDING ALONE OR STANDING TOGETHER
A HOUSING GUIDE***

Prepared for U.S. Department of Housing & Urban Development,
Office of Native American Programs for use by Tribes

By
Steven Winter Associates, Inc., and Wagenlander & Heisterkamp LLC
(June 2001)

INTRODUCTION & INSTRUCTIONS ON HOW TO USE THIS CHECKLIST

The following is a list of legal contract terms that are recommended to be used when tribes, Alaska Native villages or their tribally designated housing entities enter into agreements to join a cooperative housing organization, umbrella or regional housing authority. This is a component of the training material developed for *Standing Alone or Standing Together, a Housing Guide*.

It is recommended that a written legal agreement be used whenever tribal housing programs join what we will call cooperative housing organizations. Though the length, format and content of such agreements may vary based on local circumstances and the size of programs, the following checklist contains most of the provisions that should be placed into these agreements. Addressing and agreeing on these issues and terms prior to joining a cooperative housing organization is most important.

Experienced Indian housing attorneys have developed this checklist, however it is advised that both of the parties entering into these agreements additionally obtain their own legal assistance and advice in drafting or reviewing these agreements.

**CHECKLIST
OF LEGAL CONTRACT TERMS
FOR
A PARTICIPATION AGREEMENT WITH A COOPERATIVE
HOUSING ORGANIZATION**

- ❑ COOPERATIVE. Name, address, type of entity.
- ❑ MEMBER. Name, address, type of entity. (e.g. tribe, Native village, etc.)
- ❑ PURPOSE OF THE COOPERATIVE. A general statement as to its purpose, activities, what it does for its members, a commitment that its duties to its members shall be approximately in proportion to the level of the contributions made by each of its members.
- ❑ MEMBERSHIP. Who can be members of the Cooperative and what is the current membership. Are there owners other than the members.
- ❑ COOPERATIVE BOARD. Description of governing board, size and who is eligible to sit on the Board, how are they appointed, is this Member entitled to a seat(s) on the Board, how can they be removed and by whom.
- ❑ PAYMENTS/CONTRIBUTIONS BY MEMBER. As a member what is the Member required to pay and contribute to the Cooperative and when are such contributions to be made.
- ❑ ADDITIONAL COSTS. Are there other costs that the Member may have to pay or share in paying.
- ❑ SERVICES. An extensive list of the services to be performed by the Cooperative addressing such issues as "will the Cooperative prepare NAHASDA Indian Housing Plans and Annual Performance Reports?"
- ❑ ASSIGNMENTS. Is the Member required or asked to additionally assign any of its interests or rights.
- ❑ STAFF OF THE COOPERATIVE. Description of the current staff and name of the chief executive officer.
- ❑ HOW THE COOPERATIVE FUNCTIONS. Brief statement of how the Cooperative functions including its decision making process.

- SPECIAL SERVICES OR LIMITATIONS. Are any special services to be provided to this Member or is there a limitation of the services that would otherwise be provided to this Member as a member. (This would include any program administration left with the member).
- TERMINATION. How the Agreement can be terminated by either party and what the consequences would be among other things on Cooperative property, reserves and balances in money accounts.
- RIGHTS THAT MEMBERS HAVE. General listing of any rights that members have.
- ACCESS TO RECORDS. Statement that members have full access to the Cooperative's records, books and policies including personnel records.
- FINANCIAL AUDIT. Requirement that there be an annual audit of the Cooperative by independent auditors. Results available to all members.
- INSURANCE. Statement about the types of insurance and the level of coverage that is required to be maintained by the Cooperative.
- REPORTS. Requirement that written reports be submitted to Members on a specific periodic basis.
- COMPLIANCE. Provisions obligating the Cooperative to comply with all applicable tribal, federal, state and local laws, as well as funding and loan requirements. (e.g. Indian preference in hiring and training)
- DISPUTES. Statement about how disputes between the members are to be resolved.
- LAWS AND JURISDICTION. What laws are to govern both the Agreement and the operation/activities of the Cooperative and what courts have jurisdiction.
- SOVEREIGN IMMUNITY. If either the Member or the Cooperative has sovereign immunity it should be so stated. Furthermore, if there is to be any waiver of immunity or authorization to waive immunity it should be stated and conditions for such waiver should be specified.
- AMENDMENT. Statement that the Agreement should only be changed by a written amendment signed by all members and that no other representation regarding this Agreement shall be valid or enforceable.

- SEVERABILITY. A severability clause that permits other parts of the Agreement to stand even if some of the provisions are subsequently ruled to be invalid.
- DATES. Date of execution as well as the effective dates of the Agreement.
- *[Add here additional local concerns and terms]*

U S C E N S U S B U R E A U

Census Data Products For Indian Country



Results of the 1990 Census

- Total population: 281,421,906
- AI/AN (Alone): 0.9 percent
- AI/AN (Alone or in combination): 1.5 percent



American Indian/Alaska Native Population

- AI/AN ONLY: 2,475,956
- IN COMBINATION: 1,643,345
- TOTAL: 4,119,301



Tribal Affiliation

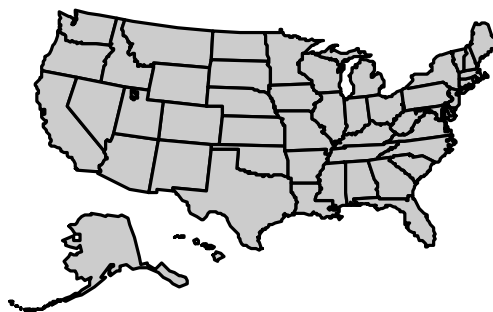
- Geographic based, not enrollment
- Census questionnaire asks for the "enrolled or principal tribe"
- Census tables will show data by tribal affiliation

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100 Percent Population Items

- Household Relationship
- Gender
- Race/Tribal Affiliation
- Age
- Hispanic Origin



Population Characteristics

- Marital Status
- Education
- Disability
- Caregiver Status
- Work Status
- Income
- Journey to Work



Housing Characteristics

- Rooms
- Year structure built
- Plumbing
- Kitchen
- Value
- Rent
- Shelter costs

Population: Social Characteristics

- Place of Birth
- Education
- Ancestry
- Migration
- Language spoken at Home
- Veteran Status
- Disability



Population - Economic Characteristics

- Occupation, Industry and Class of Worker
- Work Experience
- Labor Force Status
- Income
- Poverty
- Journey to Work



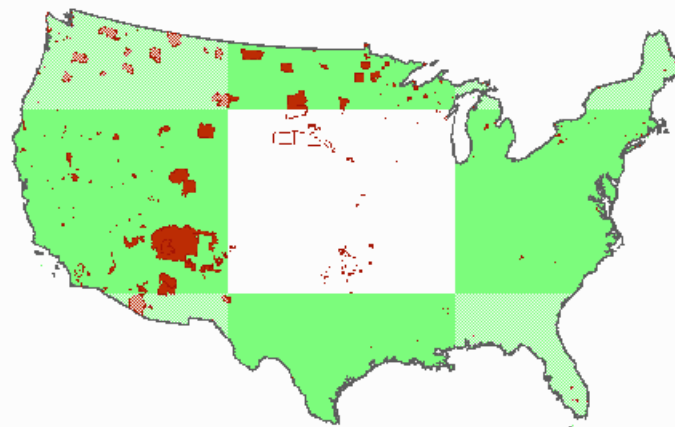
Data Release Schedule

- December 31, 2000: Official apportionment counts
- April 1, 2001: Redistricting
- Summer, 2001: 100 percent counts and characteristics
- Summer 2002: Sample data products



AI/AN Land Areas

- American Indian Reservations
- Off Reservation Trust Lands



AI/AN Lands

- Alaska Native Village Statistical Area
- Oklahoma Tribal Statistical Area
- Sub-Reservation Geography



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- The Census Bureau's Award winning Internet site
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New!
E-Stats
Report

Population Clocks

U.S. **284,589,679**
World **6,158,420,989**
16:19 EDT Jul 05, 2001

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Table Year	Age	Sex
1 and 2 years	15,781	21,941
3 and 4 years	16,138	22,462
5 years	20,218	11,944
6 years	10,238	11,944

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Summary File 1

Tables on age, sex, households, families, and housing for smaller areas are now being released on a state-by-state basis

Housing Unit Counts

Housing unit counts for states, counties, places, and more

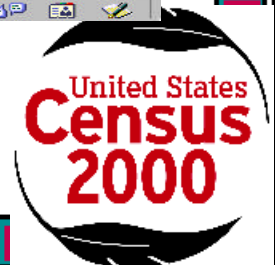
Demographic Profiles

Age, sex, race, and Hispanic/Latino counts, and information on housing, households and families

Rankings, Comparisons, and Summaries

Rankings and 1990-2000 population change for the United States, states, counties, metropolitan areas, and large places

▶ United States total population: **281 421 906** (April 1, 2000)



American Community Survey

- A survey which will provide demographic, economic and housing profiles of America's communities every year.
- The ACS will replace the decennial long form in 2010.



U S C E N S U S B U R E A U

**Tribal Governments Program
FOB 3-3624
U.S. Census Bureau
Washington, DC 20233**

Thelma Stiffarm, Program Administrator

John Morales, Program Specialist

301-457-1305

Thelma.J.Stiffarm@census.gov

Cerafin.J.Morales@census.gov



Population Change and Distribution

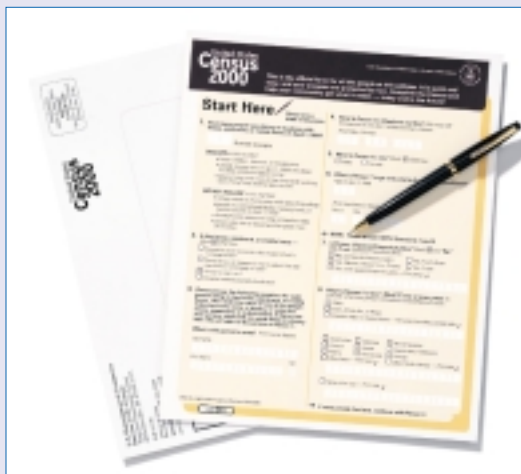
Census 2000 Brief

1990 to 2000

Issued April 2001

C2KBR/01-2

In Census 2000, 281.4 million people were counted in the United States, a 13.2 percent increase from the 1990 census population of 248.7 million. Population growth from 1990 to 2000 varied geographically, with large population increases in some areas and little growth or decline in others. This report, part of a series that analyzes population and housing data collected from Census 2000, highlights population size and distribution changes between 1990 and 2000 in regions, states, metropolitan areas, counties, and large cities.¹



By
Marc J. Perry and
Paul J. Mackun

(With Josephine D. Baker,
Colleen D. Joyce,
Lisa R. Lollock, and
Lucinda S. Pearson)

The 1990 to 2000 population increase was the largest in American history.

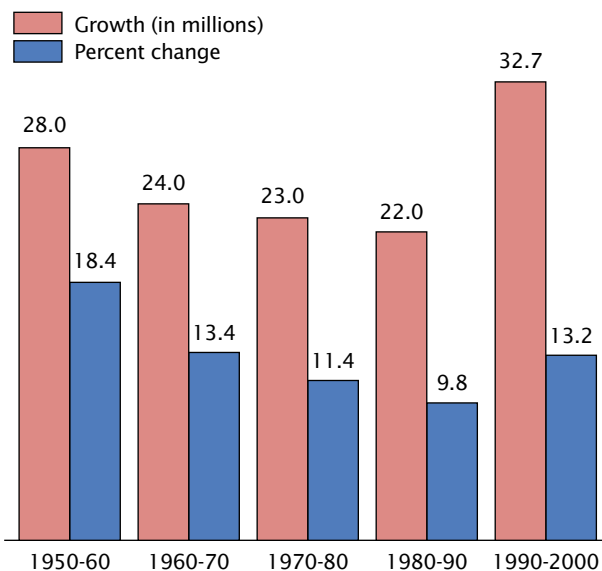
The population growth of 32.7 million people between 1990 and 2000 represents the largest census-to-census increase in American history.² The previous record increase was 28.0 million people between 1950 and 1960, a gain fueled primarily by the post-World War II baby boom (1946 to 1964). Total decennial population growth declined steadily in the three decades following the 1950s' peak before rising again in the 1990s (see Figure 1).

¹ 1990 populations shown in this report were originally published in 1990 Census reports and do not include subsequent revisions resulting from boundary or other changes.

² This increase may be caused by changes in census coverage, as well as births, deaths, and net immigration.

Figure 1.
U.S. Population Growth: 1950-60 to 1990-2000

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2000/doc/pl94-171.pdf)



Source: U.S. Census Bureau, Census 2000; 1990 Census, *Population and Housing Unit Counts, United States* (1990 CPH-2-1).

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Helping You Make Informed Decisions

U.S. Department of Commerce
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In percentage terms, the population increase of 13.2 percent for the 1990s was higher than the growth rates of 9.8 percent for the 1980s and 11.4 percent for the 1970s. The 1990s growth rate was similar to the 13.4 percent growth in the 1960s and was well below the 18.4 percent growth for the 1950s.

West grew fastest in the 1990s; South reached 100 million.

Population growth varied significantly by region in the 1990s, with higher rates in the West (19.7 percent) and South (17.3 percent) and much lower rates in the Midwest (7.9 percent) and Northeast (5.5 percent).³ The West increased by 10.4 million to reach 63.2 million people, while the South grew by 14.8 million to a population of 100.2 million people. The Midwest gained 4.7 million to reach 64.4 million people, and the Northeast's increase of 2.8 million brought it to 53.6 million people.

Because of differences in growth rates, the regional shares of the total population have shifted considerably in recent decades. Between 1950 and 2000, the South's share of the population increased from 31 to 36 percent and the West increased from 13 to 22 percent. Meanwhile, despite overall population growth in each of the past five decades, the Midwest's share of total population fell from 29 to 23 percent and the

³ The Northeast region includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The Midwest includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. The South includes Alabama, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The West includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

Table 1.
U.S. Population Change for Regions, States, and Puerto Rico: 1990 to 2000

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2000/doc/pl94-171.pdf)

Area	Population		Change, 1990 to 2000	
	April 1, 1990	April 1, 2000	Number	Percent
United States	248,709,873	281,421,906	32,712,033	13.2
Region				
Northeast	50,809,229	53,594,378	2,785,149	5.5
Midwest	59,668,632	64,392,776	4,724,144	7.9
South	85,445,930	100,236,820	14,790,890	17.3
West	52,786,082	63,197,932	10,411,850	19.7
State				
Alabama	4,040,587	4,447,100	406,513	10.1
Alaska	550,043	626,932	76,889	14.0
Arizona	3,665,228	5,130,632	1,465,404	40.0
Arkansas	2,350,725	2,673,400	322,675	13.7
California	29,760,021	33,871,648	4,111,627	13.8
Colorado	3,294,394	4,301,261	1,006,867	30.6
Connecticut	3,287,116	3,405,565	118,449	3.6
Delaware	666,168	783,600	117,432	17.6
District of Columbia	606,900	572,059	-34,841	-5.7
Florida	12,937,926	15,982,378	3,044,452	23.5
Georgia	6,478,216	8,186,453	1,708,237	26.4
Hawaii	1,108,229	1,211,537	103,308	9.3
Idaho	1,006,749	1,293,953	287,204	28.5
Illinois	11,430,602	12,419,293	988,691	8.6
Indiana	5,544,159	6,080,485	536,326	9.7
Iowa	2,776,755	2,926,324	149,569	5.4
Kansas	2,477,574	2,688,418	210,844	8.5
Kentucky	3,685,296	4,041,769	356,473	9.7
Louisiana	4,219,973	4,468,976	249,003	5.9
Maine	1,227,928	1,274,923	46,995	3.8
Maryland	4,781,468	5,296,486	515,018	10.8
Massachusetts	6,016,425	6,349,097	332,672	5.5
Michigan	9,295,297	9,938,444	643,147	6.9
Minnesota	4,375,099	4,919,479	544,380	12.4
Mississippi	2,573,216	2,844,658	271,442	10.5
Missouri	5,117,073	5,595,211	478,138	9.3
Montana	799,065	902,195	103,130	12.9
Nebraska	1,578,385	1,711,263	132,878	8.4
Nevada	1,201,833	1,998,257	796,424	66.3
New Hampshire	1,109,252	1,235,786	126,534	11.4
New Jersey	7,730,188	8,414,350	684,162	8.9
New Mexico	1,515,069	1,819,046	303,977	20.1
New York	17,990,455	18,976,457	986,002	5.5
North Carolina	6,628,637	8,049,313	1,420,676	21.4
North Dakota	638,800	642,200	3,400	0.5
Ohio	10,847,115	11,353,140	506,025	4.7
Oklahoma	3,145,585	3,450,654	305,069	9.7
Oregon	2,842,321	3,421,399	579,078	20.4
Pennsylvania	11,881,643	12,281,054	399,411	3.4
Rhode Island	1,003,464	1,048,319	44,855	4.5
South Carolina	3,486,703	4,012,012	525,309	15.1
South Dakota	696,004	754,844	58,840	8.5
Tennessee	4,877,185	5,689,283	812,098	16.7
Texas	16,986,510	20,851,820	3,865,310	22.8
Utah	1,722,850	2,233,169	510,319	29.6
Vermont	562,758	608,827	46,069	8.2
Virginia	6,187,358	7,078,515	891,157	14.4
Washington	4,866,692	5,894,121	1,027,429	21.1
West Virginia	1,793,477	1,808,344	14,867	0.8
Wisconsin	4,891,769	5,363,675	471,906	9.6
Wyoming	453,588	493,782	40,194	8.9
Puerto Rico	3,522,037	3,808,610	286,573	8.1

Source: U.S. Census Bureau, Census 2000; 1990 Census, *Population and Housing Unit Counts, United States* (1990 CPH-2-1).

Northeast's proportion declined from 26 to 19 percent.

Every state grew; Nevada's rate was fastest.

State population growth for the 1990s ranged from a high of 66 percent in Nevada to a low of 0.5 percent in North Dakota (see Table 1). This decade was the only one in the 20th Century in which all states gained population. Following Nevada, the fastest growing states were Arizona (40 percent), Colorado (31 percent), Utah (30 percent), and Idaho (29 percent). Following North Dakota, the slowest growing states were West Virginia (0.8 percent), Pennsylvania (3.4 percent), Connecticut (3.6 percent), and Maine (3.8 percent). Puerto Rico's population grew by 8.1 percent to reach 3.8 million, while the District of Columbia declined by 5.7 percent.

California had the largest population increase during the 1990s, adding 4.1 million people to its population. Texas (up 3.9 million), Florida (3.0 million), Georgia (1.7 million), and Arizona (1.5 million) rounded out the top five largest gaining states.

Within the Northeast, New Hampshire grew fastest for the fourth straight decade — up 11 percent since 1990. New York and New Jersey gained the most population, increasing by 986,000 and 684,000 respectively. In the Midwest, Minnesota was the fastest growing state for the third straight decade, growing by 12 percent since 1990. Illinois (up 989,000) and Michigan (up 643,000) had the largest numerical increases.

While no state in the Midwest grew faster than the U.S. rate of 13.2 percent, several states in the region had their fastest growth rates in many decades. Nebraska's 8 percent increase and Iowa's 5 percent

increase were the highest growth rates for those states since their 1910 to 1920 increases of 9 percent and 8 percent, respectively. Missouri's 9 percent increase was its highest since a 16 percent increase from 1890 to 1900.

In the South, Georgia was the fastest growing state, up by 26 percent since 1990. This was Georgia's most rapid census-to-census population growth rate in the 20th Century, and the 1990s was the only decade in that century when Florida was not the South's fastest growing state.⁴ Texas (up 3.9 million) and Florida (up 3.0 million) had the largest numerical increases.

Growth in the West was led by Nevada, now the country's fastest growing state for each of the past four decades. Of the 13 states in the region, only Wyoming (8.9 percent), Hawaii (9.3 percent), and Montana (12.9 percent) grew slower than the U.S. rate of 13.2 percent.

The majority of Americans lived in the ten most populous states.

The ten most populous states contained 54 percent of the population in 2000. California, with 33.9 million people, was the most populous one, accounting for 12 percent of the nation's population. The second and third most populous states — Texas, at 20.9 million people, and New York, at 19.0 million — together accounted for 14 percent of the U.S. population. The next seven most populous states — Florida, Illinois, Pennsylvania, Ohio, Michigan, New Jersey, and Georgia — contained an additional 28 percent of the population. The ten most populous states are distributed among all four regions: three each in the Northeast,

the Midwest, and the South, with one in the West.

The ten least populous states accounted for only 3 percent of the total population. Of the ten, three are in the Northeast (New Hampshire, Rhode Island, and Vermont), two in the Midwest (North Dakota and South Dakota), one in the South (Delaware) and four in the West (Hawaii, Montana, Alaska, and Wyoming).

Most counties grew, while some lost population.

Figure 2 shows population growth between 1990 and 2000 for the country's 3,141 counties and equivalent areas. Some broad patterns are immediately evident. A band of counties that lost population — in some cases declining more than 10 percent — stretches across the Great Plains states from the Mexican border to the Canadian border. A second band of slow growth counties includes much of the interior Northeast and Appalachia, extending from Maine through western Pennsylvania and West Virginia to eastern Kentucky. Rapid population growth occurred in the interior West and much of the South — particularly in counties in Florida, northern Georgia, North Carolina, Tennessee, southwestern Missouri, and eastern, central, and southern Texas.

Figure 2 underscores the continued concentration of population growth both within and adjacent to metropolitan areas.⁵ In Texas, for

⁴ Washington, DC, treated as a state equivalent for statistical purposes, had a larger percent gain than Florida in the 1910s and 1930s.

⁵ This report uses the June 30, 1999, metropolitan areas as defined by the Office of Management and Budget for all 1990 and 2000 metropolitan area populations. All metropolitan areas in the text are either metropolitan statistical areas (MSAs) or consolidated metropolitan statistical areas (CMSAs). There are 276 metropolitan areas in the United States—258 MSAs and 18 CMSAs. In some cases, an abbreviated version of the full MSA or CMSA name was used in the text and tables.

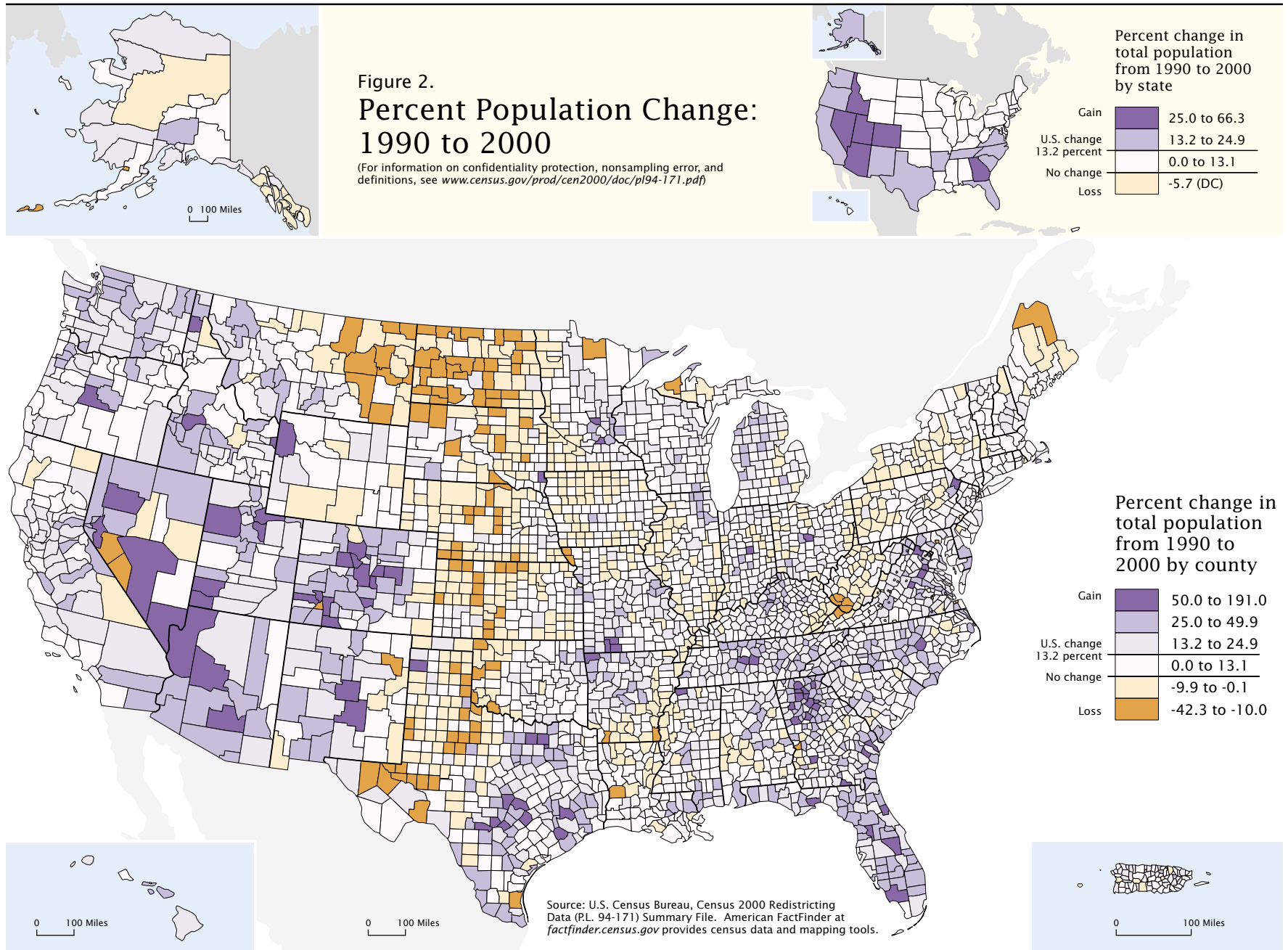


Table 2.
Population Change and 2000 Share by Metropolitan Status and Size Category: 1990 to 2000

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2000/doc/pl94-171.pdf)

Population size category	Population		Percent change, 1990 to 2000	2000 share of U.S. total
	April 1, 1990	April 1, 2000		
United States	248,709,873	281,421,906	13.2	100.0
Total for all metropolitan areas	198,402,980	225,981,679	13.9	80.3
5,000,000 or more	75,874,152	84,064,274	10.8	29.9
2,000,000 - 4,999,999	33,717,876	40,398,283	19.8	14.4
1,000,000 - 1,999,999	31,483,749	37,055,342	17.7	13.2
250,000 - 999,999	39,871,391	45,076,105	13.1	16.0
Less than 250,000	17,455,812	19,387,675	11.1	6.9
Total nonmetropolitan	50,306,893	55,440,227	10.2	19.7

Source: U.S. Census Bureau, Census 2000; 1990 Census, *Population and Housing Unit Counts, United States* (1990 CPH-2-1).

instance, the Dallas, Houston, Austin, and San Antonio metropolitan areas show up as pockets of fast population growth, while most of the nonmetropolitan counties in the state recorded either slow growth or population decline.

In the slow growing upper Midwest, the rapid growth of counties in the Sioux Falls, South Dakota and Minneapolis-St. Paul, Minnesota metropolitan areas stands in sharp contrast to the population declines that occurred in most of the region's other counties. The Minneapolis-St. Paul metropolitan area has a common growth pattern: slow expansion in the central county or counties and faster growth in outlying counties. In the South, the Atlanta, Georgia metropolitan area also shows this pattern, with a large group of fast growing, primarily outlying, counties surrounding two slower growing central counties.

Population growth also differed between counties bordering Canada and those counties bordering

Mexico.⁶ Between 1990 and 2000, the counties on the Mexican border grew rapidly, up 21 percent. In contrast, the population on the Canadian border remained stable over the period, increasing just 0.8 percent, with many counties experiencing population decline. In 2000, 6.3 million Americans lived in counties that bordered Mexico, while 5.0 million resided in counties bordering Canada.

Growth differences between coastal and noncoastal counties are also evident in Figure 2, particularly in the West, where coastal counties grew more slowly than noncoastal ones.⁷ Nationwide, while some coastal counties grew rapidly in the 1990s, their overall growth rate of 11 percent was exceeded by that of noncoastal counties (up 15 percent). Over one half of all Americans (53 percent or 148.3 million people) lived in a coastal county in 2000.

Five counties more than doubled their populations during the 1990s.

⁶ The United States-Mexico county-based border region includes 25 counties in Texas, New Mexico, Arizona, and California. The United States-Canada county-based border region includes 64 counties in Maine, New Hampshire, Vermont, New York, Michigan, Minnesota, North Dakota, Montana, Idaho, Washington, and Alaska.

⁷ Coastal areas as defined by the U.S. National Oceanic and Atmospheric Agency, 1992. Covers 673 counties and equivalent areas with at least 15 percent of their land area either in a coastal watershed (drainage area) or in a coastal cataloging unit (a coastal area between watersheds).

Douglas County, Colorado (south of Denver) had the largest rate of population growth between 1990 and 2000, increasing by 191 percent. Following Douglas were Forsyth County, Georgia (north of Atlanta), up 123 percent; Elbert County, Colorado (southeast of Denver, adjacent to the metropolitan area), up 106 percent; Henry County, Georgia (east of Atlanta), 103 percent; and Park County, Colorado (southwest of Denver), up 102 percent.

Large metropolitan areas had strong growth in 1990s.

In 2000, 80.3 percent of Americans (226.0 million people) lived in metropolitan areas, up slightly from 79.8 percent (198.4 million people) in 1990 (see Table 2). The population within metropolitan areas increased by 14 percent, while the nonmetropolitan population grew by 10 percent.

Almost one-third of Americans (30 percent) lived in metropolitan areas of at least 5.0 million people, while those with populations between 2.0 million and 5.0 million contained 14 percent of the population. Metropolitan areas with populations between 1.0 million and 2.0 million contained 13 percent of the population, while those with populations between 250,000 and 1.0 million and those with populations less than 250,000 contained 16 percent and 7 percent of the population, respectively.

Metropolitan areas with populations of 2.0 million to 5.0 million in 2000 grew the fastest, up 20 percent. The largest and smallest metropolitan area size categories, those with populations of 5.0 million or more and those with populations less than 250,000, each grew by about 11 percent.

As shown in Table 3, New York was the most populous metropolitan area, surpassing the 20 million mark with a population of 21.2 million (7.5 percent of the total population). The Los Angeles metropolitan area was the second largest, with a population of 16.4 million (5.8 percent of the total). The third most populous was Chicago, with 9.2 million people and 3.3 percent of the population. The Washington, DC and San Francisco metropolitan areas ranked fourth and fifth – with 7.6 million and 7.0 million people, respectively. Philadelphia ranked sixth, with 6.2 million people. The seventh, eighth, and ninth largest metropolitan areas — Boston, Detroit, and Dallas — each had populations of between 5 million and 6 million. All of the metropolitan areas with populations of at least 5.0 million grew over the period, ranging from 29 percent for the Dallas metropolitan area to 5 percent for Philadelphia.

Between 1990 and 2000, Las Vegas, Nevada-Arizona was the fastest growing metropolitan area (83 percent), as shown in Table 4, followed by Naples, Florida, with a growth rate of 65 percent, and by seven other areas with growth rates between 44 percent and 50 percent: Yuma, Arizona; McAllen, Texas; Austin, Texas; Fayetteville, Arkansas; Boise City, Idaho; Phoenix, Arizona; and Laredo, Texas. The tenth fastest growing area, Provo, Utah, grew by almost 40 percent. Of the ten fastest growing metropolitan areas in 2000, one had a population

Table 3.
Population Change and 2000 Share for the Largest Metropolitan Areas: 1990 to 2000

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2000/doc/pl94-171.pdf)

Metropolitan area	Population		Percent change, 1990 to 2000	2000 share of U.S. total
	April 1, 1990	April 1, 2000		
Total for metropolitan areas of 5,000,000 or more	75,874,152	84,064,274	10.8	29.9
New York-Northern New Jersey-Long Island, NY-NJ-CT-PA	19,549,649	21,199,865	8.4	7.5
Los Angeles-Riverside-Orange County, CA	14,531,529	16,373,645	12.7	5.8
Chicago-Gary-Kenosha, IL-IN-WI	8,239,820	9,157,540	11.1	3.3
Washington-Baltimore, DC-MD-VA-WV	6,727,050	7,608,070	13.1	2.7
San Francisco-Oakland-San Jose, CA	6,253,311	7,039,362	12.6	2.5
Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD	5,892,937	6,188,463	5.0	2.2
Boston-Worcester-Lawrence, MA-NH-ME-CT	5,455,403	5,819,100	6.7	2.1
Detroit-Ann Arbor-Flint, MI	5,187,171	5,456,428	5.2	1.9
Dallas-Fort Worth, TX	4,037,282	5,221,801	29.3	1.9

Source: U.S. Census Bureau, Census 2000; 1990 Census, *Population and Housing Unit Counts, United States* (1990 CPH-2-1).

Table 4.
Population Change for the Ten Fastest Growing Metropolitan Areas: 1990 to 2000

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2000/doc/pl94-171.pdf)

Metropolitan area	Population		Change, 1990 to 2000	
	April 1, 1990	April 1, 2000	Number	Percent
Las Vegas, NV-AZ	852,737	1,563,282	710,545	83.3
Naples, FL	152,099	251,377	99,278	65.3
Yuma, AZ	106,895	160,026	53,131	49.7
McAllen-Edinburg-Mission, TX	383,545	569,463	185,918	48.5
Austin-San Marcos, TX	846,227	1,249,763	403,536	47.7
Fayetteville-Springdale-Rogers, AR	210,908	311,121	100,213	47.5
Boise City, ID	295,851	432,345	136,494	46.1
Phoenix-Mesa, AZ	2,238,480	3,251,876	1,013,396	45.3
Laredo, TX	133,239	193,117	59,878	44.9
Provo-Orem, UT	263,590	368,536	104,946	39.8

Source: U.S. Census Bureau, Census 2000; 1990 Census, *Population and Housing Unit Counts, United States* (1990 CPH-2-1).

between 2.0 million and 5.0 million; two had populations between 1.0 million and 2.0 million, five contained populations between 250,000 and 1.0 million, and two had populations less than 250,000.

ADDITIONAL TOPICS ON POPULATION CHANGE AND DISTRIBUTION

How did the population change in the ten largest American cities?

Eight of the ten largest cities in 2000 gained population in the 1990s; only Philadelphia and Detroit declined in size. New York remained the country's largest city, passing the 8 million threshold for the first time. Phoenix was the fastest growing of the 10 largest cities, up by 34 percent over the decade.

New York also had the largest numerical increase of any city, gaining 686,000 people. The 1990s

was the first decade since the 1930s that New York City led in city population growth.

Los Angeles gained the most population in each of the decades from the 1940s through the 1980s, with the exception of the 1970s, when Houston gained the most.

Have any more counties crossed the 1 million population threshold?

Four counties exceeded the 1 million mark for the first time in Census 2000: Clark County, Nevada (1.4 million); Palm Beach County, Florida (1.1 million); Franklin County, Ohio (1.1 million); and St. Louis County, Missouri (1.0 million).

FOR MORE INFORMATION

Census 2000 data for state and local areas are available on the Internet via factfinder.census.gov and for purchase on CD-ROM and eventually on DVD. For information on population change and distribution, as well as information on the post-censal population estimates program, visit the U.S. Census Bureau's Internet site at www.census.gov and click on Estimates. For more information on metropolitan areas, including concepts, definitions, and maps, go to www.census.gov/population/www/estimates/metroarea.html.

Information on other population and housing topics will be presented in the Census 2000 Brief Series, located on the U.S. Census Bureau's Web site at www.census.gov/population/www/cen2000/briefs.html. This series will present information about race, Hispanic origin, age, sex, household type, housing tenure, and other social, economic, and housing characteristics.

For more information about Census 2000, including data products, call the Customer Services Center at 301-457-4100 or e-mail webmaster@census.gov.

Table 5.
Population Change for the Ten Largest Cities: 1990 to 2000

(For information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2000/doc/pl94-171.pdf)

City and state	Population		Change, 1990 to 2000	
	April 1, 1990	April 1, 2000	Number	Percent
New York, NY.....	7,322,564	8,008,278	685,714	9.4
Los Angeles, CA.....	3,485,398	3,694,820	209,422	6.0
Chicago, IL.....	2,783,726	2,896,016	112,290	4.0
Houston, TX.....	1,630,553	1,953,631	323,078	19.8
Philadelphia, PA.....	1,585,577	1,517,550	-68,027	-4.3
Phoenix, AZ.....	983,403	1,321,045	337,642	34.3
San Diego, CA.....	1,110,549	1,223,400	112,851	10.2
Dallas, TX.....	1,006,877	1,188,580	181,703	18.0
San Antonio, TX.....	935,933	1,144,646	208,713	22.3
Detroit, MI.....	1,027,974	951,270	-76,704	-7.5

Source: U.S. Census Bureau, Census 2000; 1990 Census, *Population and Housing Unit Counts, United States* (1990 CPH-2-1).

2001

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Highlights

Census of Population and Housing Topics, p. 1.

- Includes 100-percent and sample characteristics.

Census 2000 Geographic Areas, p. 2.

- Understanding the relationships among U.S. Census Bureau geographic entities.

Census 2000 Data Products Available in Many Forms, p. 3.

- Internet access
- CD-ROM, DVD
- Printed reports

Maps and Geographic Products, p. 4.

- Internet access
- CD-ROM, DVD
- Print-on-demand

United States
**Census
2000**

U.S. Department of Commerce
Economics and Statistics Administration
U.S. CENSUS BUREAU

Introduction to Census 2000 Data Products

Census 2000 was the largest peacetime effort in the history of the United States. Information about the 115.9 million housing units and 281.4 million people across the United States will be available in a variety of formats and media, including the Internet, CD-ROMs, DVDs, and printed reports. This brochure provides a brief introduction to the information available from Census 2000, Census 2000 geography, maps, and data products. Visit our Web site at <http://www.census.gov> for more information.

Information Available From the 22nd Census of Population and Housing

100-percent characteristics (short form): A limited number of questions were asked of every person and housing unit in the United States. Information is available on:

Household relationship	Race
Sex	Tenure (whether the home is owned or rented)
Age	Vacancy characteristics
Hispanic or Latino origin	

Sample characteristics (long form): Additional questions were asked of a sample (generally 1-in-6) of persons and housing units. Data are provided on:

Population

Marital status
Place of birth, citizenship, and year of entry
School enrollment and educational attainment
Ancestry
Migration (residence in 1995)
Language spoken at home and ability to speak English
Veteran status
Disability
Grandparents as caregivers
Labor force status
Place of work and journey to work
Occupation, industry, and class of worker
Work status in 1999
Income in 1999

Housing

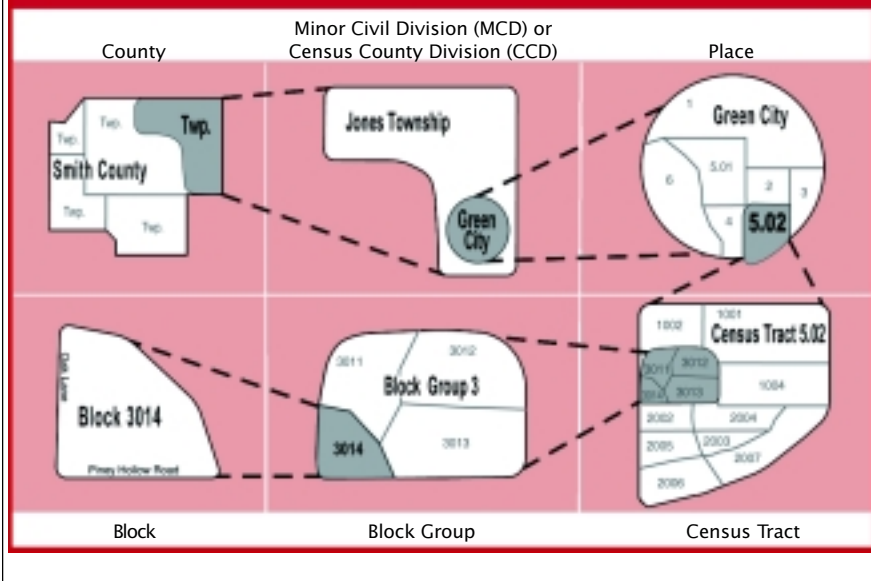
Value of home or monthly rent paid
Units in structure
Year structure built
Number of rooms and number of bedrooms
Year moved into residence
Plumbing and kitchen facilities
Telephone service
Vehicles available
Heating fuel
Farm residence
Utilities, mortgage, taxes, insurance, and fuel costs

U S C E N S U S B U R E A U

Helping You Make Informed Decisions

Census Small-Area Geography

Understanding the Relationships Among U.S. Census Bureau Geographic Entities



Census 2000 Geographic Areas

American Indian/Alaska Native areas and Hawaiian home lands.

These areas include the legal federally recognized American Indian reservations, off-reservation trust land entities, tribal subdivisions, Alaska Native Regional Corporations, and Hawaiian home lands. These areas also include the tribal-designated statistical areas, Oklahoma tribal statistical areas, and Alaska Native village statistical areas that are defined for federally recognized tribes without a legal land base. The boundaries of federally recognized American Indian and Alaska Native areas are provided by the tribal governments. The State of Hawaii Department of Hawaiian Home Lands provides the boundaries for Hawaiian home lands. The boundaries of state-recognized American Indian reservations and state-designated American Indian statistical areas (for state-recognized tribes without a reservation) are provided by a state liaison designated by the state's governor.

Blocks. Generally bounded by streets, legal boundaries, and other features, a block is the smallest geographic unit for which the Census

Bureau tabulates data. Approximately 8.5 million blocks are identified in Census 2000.

Block groups (BGs). Block groups are a collection of census blocks within a census tract, sharing the same first digit of their four-digit identifying numbers.

Census tracts. These small statistical subdivisions (averaging about 4,000 persons) of counties generally have stable boundaries and, when first established, were designed to have relatively homogeneous demographic characteristics.

Counties and equivalent areas.

These are the primary divisions of most states, Puerto Rico, and the Island Areas. They include counties in 48 states; parishes in Louisiana; boroughs and census areas in Alaska; municipios in Puerto Rico; independent cities in Maryland, Missouri, Nevada, and Virginia; and other entities in the Island Areas.

Metropolitan areas (MAs). An MA consists of a large population nucleus of 50,000 population or greater, together with adjacent communities having a high degree of social and economic integration with that core. Metropolitan areas comprise at least one county, except

in New England, where cities and towns are the basic geographic units.

Minor Civil Divisions (MCDs)/ Census County Divisions (CCDs).

MCDs are legally defined county subdivisions, such as towns and townships. In 21 states where MCDs do not exist or are not adequate for reporting subcounty statistics, the Census Bureau, in cooperation with state and local officials, delineates county subdivisions known as Census County Divisions.

Places. Incorporated places are concentrations of population such as cities, that have legally prescribed boundaries, powers, and functions. Other population centers without legally defined corporate limits or corporate powers are defined by the Census Bureau in cooperation with state officials and local data users. These are called Census-Designated Places and are identified in data tables by the acronym CDP following the place name.

States and equivalent areas.

Besides the 50 states, the Census Bureau treats the District of Columbia, Puerto Rico, and the Island Areas (the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands) as state equivalents for statistical presentation.

Urban areas. Urban areas consist of urbanized areas (UAs) and other urban entities. A UA consists of densely settled territory with a population of 50,000 or more inhabitants. Other urban areas have from 2,500 to 49,999 population.

Voting districts. Voting districts represent areas created for the purpose of conducting elections. They include election districts, precincts, wards, polling areas, and other types of electoral units submitted to the Census Bureau by states participating in the Redistricting Data Program.

ZIP Code Tabulation Area

(ZCTA™). ZCTAs are approximate representations of five- or three-digit U.S. Postal Service ZIP Code service areas. ZCTAs are composed of census blocks and represent the majority ZIP Code for addresses within a census block.

Census 2000 Data Products Available in Many Forms

Census 2000 Data Products

The decennial census yields a wealth of data, which have virtually unlimited applications. A complete line of Census 2000 data products will soon be available to meet these requirements.

Detailed results of Census 2000 will be contained in a series of five files that you can access through the **Internet** and on **CD-ROM** or **DVD**. Several related electronic and print products include **Demographic Profiles** of most geographic areas; **Quick Tables** that allow users to choose from among approximately 50 table shells, then specify the geographic area and the universe or population subgroup (such as the African American or the Hispanic population); and approximately 30 **Geographic Comparison Tables** that will enable users to compare key data items across geographic areas. In addition, there will be three series of **reports** available in print and in Portable Document Format (PDF) on the Internet.

Internet. For easy access to all Census 2000 information, click on American FactFinder™ on the Census Bureau's home page (www.census.gov). Generally, most data products will be released first on the Internet, followed by subsequent releases in other formats.

CD-ROM and DVD. Most Census 2000 tabulations and maps will be available on CD-ROMs and/or DVDs. Viewing software will be included. CD-ROMs may be ordered by phone through the Census Bureau's Customer Services Center on 301-457-4100, or by clicking on *Catalog* from the Census Bureau's home page.

Printed reports will be sold through the U.S. Government Printing Office. Much of the information in these series will be available earlier in other data products.

The following release dates are preliminary and may be revised later.

Census 2000 Redistricting (Public Law 94-171) Summary File. The first Census 2000 data files released contain the information required for local redistricting. The data include tabulations for the total population and the population 18 years old and over for 63 race categories, Hispanic or Latino, and race by not Hispanic or Latino. Detailed tabulations present data down to the block level, and are available through the Internet and through two CD-ROM series (state and national files). One Quick Table and a Geographic Comparison Table are based on this redistricting file.

Available now

Summary File 1 (SF 1) presents counts and basic cross-tabulations of information collected from all people and housing units. This information includes age, sex, race, Hispanic or Latino origin, household relationship, and whether the residence is owned or rented. Data will be available down to the block level for many tabulations, but only to the census-tract level for others. Summaries will also be included for other geographic areas such as ZCTAs and Congressional Districts.

Related products include Demographic Profiles that will give a snapshot of the geographic area; Quick Tables; Geographic Comparison Tables, and the first of the printed report series. (See below.)

Planned release date:
June 2001-June 2002

Summary File 2 (SF 2) will also contain 100-percent population and housing characteristics, but the tables in this file will be iterated for a selected list of detailed race and Hispanic- or Latino-origin groups, as well as American Indian and Alaska Native tribes. For this file, the lowest level of geography will be the census tract, and there will be a population-size threshold before information is shown for a particular group. Various Quick Tables and Geographic Comparison Tables will be derived from Summary File 2.

Planned release date:
September 2001-July 2002

Summary File 3 (SF 3) will be the first release of the information collected on a sample basis. Data will be provided down to the block group for many tabulations but only down to the census tract for others. SF 3 will also include data by ZIP Code Tabulation Area and Congressional District. Related products include a three-page profile report, various Quick Tables and Geographic Comparison Tables, and a printed report series, developed from the sample data.

Planned release date:
June-September 2002

Summary File 4 (SF 4) will include tabulations of the population and housing data collected from a sample of the population. Just as in Summary File 2, the tables on SF 4 will be iterated for a selected list of race and Hispanic- or Latino-origin groups, for American Indian and Alaska Native tribes, as well as for ancestry groups. Various Quick Tables and Geographic Comparison Tables will be derived from Summary File 4.

Planned release date:
October 2002-February 2003

Microdata

Microdata allow users to prepare their own customized tabulations and cross tabulations of most population and housing subjects, using specially prepared microdata files. These files are the actual responses to census questionnaires, but with names or addresses removed and the geography sufficiently broad to protect confidentiality. Two ways to access microdata will be available.

Public Use Microdata Sample (PUMS) Files. Two PUMS files are planned for release on CD-ROM: a 1-percent and a 5-percent sample.

Planned release date:
1-percent file: 2002
5-percent file: 2003

Advance Query Function. Users of the American FactFinder™ will be able to prepare tabulations online,

using the full database of all individual responses, subject to restrictions and filters required to protect the confidentiality of individual responses.

Printed Reports

There will be three series of printed reports with one report per state and a national summary volume.

Summary Population and Housing Characteristics (PHC-1).

This series, containing information collected on a 100-percent basis, will present information for states, counties, places, and other areas. Comparable to the 1990 CPH-1 report, *Summary Population and Housing Characteristics*, it will also be available on the Internet.

Planned release date: 2002

Summary Social, Economic, and Housing Characteristics (PHC-2).

This publication will include information on the sample population and housing subjects for the same geographic areas and information and will be comparable to the 1990 CPH-5 census report series, *Summary Social, Economic, and Housing Characteristics* (1990 CPH-5). It will also be available on the Internet.

Planned release date: 2003

Population and Housing Unit Totals (PHC-3). This publication includes population and housing unit totals for Census 2000 as well as the 1990 and 1980 censuses. Information on area measurements and population density will be included. This series will include one printed report for each state plus a national report; it will also be available on the Internet.

Planned release date: 2003

Maps and Geographic Products

A variety of maps, boundary files, and other geographic products will be available to help users locate and identify geographic areas. These products will be available in various media such as the Internet, CD-ROM, DVD, and, in the case of maps, as print-on-demand products.

TIGER/Line® files. These files contain geographic boundaries and codes, streets, address ranges, and coordinates for use with geographic information systems for mapping and other applications.

Planned release date: 2001

Census block maps. These maps show the boundaries, names, and codes for American Indian/Alaska Native areas, and Hawaiian home lands, states, counties, county subdivisions, places, census tracts, and census blocks. This map series will also be produced by specified governmental units (e.g., American Indian and Alaska Native areas, and Hawaiian home lands, counties, incorporated places, and functioning minor civil divisions).

Planned release date: 2001

Census tract outline maps. These county maps show the boundaries and numbers of census tracts and names of features underlying the boundaries. They also show the boundaries, names, and codes for American Indian and Alaska Native areas, counties, county subdivisions, and places.

Planned release date: 2001

Reference maps. This series of tabulation reference map types shows the boundaries for tabulations areas including: states, counties, American Indian reservations,

county subdivisions (MCDs/CCDs) incorporated places, and Census-Designated Places. This series includes the state and county subdivision outline maps, urbanized area maps, and metropolitan area maps. These maps vary in size from wall to page size.

Planned release date: 2001-2003

Generalized boundary files.

These files are designed for use in a geographic information system (GIS) or similar computer mapping software. Boundary files are available for most levels of census geography.

Planned release date: 2001-2002

Statistical maps. Census 2000 data will be displayed on colorful maps on such topics as population density and population distribution.

Planned release date: 2001-2003

For More Information About Census 2000 and Census 2000 Data Products:

- Visit the Census Bureau's Internet site at www.census.gov or call our Customer Services Center at 301-457-4100.
- Visit your local library. Many major university and public libraries participate in the Federal Depository Library Program and receive copies of Census Bureau reports and CD-ROMs.
- Call or visit one of 2,000 state tribal, minority serving institutions, local planning groups, libraries, chambers of commerce, and others that participate in a Census Bureau data dissemination program. For general program information, see: www.census.gov/clo/www/clo/html.
- Call or visit a Census Bureau Regional Office. For the address and phone number of the regional office near you, visit: census.gov/field/www/.



Census Bureau Facts for Features

A product of the U.S. Census Bureau's Public Information Office

CB00-FF.13

October 23, 2000

American Indian Heritage Month: November 2000

To mark this observance, the U.S. Census Bureau has culled from previously released reports on the American Indian and Alaska Native population the following data:

Income and Poverty

- American Indians and Alaska Natives had a median household income of \$30,784, based on a three-year average (1997-1999). This is higher than for African Americans (\$26,608) and not statistically different from Hispanics (\$29,110), but lower than for non-Hispanic Whites (\$43,287) and Asians and Pacific Islanders (\$48,614).

<http://www.census.gov/Press-Release/www/2000/cb00-158.html>

- Based on a three-year average (1997-1999), the poverty rate for American Indians and Alaska Natives was 25.9 percent. This is higher than the poverty rates for non-Hispanic Whites (8.2 percent) and Asians and Pacific Islanders (12.4 percent) but not statistically different from the rates for African Americans (25.4 percent) and Hispanics (25.1 percent).

<http://www.census.gov/Press-Release/www/2000/cb00-158.html>

Health Insurance

- Based on a three-year average (1997-1999), 27.1 percent of American Indians and Alaska Natives lack health insurance coverage. Their rate is significantly higher than that of African Americans (21.6 percent), Asians and Pacific Islanders (20.9 percent) and non-Hispanic Whites (11.6 percent), but lower than that of Hispanics (34.3 percent).

<http://www.census.gov/Press-Release/www/2000/cb00-160.html>

Voting

- Nationwide, it is expected there will be 1.6 million American Indians and Alaska Natives of voting age on Election Day, Nov. 7, 2000. California (240,000), Oklahoma (170,000), Arizona (159,000) and New Mexico (103,000) will have the highest numbers of these.

<http://www.census.gov/Press-Release/www/2000/cb00-125.html>

Households and Families

- Between July 1, 2000, and July 1, 2010, the Census Bureau projects that the number of American Indian and Alaska Native households in the United States will climb from 754,180 to 906,036.

<http://www.census.gov/population/projections/nation/hh-fam/table4n.txt>

- On July 1, 2000, according to projections made in 1995, 74 percent of the nation's American Indian and Alaska Native households were family households. Of these families, 65 percent were maintained by married couples, 26 percent by women with no husband present and 9 percent by

men with no wife present. The typical American Indian and Alaska Native family was made up of 3.57 people, larger than the average 3.12 people for families of all races.

<http://www.census.gov/population/projections/nation/hh-fam/table4n.txt>

Education

- In the fall of 1996, 134,000 non-Hispanic American Indians were enrolled in the nation's colleges and universities, up from 84,000 in the fall of 1980. Of these persons, about half attended two-year schools, nearly 6 in 10 were women, more than 8 in 10 went to public schools and more than 9 in 10 were undergraduates.

<http://www.census.gov/Press-Release/www/1999/cb99-238.html>

- During the 1995-96 school year, about 15,000 of the nation's American Indians and Alaska Natives received college degrees -- either an associate's, bachelor's, master's, doctor's or other professional.

<http://www.census.gov/Press-Release/www/1999/cb99-238.html>

Population Distribution

- The nation's American Indian and Alaska Native resident population grew by 371,000 between April 1, 1990, and Aug. 1, 2000, to 2.4 million.

<http://www.census.gov/population/estimates/nation/intfile3-1.txt>

- The American Indian and Alaska Native resident population has grown more rapidly than the nation's population as a whole during the last decade -- 17.9 percent versus 10.7 percent between April 1, 1990, and Aug. 1, 2000.

<http://www.census.gov/population/estimates/nation/intfile3-1.txt>

- Despite its steady growth over the last 10 years, the nation's American Indian and Alaska Native population remained at 0.9 percent of the total population on Aug. 1, 2000.

<http://www.census.gov/population/estimates/nation/intfile3-1.txt>

- The nation's American Indian and Alaska Native resident population is young, with an estimated median age on Aug. 1, 2000, of 27.8 years eight years younger than the median for the population as a whole.

<http://www.census.gov/population/estimates/nation/intfile3-1.txt>

- According to middle-series population projections, the nation's American Indian and Alaska Native resident population will grow to 4.4 million by 2050. This means that this race group should see its population increase faster over the next half-century than either Whites or African Americans but more slowly than Hispanics (who may be of any race) or Asians and Pacific Islanders.

<http://www.census.gov/Press-Release/www/2000/cb00-05.html>

- There were an estimated 167,000 American Indians and Alaska Natives age 65 and over and 22,000 age 85 and over residing in the United States as of July 1, 2000. Projections indicate these numbers will increase by July 1, 2050, to 662,000 and 148,000, respectively.

<http://www.census.gov/Press-Release/www/2000/cb00-05.html>

As of July 1, 1999, according to population estimates:

- The five states with the largest American Indian and Alaska Native populations were: California (314,000), Oklahoma (263,000), Arizona (261,000), New Mexico (166,000) and Washington (105,000) Overall, roughly one-half of the nation's American Indians and Alaska Natives lived in Western states.

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>

- Each of the five states with the largest percentage of American Indians and Alaska Natives were located west of the Mississippi River. They were: Alaska (where persons of this group constituted 16 percent of the total population), New Mexico (10 percent), South Dakota (8 percent), Oklahoma (8 percent) and Montana (7 percent).

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>

- Of the five counties with the largest American Indian and Alaska Native population, four were located in either Arizona or New Mexico. However, it was Los Angeles, Calif., that topped the nation, with 56,700 American Indians and Alaska Natives. Rounding out the top five were: Maricopa, Ariz. (56,400); Apache, Ariz. (53,300); Navajo, Ariz. (51,300); and McKinley, N.M. (48,900).

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>

- Of the six counties (or county equivalents) with the largest percentage of American Indians and Alaska Natives, five were located in either South Dakota or Alaska. Shannon, S.D., where 95 percent of residents were American Indians and Alaska Natives, led the nation, followed by Wade Hampton Census Area, Alaska (94 percent), Menominee, Wis. (89 percent); Northwest Arctic Borough, Alaska (86 percent); Bethel Census Area, Alaska (85 percent); and Todd, S.D. (84 percent).

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>

Between April 1, 1990, and July 1, 1999, according to population estimates:

- Arizona added 46,700 American Indians and Alaska Natives to its population, more than any other state. Next were New Mexico (28,300), California (27,000), Texas (25,100) and Florida (23,200).

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>

- Florida's American Indian and Alaska Native population increased 63 percent -- tops among all the states. Nevada, at 56 percent, New Jersey, at 42 percent, Georgia, at 37 percent, and Texas, at 35 percent, were the runners-up.

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>

- Both of the counties that added the most American Indians and Alaska Natives to their populations were located in Arizona. Maricopa led the way, adding 14,100 over the period, followed by Navajo (10,700). Rounding out the top five were San Juan, N.M. (8,700), Robeson, N.C. (7,200) and Sandoval, N.M. (6,600).

<http://www.census.gov/Press-Release/www/2000/cb00-126.html>


The preceding facts come from the Current Population Survey, the Statistical Abstract of the United States, population estimates and projections and the Property Owners and Managers Survey. The data are subject to sampling variability and other sources of error. Previous Census Bureau Facts for Features this year: African American History Month (February), Valentine's Day (February 14), Women's History Month (March), Census Day, 2000 (April 1), Asian Pacific American Heritage Month (May), Mother's Day (May 14), Father's Day (June 18), the Fourth of July, Back to School (August), Grandparents Day (Sept. 10), Hispanic Heritage Month (Sept. 15-Oct. 15) and Election Day (Nov. 7). Questions or comments should be directed to the Census Bureau's Public Information Office (Tel: 301-457-3030; fax: 301-457-3670; email: pio@census.gov).

*Source: U.S. Census Bureau
Public Information Office*

301-457-3030

Last Revised: March 16, 2001 at 02:09:03 PM

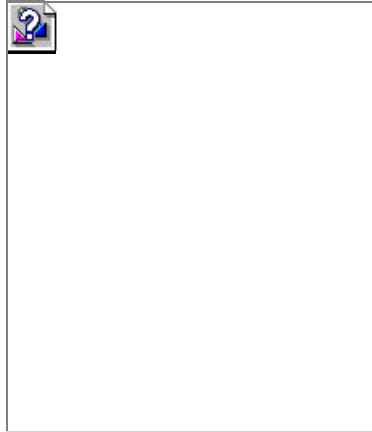
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 U.S. Census Bureau. Helping You Make Informed Decisions



Minority Links

Facts on the American Indian/Alaska Native Population



Other Ethnic Census Data Links:

- [Black/African American Links](#)
- [Hispanic/Latino Links](#)
- [Asian/Pacific Islander Links](#)

<p>Census 2000</p> <ul style="list-style-type: none"> • American FactFinder • Summary File 1 • Demographic Profiles • Census 2000 Briefs • Population Tables and Reports • Redistricting Data (P.L. 94-171) • Q&As for Census 2000 Data on Race • ESCAP Report • American Community Survey • Race & Ethnicity: 1990 vs. 2000 • Advisory Committee • Federal Register and Test Surveys • Working Papers • Partnership Programs • Boundaries 	<p>Social Characteristics</p> <ul style="list-style-type: none"> • Foreign Born • Housing • Languages • Maps • Population • Social & Economic Characteristics: 1990 	<p>Economic Characteristics</p> <ul style="list-style-type: none"> • Business
<p>General Information</p> <ul style="list-style-type: none"> • Tribe Profiles: 1980 to 1990 • Facts for Features • Statistical Briefs • 1990 Census • 1990 "We" Reports 	<p>News Releases</p> <ul style="list-style-type: none"> • News Releases 	<p>Related Topics</p> <ul style="list-style-type: none"> • American FactFinder • Federal Stats • Telephone Contacts

Public Information Office
e-mail: pio@census.gov
301-457-3030
301-457-3670 (fax)

Source: U.S. Census Bureau

Public Information Office
301-457-3030
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U.S. Census Bureau. Helping You Make Informed Decisions

U.S. Census Bureau

American FactFinder

Census 2000: PL Data in American FactFinder

U S C E N S U S B U R E A U

American FactFinder (AFF) is the Census Bureau's primary on-line data retrieval tool for Census 2000.

AFF already has data from the 1990 Census, The American Community Survey, and the 1997 Economic Census. The data from Census 2000 will be released on AFF as soon as it is available.

American FactFinder's Main Page

U.S. Census Bureau

Search
☐ keyword
☐ place name

Site Tour
 What's in FactFinder
 Confidentiality
 What's New
 Products
 Reference Maps
 Thematic Maps
 Data Sets
 Census 2000 Puerto Rico
 on a special
 Kids' Corner

Your source for population, housing, economic and geographic data.
 With Elastic Facts
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Show me
 for

[Census 2000 Release Schedule](#) | [American Community Survey Data](#)

Items of Interest

Census 2000
 Local Census 2000 Results
 Now Available
 Census 2000 data (P.L. 94-171) for states, counties, and smaller areas are now being released on a state by state basis

FactFinder Data Sources

The Decennial Census collects data every 10 years about households, education, income, homeownership and more
[Geographic Comparison Tables](#)

The Economic Census profiles the U.S. Economy every 5 years, from the national to the local level
[Industry Quick Report](#)
[Geographic Census Profile](#)

The American Community Survey (ACS) is a survey conducted by the U.S. Census Bureau that provides profiles of selected communities every year

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Performance Tips

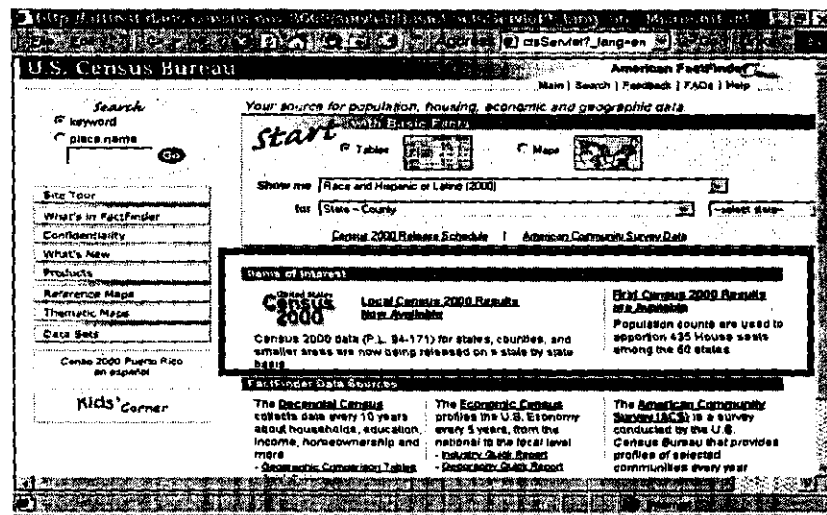
- Use browser versions of Netscape 4.7 or IE 5.0
- Enable JavaScript and accept cookies (usually the default settings)
- Review the Site Tour
- Look at FAQs
- Use Help

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Higher versions of internet browsers are not recommended for use with American FactFinder at this time.

FactFinder uses only one transient cookie to keep track of your selections while at the site. It is necessary to enable data to be returned to you, but goes away as soon as your session ends.

Items of Interest



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The Items of Interest section of the site is the most frequently updated area of FactFinder. Always look here to see what is new since your last visit. Currently, clicking on the "Local Census 2000 Results" link allows you to select a state and see the redistricting data in Quick Table format.

Viewing Redistricting Data in American FactFinder

Data in AFF can be located using:

- Basic Facts
- Geographic Comparison Tables
- Quick Tables
- Data Sets
- Search
- Thematic or Reference Maps

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The data available through the drop down selection lists in Basic Facts will always default to the most current data available, meaning that although you currently see 1990 data, it will be updated with data from Census 2000 as it is released.

Geographic Comparison Tables and Quick Tables are available directly through links under FactFinder Data Sources at the bottom of the main page.

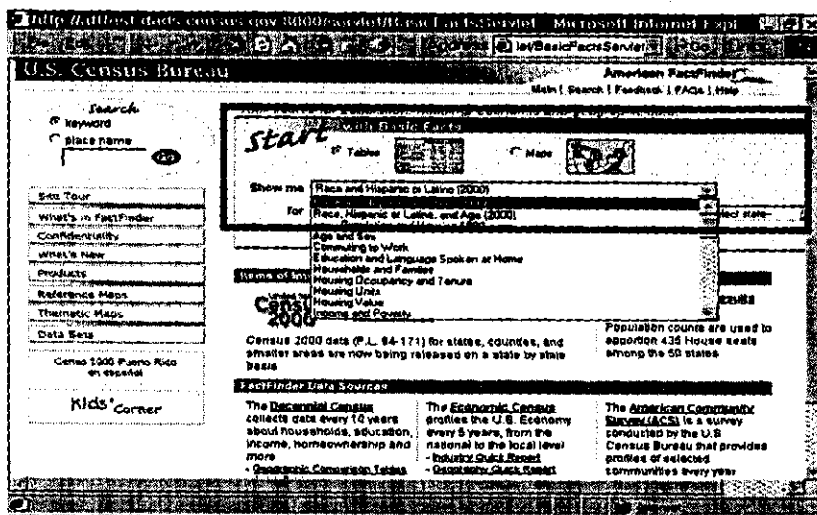
The Data Sets path is the gateway to ALL of the data available in American FactFinder and the only way to access Detailed Tables.

You can search by either keyword or place name, and choose to use a basic search function (in the yellow bubble at the top of the main page) or a more refined search using the button on the banner.

Thematic maps display data while reference maps show geographical boundaries and are an excellent tool for locating census tract numbers.

We'll talk about each of these areas in detail as we look at American FactFinder.

Using Basic Facts



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The Basic Facts section presents frequently requested data from both population and economic surveys. This area was designed to allow easy access to census data for anyone who can use the internet.

All you have to do is select the topic you're interested in from the drop-down list in the "Show me" box.

Select Using Drop-down Lists

The screenshot shows the U.S. Census Bureau American FactFinder website. The browser address bar displays a URL starting with 'http://factfinder.census.gov'. The page header includes 'U.S. Census Bureau' and 'American FactFinder'. A navigation bar contains links for 'Main', 'Search', 'Feedback', 'FAQs', and 'Help'. The main content area is titled 'Your source for population, housing, economic and geographic data' and features a 'START' button. Below this, there are radio buttons for 'Table' and 'Map'. A section titled 'Show me (Race and Hispanic or Latino (2000))' contains a drop-down menu for 'County - Census Tract' with a list of options: 'State - Race and Hispanic or Latino (2000)', 'State - American Indian Area/Alaska Native Area/Hawaiian Home Land', 'State - Congressional District (108th Congress)', and 'County - Census Tract'. To the left of the main content area, there is a sidebar with links for 'See Tour', 'What's in FactFinder', 'Confidentiality', 'What's New', 'Products', 'Reference Maps', 'Thematic Maps', 'Data Sets', 'Census 2000 Puerto Rico on Spanish', and 'Kids' Corner'. At the bottom of the page, there are three columns of text providing information about the 'First Census 2000 Results', 'American FactFinder New Release', and '1997 Economic Census'.

U.S. Census Bureau

Search
By keyword
By place name

See Tour
What's in FactFinder
Confidentiality
What's New
Products
Reference Maps
Thematic Maps
Data Sets
Census 2000 Puerto Rico on Spanish
Kids' Corner

Your source for population, housing, economic and geographic data

START

Table Map

Show me (Race and Hispanic or Latino (2000))

for County - Census Tract

State - Race and Hispanic or Latino (2000)
State - American Indian Area/Alaska Native Area/Hawaiian Home Land
State - Congressional District (108th Congress)
County - Census Tract

First Census 2000 Results
New Release
Population counts are used to apportion 435 House seats among the 50 states.

American FactFinder
New Release
A new look for FactFinder in preparation for the release of Census 2000 data.

1997 Economic Census
Just released:
Economic-Wide Key Statistics: 1997

The American Community Survey (ACS) is a survey conducted by the U.S. Census Bureau that provides profiles of selected communities every year.

U.S. CENSUS BUREAU

Next, select the geography for which you are interested in seeing the data. After choosing a format from the drop-down list, you will be asked to specify a state, county, and so forth in order to see the exact table you want.

A Basic Facts Table

U.S. Census Bureau

Basic Facts - Geographic Comparison Table

NOTE: Data not adjusted based on the Accuracy and Coverage Evaluation. For information on confidentiality, sampling error, nonresponse error, and definitions, see the Methodology at www.census.gov/hhes/ah/tables/2000/2000_2001.html.

Geographic area	Total population	Race						Some other race
		Total	White	Black or African American	Hispanic or Latino	Asian	Native Hawaiian and Other Pacific Islander	
Arlington County	188,452	181,224	130,801	17,708	852	18,227	143	15,788
Census Tract								
Tract 1001	4,232	4,159	3,816	54	15	214	1	51
Tract 1002	5,448	5,283	5,083	81	8	183	2	63
Tract 1003	5,122	5,046	5,031	121	15	209	4	51
Tract 1004	3,284	3,214	3,088	44	8	88	0	4
Tract 1005	3,186	3,151	3,136	83	3	127	2	41
Tract 1006	2,843	2,822	2,802	123	11	241	1	41

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Click on Main at the top of the page to return to the main page and select another table.

Using Quick Links

- Geographic Comparison Tables and Quick Tables can be accessed from quick links under FactFinder Data Sources at the bottom of the main page
- A default table will be presented so you can see the table layout

Default Quick Table

U.S. Census Bureau

Quick Tables

QT-P1. Age and Sex: 1990 Universe: Total Population

Geographic Area: United States

NOTE: For information on confidentiality, nonsampling error, and definitions, see <http://factfinder.census.gov/homerelease/relnotes/90/900120.htm>

Age	Number			Percent		
	Both sexes	Male	Female	Both sexes	Male	Female
Total population	246,796,973	121,238,418	125,558,555	100.0	100.0	100.0
Under 3 years	18,364,443	8,962,408	9,402,034	7.4	7.7	7.0
Under 1 year	3,812,512	1,844,801	1,967,711	1.5	1.4	1.2
1 and 2 years	7,794,147	3,874,524	3,919,623	3.1	3.2	3.0
3 and 4 years	7,371,864	3,779,074	3,592,790	3.0	3.1	2.8
5 to 9 years	18,098,178	8,282,527	9,815,651	7.3	7.0	6.9
5 years	3,699,533	1,698,177	1,991,356	1.5	1.8	1.4
6 years	3,577,832	1,628,830	1,949,002	1.4	1.3	1.4
7 to 9 years	10,822,014	5,345,518	5,476,496	4.4	4.8	4.1
10 to 14 years	17,114,249	8,787,187	8,327,062	6.9	7.2	6.5
10 and 11 years	7,108,882	3,648,808	3,460,074	2.9	3.0	2.7
12 and 13 years	6,782,480	3,488,418	3,294,062	2.7	2.9	2.6
14 years	3,243,107	1,682,248	1,560,859	1.3	1.4	1.2

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This is the default Quick Table that is currently presented by American FactFinder. It will be updated when Census 2000 data are released.

The Change Selections Button

The screenshot shows the U.S. Census Bureau American FactFinder interface. At the top, there's a navigation bar with 'U.S. Census Bureau' and 'American FactFinder'. Below this, a 'Quick Tables' section displays the current selection: 'QT-P1 Age and Sex: 1990 Universe: Total Population'. A 'Change Selections' button is highlighted with a red box. To the right of this button are links for 'Print / Download', 'Related Tables', and 'Current Selections'. Below the button, a table displays population data for the United States, categorized by age and sex.

NOTE: For information on confidentiality, nonsampling error, and definitions, see <http://factfinder.census.gov/home/notes/notes1990.html>.

Age	Number			Percent		
	Both sexes	Male	Female	Both sexes	Male	Female
Total population	248,766,273	121,235,418	127,476,458	100.0	100.0	100.0
Under 5 years	18,364,443	8,302,408	8,982,034	7.4	7.7	7.0
Under 1 year	3,217,312	1,644,801	1,572,511	1.3	1.4	1.2
1 and 2 years	7,784,147	3,674,534	3,789,613	3.1	3.3	3.0
3 and 4 years	7,372,564	3,773,074	3,599,490	3.0	3.1	2.8
5 to 9 years	16,088,179	8,282,527	8,636,652	7.3	7.5	6.9
10 years	3,686,233	1,686,177	1,800,056	1.5	1.6	1.4
11 years	3,577,832	1,629,832	1,747,800	1.4	1.5	1.4
12 to 14 years	10,822,014	5,542,518	5,298,496	4.4	4.6	4.1
15 to 19 years	17,114,248	8,787,187	8,347,062	6.9	7.2	6.5
20 to 24 years	7,108,882	3,645,508	3,463,374	2.9	3.0	2.7
25 to 34 years	6,782,450	3,438,418	3,303,034	2.7	2.8	2.6
35 to 44 years	3,243,107	1,682,246	1,560,861	1.3	1.4	1.2

USCENSUSBUREAU

Clicking on Change Selections at the top of the page, allows you to go from any default table to the table of your choice by specifying topic and geography.

Since FactFinder generally asks you to select geography first, try to get in the habit of doing that even when using Change Selections.

Related Items

U.S. Census Bureau

Quick Tables

QT-P1. **Age and Sex: 1990 Unhears: Total Population**

Geographic Area: United States

NOTE: For information on how to use the data, see the documentation.

Related Items

Geographic Comparison Tables
 Age, Sex, and Group Quarters: 1990

Demographic Profiles
 Redistricting Data (Public Law 94-171) Summary File
 QT-P1. Race, Hispanic or Latino, and Age: 2000 - Summary Data
 Unadjusted Block Data (Public Law 105-119) Summary File
 QT-P1-A. Race, Hispanic or Latino, and Age: 2000 - Summary Data (without adjustment based on 1990 Summary Tape File 1 (STF 1) - 100-Percent data)
 DP-1. General Population and Housing Characteristics: 1990
 QT-P1. Age and Sex: 1990 - Unhears: American Indian, Eskimo, or Aleut Population
 QT-P1. Age and Sex: 1990 - Unhears: Asian or Pacific Islander Population
 QT-P1. Age and Sex: 1990 - Unhears: Black Population
 QT-P1. Age and Sex: 1990 - Unhears: Hispanic Origin Population
 QT-P1. Age and Sex: 1990 - Unhears: Other Race Population
 QT-P1. Age and Sex: 1990 - Unhears: White Population

Thematic Maps

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Clicking the Related Items button will bring up a new window showing all data available in FactFinder for the subject of your table – much like doing a Search on the topic. You can click on any of the links in the Related items window to be taken directly to that table or map.

Default Geographic Comparison Table

U.S. Census Bureau American FactFinder

Geographic Comparison Table

Change Selections Print/Download Related Items Current Selection

GCT-Pa. Age, Sex, and Group Quarters, 1990

Geographic Area: United States -- Region, Division, and States

NOTE: For information on confidentiality, nonsampling error, and definitions, see <http://factfinder.census.gov/handbook/tables/1990/note.html>.

Geographic Area	Total population	Percent of population			90 years and over: males per 100 females	Group quarters population	
		Under 18 years	18 to 64 years	65 years and over		Number	Percent of total
United States	248,708,873	25.6	61.9	12.5	91.9	6,897,743	2.7
REGION AND DIVISION							
Northeast Region	90,808,229	23.4	62.8	13.8	89.2	1,510,088	3.0
New England Division	13,208,843	22.2	63.4	13.4	90.2	445,031	3.4
Middle Atlantic Division	37,802,386	23.6	62.6	13.8	89.8	1,055,057	2.8
Midwest Region	58,888,832	26.2	60.8	13.0	90.8	1,598,828	2.7
East North Central Division	42,008,842	26.1	61.3	12.6	90.6	1,085,888	2.6
West North Central Division	17,858,880	26.3	59.7	13.9	91.5	542,821	3.1

U.S. CENSUS BUREAU

The default Geographic Comparison Table allows the user to scan the headings and see the types of data available in this format.

This table can be changed in the same way as the Quick Table: use the Change Selections or Related Items buttons to specify preferred tables and geographies.

Quick Links Review

QUICK SELECTION METHOD:

Click on **Quick Tables** or **Geographic Comparison Tables** link under FactFinder Data Sources at bottom of main page. Default Table appears.

Click on **Change Selections** at top of screen.

Select **Geography** and choose the area of interest.

Go to **Change Selections** again and select Tables.

Use the table selection boxes to choose the desired tables(s) and click **Show Table**.

USCENSUSBUREAU

NOTE: When more than one Quick Table is selected, or the All States choice is invoked, the tables will appear in a scrolling list.

Data Sets

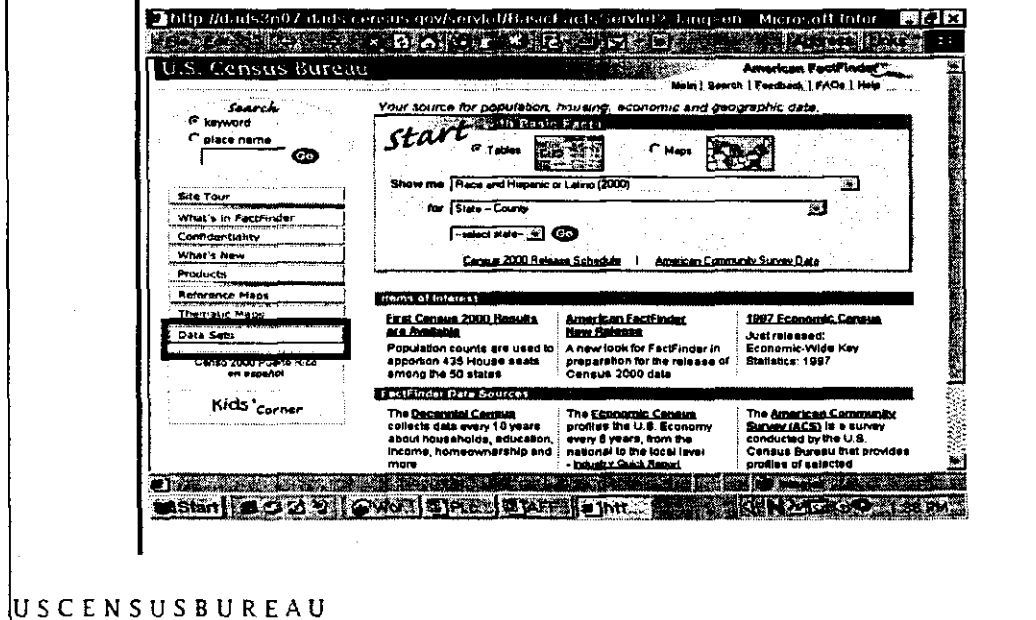
- Can access Geographic Comparison Tables, Quick Tables, Detailed Tables and Thematic Maps from same selection area
- Allows selection of lower level geographies including census tracts and voting districts
- Selection methods are the same as for quick links, but more data is available

USCENSUSBUREAU

Data Sets is the gateway to ALL of the data held in American FactFinder. Every table and map from every survey available can be located using this area of the site.

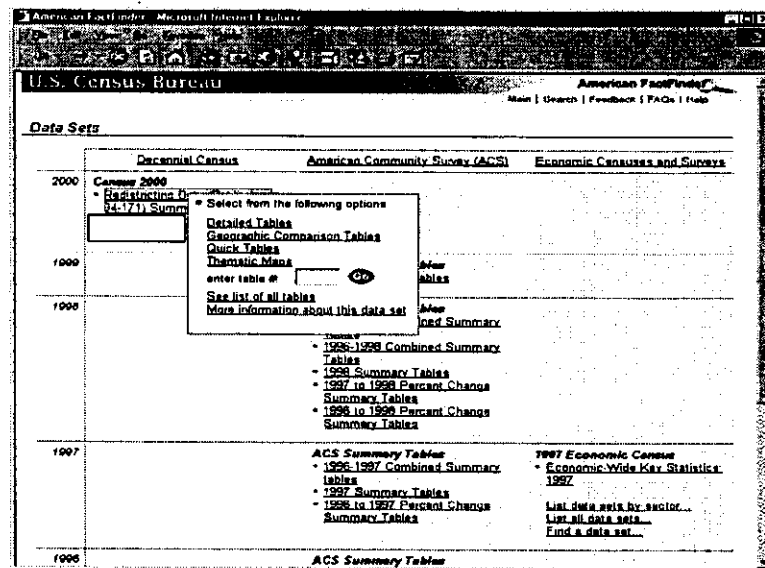
You will still use drop-down lists and links to make many of your selections, just as you did with Basic Facts, Quick Tables, and Geographic Comparison Tables.

Using the Data Sets Path



Clicking the Data Sets button on the left side of the main page will take you deeper into FactFinder's data access capabilities.

Selecting a Data Set and Presentation



USCENSUSBUREAU

As you run your mouse over each of the links on the Data Sets page, a “mouseover” will appear, giving you a brief description of the data contained in that file. Once you click on a data set, say Census 2000 Redistricting Data, an option box will appear on your screen.

Here, you can select from a variety of table formats or Thematic maps, as well as choose to see information about the data set or a list of all tables available within this data set. Have a favorite table? Feel free to type in its’ number and click “Go” to see immediately.

List of Tables Available in 2000 Redistricting Data

http://data3n01.dads.census.gov/service/DataSetTableListServlet?ds_name=D1C_20

U.S. Census Bureau American FactFinder

Main | Search | Feedback | FAQs | Help

Data Sets » **List all tables** [Change Selections](#)

Current Data Set: [Unadjusted Redistricting Data \(Public Law 105-119\) Summary File](#)

► Select a table and click 'Next'

Quick Tables

QT-PL-1: Race, Hispanic or Latino, and Age: 2000 (without adjustment based on the Accuracy and Coverage Evaluation)

Geographic Comparison Tables

GCT-PL-1: RACE AND HISPANIC OR LATINO: 2000 (without adjustment based on the Accuracy and Coverage Evaluation)

Detailed Tables

PL-1: Race

PL-2: Hispanic or Latino, and Not Hispanic or Latino By Race

PL-3: Race for the Population 18 Years and Over

PL-4: Hispanic or Latino, and Not Hispanic or Latino by Race for the Population 18 Years and Over

[Data Information](#)

[Next](#)

Unadjusted Redistricting Data (Public Law 105-119) Summary File

U.S. CENSUS BUREAU

The first data released from Census 2000 for the purposes of Redistricting (Public Law 94-171) will be presented in four Detailed Tables, one Quick Table and one Geographic Comparison Table.

Detailed Tables

The screenshot shows the 'Detailed Tables' selection interface on the U.S. Census Bureau's American FactFinder website. The page is titled 'Detailed Tables • Select Geography' and indicates the 'Current Data Set: Statistical Data Online, July 2003 Summary File'. It provides instructions for selecting geographic areas through three methods: list, place name, address, or map. The 'list' method is selected, and the user is prompted to 'Select the type of area' (currently set to 'State') and 'Select one or more geographic areas and click 'Add''. A list of states is shown on the left, with 'Virginia' selected and added to a 'Current Selections' box. The 'Next' button is visible at the bottom right of the selection area.

U.S. Census Bureau

American FactFinder

Detailed Tables • Select Geography

Current Data Set: Statistical Data Online, July 2003 Summary File

Choose a selection method: ☒ list ☐ place name ☐ address ☐ map

Select the type of area: [Select Census Geography](#)

☐ show all geography types

Select one or more geographic areas and click 'Add'

All States
Alaska
Louisiana
Texas
Vermont

Add Remove

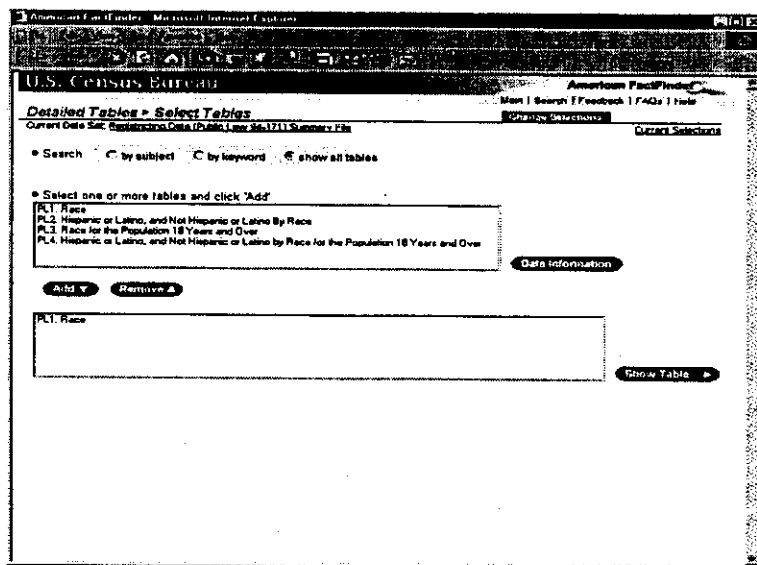
Virginia

Next

USCENSUSBUREAU

The default selection method is "list." Using that, you will be asked to first select the **type** of area and then the particular geographic area. It's quite easy if you read and follow each bulleted item on the screen. Then click Add to put your selections in the selection box (or shopping basket, as some people call it!) and click next.

Select One or More Tables to Display



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Highlight the table or tables you'd like to see and click the "Add" button. Then click Show Table.

In order to select more than one item from a list in FactFinder, hold down the shift key on your keyboard and highlight as many as you'd like at one time. They can all be added to the selection box with one click. The upper limit for selections in FactFinder is 500.

When multiple tables are selected, they will display one under the other in a scrolling list.

The Detailed Table

Current Selections

U.S. Census Bureau American Factfinder

Detailed Tables Options Change Selections Print Download

Current Selections

Data Set: Redistricting Data (Public Law 94-171) Summary File

Geographic Areas: Virginia

Tables: PL1, RACE [71] - Universe: Total population

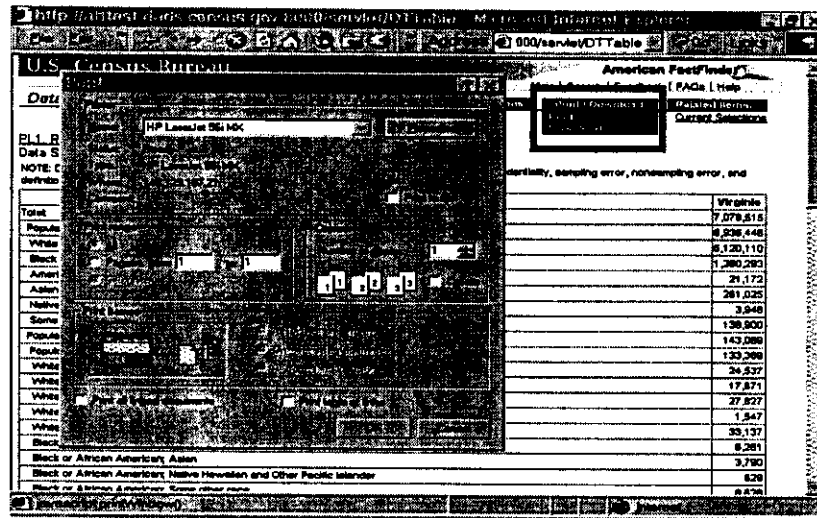
Close

White, Asian	17,827
White, Native Hawaiian and Other Pacific Islander	1,547
White, Some other race	33,137
Black or African American, American Indian and Alaska Native	6,281
Black or African American, Asian	3,780
Black or African American, Native Hawaiian and Other Pacific Islander	629

USCENSUSBUREAU

Clicking Current Selections after viewing your detailed tables allows you to see all of the tables and geographies you have chosen. This is especially helpful when you have selected many tables. You can print this pop-up box to keep as a record that can help you organize files or avoid repeating your work needlessly.

Printing in AFF



USCENSUSBUREAU

Any table in American FactFinder can be printed. Click on the Print/Download button and click on Print. The print pop-up box will appear on your screen. Verify that all settings are correct and click OK.

Downloading Data from AFF

U.S. Census Bureau

Detailed Tables

PLT RACE [71] - Universe: Total population

Date Set: **Unadjusted**

NOTE: Data not adjusted for definitions see [link]

Detailed Tables - Download

Date Set: **Unadjusted Block Data (Public Law 105-119) Summary File**

Tables: **PLT RACE [71] - Universe: Total population**

Format: ☒ Comma delimited - spreadsheet format (.csv file)

☐ Tab delimited (.txt file)

OK Cancel

Population of area	Population
White alone	7,078,513
Black or African American alone	9,835,446
American Indian or Alaska Native alone	5,120,110
Asian alone	1,360,280
Native Hawaiian or Other Pacific Islander alone	21,172
Some other race	281,025
Population of two or more races	3,948
White, Black or A.	139,800
White, American I.	143,098
White, Asian	133,368
White, Native H.	24,237
White, Black or A.	17,871
White, American I.	27,527
White, Asian	1,647
White, Native Hawaiian and Other Pacific Islander	33,137
White, Some other race	6,281
Black or African American, American Indian and Alaska Native	3,790
Black or African American, Asian	626
Black or African American, Native Hawaiian and Other Pacific Islander	876
Black or African American, Some other race	876

U.S. CENSUS BUREAU

Comma delimited download will be saved to your spreadsheet software and tab delimited will be saved as a text file.

Downloading is especially useful with Detailed Tables which can be very long and often cannot be printed (only the part you can see on the screen will be available to print).

Downloading is a 3-Step Process

U.S. Census Bureau American Factfinder

Detailed Tables

PL1, RACE [71] - Universe: Total
 Data Set: Unadjusted Black
 NOTE: Data not adjusted based on definitions see <http://factfinder.cen.gov>

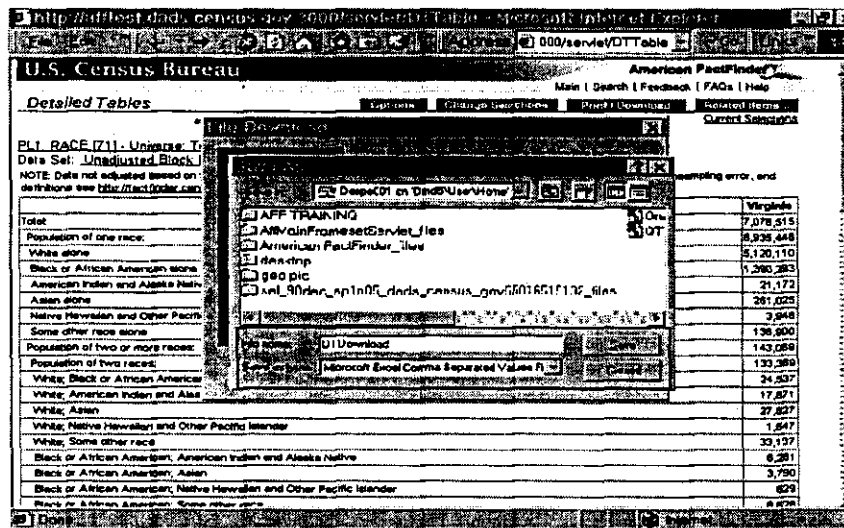
Sampling error, and

Total	7,078,815
Population of one race	6,836,448
White alone	5,120,110
Black or African American alone	1,380,290
American Indian and Alaska Native alone	21,172
Asian alone	281,026
Native Hawaiian and Other Pacific Islander alone	3,346
Some other race alone	136,800
Population of two or more races	143,088
White, Black or African American	131,268
White, American Indian and Alaska Native	24,537
White, Asian	17,671
White, Native Hawaiian and Other Pacific Islander	27,827
White, Some other race	1,547
Black or African American, American Indian and Alaska Native	32,137
Black or African American, Asian	6,281
Black or African American, Native Hawaiian and Other Pacific Islander	3,780
Black or African American, Some other race	829
Asian, American Indian and Alaska Native	8,678

USCENSUSBUREAU

If you wish to continue with the download and save the file to a disk or drive on your PC, click OK.

Carefully Choose a Filename



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Be sure to save your file with a name you will recognize and be able to find within your directory when you are ready to use the data.

Click save. The download manager will do the rest.

Using Search to Find Redistricting Data

- Use the keyword search in the yellow bubble to look for a particular topic such as race, or type in "PL" to get a list of all available tables and maps
- Use the place name search to look for data on named geographies
- Direct access to data by clicking on a link in the results list

USCENSUSBUREAU

The Search area allows users to search by multiple methods. You can search by a keyword or a place name, by selecting a year or program, or by selecting from many predetermined subjects in a drop-down menu.

Once you get results for your inquiry, you can directly access the data by clicking on the linked response.

A Basic Search

The screenshot shows the U.S. Census Bureau American Factfinder website. At the top, there's a navigation bar with links like 'Home', 'Search', 'Feedback', 'FAQs', and 'Help'. Below this, the 'Search' section is prominent, featuring two input fields: 'keyword' and 'place name'. The 'place name' field contains the text 'pl'. To the right of the search fields is a 'Go' button. Below the search fields, there's a 'Show me' section with a dropdown menu set to 'Race and Hispanic or Latino (2000)'. Further down, there's a 'State - County' dropdown menu. The main content area is titled 'Your source for population, housing, economic and geographic data' and includes a 'start' button. Below this, there's a 'What's New' section with links to 'Census 2000', 'Local Census 2000', and 'Fast Census 2000'. The bottom of the page features a 'Factfinder Data Sources' section with links to 'The Decennial Census', 'The Economic Census', and 'The American Community Survey'.

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The search bubble allows you to search by keyword, such as education, children, income, race; and the place name search allows you to search for data on states and places simply by typing the name.

Note that place name search does not return results when you enter a number such as a ZIP Code or census tract number, and that place name search works best if you just type "suitland" rather than "suitland, md."

List of Search Results

The screenshot shows the American FactFinder search results page. At the top, there's a navigation bar with 'U.S. Census Bureau' and 'American FactFinder'. Below this is a 'Search' section with three tabs: 'keyword', 'place name', and 'Advanced Geography Selection'. The 'keyword' tab is selected. Under 'Select year and program', there's a dropdown menu set to 'All years and programs'. The 'Enter a keyword' field contains 'PL'. There are 'Go' buttons for both the keyword and the 'use synonyms' checkbox. Below the search section, the 'Search Results' are listed. The results are categorized into 'Population and Housing Summary Data Sets', 'Thematic Maps', 'Unduplicated Block Data', and 'Quick Tables'. Each category lists several data sets with links to their respective files or maps.

U.S. Census Bureau

Search

• Search ☒ keyword ☐ place name ☐ Advanced Geography Selection

• Select year and program

• Enter a keyword ☐ use synonyms

• select a subject

Search Results

Population and Housing Summary Data Sets

Redistricting Data (Public Law 94-171) Summary File

Unduplicated Block Data (Public Law 105-119) Summary File

Thematic Maps

Redistricting Data (Public Law 94-171) Summary File

Percent of Persons Who Are American Indian and Alaska Native Alone or in Combination With One or More Other Races, 2000

Percent of Persons Who Are American Indian and Alaska Native Alone, 2000

Percent of Persons Who Are Asian Alone or in Combination With One or More Other Races, 2000

Map...

Unduplicated Block Data (Public Law 105-119) Summary File

Percent of Persons Who Are American Indian and Alaska Native Alone or in Combination With One or More Other Races, 2000

Percent of Persons Who Are American Indian and Alaska Native Alone, 2000

Percent of Persons Who Are Asian Alone or in Combination With One or More Other Races, 2000

Map...

Quick Tables

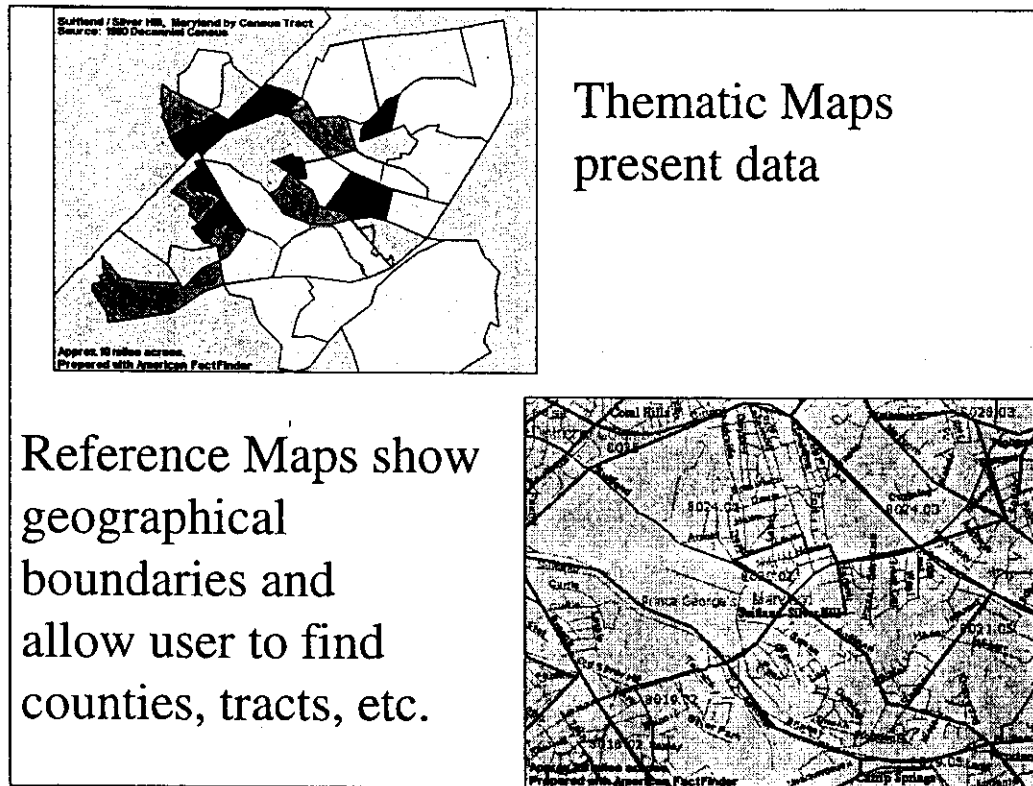
Redistricting Data (Public Law 94-171) Summary File

Percent of Persons Who Are American Indian and Alaska Native Alone or in Combination With One or More Other Races, 2000

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You can click on any link returned as a search result and move directly to that table or map.

The selection boxes at the top of the page allow you to further refine your search if needed, or to search on a completely different topic without returning to the main page.



Thematic maps reveal the geographic patterns in statistical data. Here is an example of Silver Hill, Maryland (home to the Census Bureau's headquarters) displayed as a thematic map by census tract.

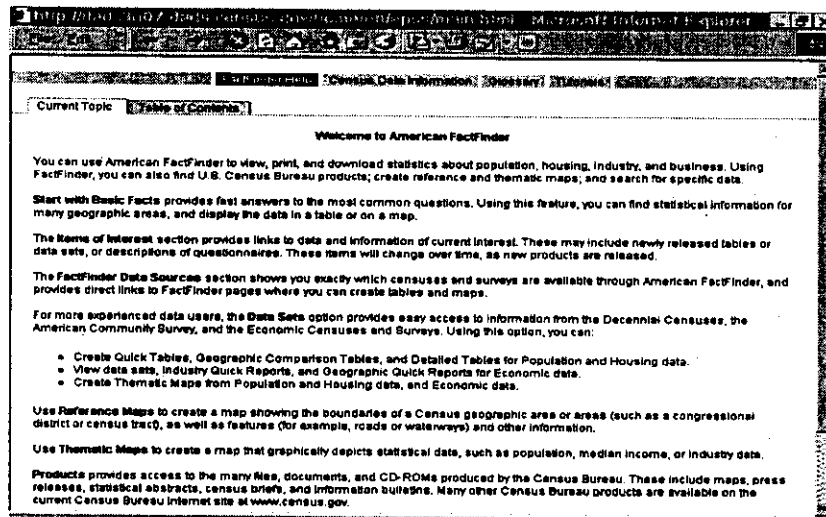
The reference map shows the geographical boundaries of the census tracts that were in the thematic map above. Reference maps show street names, rivers, and other geographical identifiers of geographical unit boundaries.

FactFinder Help

- Available from every page on the site
- Automatically gives help relevant to task you are performing
- Can select any topic from Table of Contents at anytime
- Includes 'Census Data Information' (metadata), and tutorial(s)

USCENSUSBUREAU

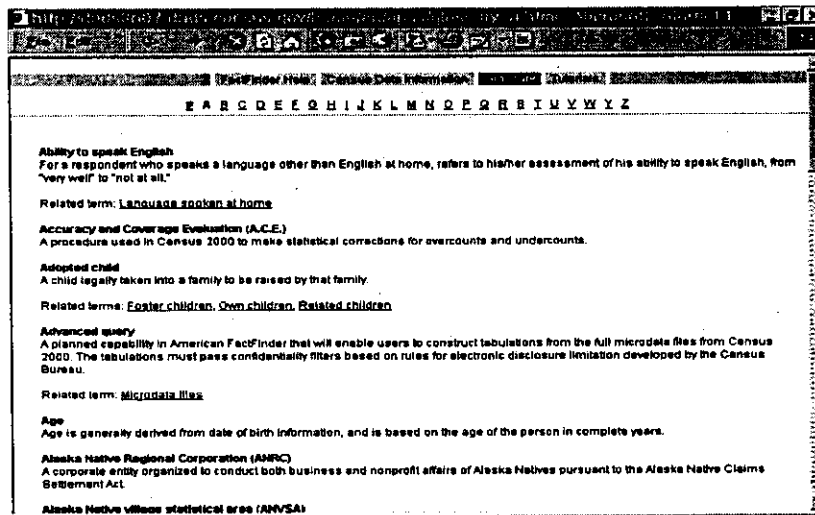
HELP System Main Page



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The HELP system is “context sensitive” meaning that whenever you click on HELP, you will get instructions for the page you are working on in FactFinder. The Table of Contents, Census Data Information, Glossary and Tutorials are available anytime HELP is open – just click on the tabs.

Glossary



U S C E N S U S B U R E A U

American FactFinder's HELP system includes an online glossary that contains an explanation of many census and technical terms we think our users will find helpful.

Coming Soon....

Search by address:

- Available in late March
- Census 2000 data only
- Enter a city-style address and find the Census geographies that contain the address...

USCENSUSBUREAU

Entering an address will allow FactFinder to give you a list of all census geographies that contain that address – an excellent source for finding census tract and block numbers.

To assure that privacy and confidentiality are protected, you will never be able to enter an address in FactFinder and have that address pinpointed on a map, nor will FactFinder give driving directions.

Contacting the American FactFinder Staff

The screenshot shows a web browser window titled "Microsoft Internet Explorer" with the address bar displaying "http://blacksand74.chi.gov/census/home/ff-feedback.html". The page is titled "American FactFinder Feedback". The instructions read: "Enter your feedback and click 'OK'. Please be as specific as possible. Please provide your name, e-mail address, and/or phone number so that we can contact you if we have questions about your feedback." The form includes a large text area for "Feedback:", a radio button for "Comment" (selected) and a radio button for "Problem", and three optional text fields for "Name (optional):", "E-mail (optional):", and "Phone (optional):". At the bottom are "OK" and "Cancel" buttons.

USCENSUSBUREAU

If you have a question about how to locate data in FactFinder, or a suggestion for the site's improvement, please take a minute to send us a feedback. Feedback messages are circulated through management and staff each day and are taken quite seriously. If you provide your e-mail address in the space provided, you will get a personal response from a Census headquarters employee.

FactFinder Contacts

- www.census.gov - click on A or American FactFinder link on the left side of the homepage
- Direct URL: factfinder.census.gov
- Telephone assistance:
301-457- 4100

USCENSUSBUREAU

MEETING MANAGEMENT AND FACILITATION

Working Together to Build Programs and Opportunities

Slide 1



Session Overview

- Managing large meetings
- Voting models
- Managing small meetings
- Making presentations
- Follow-up



MANAGING LARGE MEETINGS

Working Together to Build Programs and Opportunities

Slide 3

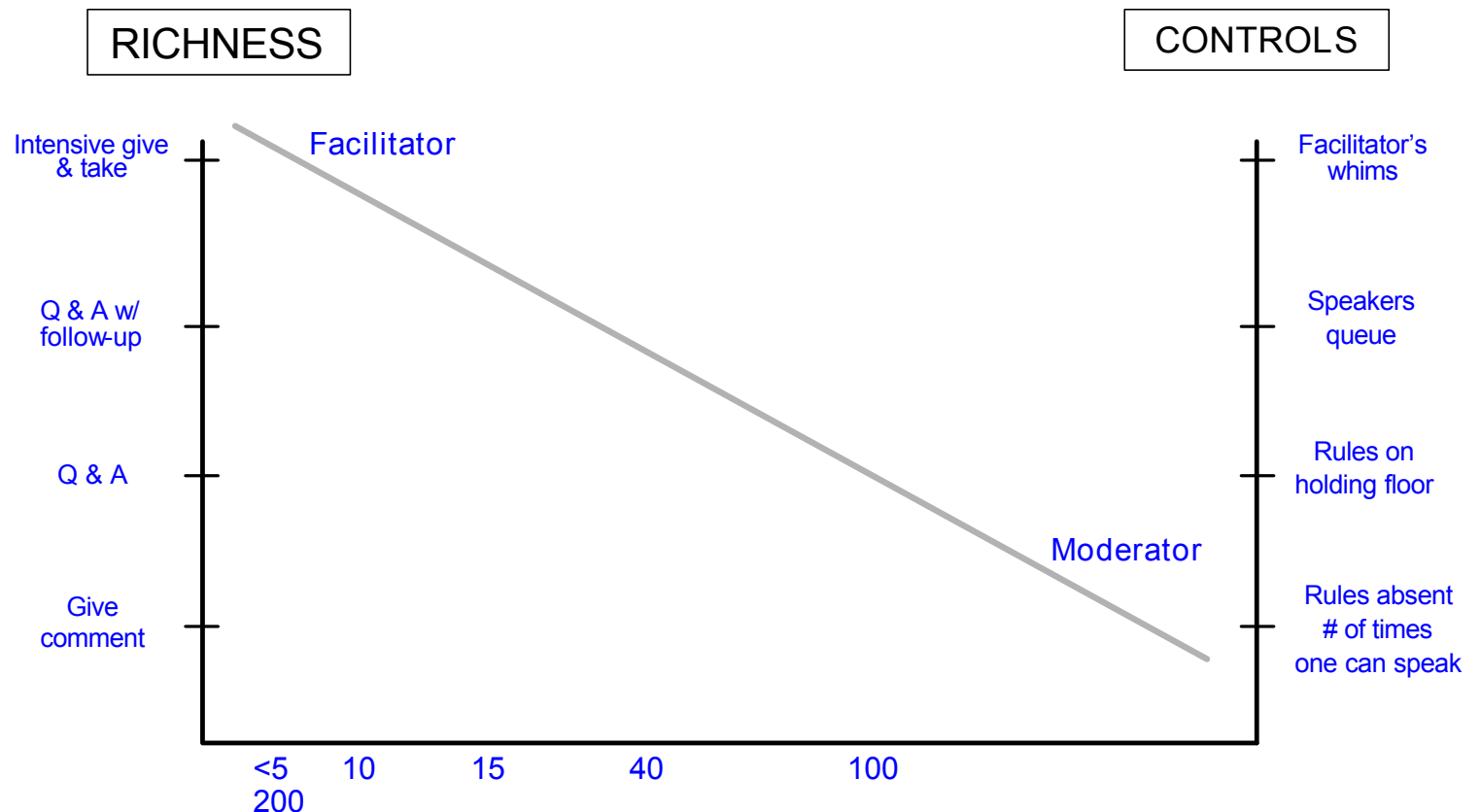


Very First Question To Ask

- Is meeting necessary?
 - Many ways to accomplish task
 - Other means to accomplish goal more easily and with fewer resources?
 - Document
 - E-mail
 - One on one conversations



The Size of the Group Really Matters



Managing Large Meetings

- Planning large meetings
- Room layout and set up
- Getting started
- Time management



Planning for Large Meetings

- Three planning tools
 - Agenda
 - Ground rules
 - Contingency planning
- As a rule of thumb should spend 2 - 4 hours planning for every hour of actual meeting time



Developing Agendas

- Agenda is primary road map of meeting
- Typically includes the following:
 - Meeting goals or objectives
 - Meeting times, including breaks and end time
 - Key components of the agenda



Developing Agendas

- To extent practicable, agendas should be consensus documents
 - Take time to get buy-in from participants on the process
 - Often development is iterative process
 - Don't spend meeting time discussing how to spend meeting time



Developing Agendas

- Should be logical flow to topics covered in meeting
 - Also for issues across a series of meetings
- Document flow of issues to be covered
 - Will help identify sequence and inter-relationship between topics
 - Also important when people want to change order of topics



Things to Remember

- Be reasonable on how long things take and what can be accomplished
 - Speakers almost always run long
 - Have a more detailed facilitator's edition



Developing Ground Rules

- Ground rules should be agreed upon participants
- Always frame ground rules
- In building consensus on the ground rules, need not be impartial



Developing Ground Rules

- Typical ground rules
 - Length of presentation
 - Speakers queue
 - Rights of response
- Typical good citizen ground rules
 - No personal attacks
 - No swearing
 - Listening



Using Ground Rules

- Not worth anything if don't use them
- Enforce ground rules uniformly



Contingency Planning

- Planning for things not working as expected
 - Mechanics
 - Discussion
 - Control of the meeting



Contingency Planning

- Always risk of losing control of meeting
- Best way to avoid is by careful planning
- Contingency planning should consider
 - Conditions under which you will relinquish control
 - Conditions under which you will no longer participate



Room Layout & Set Up

- You have a range of layouts to consider
 - Auditorium
 - Classroom
 - A big table
 - An open U
- 80% of all meetings are held in sub-optimal conditions



Room Layout & Set Up - Auditorium

- Best used
 - When there is significant presentation materials to view such as videos and slides
 - Gets the most people in the least space
- Limitations
 - Very awkward to carry on a discussion



Room Layout & Set Up - Classroom

- Best used
 - When there are significant presentation materials to view such as videos and slides
- Limitations
 - Very awkward to carry on a discussion



Room Layout & Set Up - Circle/ Big Table

- Best used
 - Smaller groups to encourage an atmosphere of teamwork and cooperation
- Limitations
 - Can be difficult to see
 - Can be difficult to control the discussion -- especially when it is at the other end of the table



Room Layout & Set Up - Open U

- Best used
 - For maximum control of the meeting by the facilitator
- Limitations
 - Not always easy to focus on one end if presentations with visual aids are being presented



Room Layout & Set Up - Clusters

- Best used
 - Small breakout groups within a larger group to encourage an atmosphere of teamwork and cooperation
- Limitations
 - Can be difficult to see name tents
 - Can be difficult to control the discussion



Managing Large Meetings - Getting Started

- Start on time
- Review agenda with time frames
- Review process and ground rules
- Describe meeting's goals
 - How meeting's output will be used
- Describe follow up opportunities



Managing Large Meetings - Time Management

- Ways to effectively manage time
 - Start on time and rigorously enforce breaks
 - Enforce time frames -- even on your colleagues
 - Encourage brevity
 - Give 10, 5 and 2 minute warnings
 - Develop “lightning round” techniques



VOTING MODELS



Voting - An Overview

- Some meetings have voting to express preferences and set priorities
- Two models of voting
 - Consensus
 - Majority



Decision-Making Meetings

- Consensus
 - Is often what is hoped for in the group process
 - Is not uniformity
 - Means group will support decision, even if they disagree
 - May allow for minority opinions



Decision-Making Meetings

- Majority Voting -- Key Issues
 - Everyone have same number of votes?
 - Allow for proxies?
 - Majority sufficient, or does it have to be a plurality?
 - What about people that abstain?
 - Do not let others call for when it is time to vote
 - Sometimes you want more than 51%
 - Can hurt consensus-building



MANAGING SMALL MEETINGS



Managing Small Meetings

- Planning
- Small group processes
- Managing small group processes

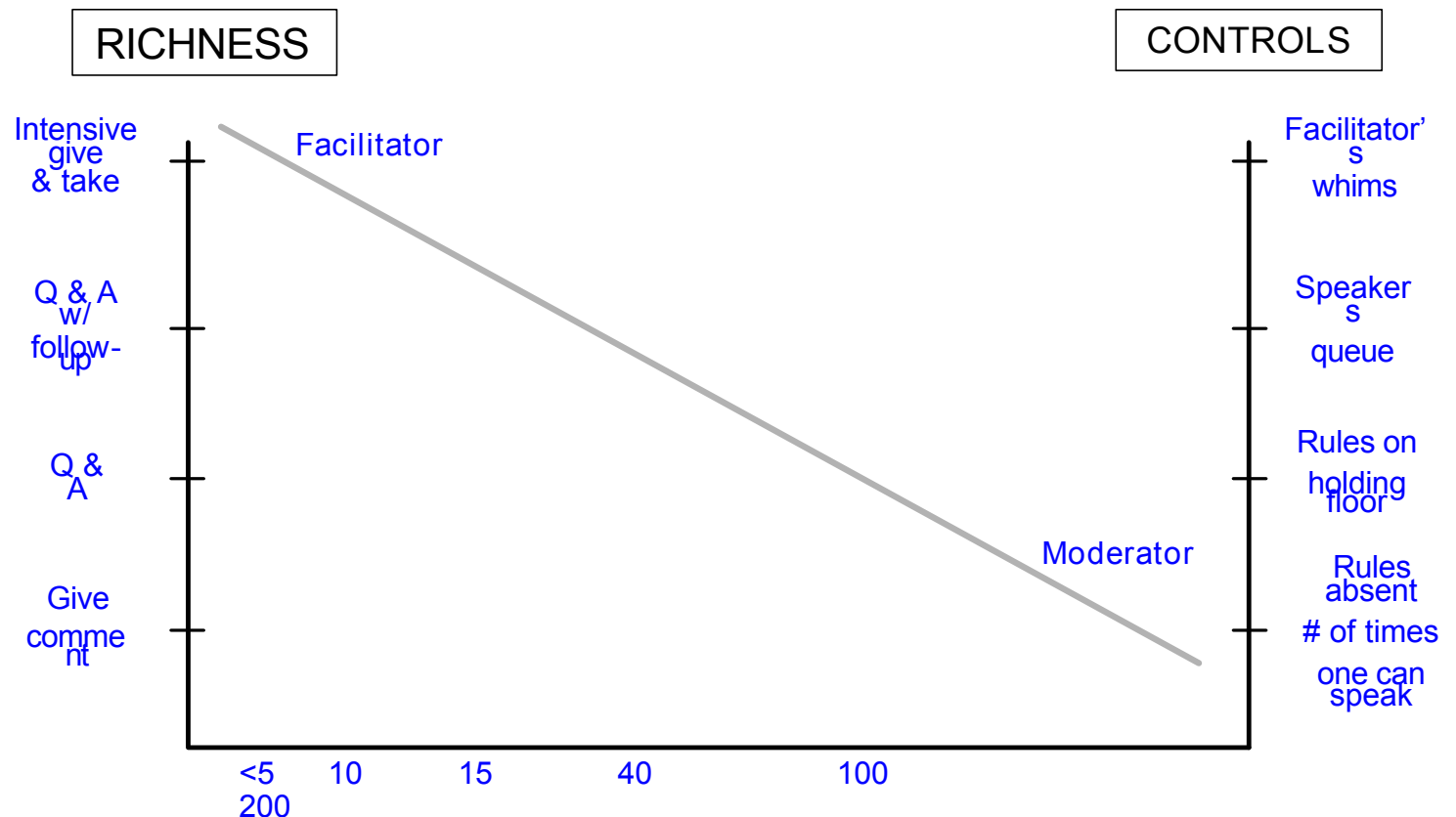


Planning Small Meetings

- Most planning issues covered in large meeting lesson are true for small meetings as well
 - Less of an emphasis on control techniques
 - More emphasis on how to manage the dialogue



The Size of the Group Really Matters

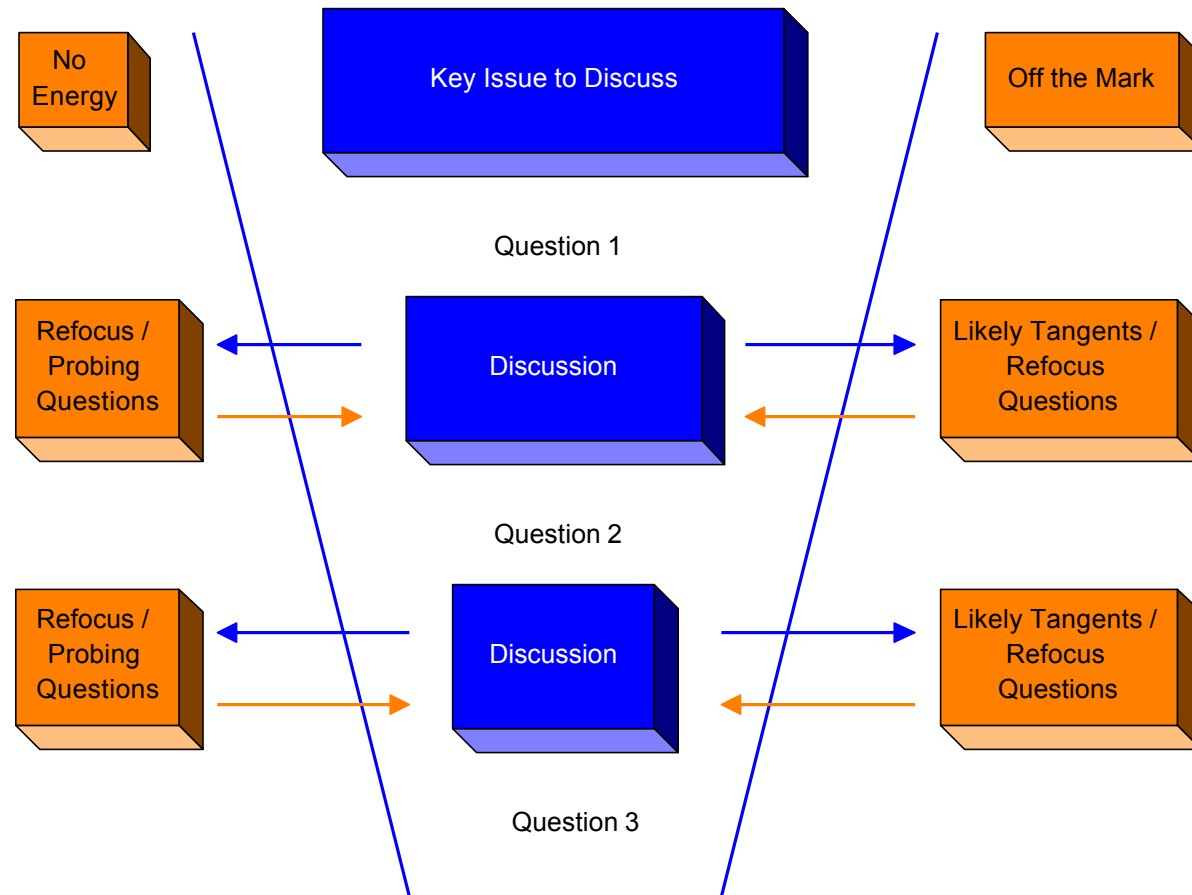


Detailed Planning

- Plan meeting in greater detail than the agenda
- Focus of planning should be on dialogue



Keeping the Discussion On Track



Detailed Planning

- Keep focus narrow
 - Discussions more effective when focus
 - When questions too broad, end up managing simultaneous discussions



Small Group Processes

- Ice-breakers
- Brain-storming
- The big scoreboard
- Breakout groups
- Written assignments
- Building consensus
- Resolving conflict



Ice-Breakers

- Ice-breakers
 - Are used to create a group shared experience
 - Are used to improve a group's understanding of other participants
 - Can range from silly to practical



Brainstorming

- Brainstorming is frequently used to start off a process or get out of a rut
 - Works well for defining problems and searching for solutions to problems
- Primary purpose is to generate more ideas in quick period of time
- Keys to facilitating a brainstorming session
 - Encourage creativity
 - Don't stop to evaluate
 - Keep it lively and keep it fast



Brainstorming

- Brainstorming session is typically designed around a question
 - Keep it open enough to allow for creativity
 - Keep it closed enough to be useful to you



Brainstorming

- Brainstorming session is only effective if it leads to something
 - Should have a plan for what to do with the output
- Typically brainstorming sessions are followed by a winnowing process
 - Many models and processes exist, including,
 - Grouping like suggestions
 - Eliminating those with the least appeal
 - Creating a short list for further investigation
 - This process can typically involve several rounds



Brainstorming

- A winnowing process will likely involve some type of decision process
 - Be prepared
 - Different models of voting produce different outcomes
 - Breakout groups can be an effective tool in this process



The Big Scoreboard

	Phil	Betty	Steve	Alan	Janice	Alicia	Sarah	Dirk	Debbie	John	
Miles of Navigable Waterways	20	15	10	15	20	25	20	15	15	15	
State Population	20	40	30	20	25	20	35	25	20	20	
# of RCRA Facilities	10	7	35	20	5	8	10	30	20	5	
Size of State (Sq. miles)	20	20	0	30	20	5	10	10	30	25	
Sq. miles of water	25	15	15	15	15	20	20	15	5	5	
Number of businesses over 100 employees	5	3	10	0	15	2	5	5	10	30	



The Big Scoreboard

- Tool for prioritizing discussions when there are lots of potential things to talk about
- Meant as a beginning, more than as an end
 - Although it can be used to bracket a discussion



Using Breakouts

- Breakouts are useful for a number of reasons
 - More work can be done
 - Small groups reach agreement faster than large groups
 - Dialogues are more interactive with less participants



Using Breakouts

- Models for breakouts
 - Smaller versions of the plenary
 - Special interest-based
 - Same Sides -- usually only effective in a negotiation
 - Opposite ends
- Be clear about empowerment of breakout group and its relationship to plenary
 - In most cases breakouts report back to plenary



Written Assignments

- An effective and efficient technique to open and close meetings
 - As a closing, written assignments work best in information, not decision making meetings
- Requires:
 - A sentence to finish
 - Pencils and paper
 - Rigorous enforcement of groundrules



Building Consensus

- Actively look for and document points of common ground
- Make summary statements to re-focus and move forward
- Most groups are better reacting to something than creating from scratch
 - Develop straw men
- Start small to build trust



Resolving Conflict

- Conflict exists for a number of reasons
 - Misunderstanding
 - Different perceptions
 - Different outcomes (winners and losers)
 - Values



Resolving Conflict

- Steps to resolving conflict
 - Create an atmosphere for frankness
 - Ensure that the conflict is not a misunderstanding
 - Ensure that parties fully understand consequences of not resolving conflict
- Group meetings are typically not best forum for resolving conflict
 - Smaller groupings such as break-outs tend to be more effective



Small Group Management Techniques

- Managing time
- Using props to help facilitate
 - Flipcharts
 - Name tents and badges



Small Group Meetings

Managing Time

- Many of same time management issues for large meetings apply to small meetings
 - Since often have more ambitious goals, time management can be more important
 - Ways to manage time
 - Encourage brevity
 - Give frequent time warnings
 - Written assignments



Managing Time

- Avoid getting bogged down
 - Cut off discussion when have heard same thing over and over
 - Be careful of posing questions that are too open-ended
 - Do not “wordsmith” documents in a group setting if at all possible
 - Use breakouts or proxies
 - Encourage participants to be blunt



Using Props – Recording a Meeting

- Many small group facilitators use flip charts to “record” a meeting
 - Goal is to focus group’s attention and show concerns have been heard
 - Useful means of managing “off-the-mark” issues



Using Props - Name Tents & Badges

- Name tents can be extremely useful
 - Creates an atmosphere of camaraderie and familiarity which facilitates discussion
 - An effective means for keeping a speakers' queue
- Name badges are less useful
 - Real value is in informal and off-line conversations





MAKING PRESENTATIONS

Working Together to Build Programs and Opportunities

Slide 55



Making Presentations-- Preparation

- Preparation
 - Assess what audience wants to know
 - Develop 3-4 points want to make
 - Keep it short
 - Inform audience about how they can contribute
 - Organize materials logically
 - Develop visual aids that support your presentation
 - Anticipate questions that are likely to arise
 - Practice, practice, practice



Making Presentations - Delivery

- Delivery
 - Find personal style
 - Be professional, but human
 - Expect to be nervous
 - Avoid jargon
 - Rules for using humor
 - If you are not funny, this is no time to start
 - Never be funny at someone else's expense



Answering Tough Questions

- Be polite to all questioners, even if they are not polite to you
- Listen carefully to the question
- Be brief and to point
- Take opportunity to re-emphasize main points



A Few Really Tough Questions

- The “set up”
 - Long preamble precedes a question filled with misinformation
- Solution
 - State: “What you have said is just not true. Let’s examine the facts...”, “I regret that you feel that way...”, or “I don’t agree” and move on to the subject on the table
 - Do not nod your head during the question



A Few Really Tough Questions

- The “either...or” situation
 - The questioner poses two unacceptable alternatives
- Solution
 - Answer the question directly, “Neither...”
 - Do not repeat the question



A Few Really Tough Questions

- The Irrelevancy
 - You are called on to answer a question either outside your area of expertise or irrelevant to the subject
- Solution
 - If appropriate, make the transition to your area of expertise
 - Otherwise, say it is not what you had prepared to talk about and offer to put the person in contact with the right office at a later time



A Few Really Tough Questions

- The empty chair
 - Questioners quote a person with a different point of view who is not present
- Solution
 - Respond: “I have not heard those remarks. However, I can tell you that the design...”
 - Do not attach an individual who is not present
 - They may never have said what is being attributed to them



FOLLOW-UP

Working Together to Build Programs and Opportunities

Slide 63



Follow-Up

- Meetings successful if lead to an output or next steps
 - Too often meetings fail in end by not documenting agreements or next steps
- Keep a running record of what agreements have been made and what next steps have been agreed to
 - These are typically in “Action Item” format
 - Always include a person’s name and a due date
 - Review agreements and action items at the end of a meeting



Follow-Up

- Meeting notes or minutes
 - Always agree beforehand who is responsible
 - Format and detail vary greatly
 - May be circumstances where transcript should be used instead of minutes approach



Follow-up

- Evaluate your efforts
 - Write down what think went poorly and how it can be improved
 - If it is a multi-meeting process, incorporate changes to the degree possible





Skill Building for Effective Staff Management

*Implementing the
Organizational Structure*

Working Together to Build Programs and Opportunities

Slide 1



Presenter:

- **Kermit C. Mankiller, MBA**
NAIHC Training Director



Organizational Issues

- Management & Supervision
- Authority Vs. Responsibility
- Organizational Culture
- Unity of Command
- Span of Control



McGregor's Theory X and Y



- Theory X- Workers must be coerced or they won't perform
- Theory Y- People like to work and view their jobs as a natural form of expression



McGregor's Theory X and Y

- Theory X
 - Traditional View of Supervisory Mgt
 - Technique for Managing Large Groups
 - Generally Autocratic Leadership



Theory X and Y

- Theory Y
 - Participative, Open, Encouraging
 - The Team Concept
 - Risk Taking is Encouraged
 - Achievements are Recognized Publicly
 - Discipline in Private



Organizational Roles and Philosophy

- **What is my/our role?**
- **Social Services vs. Pure Business**



Organizational Roles and Philosophy

- General TDHE Organizational Model
- Authority and Delegation
- “Filtering” Ideas
- Concept vs. Reality
- Policy vs. Administration or Management
- Chain of Command



Basic Skills Required of Supervisors

- Conceptual Skills
- Human Relations Skills
- Administrative Skills
- Technical Skills



Managerial Functions

- **Planning**
- Organizing
- Staffing
- **Directing (or Leading)**
- Controlling



Planning

- Precedes Everything Else
- Make A Plan And Stick to It
- Avoiding Crisis Management
- The Big Picture: Contingencies
- Planning at Different Mgt Levels
- Types of Plans



Leading or Directing

- Leadership Issues
- Motivation



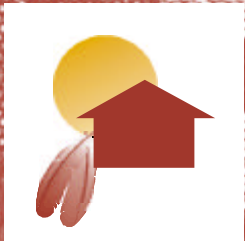
Maslow's Hierarchy of Needs

- Self-Actualization
- Ego or Esteem Needs
- Social or Belonging Needs
- Safety or Security Needs
- Physiological or Biological Needs



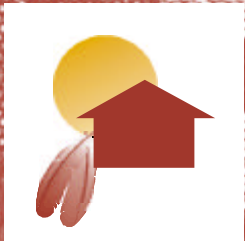
Skill Building for Effective Staff Management

Overseeing Staff Development



Presenter:

- Ramona Burks, Vice President, ICF Consulting
 - Training design and delivery
 - Strategic planning, organizational development, management, and evaluation experience



What You'll Learn Today

- Staff management techniques including
 - Helping staff motivate themselves
 - Staff development strategies
 - A problem solving process
 - Alternatives to consider when you can't solve a staff problem
 - How to deal with turnover and transition



What Motivates Staff?

- Your Role in Motivating Staff
 - Create a positive environment
 - Physical space
 - Support the work
 - Support the worker
 - Determine what factors work for your staff
 - Create an incentive plan
- What motivates you?



Finding Out What Works

- Managers and employees may see things differently
- Ask about what matters
- Consider personal and cultural issues
- Consider budget constraints



Ideas to Consider

- Material
 - Pay
 - Perks
- Non-Material
 - Recognition
 - Responsibility and autonomy
 - Equitable treatment



Approaches to Staff Development

- Deficit model
 - Assumes “empty vessel”
 - Implies remediation or problem-solving
 - Focuses on inadequacies
- Asset-based model
 - Acknowledges capacities
 - Implies professional development
 - Focuses on overall improvement of organizational capacity



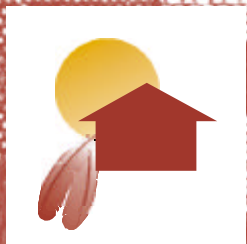
What is Staff Development?

- Workshops or courses
- Peer observation or coaching
- Study circles
- Staff meeting time or retreats
- Visiting other programs or classes
- "Time out" for learning or practice
- Conferences
- Team or paired assignments



Professional Development Plan

- Employee defines goals in consultation with manager
- Manager serves as coach and mentor
- Periodic meetings and reviews to
 - Gauge progress
 - Revise plan as needed



Coaching Skills

- Listen actively
- Build confidence
- Encourage self-discovery



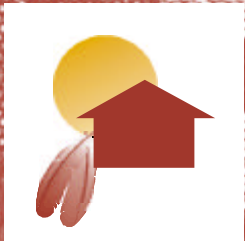
Coaching Skills, cont.

- Listening actively
 - Don't interrupt
 - Listen to words and feeling behind them
 - Test for understanding
 - Ask questions
 - Use silence



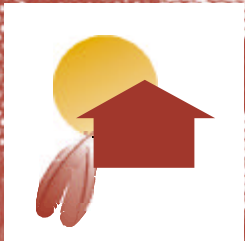
Coaching Skills, cont.

- Build confidence
 - Listen actively
 - Be optimistic and expect success
 - Acknowledge strengths and success
 - Acknowledge worries and concerns
 - Provide support and resources
 - Set goals that are a reasonable stretch



Coaching Skills, cont.

- Encourage self-discovery
 - Ask “big picture” questions
 - Give employee time to answer
 - Ask for ideas
 - Listen to ideas and state yours as extension
 - Don’t crush ideas you don’t like
 - Give employee time to think alone



Internal Resources

- HUD \$\$
- Internal training programs
- Local partners
- Other staff



External Resources

- Professional organizations
- Nonprofit organizations
- Universities, colleges, community colleges
- Publications
- On-line resources



Problem Solving Process

Answer the following questions:

- What is the problem?
- How could we solve this problem?
- Which is the most effective solution?
- How will the solution be implemented?
- How will we know the solution is working?



Tips for Effective Problem-Solving

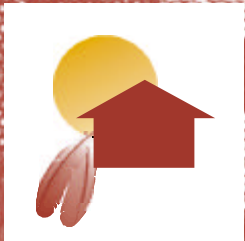
- Stay objective
- Listen actively
- Use discretion and tact
- Discuss the situation with a trusted friend/mentor
- Find the right solutions
- Generate several good options
- Identify the “bottom-line”



Document, Document....

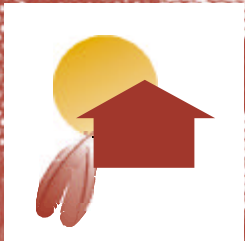
Describe the:

- Problem, using facts and specifics
- History of the problem
- Discussion about the problem
- Any “agreements to change”



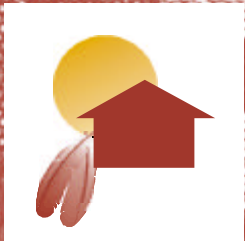
When You Can't Resolve a Problem

- Consider your alternatives
 - Redefine the job
 - Reassign to a different role
 - Termination



Turnover and Transition

- Turnover will occur
- Strategies for managing the transition
 - Document position roles and responsibilities
 - Develop written procedures
 - Identify back up for critical staff functions



Staff Motivators

To create an environment in which your staff are motivated to work you have to find out what their motivators are—what works for you isn't guaranteed to work for someone else.

Research on Motivators

The following chart describes the responses of employees asked to rank a number of motivating factors.

Employees' Rank	Item	Employer's Rank
1	Interesting work	5
2	Appreciation and recognition	8
3	Feeling "in on things"	10
4	Job security	2
5	Good wages	1
6	Promotion/growth	3
7	Good working conditions	4
8	Personal loyalty	6
9	Tactful discipline	7
10	Sympathetic help with problems	9

(Niebrugge, Vicki, *Declining Employee Morale: Defining the Causes and Finding the Cure*, NOVA Group, July 1992.)

Skill Building for Effective Staff Management

I. Introduction

Management: The process of working with and through people to achieve objectives by means of effective decision making and coordination of available resources.

Supervisory Management: The responsibility for directing the work of others and using organizational resources to accomplish stated goals. Supervisors are managers who must plan, organize, and control the work of the organization, using their leadership skills to motivate people to get the work done.

Without goals and objectives each department will go off in different directions and attempt to achieve individual departmental goals. An organization that lacks management will waste considerable time, money, and effort to accomplish something. As a supervisor you become a vital part of the management team of the TDHE. You are closer to the employees and are expected to carry out orders or directions from either your Department Director or Executive Director. How well you understand your role will determine how effectively you perform. As stated previously, you are part of a management team. In organizations there are various levels of management and one must understand the responsibility of each level.

Levels of Management: Every organization has different levels of management. Within the different levels there are supervisors that have different levels of authority and responsibility. The higher one goes in management the more authority and responsibility one has. **Authority** is the right to command or direct others to act or not to act in order to reach objectives. **Responsibility** is the obligation that is created when a subordinate accepts a higher supervisor's delegated authority or accepts specific instructions to accomplish a task, large or small.

Each level of management should be working together to accomplish specific goals or objectives. The higher one is in management the greater the **authority** and **responsibility**. Another difference among levels of management or managers is the amount of time they spend carrying out various activities.

Each organization should have an organizational chart that informs everyone internally and externally where each department is placed. This is really a picture of the organization. When we look at the picture we are really looking at what makes the organization “tick”. An organization is unique in that it has a personality of its’ own consisting of the personalities of the people in the organization. If the workers are motivated, the organization will be considered as a good place to work. If the workers are unhappy, the organization will reflect some of the bad atmosphere the workers are feeling.

This personality is sometimes referred to as **corporate culture**. Corporate culture consists of the shared values, symbols, stories or myths, rituals that shape an organization’s work patterns. As people change at different levels of the organization chances are the culture will change to some degree. Overall the organization will continue to behave in a certain manner depending on what it is to accomplish while in existence.

Department Directors, Assistant Directors, and Supervisors will have to learn what makes the organization “tick” and find ways to work within the corporate culture. If one does not feel they fit, their chances of being a long-term successful supervisor are not real good.

When looking at organizing we need to learn two important organizing principles. The first, **unity of command** which states that everyone in an organization should report to and be accountable to only one boss for performance of a given activity. Regardless of where we are within the organization we should be able to turn to someone for direction, advice, support, and help. Depending on the size of the organization these functions can become the responsibility of the supervisor. The supervisor looks to the Executive Director for the same. The Executive Director looks in a mirror!!! Actually, the BOC should be able to provide some of the same guidance for the Executive Director.

Staff need to understand this basic principle if they are to do their jobs effectively and feel comfortable with performance standards set by the organization. Supervisors need to understand the principle as well to provide proper direction and learn that command is to be used to get the job done and **not as a tool to adversely direct staff**.

Proper adherence to the unity of command principle is important for five reasons:

1. It prevents duplication and conflict when orders and instructions are passed down.
2. It decreases confusion and buck passing because everyone -- including supervisors - is accountable to only one person for a given assignment.
3. It provides a basis whereby a supervisor and his or her employees can develop a knowledge of each other's strengths and weaknesses.
4. It provides an opportunity for a supervisor and employees to develop supportive relationships and to realize their individual and group potential in achieving organizational objectives.
5. It promotes higher morale than is generally found in organizations that do not follow the unity of command principle.

The second concept, **span of control** is the limit to the number of people a person can effectively manage or supervise. The span of control varies with the size of the organization and is generally narrower at the top of the organization. It is important for top management to have as few individuals reporting to them as possible. If this is not the case there will be considerable time wasted while people wait for decisions to be made regardless of the importance and size of the decision.

In order to better understand staff management we must look at our own philosophy of people and work. These factors will impact how we do our job as a supervisor. Douglas McGregor, a management scientist developed the **Theory X** and **Theory Y** assumptions about the nature of

people and how it affected management and management style.

Theory X:

1. *The average human being has an inherent dislike of work and will avoid it if possible.*
2. Because of this human characteristic – dislike of work – most people must be coerced, controlled, directed, or threatened with punishment to get them to put forth adequate effort toward the achievement of organizational objectives.
3. The average human being prefers to be directed, wishes to avoid responsibility, has relatively little ambition, and, above all, seeks security.

Theory Y:

1. The expenditure of physical and mental effort in work is as natural as play or rest.
2. External control and the threat of punishment are not the only means of bringing about effort toward organizational objectives. People will exercise self-direction and self-control in the service of objectives to which they are committed.
3. Commitment to objectives is a function of the rewards associated with their achievement.
4. The average human being learns, under proper conditions not only to accept but also to actively seek greater responsibility.
5. The capacity to exercise a relatively high degree of imagination, ingenuity, and creativity in the solution of organizational problems is widely, not narrowly, distributed in the population.
6. Under the conditions of modern industrial life, the intellectual potentialities of the average human being are only partially utilized.

Supervisor's who accept Theory X assumptions will be more inclined to prefer structured, autocratic leadership style. Supervisor's who accept Theory Y assumptions will be more inclined to prefer a supportive, participative leadership style. The two sets of assumptions are the opposite of one another and formulate the basis for some of the management styles supervisors use today.

II. BASIC SKILLS REQUIRED BY SUPERVISORS

Everything involved in managing people is not spelled out in a job description. Employers look for certain qualities and skills in a person. Skills are gained from other jobs and life long learning experiences. This section addresses some of the most common skills required to supervise other people.

Conceptual Skills: Conceptual skills can best be described as "seeing the big picture." To see what is occurring in an organization or project means you must be able to acquire, analyze, and interpret information in a logical manner. Supervisors need to understand what is going on

inside and outside the organization in order to apply organizational functions. The higher one goes in the organization the greater the need for conceptual skill.

Human Relations Skills: Dealing with people on a day to day basis is the bottom line for supervisors. Without the cooperation and work of your staff you will not get the job done. It is vital that supervisors have the ability to understand other people and to interact effectively with them. This requires good communication between the supervisor and staff. Being able to motivate people is necessary but not easy to do if an individual is not a good "people person."

Administrative Skills: A supervisor has to do paperwork too!! Someone has to report on projects and make decisions regarding what the next step will be for successful completion. This does not mean the supervisor must be able to type 90 words per minute (it helps), but he or she must be able to generate the report based on the information available.

Technical Skills: Each department has a specific function within an organization that is different from other departments. The differences are technical in nature, therefore, the supervisors must have specific technical knowledge and skills to supervise their department. Supervisors will have more technical skill than most of the staff in their department. After all, who is going to train the staff to do their jobs correctly?

Managerial Functions: There are acts or operations expected of managers or supervisors in a given situation. Depending on the management philosophy of the organization, there are generally five separate, but interrelated, basic functions that must be performed by any manager or supervisor. Successful supervisors perform these functions efficiently and effectively:

1. **Planning**
2. Organizing
3. Staffing
4. **Leading (or Directing)**
5. Controlling

Planning at Different Management Levels: We know there are different levels of management that perform various functions with varying degrees of importance. Regardless of the level of management, planning is just as important at the top as it is at the bottom. The degree of complexity is different at the top but must depend on good planning from all levels of management in order to develop a good overall operating plan for the organization.

Types of Plans: The planning process can be rewarding after a plan is approved by the Tribal Council, BOC or Executive Director. At this point the work begins as we must now put the plan into action by following set policies and procedures or developing new ones that will guide the staff throughout the implementation process. In most cases the TDHE will have policies and procedures in place for everyone to follow. Policies and procedures are also viewed as plans which are described as follows.

Plans basically fall into two categories: standing plans and single-use plans:

1. **Standing plans** are those that are used repeatedly over a period of time. There are three types of standing plans:
 - a. **Policies:** A policy is a guide to decision making or a set of boundaries to work within.
 - b. **Rules:** A rule is stronger than a policy in that the guidance given by the rule is final and definite. Rules are inflexible and must be obeyed.
 - c. **Procedures:** A procedure outlines the steps to be performed when a particular course of action is to be taken.
2. **Single-use plans** are developed to accomplish a specific purpose and are then discarded. Examples of single-use plans are programs, projects, and budgets.
 - a. **Programs:** A large-scale plan that involves a mix of objectives, policies, rules and smaller projects.
 - b. **Project:** A distinct, smaller part of a program.
 - c. **Budgets:** A forecast of expected financial performance over a period of time.

Leadership: Being a supervisor is a big job and requires considerable skills and patience. Blending all of this together is not easy for top management even if an individual shows promise as a super worker. Let us look at the definition of leadership. **Leadership** is the process of influencing individual and group activities toward goal setting and goal achievement. The key element is influencing people. How well we influence our employees will determine how effective our leadership is. This means we have been influenced by someone or something to lead others. Let us examine some of the factors affecting leadership.

1. Supervisor's Management Philosophy
2. The followers' maturity level
3. The situation faced by the supervisor

The **supervisor's management philosophy** is basically determined by his or her assumptions about the nature of people. We all have some form of management philosophy that has been shaped by several factors. The first is our family and early school environment. Second, our experience and training in the area of leadership, and third, our present work environment, including the type of work and the general management system. These factors are basically common in all of us.

The **followers' maturity level** can either make or break us when leading people. We need to understand the state of a person's drive and need for achievement in order to get results. If our followers have a low maturity level one can expect poor results. If the maturity level is high, the better the results. As supervisors, we need to recognize this factor in our employees and adapt.

The **situation faced by the supervisor** will test the ability to lead. If a supervisor comes through a crisis situation without completely falling apart is it an indication of continued success. Or was the supervisor just lucky? This factor can only be tested when the situation occurs.

Since we are leading and supervising people we need to understand that sometimes all is not well even if we think otherwise. In times such as these supervisors look to the workers and attempt to motivate them in different ways. In order to motivate we must first learn something about the needs of the workers.

Understanding the "Why" of Human Behavior: In this section of the text we will focus on how supervisors can understand human behavior and establish appropriate conditions so that their employees will be motivated to improve performance at individual, group, and organizational levels. **Motivation** can be defined as the willingness of a person or a group, with distinctive needs and personality, to work to achieve the organization's objectives, while also working to achieve individual objectives. What a mouth full to say, "take your time, but hurry up." We need to be motivated a majority of the time, it is natural since there are few people who can move along at the same pace day after day without being recognized for their efforts. There are individuals that can do the same task over and over with little desire to improve speed or efficiency. They are the exception if they are happy in what they do.

Each of us have different hobbies, likes, dislikes, and general interests in life. Knowing there are differences among us is the first step. It is because of these differences that we do not treat people the same when attempting to motivate them to improve their work.

How can we help satisfy our employees' needs in order to get the most out of them without making them feel used? First, treat people with respect. Don't be quick to criticize without getting all the facts. Second, be knowledgeable of your employees by learning how to communicate in a way that is understandable. After working with people we learn more about their habits and how they react to directions and orders. Third, develop an atmosphere of trust and confidence with your employees. Finally, be firm and fair when discipline is necessary. Give praise openly and criticism privately. People will remember more about the good times than the bad. A good supervisor will work with employees to learn from their mistakes rather than making the mistake a terrible memory.

Theories of Motivation

Searching on either the theory's title or authors should lead you to more in-depth information in a library or on the Internet.

Hierarchy of Needs (Maslow)

Abraham Maslow, *Motivation and Personality*, New York: Harper and Row, 1954. (However, first presented in 1942 to a psychoanalytic society.)

The Hierarchy of Needs identifies five hierarchical levels of needs, with the most basic need emerging first and the most sophisticated need last. People move up the hierarchy one level at a time. Gratified needs lose their strength and the next level of needs is activated. A satisfied need is not a motivator.

- ☐ Level I—Physiological needs are the most basic human needs.
- ☐ Level II—Safety needs are the desires for security and stability, to feel safe from harm.
- ☐ Level III—Social needs are the desires for affiliation.
- ☐ Level IV—Esteem needs are the desires for self-respect and respect or recognition from others.
- ☐ Level V—Self-actualization needs are the desires for self-fulfillment and the realization of the individual's full potential.

Motivator-Hygiene Theory (Herzberg)

Frederick Herzberg, *Work and the Nature of Man*, Crowell Publications, 1966.

This theory, sometimes called the Two-Factor Theory, says that motivating employees is a two-step process. First resolve hygiene factors and then add motivator factors. Motivation comes from the employee's feelings of accomplishment or job content rather than from the environmental factors or job context.

The hygiene factors are preventive in nature. Once they are provided they don't necessarily promote motivation. However, their absence can create employee dissatisfaction. Some examples of hygiene factors are: pay, job security, working conditions, peer relations and supervision. Hygienes correspond to Maslow's physiological, safety and social needs.

The motivators, on the other hand, are considered job turn-ons. They are necessary for substantial improvements in work performance and move the employee beyond satisfaction to superior performance. Motivators correspond to Maslow's higher-level needs of esteem and self-actualization.

Acquired Needs (McClelland)

David McClelland, *The Achieving Society*, Free Press, 1961.

Acquired (or “Learned”) Needs theory explains motivation in terms of a person’s drives for power, affiliation and achievement.

Achievement-motivated (nAch) people thrive on pursuing and attaining goals. They like to be able to control the situations in which they are involved. They take moderate risks. They like to get immediate feedback on how they have done. They tend to be preoccupied with a task-orientation towards the job to be done.

Power-motivated (nPow) individuals see almost every situation as an opportunity to seize control or dominate others. They love to influence others. They like to change situations whether or not it is needed. They are willing to assert themselves when a decision needs to be made.

Affiliation-motivated (nAff) people are usually friendly and like to socialize with others. This may distract them from their performance requirements. They will usually respond to an appeal for cooperation.

Also discussed in this theory is the drive to help others in need, nExt. However, this drive doesn’t mean “helping” others as a means of satisfying one’s other needs. Rather, it’s an urge to help others purely as a function of realizing that the other person needs help and that you are capable of providing the help.

Expectancy Model (Vroom)

Victor H Vroom, *Work and Motivation*, John Wiley and Sons, 1964.

Briefly, the expectancy theory states that motivation to behave or perform depends on three variables. *Expectancy* is the strength of one’s belief that such-and-such effort will result in such-and-such performance outcome. *Instrumentality* is the strength of one’s belief that certain kind and level of performance will lead to a particular reward. Lastly, *Valence* refers to the attractiveness or utility of the reward to the individual.

A person will expend the required effort if he believes that his effort will result in the desired performance ... and the reward that is important to him.

Equity Theory (Adams)

J. Stacey Adams, 1965

This theory is the idea that employees are satisfied and motivated when the ratio of their inputs (efforts) to output (rewards) are similar to those of their colleagues. Inputs or efforts are more clearly defined as either achieved (i.e.): job skills, experience, training or attributed (i.e.): race, age, gender.

Outcomes or rewards are what the employee receives from the job such as pay, recognition, advancement or benefits. Employees will compare their rewards with the rewards received by others for their efforts.

If employees perceive that an inequity exists, they are likely to withhold some of their contributions, either consciously or unconsciously, to bring a situation into better balance.

For example, if someone thinks he or she is not getting enough pay (output) for his or her work (input), s/he will try to get that pay increased or reduce the amount of work s/he is doing. On the other hand, when a worker thinks s/he is being paid too much for the work he or she is doing, he or she tends to increase the amount of work.

Not only do workers compare their own inputs and outputs; they compare their input/output ratio with the input/output ratio of other workers. If one work team believes they are doing more work than a similar team for the same pay, their sense of fairness will be violated and they will tend to reduce the amount of work they are doing. It is a normal human inclination to want things to be fair.

Not much research indicates the long-term effects of equity.

[Federal Register: September 10, 1996 (Volume 61, Number 176)]
[Notices]
[Page 47787-47791]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr10se96-124]

[[Page 47787]]

Part II

Department of Health and Human Services
Indian Health Service

Department of Housing and Urban Development

Department of the Interior
Bureau of Indian Affairs

Interdepartmental Agreement on Indian Housing Program; Notice

[[Page 47788]]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing
[Docket No. FR-3763-N-02]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Interdepartmental Agreement on Indian Housing Program

AGENCIES: Offices of the Indian Health Service (HHS); the Assistant Secretary for Public and Indian Housing, (HUD); and the Bureau of Indian Affairs, (Interior).

ACTION: Notice of Interdepartmental Agreement.

SUMMARY: This notice announces an Interdepartmental Agreement which sets forth the guidelines by which HUD, the Bureau of Indian Affairs, and the Indian Health Service will coordinate their efforts in the delivery of services and financial assistance to Tribes and Indian Housing Authorities.

EFFECTIVE DATE: September 10, 1996.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, Room B-133, 451 Seventh Street, SW, Washington, DC 20410; telephone (202) 755-0032. Hearing- or speech-impaired individuals may access this number by calling the Federal Relay Service TTY at 1-800-877-8339. (With the exception of the ``800'' number, these are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. September 2, 1994 Notice of Proposed Interdepartmental Agreement

On September 2, 1994 (59 FR 45702) HUD published a notice which proposed to set forth the working relationship among HUD, the Bureau of Indian Affairs (BIA), and the Indian Health Service (IHS) in the delivery of services to Tribes and Indian Housing Authorities (IHAs) in conjunction with the planning and construction of new housing developed with financial assistance of HUD's Indian housing program.

The Interdepartmental Agreement (IA) establishes a general foundation for this cooperative effort and guidelines by which each of the three agencies will interact with Tribal governments and IHAs. The IA will be supplemented, as necessary, by individual Memorandums of Agreement (MOA) developed between local decision makers and the specific Federal agencies assisting in the development of the housing.

The BIA Housing Improvement Program (HIP) was eliminated from this IA to streamline the agreement among all signatory agencies in the development of HUD Indian housing programs. It is anticipated that the IHS and the BIA will be addressing the BIA-HIP separately. Other sections pertaining to program procedures are more appropriately covered in the program handbook or program NOFA and have been deleted from the IA.

HUD solicited public comments on the proposed IA. Eight comments were received. The following section of the preamble presents a summary of the comments raised by the commenters, and HUD's responses to these comments.

II. Comments on the September 2, 1994 Notice of Proposed Interdepartmental Agreement

Comment. Two commenters wrote that proposed section 5.2.1 of the IA, which concerns the construction of access roads, should be revised to clarify that the BIA ``has responsibility for access roads which provide public access to cluster sites only and not private access to individual sites which the BIA is prohibited from constructing.''

Response. HUD has adopted the comment by revising section 5.2.1 to exclude individual homesites from the access road construction requirements.

Comment. One commenter wrote that the language in proposed section 5.2.1 granting the BIA a lead time of 2\1/2\ years in the construction of access roads should be revised. The commenter believed that ``in the 2\1/2\ year interim, the `temporary' access road built by the IHA becomes unacceptable as there is a void of responsibility for constructing a permanent access road. The BIA should be required to pick up these roads immediately after the IHA has completed the project.''

Response. HUD has not revised the IA as a result of this comment. Due to budgetary prioritization, the 2\1/2\ year time-frame is necessary for BIA to complete its part of the project.

Comment. Two of the commenters urged that the IA provide for greater coordination in National Environmental Policy Act (NEPA) compliance efforts. One of the commenters recommended that section 7.0 be revised to specify that each signatory agency will follow procedures

in a manner which will avoid or minimize delays and that timelines for compliance will be included in time schedules worked out at the project coordination meeting. The other commenter suggested that the IA permit the designation of a lead agency ``in performing NEPA compliance where the project encompasses the functions of all [three] agencies.'' The commenter believed this would expedite the development of a project by eliminating ``multiple comment periods, multiple opportunities for litigation, and multiple FONSI's or EISs.''

Response. Based upon the IHS's recommendation, HUD has revised the IA as a result of these comments. Section 7.0 now provides that in order to minimize delays, HUD, or the Tribal government which has assumed HUD's NEPA responsibility, shall be the lead agency for the preparation of all required environmental statements.

Comment. One commenter wrote that the IA should address land acquisitions since, according to the commenter, ``acquisitions require as much coordination between the BIA and HUD as does development.'' Specifically, the commenter believes the BIA should delegate authority to area offices to approve land acquisitions. Alternatively, the commenter proposed that the BIA designate a person to exclusively review and approve HUD financed land acquisitions. Moreover, the commenter suggested that the IA require NEPA review of these acquisitions.

The commenter also suggested that HUD and the BIA coordinate their acquisition related time requirements. The commenter believed that, due to the time needed by the BIA to take land in trust, some IHAs may not be able to meet HUD's requirement that construction commence within 30 months of a program reservation date. The commenter urged that HUD and the BIA ``negotiate time lines and procedures to avoid these conflicts.''

Response. HUD and the BIA will work more closely in coordinating time requirements.

Comment. One commenter wrote to suggest that proposed section 2.2 of the IA be revised to specify that the BIA will review and approve all Tribal trust, restricted fee and allotted land housing leases in accordance with 25 CFR part 162. Furthermore, the commenter suggested additional language stating that BIA will review and approve all easements to housing sites in accordance with 25 CFR part 169. Lastly, the commenter recommended that proposed section 2.3 be revised to

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require that all housing sites have approved easements and leases before the start of construction.

Response. HUD has adopted the first two elements of this comment. In reference to requiring the IHAs to complete all easements and leases prior to construction, this is a requirement that is inappropriate for this IA since the IA does not encompass the Indian Housing Authorities. This is a requirement that would more appropriately be added to the local Memorandum of Understanding (MOU).

Comment. One commenter objected to the fact that proposed section 2.2 of the IA ``does not specifically state that the BIA is responsible for funding access road construction in HUD assisted housing projects.'' According to the commenter, ``this weakens the BIA's responsibility of supporting HUD-assisted housing projects.''

Response. HUD has not adopted this comment. The IA does not have the force of law, but merely sets forth the coordination efforts of HUD, the BIA, and the IHS. Accordingly, the comment is inappropriate for inclusion in the IA.

Comment. Two commenters objected to the language in proposed section 6.3, IHS PARTICIPATION IN HUD FUNDED SANITATION FACILITIES CONSTRUCTION, which states that the IHS ``may participate'' in the construction of sanitation facilities. According to the commenters ``this statement does not adequately commit the IHS to execute their

responsibility for sanitation system development which servers [sic] Native Americans.'

Response. Based on the IHS's recommendation, HUD has adopted this comment by revising section 6.3 to require that the IHS endeavor to participate in the construction of sanitation facilities.

Comment. One commenter wrote that because the IA's scope is limited to Indian mutual help and low rent programs, it does not go far enough in achieving coordination between the signatory Federal agencies. The commenter recommended that other programs, such as Indian HOME and the BIA Housing Improvement Program (HIP) be included in the IA.

Response. HUD has not revised the IA as a result of this comment. The HOME and HIP programs have different requirements and agency responsibilities. If the coordination of efforts becomes a problem for these programs, separate agreements can be negotiated.

Comment. One of the commenters recommended that language be inserted in section 5.0, DEVELOPMENT OF ON-SITE AND OFF-SITE ROADS, which includes the ``standards of road design and construction that would be required to assure States, cities, counties, townships, etc. assume responsibility for the maintenance and up-keep of roads and streets within the on-site construction area.'' These standards would be in effect when the State and local government have construction and design requirements that exceed ASHTO requirements.

Response. HUD has not revised the IA as a result of this comment. Under 24 CFR 905.250, the IHAs are already required to comply with appropriate local road design standards.

Comment. One of the commenters recommended that the IA specify which agencies are responsible for the costs of complying with Federal, State, or local statutory requirements. Among other examples, the commenter pointed to the costs associated with meeting EPA environmental requirements.

Response. HUD has not revised the IA as a result of this comment. The question of financial responsibility for complying with the various statutory requirements is more properly addressed in the individual MOAs.

Comment. One commenter wrote that the IA was vague concerning IHS duties. The commenter urged that the IA be revised to specify that the IHS has the responsibility of providing water, waste water and solid waste facilities, and O&M infrastructure.

Response. Based on the IHS's recommendation, HUD has adopted this comment by revising section 6.2. This section now details the IHS's statutory authority and responsibility for utilizing HUD funds to provide sanitation facilities for HUD financed Indian homes.

The text of the Interdepartmental Agreement follows:

Interdepartmental Agreement on the Indian Housing Program

The Department of Housing and Urban Development--Office of Native American Programs

The Department of Interior--Bureau of Indian Affairs

The Department of Health and Human Services--Indian Health Service

1.0 Statement of Purpose

The purpose of the Interdepartmental Agreement (IA) is to set forth the working relationship among the Department of Housing and Urban Development (HUD), the Bureau of Indian Affairs (BIA), and the Indian Health Service (IHS) in the delivery of services to Tribes and Indian Housing Authorities (IHAs) in conjunction with the planning and construction of new Indian housing developments. The above agencies share a common goal to assist Tribes in improving their living environment through the delivery of quality housing and infrastructure.

This goal can be more readily achieved with an efficient and integrated utilization of available resources.

This Interdepartmental Agreement establishes a general foundation for this cooperative effort and the guidelines by which each of the three agencies will interact with Tribal governments and IHAs. The IA will be supplemented, as necessary, by individual Memorandums of Agreement (MOA) developed between local decision-makers and the specific federal agencies assisting in the development of the housing.

2.0 General Agency Responsibilities

2.1 HUD Responsibilities. HUD will provide financial and technical assistance for the development and management of low income housing and community developments in Indian and Alaska Native areas through the mutual help/low rent Indian Housing Development Program.

2.2 BIA Responsibilities. BIA will provide real estate and transportation assistance to IHAs pursuant to 25 CFR parts 162, 169, and 170. These services may include (i) assistance in preparing appropriate lease documents for housing sites and required easements; (ii) review, approval and recordation of all required trust or restricted fee land lease and easement documents; where resources are available, providing assistance in obtaining real estate appraisals; (iii) development of access roads to housing sites in accordance with the Tribe's road priorities; (iv) providing maintenance services to those IHA constructed roads and streets accepted into the BIA road systems in accordance with 25 CFR part 170; and (v) provision of other support, when available, necessary for the timely development of housing.

2.3 IHS Responsibilities. The IHS provides a comprehensive primary and preventive health services delivery system for American Indians and Alaska Natives. The environmental health component of IHS assists Tribes in the development of Tribal sanitation facilities [water, waste water, and solid waste facilities and operation & maintenance (O&M) infrastructure]. IHS has the primary responsibility and authority to provide Native American homes and communities with the necessary sanitation facilities and related services.

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3.0 Agency Coordination

3.1 Processing Procedures. The signatories of the IA agree to maintain timely and relevant processing of regulations, handbooks, notices and other administrative guidance for use by Tribes and IHAs. All signatory agencies will be given an opportunity to comment on such documents before they are made effective.

3.2 Program Administration. The signatories of the IA agree to enforce the provisions of current program guidelines with their respective area/regional offices. Disputes between or among the signatory agencies may be made in writing to the head of the appropriate area or field office involved, with a copy to the other agencies. Unresolved disputes extending more than 90 days beyond the date of submission shall be referred, in writing, to the Headquarters Working Group for resolution. This group is composed of the Director, Office of Native American Programs in HUD; Director, Office of Trust Responsibilities in BIA; and the Director, Division of Environmental Health in IHS.

3.3 Information Sharing. Whenever possible, the signatory agencies will provide, or cause to be provided, copies of housing and supporting infrastructure planning documents, to include utility master plans, transportation plans, and IHA comprehensive housing plans, to the appropriate area/regional offices of other signatory agencies.

HUD Field Offices of Native American Programs will provide

quarterly reports on the progress of HUD's assisted housing projects to BIA and IHS. These reports will indicate the method of construction, project number, and number of units. Scheduled and actual completion dates for applicable project review points will be provided, where available.

3.4 Grant Award. Signatory agencies will provide copies of applicable housing and supporting infrastructure grant/project award notices to the other signatory agencies as soon as practicable after notification to Tribes.

4.0 Development of Housing Units

4.1 HUD Responsibilities.

4.1.1 Applications. HUD will advise IHAs to use BIA and IHS information on existing infrastructure and new construction recommendations to support proposed housing project applications for funding.

4.1.2 Project Coordination. HUD will advise IHAs to use handbooks concerning procedures the IHA may use to determine what assistance they need from the BIA and IHS. At the request of a Tribe through the IHA, the BIA (including Area Road Engineers and Realty Officers) and IHS will provide, to the extent feasible, technical reviews and recommendations on project planning, design and construction documents involving supporting infrastructure, and related requirements at appropriate project review points. Appropriate project review points will be determined on a project by project basis and may include: project coordination schedule review, housing site feasibility review, project plan review, project final inspection, and record drawings review. Schedules or commitments made as a result of project coordination require the approval of the appropriate IHS and/or BIA official.

4.1.3 Standard vs Assisted Housing Development Method. The Standard Method of development refers to all procedures, guidelines and requirements associated with the normal development of an Indian housing project by an administratively capable IHA. The Assisted Method contains all of the procedures, guidelines and requirements associated with the development of an Indian housing development by an IHA which has requested additional HUD assistance due to its inexperience or lack of staff resources, or by an IHA which has been deemed by HUD to need additional assistance, monitoring and supervision during the development process. The Standard Method will require less technical assistance by the signatory agencies as compared to the Assisted Method.

4.2 BIA Responsibilities.

Leases, Easements and Real Estate Appraisals on Trust or Restricted Fee Property. Where resources are available, the BIA will provide real estate appraisals at the request of the IHA. All leases and easements shall be approved by the BIA.

5.0 Development of On-site and Off-site Roads

5.1 HUD Responsibilities.

On-Site Street Construction. HUD will provide sufficient funds for the construction of on-site streets, in accordance with the American Association of State Highway and Transportation Officials (AASHTO) standards. The IHA will have the overall responsibility for construction of on-site streets. The Tribal government must determine the type of streets to be constructed in conjunction with housing projects, and whether the streets will be included in the BIA Roads System for maintenance by the BIA. HUD will advise each IHA and Tribe which receives a HUD Housing Grant that the on-site streets must be designed and constructed to AASHTO standards to be eligible for inclusion on the BIA Roads System.

5.2 BIA Responsibilities.

5.2.1 Access Road Construction. When requested by the Tribal government, and when resources are available, the BIA will plan and construct access roads to housing developments, excluding individual homesites. Sufficient lead time is required to develop access roads. This lead time may be as much as 2\1/2\ years. The BIA will coordinate access road construction with the IHA and make every effort to complete such roads prior to the completion of the housing project.

5.2.2 Road/Street Maintenance. IHA-developed streets may be added to the BIA Roads System only when the street(s) and related curb, gutters and drainage features have been built to acceptable AASHTO specifications and standards as well as to the requirements of section 504 of the Americans with Disabilities Act, and the right-of-way is transferred to the BIA. When requested by the Tribal government, and when resources are available, the BIA Area Office will accept IHA developed streets on the BIA Roads System and will provide ongoing maintenance for those streets that meet the above specifications and standards.

6.0 Development of Sanitation Facilities

6.1 HUD Responsibility. To the extent that funds are appropriated by Congress, HUD will provide funding to IHAs to develop water, waste water, solid waste facilities, and O&M infrastructure necessary to support individual low-rent or mutual help housing projects financed by HUD. O&M infrastructure includes the plant, equipment, tools and training needed by utility authorities to provide continuing sanitation service to the residents of HUD-financed homes, as well as the long range planning necessary to identify and implement those requirements.

6.2 IHS Authority. Under section 302(b)(3) of the Indian Health Care Improvement Act, the IHS has the authority to receive HUD funds to provide sanitation facilities for Indian homes financed by HUD.

6.3 IHS Participation in HUD Funded Sanitation Facilities Construction. When requested by the Tribe and the IHA, IHS will endeavor to participate in the construction of sanitation facilities funded by HUD under the mutual help/low rent HUD-assisted housing development program. IHS participation will be on a project by

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project basis, pursuant to an approved MOA duly executed by the IHA, Tribe, IHS, and if necessary, HUD.

6.4 Individual and Community Sanitation Systems. Where it is determined that sanitation facilities are feasible and necessary, the following conditions will apply:

6.4.1 HUD will finance the installation of all dwelling plumbing facilities.

6.4.2 Where facilities serve only HUD-assisted housing project homes, HUD will fund the total cost of the sanitation facilities necessary to serve the project. Where HUD-assisted housing project homes are interspersed with existing homes also served by a sanitation facility, HUD shall fund a prorated share of sanitation facilities costs. All community sanitation system construction, improvement, or expansion will be designed on the basis of a total community concept, such that the proposed sanitation facilities are (a) safe and adequate to meet the environmental health needs of residents, (b) compatible with Tribal infrastructure development, (c) economically feasible to construct and operate, and (d) in compliance with applicable codes, ordinances, and industry standards.

7.0 Environmental Compliance

Each signatory agency (HUD, BIA, and IHS) shall be responsible for

following its own applicable procedures addressing the requirements of the National Environmental Policy Act (NEPA), and related and/or similar environmental legislation and/or Executive Orders. A Memorandum of Understanding (MOU), dated June 21, 1991, signed by BIA, HUD, IHS, and the Environmental Protection Agency, clarifies each agency's role in environmental protection.

In the implementation of the roles and responsibilities identified in the MOU and herein, signatory agencies will, to the extent feasible, adopt and/or combine environmental documents which are provided by the other signatory agencies. Joint use of environmental documents that comply with NEPA and related regulations will reduce duplication and paperwork. Copies of one signatory agency's environmental determination documentation (e.g., archeological review) may be required by another signatory agency prior to granting approvals; however, the approving agency shall not require the applying agency to change procedures, format, etc., during the review process and prior to granting its approval.

Unless otherwise provided for in a duly executed MOA, HUD, or a Tribal government which has assumed HUD's NEPA responsibility, shall be the lead agency for the preparation of environmental review, assessments and impact statements in compliance with NEPA for all HUD-assisted housing and related infrastructure projects. When BIA and IHS participate directly in these projects, they shall be cooperating agencies for the purposes of NEPA compliance.

Dated: April 30, 1996.

Donna E. Shalala,
Secretary, Department of Health and Human Services.

Dated: August 19, 1996.

Bruce Babbitt,
Secretary, Department of the Interior.

Dated: May 6, 1996.

Henry G. Cisneros,
Secretary, Department of Housing and Urban Development.
[FR Doc. 96-22923 Filed 9-9-96; 8:45 am]
BILLING CODE 4160-16-P; 4210-33-P; 4310-02-P

RURAL DEVELOPMENT'S INFRASTRUCTURE PROGRAM

- ❖ **WATER & ENVIRONMENTAL
INFORMATION AND FUNDING**
- ❖ **STATE OFFICE DIRECTORY**
- ❖ **TECHNICAL ASSISTANCE PROVIDER
FOR SEWER & WATER
INFRASTRUCTURE**

**WATER &
ENVIRONMENTAL
INFORMATION
AND
FUNDING**

RURAL UTILITIES SERVICE

***Water and Environmental
Programs***

In Indian Country

December 2000



United States Department of Agriculture

A Message From the Administrator

November 2000



USDA's Rural Development mission area is actively seeking to expand our partnerships with federally recognized tribes, Alaskan Native Villages, and increase our grant/loan investments in your safe and clean water development projects.

Our strong interest in this area is driven by the goals and principles outlined by President Clinton's memorandum on Government-to-Government relations with Native American Tribal Governments (Attachment A). We take this commitment very seriously. In the course of putting that policy into practice, we have almost quadrupled our level of investment in tribal safe drinking water and sanitary sewer projects since May 1994.

Attached you will find the list of tribal safe and clean water projects funded with grants and low interest loans from the USDA for federal fiscal years 1995 through 2000 (Attachment C). We have also included a list of projects funded with the Rural Utilities Service (RUS) Native American Indian Grant Program (Attachment D). This is a start. However, we believe that we can and must do more in Indian Country. As you consider your tribe's public and environmental health and economic development needs related to safe and clean water, we invite you to consider the RUS Water and Environmental Programs (WEP). (Attachment B)

For FY 2001 WEP has \$1.55 billion available for its Water and Waste Program. Of this amount \$15,750,000 has been set aside for the Native American Grant Program. With these funds WEP offers several types of financial assistance. We are allowed under law to guarantee loans, make direct low interest loans, and make grants. Grants, through our regular grant program, can be as high as 75 percent of the total project budget under certain economic circumstances for eligible projects. Grants can go up to 100% through the Native American Indian Grant Program. We will work with you on a project-by-project basis to assemble the best possible financial package for your community. As you can see from the attached list of projects for the past four years, the average WEP tribal investment package has been approximately 50 percent grant and 50 percent loan. Many of these projects are under construction right now.

Included for your use is a list of our USDA Rural Development State Directors and RUS Program Directors in all 50 states (Attachment E). They operate the WEP program at the community level. Their offices can start you on the road to securing a clean and safe water project investment from our agency. We invite and encourage you to work with us. Improving water resources improves the public and economic health of your community.

Christopher A. McLean
Administrator
Rural Utilities Service



WATER AND ENVIRONMENTAL PROGRAMS HIGHLIGHTS



AMBITIOUS GOALS The RUS Water and Environmental Programs confronts a difficult challenge. The demand for clean safe water and sewer systems are huge. The RUS targets its sound, supportable investments in the people that need it the most. The program assists a broad cross section of rural America and focuses on people without safe drinking water and sanitary sewer facilities. At the time of the 1980 Census, approximately 2.1 million Americans were in this category. By the 1990 Census, the number dropped to about 1.07 million. The USDA estimates that by the end of 2000, it will be below 700,000. No reliable number is available on how many of these people live in Indian Country, but the number is thought to be substantial. Some assessments indicate that people without any drinking water live in some of the most remote, low income, geologically rugged areas of the nation. Serving them with safe, clean public water requires hard work, considerable engineering expertise and careful, targeted investment.



DEEP TARGETING The typical median household income (MHI) for communities receiving Water and Environmental Programs' investments is approximately \$18,500 which is just above the poverty line. In the Native American and Alaskan Native communities we serve, the MHI for most communities is substantially below the national poverty level. These are communities that would have serious difficulties assembling funding for large water infrastructure projects from other sources. We are pleased, under Water and Environmental Programs, to act as their "investor of last resort", because their public health needs are great.



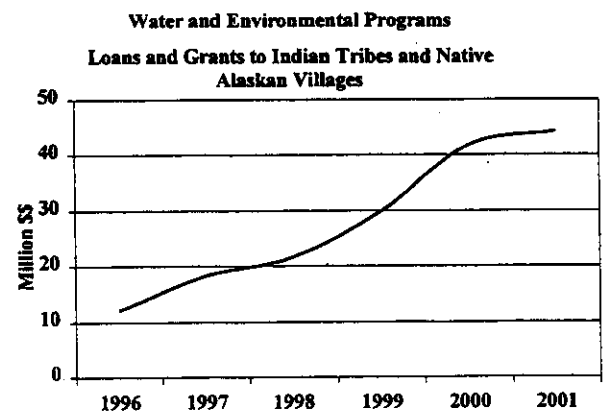
BROAD IMPACT ON PEOPLE It is estimated that, once they are all constructed, the projects that have been funded during the last five years will serve over 75,000 people in Native American and Alaska Native communities with safer, cleaner water from well maintained and operated public systems.



EXPANDED ASSISTANCE TO TRIBAL PROJECTS USDA investment in tribal safe and clean water projects has grown impressively under the Water and Environmental Programs, to over \$44 million annually in grants and loans last year, versus \$4.4 million annually over the five previous years.



ENVIRONMENTAL JUSTICE A significant number of Water and Environmental Programs' beneficiaries are minority, low income communities. Some have experienced varying degrees of toxic waste dumping from public and private sources. Such heavily burdened communities--many of them home to African American, Hispanic, Native American, and Native Alaskan families--receive at least partial protection from continued environmental and public health danger when public investments help them secure new water sources, improved source protection, and expanded water treatment and distribution.





Funds for Native Americans and Alaskan Natives

Native American Set Aside

The amount available is \$15,750,000. These funds are specifically intended to be used for eligible projects which benefit members of Federally Recognized Native American Tribes (Tribal Members). Applications will be processed in accordance with all eligibility and other requirements of 7 C.F.R. 1777. These funds cannot be used for projects which are eligible for funding under any other set-aside.

Every effort is made to identify and fund the neediest projects. The use of RUS loan funds, as well as funds from other sources, in conjunction with the grant funds is strongly encouraged whenever feasible to maximize the investment in Indian Country. Generally, applicants are expected to borrow as much as they can afford to repay, as in the regular loan program.

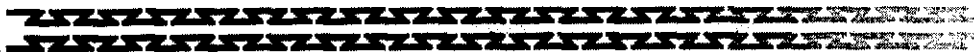
Projects for which the applicant is not a Federally Recognized Native American Tribe, but which benefit Tribal Members, may be considered eligible for set-aside funds if the applicant certifies that more than 50 percent of the users in the project service area are Tribal Members. In such cases, set-aside funds cannot exceed the applicable percentage of the total eligible project cost. If the applicant is not a Federally Recognized Native American Tribe, the applicant should obtain a letter of support from the benefiting Federally Recognized Native American Tribe.

Native American set-aside funds will be available on a priority basis. The maximum amount from the set-aside for any project is \$1 million. Funds are allocated on a project-by-project basis periodically throughout the year.

For FY 2001, Native American set-aside projects must have service areas where the per capita income is not more than \$10,094 and the unemployment rate is not less than 4.88 percent for the Tribe or County.

Rural Alaskan Villages

\$20,000,000 is available to the State of Alaska for grants to rural or native villages. Funds must be used for development and construction of water and wastewater systems to improve health and sanitation conditions in those villages. At least 25 percent of the project costs must be matched by non-federal funds. In an effort to streamline the application process a single grant was made to the State of Alaska to enable 16 projects to be funded. A similar process is anticipated for FY 2001.



Discover RUS

In addition to our Water and Environmental Programs, the Rural Utilities Service (RUS) is the Federal "point" agency for rural infrastructure assistance in electricity, and telecommunications.

As a Federal credit agency in the United States Department of Agriculture, RUS provides a leadership role in lending and technical guidance for the rural utilities industries.

The public - private partnership, which is forged between RUS and these industries, results in billions of dollars in rural infrastructure development and creates thousands of jobs for the American economy.

Electric Program

RUS is a leader in lending to upgrade, expand, maintain, and replace the vast rural America electric infrastructure. The federal Government, through RUS, is the majority note holder for nearly 850 systems. Since the start of the program, RUS has approved approximately \$57 billion in financing to support electric infrastructure in rural areas. Our customers are predominately nonprofit cooperatives; however, we also provide assistance to native America Tribal utilities.

Distant Learning and Telemedicine Program

Through its DLT Program, RUS provides financial assistance to rural recipients to enhance learning and health care opportunities for rural residents. Since its inception in 1993, over \$68 million in funding has been provide to 252 incorporated organizations, partnerships, Indian tribes and tribal organizations across American and its territories. Quality education, health care, and stable economies are goals of all communities across the U.S.; and, in rural America, advanced telecommunications technologies are helping to meet the challenges of fulfilling these goals.



Telecommunications Program

RUS infrastructure loans are used by rural telecommunication providers to build new and modernize existing telecommunication networks, connect new subscribers in unserved areas, and provide necessary transmission and switching facilities. With over \$11 billion in approved telecommunication financing, RUS has been building the foundation for the information superhighway for nearly 50 years.

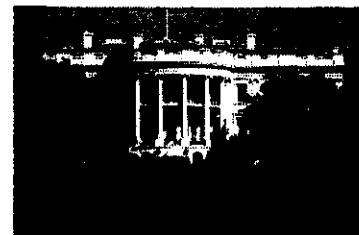
Visit us at www.usda.gov/rus.



The White House
Washington, DC
April 29, 1994

**MEMORANDUM FOR THE HEADS OF EXECUTIVE
DEPARTMENTS AND AGENCIES**

**SUBJECT: Government-to-Government Relations with Native
American Tribal Governments**



The United States government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

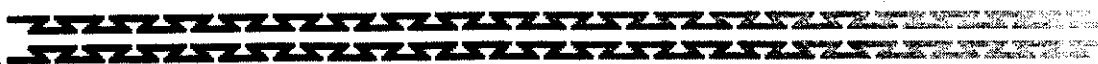
Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the federal government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
- (c) Each executive department and agency shall assess the impact of federal government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs and activities.
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.
- (e) Each executive department and agency shall work cooperatively with other federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities. The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the integral management of the executive branch 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 person.

WILLIAM J. CLINTON



Rural Utilities Service (RUS)

WATER AND WASTE DISPOSAL PROGRAMS



United States
Department of
Agriculture

Rural
Development

Rural
Utilities
Service

The Rural Utilities Service (RUS) administers a water and wastewater loan and grant program to improve the quality of life and promote economic development in rural America. At the State and local levels, the program is administered by field offices of Rural Development.

WATER AND WASTE DISPOSAL DIRECT AND GUARANTEED LOANS

Purpose: Direct loans may be made to develop water and wastewater systems, including solid waste disposal and storm drainage, in rural areas and to cities and towns with a population of 10,000 or less. Funds are available to public entities, such as municipalities, counties, special-purpose districts, and Indian tribes. In addition, funds may be made available to corporations operated on a not-for-profit basis. Priority will be given to public entities, in areas with less than 5,500 people, to restore a deteriorating water supply, or to improve, enlarge, or modify a water facility or an inadequate waste facility. Also, preference will be given to requests which involve the merging of small facilities and those serving low-income communities. Applicants must be unable to obtain funds from other sources at reasonable rates and terms. The maximum term for all loans is 40 years; however, no repayment period will exceed State statutes or the useful life of the facility. Interest rates may be obtained from Rural Development field offices.

Guaranteed loans may be made for the same purpose as direct loans. They are made and serviced by lenders such as banks and savings and loan associations. Normally, guarantees will not exceed 80 percent on any loss of interest and principal on the loan.

WATER AND WASTE DISPOSAL GRANTS

Purpose: Reduce water and waste disposal costs to a reasonable level for users of the system. Grants may be made, in some instances, up to 75 percent of eligible project costs. Eligible applicants are the same as for loans.

TECHNICAL ASSISTANCE AND TRAINING GRANTS

Purpose: Make grants to nonprofit organizations to provide technical assistance and/or training to associations located in rural areas and to cities and towns with a population of 10,000 or less.

The U.S. Department of Agriculture, prohibits discrimination in its programs on the basis of race, color, national origin, sex, religion, disability, political beliefs and marital or familial status. Not all prohibited bases apply to all programs. Persons with disabilities who require alternative means for communication of program information (Braille, large print, audio tape, etc.) should contact the USDA Office of Communications at (202) 720-7327 (voice) or (202) 720-1127 (TDD). USDA is an equal employment opportunity employer.

Assistance may be provided to identify and evaluate solutions to water and waste disposal problems, to improve the operation and maintenance of existing water and waste disposal facilities, and to assist associations in preparing applications for water and waste disposal facilities.

SOLID WASTE MANAGEMENT GRANTS

Purpose: Make grants to public and private nonprofit organizations to provide technical assistance and/or training to associations located in rural areas and to cities and towns with a population of 10,000 or less to reduce or eliminate pollution of water resources, and improve planning and management of solid waste facilities. Assistance may be provided to enhance operator skills in operations and maintenance, identify threats to water resources, and reduce the solid water stream.

RURAL WATER CIRCUIT RIDER TECHNICAL ASSISTANCE

Purpose: Provide on-site technical assistance to help assure cost effective operation of rural water systems. RUS has assisted rural water systems, via contracting, with day-to-day operational, financial and management problems. The assistance is provided at no charge and may be requested by officials of rural water systems or by Rural Development personnel. It complements supervisory assistance provided by Rural Development personnel.

APPLICATIONS

Information about the water and waste disposal programs and advice on how to assemble information to determine engineering feasibility, economic soundness, cost estimates, organization, financing and management matters, may be obtained from Rural Development field offices. These offices are usually listed in local telephone directories under the U.S. Department of Agriculture.

Visit us on the Internet at www.usda.gov/rus.



**USDA's RURAL UTILITIES SERVICE
WATER AND ENVIRONMENTAL PROGRAMS
LOANS AND GRANTS TO INDIAN TRIBES
AND NATIVE ALASKAN VILLAGES
10/95 through 9/00**

Attachment C

W-Water

S-Sewer

<u>State</u>	<u>Borrower Name</u>	<u>Fiscal Year</u>	<u>Type</u>	<u>Loan Amount Obligated</u>	<u>Grant Amount Obligated</u>
AK	Akiak Native Community	97	W		\$405,500
	Akiak Native Community	99	WS		\$733,500
	Alakanuk, City Of	99	S		\$1,050,000
	Allakaket, City Of	97	WS		\$235,800
	Atnautluak Village	97	WS		\$221,000
	Beaver Tribal	97	S		\$35,000
	Bethel, City Of	98	WS		\$2,300,000
	Birch Creek Tribal	99	WS		\$462,500
	Chefornak, City Of	97	W		\$280,000
	Chefornak, City Of	98	WS		\$1,600,000
	Chalkyitsik Village	96	WS		\$680,000
	Chevak, City Of	99	WS		\$1,243,000
	Coffman Cove	99	WS		\$700,000
	Deering, City	98	S		\$600,000
	Egegik, City Of	97	S		\$275,000
	Evansville Tradition	97	S		\$185,000
	Galena, City Of	99	S		\$250,000
	Goodnews Bay, City	97	WS		\$610,000
	Goodnews Bay, City	99	WS		\$1,226,500
	Grayling, City Of	96	S		\$112,000
	Kongiganak Traditional	98	W		\$300,000
	Kotlik, City Of	97	WS		\$533,000
	Kotlik, City Of	99	WS		\$780,000
	Kotzebue, City Of	97	W		\$280,000
	Kotzebue, City Of	97	S		\$950,000
	Koyukuk, City Of	97	S		\$90,000
	Koyukuk, City Of	98	WS		\$100,000
	Kwinhagak, Native	97	W		\$275,000
	Kwinhagak, Native	99	WS		\$612,500
	Marshall, City Of	97	WS		\$60,000
	Marshall, City Of	99	WS		\$550,000
	Mat-Su Borough	97	WS		\$37,500
	Mekoryuk, City Of	97	S		\$750,000
	Mekoryuk, City Of	98	S		\$350,000
	Mountain Village	98	WS		\$551,000
	Nanwalek Native	99	W		\$747,750
	Napakiak, City Of	97	WS		\$425,000
	Napakiak, City Of	98	WS		\$170,000
	Native Village Of	97	WS		\$275,000
	Nightmute, City Of	99	WS		\$500,000
	Nikolaevsk Village	99	W		\$152,500
	Nondalton, City Of	96	S		\$348,500
	Nulato, City Of	96	WS		\$395,400
	Nunapitchuk, City Of	97	WS		\$1,150,000
	Nunapitchuk, City Of	98	WS		\$329,000
	Port Graham Native	99	W		\$528,000
	Rampart Village	99	WS		\$337,500
	Sheldon Point, City	97	WS		\$90,000
	Sheldon Point, City	99	W		\$98,000
	Stevens Village Ira	97	S		\$55,000
	Togiak, City Of	99	S		\$1,075,000
	Tuntutuliak	97	WS		\$750,000
	Unalakleet, City	97	WS		\$262,500
	Wainwright, City Of	96	WS		\$1,375,000
	Wainwright, City Of	97	WS		\$440,000
	Grant to State of Alaska for multiple projects	00	WS		\$19,464,579

<u>State</u>	<u>Borrower Name</u>	<u>Fiscal Year</u>	<u>Type</u>	<u>Loan Amount Obligated</u>	<u>Grant Amount Obligated</u>
AZ	Cocopah Tribe	97	W		\$375,000
	Cocopah Tribe	97	W	\$200,000	\$200,000
	Cocopah Tribe	98	W		\$84,000
	Cocopah Tribe	98	W		\$310,700
	Cocopah Tribe	98	W	\$25,000	
	Cocopah Tribe	98	W	\$125,000	\$375,000
	Gila River Indian	00	S		\$300,000
	Hopi Tribe	95	WS	\$702,560	\$2,108,000
	Hopi Tribe	00	WS		\$277,500
	Hualapai Tribe	97	W	\$90,000	\$300,000
	Hualapai Tribe	98	W	\$31,000	\$210,000
	Hualapai Tribe	00	W		\$50,500
	Hualapai Tribe	00	W		\$450,000
	Navajo Tribe	96	W	\$249,000	\$248,000
	Navajo Tribe	96	WS	\$262,000	\$261,000
	Navajo Tribe	97	S	\$40,000	\$40,000
	Navajo Tribe	97	WS	\$89,000	\$135,500
	Navajo Tribe	97	WS	\$172,000	\$77,900
	Navajo Tribe	98	W	\$31,500	\$94,500
	Navajo Tribe	99	W		\$267,500
	White Mountain Apache	96	W	\$1,300,000	\$1,300,000
	White Mountain Apache	96	S	\$840,000	
	White Mountain Apache	97	W	\$1,100,000	\$1,100,000
	White Mountain Apache	97	W	\$211,100	\$211,000
	White Mountain Apache	98	S	\$312,000	\$312,000
	Yu-Weh-Loo-Pah-Ki	00	W		\$350,000
CA	Bridgeport Paiute	00	WS		\$250,000
	Campo Band	99	W		\$560,000
	Happy Camp Comm (Karuk)	00	W		\$600,000
	La Posta Band	99	W		\$416,000
	Lajolla Band	98	WS		\$1,100,000
	Los Coyotes	98	W		\$597,300
	Rincon Band	99	W		\$628,000
	Torres-Martinez	96	W		\$197,000
	Torres-Martinez	97	W		\$53,000
	Nez Perce Tribe	96	WS		\$38,180
ID	Nez Perce Tribe	97	WS		\$42,000
	Shoshone-Bannock	98	W		\$42,000
	Shoshone-Bannock	99	WS	\$665,000	\$1,200,000
	Shoshone-Bannock	00	W		\$525,000
	Shoshone-Paiute	00	S		\$250,000
	Shoshone-Paiute	00	W		\$39,500
	Shoshone-Paiute	00	S	\$87,500	
	Passamaquoddy Tribe	99	W		\$340,000
ME	Passamaquoddy Tribe	00	S		\$500,000
MN	Bois Forte	97	WS	\$185,500	\$544,500
	Bois Forte	99	WS	\$224,600	\$658,000
	Bois Forte	00	W		\$783,000
	Bois Forte	00	S	\$70,000	
	Upper Sioux Comm.	98	W	\$113,000	\$339,000
	Upper Sioux Comm.	99	S		\$600,000
	Upper Sioux Comm.	00	S	\$100,000	\$780,000
	Upper Sioux Comm.	00	W	\$31,500	\$94,500
MT	Blackfeet Tribe	00	W		\$100,000
	Chippewa Cree	97	WS	\$66,000	\$198,000
	Chippewa-Cree	99	W	\$37,200	\$111,600
	Chippewa-Cree	99	S		\$112,500
	Chippewa-Cree	00	W		\$8,000
NE	Salish-Kootenai	00	W		\$120,980
	Winnebago	00	S		\$296,000

<u>State</u>	<u>Borrower Name</u>	<u>Fiscal Year</u>	<u>Type</u>	<u>Loan Amount Obligated</u>	<u>Grant Amount Obligated</u>
ND	Spirit Lake Tribe	96	S	\$215,000	
	Spirit Lake Tribe	00	SW		\$300,000
	Three Affiliated Tribes	00	S		\$450,000
	Three Affiliated Tribes	00	W		\$150,000
	Turtle Mt. Band Of Chippewas	96	W	\$461,000	
	Turtle Mt. Band Of Chippewas	97	W	\$1,589,600	
	Turtle Mt. Band Of Chippewas	98	WS		\$531,600
	Turtle Mt. Band Of Chippewas	98	W		\$1,812,000
	Turtle Mt. Band Of Chippewas	98	W	\$1,288,000	
	Turtle Mt. Band Of Chippewas	98	W		\$132,000
	Turtle Mt. Band Of Chippewas	99	W	\$125,000	\$325,000
	Turtle Mt. Band Of Chippewas	99	S	\$792,000	\$647,100
	Turtle Mt. Band Of Chippewas	00	W		\$100,000
	Turtle Mt. Band Of Chippewas	00	SW		\$150,000
	Turtle Mt. Band Of Chippewas	00	W	\$220,000	
	Turtle Mt. Band Of Chippewas	00	W		\$880,000
NM	Acoma Pueblo	97	W	\$275,000	\$1,125,000
	Acoma Pueblo	98	S	\$2,125,000	\$1,875,000
	Acoma Pueblo	99	W	\$350,000	\$1,050,000
	Alamo Navajo School	97	W		\$150,000
	Alamo Navajo School	97	W		\$85,000
	Picuris	00	W		\$700,000
	Zuni Pueblo	99	W	\$914,200	\$2,742,600
	Zuni Pueblo	00	W		\$950,000
	Zuni Pueblo	00	W	\$564,200	\$2,148,300
NY	Mohawk (W)	00	W		\$550,000
NV	Fort Mojave Tribe	96	WS	\$744,000	
	Yerington Paiute	99	W	\$62,250	\$186,750
OK	Ponca Tribe	00	S		\$651,000
	Ponca Tribe	00	S	\$232,800	\$24,400
OR	Umatilla Indian Reservation	99	SW	\$564,000	
	Warm Springs	00	S		\$600,000
	Warm Springs	00	S	\$885,000	\$108,900
SD	BDM	00	W		\$850,000
	Big Sioux Community	00	W	\$277,780	\$53,820
	Lower Brule Sioux	96	W	\$145,238	\$150,950
	Oglala Sioux	99	W	\$150,000	\$850,000
	Oglala Sioux	99	SW	\$150,000	\$850,000
	Oglala Sioux	99	W	\$148,750	\$446,250
	Oglala Sioux	00	SW		\$325,000
	Oglala Sioux	00	W		\$225,000
	Randall Community Water	00	W		\$400,000
UT	Cedar Band Of Paiute	99	W	\$49,000	\$221,000
	Cedar Band Of Paiute	00	W		\$86,000
	Confed States Of Goshute Res	00	S		\$43,000
	Duchesne/Wasatch	00	S	\$29,200	\$23,800
	Uintah-Ouray Tribe	99	SW	\$137,500	\$112,500
	Ute Indian Tribe	00	W		\$350,000
WA	Nisqually Indians	99	W	\$386,040	\$151,760
	Spokane Tribe	99	W	\$223,500	\$284,000
WI	Lac Du Flambeau (W)	00	W		\$200,000
	Lac Du Flambeau (S)	00	S		\$544,520
WI	Lac Du Flambeau	00	W	\$479,130	\$518,870
WI	Lac Du Flambeau	00	S	\$227,670	\$2,003,810
	Red Cliff Chippewa	97	W	\$943,000	
	Red Cliff Chippewa	98	S	\$1,133,00	\$3,367,000
	Stockbridge Munsee	99	S	\$472,400	\$811,000
WY	Shoshone Tribe	98	W	\$100,000	\$200,000

TOTAL

\$22,687,851

\$101,447,619



RURAL UTILITIES SERVICE
Native American Indian Grant Program
Fiscal Year 2000

Attachment D

<u>State</u>	<u>Project</u>	<u>Description</u>	<u>Amount</u>
AZ	Havasupai Tribe	Water system improvements to combat outages.	\$ \$50,500
AZ	Havasupai	Install secondary water storage tank and make improvements to the water treatment components.	\$450,000
AZ	Commun. Util Assoc (Spider Mound)	Make water improvements to the Community.	\$350,000
AZ	Hopi	Assist with cost overruns on the Water/Wastewater Improvement Project.	\$277,500
CA	Bridgeport Paiute Indian Colony	Extend water and sewer lines to serve ten additional homes on the reservation. It will also provide funds to install aerators at the Bridgeport PUD sewer treatment plant to reduce odors which directly affect the tribe.	\$250,000
CA	Happy Camp Comm (Karuk)	Modify the existing water intake system, build a new storage tank (some in order to meet EPA regulations) and construct a creek bed infiltration gallery to reduce sedimentation overload.	\$600,000
ID	Shoshone-Paiute	Replace deteriorating sewer lines.	\$250,000
ID	Shoshone-Paiute	Install water meters to ensure reasonable water.	\$39,500
ID	Shoshone-Bannock	Construct two wells, a reservoir, and extend water.	\$525,000
ME	Passamaquoddy Tribe	Rehabilitate four pump stations to prevent wastewater from flowing into Lewy Lake	.\$500,000
MN	Bois Forte Band of MN Chippewa	Extension to current water project.	\$783,000
MT	Blackfeet Tribe	Build intake structure for water project.	\$100,000
MT	Salish-Kootenai	Drill well and provide water to a small subdivision.	120,980
MT	Chippewa-Cree	Connecting the existing well to the distribution system, testing pump, water sampling and excavation.	\$8,000
ND	Three Affiliated Tribes	Provide a new lagoon system and eliminate the existing lagoon which is a major health concern with overloaded condition and is currently located next to Lake Sakakawea.	\$450,000
ND	Three Affiliated Tribes	Provide a new water reservoir in the Four Bears area, which will provide needed capacity and remove the existing structure.	\$150,000
ND	Spirit Lake	Provide necessary equipment and site development for a solid waste disposal project on the reservation.	\$300,000
ND	Turtle Mountain	Cost overrun needed to complete the pipeline and appurtenances for the project.	\$100,000
ND	Turtle Mtn	Solid Waste Disposal Open Landfill Cleanup Project.	\$150,000

RURAL UTILITIES SERVICE
Native American Indian Grant Program
Fiscal Year 2000

Attachment D (Cont.)

<u>State Project</u>	<u>Description</u>	<u>Amount</u>
NE Winnebago	Provide sanitary sewer service to 10 residences and the St. Augustine Catholic Mission.	\$296,000
NM Zuni Pueblo	Upgrade existing water system.	\$950,000
NM Picuris	Upgrade existing water system.	\$700,000
NY Mohawk (W)	Water treatment plant upgrade constructed adjacent to the existing water treatment plant with a newly constructed water intake.	\$550,000
OK Ponca Tribe	Sewer improvements in White Eagle community	\$651,000
OR Warm Springs	Upgrade the current wastewater treatment facilities ncluding preliminary treatment and influent pumping; secondary treatment with the activated sludge process; and disinfection with ultraviolet light.	\$600,000
SD BDM	Upgrade existing water system.	\$850,000
SD Randall Community Water	Assist in the financing for the City of Lake Andes to hook up to the Randall Community Water District's Rural Water System.	\$400,000
SD Oglala	Close nine district landfills throughout the Pine Ridge Reservation. The Oglala Sioux Tribe will be constructing nine transfer/collection sites within the same areas.	\$325,000
UT Ute Indian Tribe	Improve fire flow by replacing the current undersized water lines and replacing the disinfection, metering, and chemical treatment equipment.	\$350,000
UT Cedar Band of Paiutes	Upgrade existing water system.	\$86,000
UT Confed States of Goshute Res	Finance the purchase of a sewer pump truck to clean out the septic tanks of 20 residents.	\$350,000
WI Lac Du Flambeau (W)	Water transmission mains will be extended into the new Pokegama East Subdivision and water transmission lines will be extended into the new Pokegama Lake West Subdivision and the existing water system will be upgraded to provide additional water needs by constructing an elevated water tower and upgrading of two of the five existing community wells.	\$200,000
WI Lac Du Flambeau (S)	Upgrade and expand the existing aeration lagoon sewage treatment facility to serve existing and new users. A second community sewage treatment facility – a sand filter system, will also be constructed to serve a new residential subdivision.	\$544,520
Total		\$12,000,000



**STATE
OFFICE
DIRECTORY**

RURAL DEVELOPMENT STATE DIRECTORS AND RUS PROGRAM DIRECTORS

Attachment E

Revised 11/15/00

ALABAMA

Anne Payne, State Director
(334) 279-3400/(F)(334) 279-3403
Vann L. McCloud
RUS Program Director
(334) 279-3615/(F)(334) 279-3627
Sterling Centre, Suite 601
4121 Carmichael Road
Montgomery, AL 36106-3686

ALASKA

Sheila Selkregg, State Director
(907) 761-7701/(F)(907) 761-7784
Frank A. Muncy
RUS Program Director
(907) 761-7704/(F)(907) 761-7784
800 West Evergreen, Suite 201
Palmer, AK 99645

ARIZONA

Ernest J. Wetherbee
Acting State Director
(602) 280-8700/(F)(602) 280-8708
Leonard Gradillas
RUS Program Director
(602) 280-8747/(F)(602) 280-8730
Phoenix Corporate Center
3003 N. Central Ave., Suite 900
Phoenix, AZ 85012-2906

ARKANSAS

John C. Edwards, State Director
(501) 301-3207/(F)(501) 301-3278
Jerry W. Virden
RUS Program Director
(501) 301-3270/(F)(501) 301-3293
Federal Building, Room 5411
700 West Capital Avenue
Little Rock, AR 72201-3225

CALIFORNIA

Celeste Cantú, State Director
(530) 792-5800/(F)(530) 792-5837
Janice L. Waddell
RUS Program Director
(530) 792-5810/(F)(530) 792-5837
430 G Street, Dept. 4169
Davis, CA 95616-4169

COLORADO

Ruth Rodriguez, State Director
(303) 236-2801/(F)(303) 236-2854
Leroy W. Cruz
RUS Program Director
(303) 236-2801/(F)(303) 236-2847
655 Parfet Street, Room E-100
Lakewood, CO 80215

DELAWARE/MARYLAND

John S. Walls
State Director
(302) 697-4300/(F)(302) 697-4390
James E. Waters
RUS Program Director
(302) 697-4324/(F)(302) 697-4388
4607 South DuPont Highway
P.O. Box 400
Camden, DE 19934-9998

FLORIDA

Lucy Bartlett
State Director
(352) 338-3402/(F)(352) 338-3405
Glenn Walden
RUS Program Director
(352) 338-3440/(F)(352) 338-3452
4440 N.W. 25th Place
P.O. Box 147010
Gainesville, FL 32606

GEORGIA

Donnie Thomas
Acting State Director
(706) 546-2162/(F)(706) 546-2152
Jerry M. Thomas
RUS Program Director
(706) 546-2171/(F)(706) 546-2135
355 East Hancock Avenue
Athens, GA 30601-2768

HAWAII

Steven Chapman
Acting State Director
(808) 933-8300/(F)(808) 933-8327
Ted K. Matsuo
RUS Program Director
(808) 933-8310/(F)(808) 933-8327
Room 311, Federal Building
154 Waiianuenue Avenue
Hilo, HI 96720

IDAHO

Loren A. Nelson
State Director
(208) 378-5600/(F)(208) 378-5643
Daniel H. Fraser
RUS Program Director
(208) 378-5617/(F)(208) 378-5643
9173 West Barnes Street
Suite A1
Boise, ID 83709-1555

ILLINOIS

Jill Appell, State Director
(217) 398-5412/(F)(217) 398-5337
Gerald Townsend
RUS Program Director
(217) 398-5412/(F)(217) 398-5322
Illini Plaza, Suite 103
1817 South Neil Street
Champaign, IL 61820

INDIANA

John C. Thompson
State Director
(317) 290-3100/(F)(317) 290-3095
Gregg Delp
RUS Program Director
(317) 290-3109/(F)(317) 290-3127
5975 Lakeside Boulevard
Indianapolis, IN 46278

IOWA

Ellen King Huntoon
State Director
(515) 284-4663/(F)(515) 284-4859
Dorman A. Otte
RUS Program Director
(515) 284-4152/(F)(515) 284-4859
873 Federal Building
210 Walnut Street
Des Moines, IA 50309

KANSAS

William M. Kirk, State Director
(785) 271-2700/(F)(785) 271-2708
Gary L. Smith
RUS Program Director
(785) 271-2730/(F)(785) 271-2708
1200 SW Executive Drive
Topeka, KS 66604

KENTUCKY

Thomas G. Fern, State Director
(859) 224-7300/(F)(859) 224-7425
Vernon C. Brown
RUS Program Director
(859) 224-7336/(F)(859) 224-7340
771 Corporate Drive, Suite 200
Lexington, KY 40503-5477

LOUISIANA

Austin J. Cormier, State Director
(318) 473-7921/(F)(318) 473-7829
Danny H. Magee, Sr.
RUS Program Director
(318) 473-7940/(F)(318) 473-7829
3727 Government Street
Alexandria, LA 71302

**RURAL DEVELOPMENT STATE DIRECTORS Attachment E (Cont.)
AND RUS PROGRAM DIRECTORS**

Revised 11/15/00

MAINE

Seth H. Bradstreet
State Director
(207) 990-9160/(F)(207) 990-9165
Alan Daigle
RUS Program Director
(207) 990-9168/(F)(207) 990-9129
967 Illinois Avenue, Suite 4
Bangor, ME 04401

MASSACHUSETTS/CT/RI

William Bradley, State Director
(413) 253-4302/(F)(413) 253-4347
Daniel Beaudette
RUS Program Director
(413) 253-4340/(F)(413) 253-4347
451 West Street
Amherst, MA 01002-2953

MICHIGAN

Donald L. Hare, State Director
(517) 324-5190/(F)(517) 324-5224
Paul S. Miller
RUS Program Director
(517) 324-5206/(F)(517) 324-5225
3001 Coolidge Rd, Suite 200
East Lansing, MI 48823

MINNESOTA

Gary M. DeCramer
State Director
(651) 602-7801/(F)(651) 602-7824
Jim Maras, RUS Program Director
(651) 602-7810/(F)(651) 602-7824
410 Agri Bank Bldg.
375 Jackson Street
St. Paul, MN 55101

MISSISSIPPI

William Simpson, State Director
(601) 965-4318/(F)(601) 965-5384
Hershel Johnson
RUS Program Director
(601) 965-5460/(F)(601) 965-4566
Federal Building, Suite 831
100 W. Capitol Street
Jackson, MS 39269

MISSOURI

William T. Shay, State Director
(573) 876-0976/(F)(573) 876-0977
D. Clark Thomas
RUS Program Director
(573) 876-0995/(F)(573) 876-0984
601 Business Loop 70 W.
Parkade Center, Suite 235
Columbia, MO 65203

MONTANA

Robert Leigland
Acting State Director
(406) 585-2580/(F)(406) 585-2565
Mitchel R. Copp
RUS Program Director
(406) 585-2520/(F)(406) 585-2565
P.O. Box 850
Bozeman, MT 59771

NEBRASKA

James A. Otto
State Director
(402) 437-5550/(F)(402) 437-5408
Denise Brosius-Meeks
RUS Program Director
(402) 437-5559/(F)(402) 437-5408
100 Centennial Mall North
Federal Building, Room 152
Lincoln, NE 68508

NEVADA

Larry Smith
Acting State Director
(775) 887-1222/(F)(775) 885-0841
Mike E. Holm
RUS Program Director
(775) 887-1222/(F)(775) 887-1287
1390 South Curry Street
Carson City, NV 89703-9910

NEW JERSEY

Ernest R. Grunow, Jr.
State Director
(609) 265-3600/(F)(609) 265-3651
Michael P. Kelsey
RUS Program Director
(609) 265-3641/(F)(609) 265-3651
790 Woodlane Road
Tarnsfield Plaza, Suite 22
Mount Holly, NJ 08060

NEW MEXICO

Stephanie Gonzales
State Director
(505) 761-4950/(F)(505) 761-4976
Clyde F. Hudson
RUS Program Director
(501) 761-4955/(F)(505) 761-4976
6200 Jefferson St., NE, Room 255
Albuquerque, NM 87109

NEW YORK

James B. Bays, State Director
(315) 477-6435/(F)(315) 477-6438
David A. Miller
RUS Program Director
(315) 477-6427/(F)(315) 477-6448
441 S. Salina St., Suite 357
Syracuse, NY 13202

NORTH CAROLINA

William A. Tadlock, III
State Director
(919) 873-2000/(F)(919) 873-2075
Thurman E. Burnette
Acting RUS Program Director
(919) 873-2040/(F)(919) 873-2075
4405 Bland Road, Suite 260
Raleigh, NC 27609

NORTH DAKOTA

Charles F. Mertens
State Director
(701) 530-2061/(F)(701) 530-2108
Dale Van Eckhout
RUS Program Director
(701) 530-2040/(F)(701) 530-2111
220 E. Rosser Avenue
P.O. Box 1737
Bismarck, ND 58502

OHIO

Linda Jones, State Director
(614) 255-2390/(F)(614) 255-2559
David Douglas
RUS Program Director
(614) 255-2391/(F)(614) 255-2562
200 N. High Street
Federal Building, Room 507
Columbus, OH 43215

RURAL DEVELOPMENT STATE DIRECTORS Attachment E (Cont.) AND RUS PROGRAM DIRECTORS

Revised 11/15/00

OKLAHOMA

Charles Rainbolt, State Director
(405) 742-1000/(F)(405) 742-1005
Rock Davis
RUS Program Director
(405) 742-1060/(F)(405) 742-1101
USDA Agriculture Ctr, Suite 108
Stillwater, OK 74074-2654

OREGON

Lynn Schoessler, State Director
(503) 414-3300/(F)(503) 414-3386
Jerry W. Sheridan
RUS Program Director
(503) 414-3360/(F)(503) 414-3382
101 SW Maine, Suite 1410
Portland, OR 97204-3222
PENNSYLVANIA
Nancy J. Spiker
Acting State Director
(717) 237-2183/(F)(717) 237-2191
Korah Abraham
RUS Program Director
(717) 237-2188/(F)(717) 237-2197
One Credit Union Place, Suite 330
Harrisburg, PA 17110-2996

PUERTO RICO

Jose Otero
State Director
(787) 766-5095/(F)(787) 766-5844
Ramon M. Melendez
RUS Program Director
(787) 766-5095/(F)(787) 766-5844
IBM Building, Suite 601
654 Munoz Rivera Ave.
Hato Rey, PR 00918-6106

SOUTH CAROLINA

Bernie L. Wright
State Director
(803) 765-5163/(F)(803) 765-5633
Mike J. Hucks
RUS Program Director
(803) 765-5573/(F)(803) 765-5910
Strom Thurmond Federal Bldg.
1835 Assembly St., Room 1007
Columbia, SC 29201

SOUTH DAKOTA

Dallas Tonsager
State Director
(605) 352-1100/(F)(605) 352-1146
Robert Bothwell
RUS Program Director
(605) 352-1142/(F)(605) 352-1146
Federal Building, Room 308
200 Fourth Street SW
Huron, SD 57350-2477

TENNESSEE

David Seivers
State Director
(615) 783-1300/(F)(615) 783-1301
Keith Head
RUS Program Director
(615) 783-1345/(F)(615) 783-1394
3322 West End Ave., Suite 300
Nashville, TN 37203-1071

TEXAS

Steven A. Carriker
State Director
(254) 742-9710/(F)(254) 742-9709
J. Gary Lightsey
RUS Program Director
(254) 742-9789/(F)(254) 742-9709
Federal Building, Suite 102
101 South Main Street
Temple, TX 76501

UTAH

James D. Harvey, State Director
(801) 524-4321/(F)(801) 524-4406
Jack Cox, RUS Program Director
(801) 524-4326/(F)(801) 524-4406
125 South State Street
Salt Lake City, UT 84138

VERMONT/NEW HAMPSHIRE

Roberta Harold, State Director
(802) 828-6002/(F)(802) 828-6018
Rhonda L. Shippee (VT)
William W. Konrad (NH)
RUS Program Directors
(802) 828-6030/(F)(802) 828-6037
89 Main Street
City Center, Third Floor
Montpelier, VT 05602

VIRGINIA

Lloyd A. Jones
State Director
(804) 287-1552/(F)(804) 287-1718
Carrie Schmidt
RUS Program Director
(804) 287-1600/(F)(804) 287-1780
Culpeper Bldg., Suite 238
1606 Santa Rosa Road
Richmond, VA 23229

WASHINGTON

Mary E. McBride
State Director
(360) 704-7715/(F)(360) 704-7744
Jack Gleason
RUS Program Director
(360) 704-7708/(F)(360) 704-7742
1835 Black Lake Boulevard, SW
Suite B
Olympia, WA 98512-5715

WEST VIRGINIA

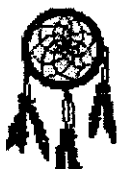
Robert D. Lewis
State Director
(304) 284-4861/(F)(304) 284-4893
Randy B. Plum
RUS Program Director
(304) 284-4884/(F)(304) 284-4892
Federal Bldg., Room 320
75 High Street
Morgantown, WV 26505-7500

WISCONSIN

Bryce E. Luchterhand
State Director
(715) 345-7600/(F)(715) 345-7669
Mark Brodziski
RUS Program Director
(715) 345-7610/(F)(715) 345-7616
4949 Kirschling Court
Stevens Point, WI 54481

WYOMING

Derrel Carruth
State Director
(307) 261-6300/(F)(307) 261-6327
John E. Cochran
RUS Program Director
(307) 261-6319/(F)(307) 261-6339
100 East "B" St., Room. 1005
P.O. Box 820
Casper, WY 82602



**TECHNICAL
ASSISTANCE
PROVIDER
FOR
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INFRASTRUCTURE**



**Rural Community
Assistance Program**



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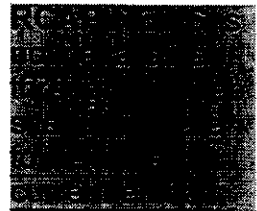
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Welcome To RCAP's Web Site!



RCAP is a resource for community leaders and others looking for technical assistance services and training related to rural drinking water supply and wastewater treatment needs, rural solid waste programs, housing, economic development, comprehensive community assessment and planning, and environmental regulations.

If you would like to learn more about our organization, you're invited to browse through our web site, or use the contact button at the left to reach us directly.



RCAP Policy Conference

October 24-26,
2001

Washington, DC

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Info
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1522 K Street, N.W., Suite 400, Washington, DC 20005
Tel: 202.408.1273 Fax: 202.408.8165



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RCAP's Mission

RCAP's mission is to help rural people to improve the quality of life in their communities.

For over 25 years, the Rural Community Assistance Program (RCAP) has been a leader in rural community development. The RCAP network includes field-based staff and delegate agencies working at the community level in all 50 states and Puerto Rico, six regional offices with multistate service areas and a national office located in Leesburg, Virginia, near Washington, D.C.

RCAP programs are targeted to small, rural communities nationwide. Most of these have populations of less than 2,500 and many are low-income or minority communities. RCAP helps elected officials, utility owners and operators, community leaders and others living in rural communities to:

- access safe drinking water supplies;
- treat or properly dispose of wastewater;
- protect their groundwater supply and watersheds;
- plan and finance infrastructure projects;
- responsibly manage and operate community facilities;
- build leadership capacity in the community;
- understand state and federal environmental regulations and requirements; and
- develop a vision for the future in their communities.

With its roots firmly planted in rural America, RCAP is looking ahead. Over the next several years RCAP will continue to expand its current services to meet the growing demand for assistance, and will increase RCAP activities in rural housing, intermediary relending programs and economic development.

RCAP's services are provided free to the communities it assists.

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Websites

How To Contact RCAP

If you would like to contact the RCAP national office, you may write to:

RCAP, INC.
1522 K Street, N.W., Suite 400
Washington, D.C. 20005

telephone: (202) 408-1273

fax to: (202) 408-8165

or send email to: rcap@rcap.org

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**National Rural Water Association**

The mission of the National Rural Water Association is *"to provide its affiliated state associations with the highest quality of support services designed to assist them in meeting the needs of their utility membership."*

Water & Wastewater Utility Support

The National Rural Water Association is a non-profit federation of State Rural Water Associations. Our mission is to provide support services to our State Associations who have more than 20,000 water and wastewater systems as members.

Member state associations are supported by their water and wastewater utility membership and offer a variety of state specific programs, services, and member benefits. Additionally, each state association provides training programs and **on-site** assistance in areas of operation, maintenance, finance, and governance. Whether you need help developing a new rate schedule, setting up proper testing methods, maintaining or upgrading your operator license, or even understanding those ever-changing and complex governmental regulations, contact your state rural water association for available services and find out how membership can benefit you and your utility!

Our support for a clean and healthy environment is second to none. Our State Associations have historically trained over 40,000 water and wastewater system personnel a year for two decades and provided over 60,000 on-site technical assistance visits a year. Over 2600 ground water protection plans have been adopted by local communities, and another 2300 are in the process of being adopted. NRWA and its S/A's do more than just talk about a better environment – we make our dreams become reality. We know that regulations don't protect public health, people do.

**Contact NRWA:
2915 South 13th Street
Duncan, OK 73533-9086**

**Phone: 580-252-0629
Fax: 580-252-4896**

[Close Window and Return to Main Page](#)

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Other HUD Funding Sources

A Look at Supportive Housing
for the Elderly
& Tribal Colleges & Universities



Supportive Housing for the Elderly Section 202

What are the Benefits?

- Expands the supply of affordable housing with supportive services
- Allows elderly to live independently in the community
- Provides capital advances to finance the construction
- Provides rent subsidies for the projects to help make them affordable.



Who is eligible to apply?

- Private non-profit organizations and non-profit consumer cooperatives



Eligible Activities

- Development of housing through new construction, rehabilitation, or acquisition of housing
- Capital advance funds may be used with non-202 funds to develop additional units for a mixed finance or mixed use project.
- Project rental assistance funds cover the difference between HUD approved operating costs and the amount residents pay as well as provide supportive services to frail elderly. For frail elderly this can include the salary of a service coordinator



Application process

- NOFA is announced in late January or February
- Applications Available & Deadline dates announced
- Field offices provide training to explain funding guidelines
- SuperNOFA broadcasts scheduled



Considerations

- HUD data must show adequate need for this facility
- Will have to address Fair Housing impediments
- Elderly housing should be listed as a community priority
- Project must serve very low-income elderly for 40 years
- Phase I Environmental Site Assessment must be included with the application
- The capital advance does not have to be repaid as long as the project serves very low-income elderly persons for 40 years.



Tribal Colleges & Universities

Purpose of the Program.

- To assist Tribal colleges and universities to build, expand, renovate, and equip their own facilities, especially those facilities that are used by or available to the larger community.
- \$3 million is available
- Deadline is August 3, 2001. Applications must be submitted to headquarters in DC



Eligible Applicants

- Only tribal colleges and universities that meet the definition of a TCU established in Title IV of the 1998 Amendments to the Higher Education Act of 1965
- Currently, there are 28 tribally chartered colleges & 3 federally chartered Indian colleges in a total of 12 states



Highlights

- One application per campus
- The maximum grant period is 24 months. The performance period will commence on the effective date of the grant agreement.
- The maximum amount to be requested and awarded is \$400,000.



Eligible Activities

Each activity you propose for funding must meet one of the following national objectives:

- (a) Benefit low- and moderate-income persons;
- (b) Aid in the prevention or elimination of slums or blight; or
- (c) Meet other community development needs having a particular urgency and other financial resources are not available to meet such needs.



For example...

- You may use no more than 20 percent of your grant for planning and administrative activities, as defined in 24 CFR 570.206.
- Grant funds can only be used to build, expand, renovate, and equip facilities owned by your institution.
- Long-term leases of property (i.e., at least five years in duration) are considered an acceptable form of ownership under this program.
- Equipment can include, but is not limited to, computers, furniture, books, etc.



Ineligible Activities

- You may not use any of your grant for public services, as defined in 24 CFR 570.201(e).



Rating Factors

- Capacity of the Applicant and Relevant Organizational Experience (20 points)
- Need/Extent of the Problem (10 points)
- Soundness of Approach (60 points)
- Leveraging Resources (10 Points)



Submission Requirements

- Your completed application is due on or before 12 midnight, Eastern time, on August 3, 2001 at HUD Headquarters.
- Mailed Applications. Your application will be considered timely filed if your application is postmarked on or before 12:00 midnight on the application due date and received by the designated HUD address on or within ten (10) days of the application due date.



Technical Assistance

- For Further Information and Technical Assistance. You may contact Jane Karadbil of HUD's Office of University Partnerships at 202-708-1537, extension 5918 or
- Sherone Ivey of the Office of Native American Programs at 202-401-7914, extension 4200.



Other HUD Programs

Access to Programs and Resources

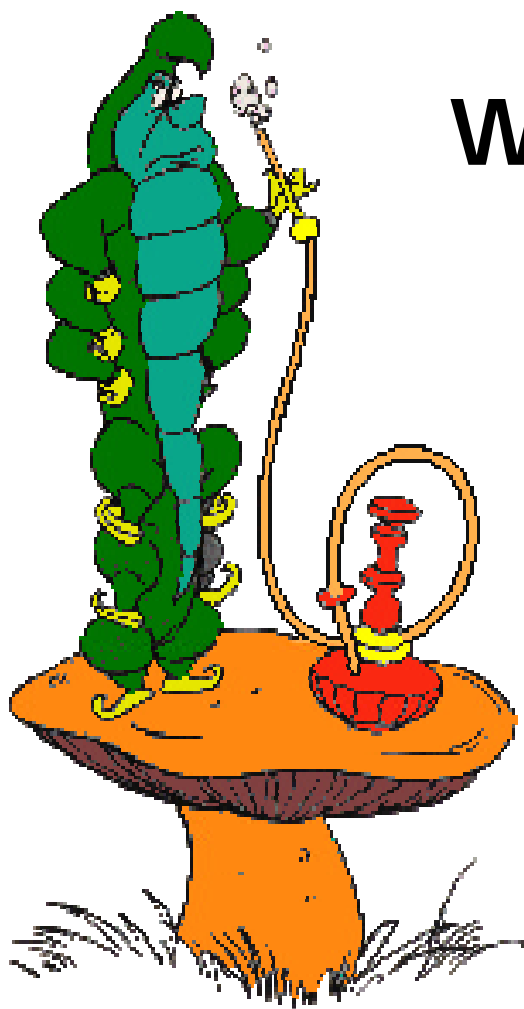
Working Together to Build Programs and Opportunities

Slide 1



Applicant Eligibility

Who . . . ARE . . . You?



Working Together to Build Programs and Opportunities

Slide 2



Applicant Eligibility

- Tribes/TDHEs*
 - Tribes eligible for nine programs under SuperNOFA
- Not-for-Profits
 - Eligible for 6 programs under the SuperNOFA
- Institution of Higher Education
 - Eligible for 3 Programs under the SuperNOFA

*RHED available to both Tribes and Not-for-Profits

*A TDHE can also be a non-profit.



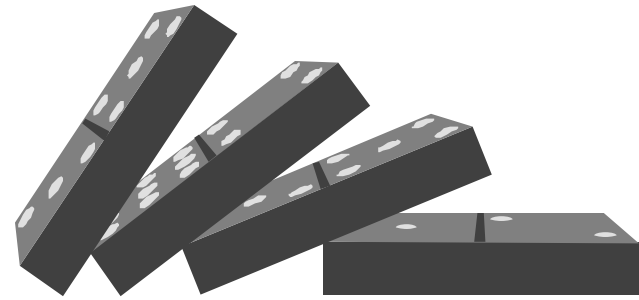


What's the Plan?

Eligibility and appropriateness of the Program



The Plan



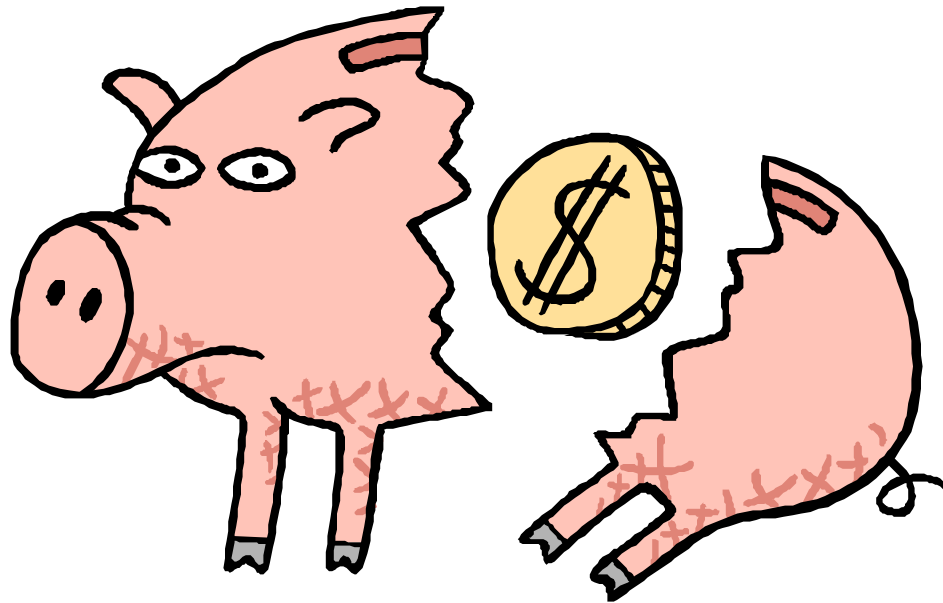
- **Not necessarily the same as the IHP**
- **What is it you want to do, and how does it fit in with the other efforts on the Reservation?**
 - **Housing**
 - **Economic Development**
 - **Social Services**
 - **Health**



What are the Funding Sources?

- ✱ Private funding

- ✱ Public funds



What are the Funding Sources?

PUBLIC Funds

- State/Local
- Federal



What are the Funding Sources?

Federal Funds

- Rural Development
- Economic Development Administration
- Administration for Native Americans (HHS)
- BIA
- IHS
- HUD**



HUD – Other Programs

Indian Community Development Block Grant (ICDBG)

Eligible Applicant: Tribes

Eligible Project(s): Multiple

Total \$ Available: \$70,843,800

Due Date: Approx 3mos After NOFA



HUD – Other Programs

Indian Housing Drug Elimination Program (DEP)

Eligible Applicant: Tribes and TDHEs*

Eligible Project(s): Drug Prevention and Law
Enforcement

Total \$ Available: \$12m

Due Date: Approx 2mos After NOFA

* On behalf of the Tribe



HUD – Other Programs

Rural Housing and Economic Development Program (RHED)

Eligible Applicant: Tribes and rural Non-Profits

Eligible Project(s): Capacity Building, Innovative Housing, Econ. Devel.

Total \$ Available: \$24m

Due Date: Approx 1.5mos After NOFA



HUD – Other Programs

Resident Opportunities and Self-Sufficiency (ROSS) Program

Eligible Applicant: Tribes, TDHEs and ROs

Eligible Project(s): Training & TA (among others)

Total \$ Available: \$55m

Due Date: Approx 3mos After NOFA



HUD – Other Programs

Programs available to tribal governments

- Lead-Based Paint Hazard Control
- Healthy Homes Research Program
- Healthy Homes Demonstration and Education Program
- Public Housing Drug – Technical Assistance (DETAP)
- New Approach Anti-Drug Program



HUD – Other Programs

Programs available to Non-Profits

- Community Development Technical Assistance
- Self-Help Homeownership Program (SHOP)
- Youthbuild
- Section 202 (Supportive Housing for the Elderly)



HUD – Other Programs

Programs available to Non-Profits

- Section 811 Supportive Housing for persons with Disabilities Program



HUD – Other Programs

Programs available to Institutions of
Higher Learning

- Community Outreach Partnership Centers
- Hispanic-Serving Institutions Assisting Communities (HSIAC)
- Alaska Native/Native Hawaiian Institutions Assisting Communities (NA/NHAIC)



A Note about NAHASDA

- NAHASDA can be used as matching funds if...
 - The activity is an eligible NAHASDA Activity
 - The activity is contained within the tribe's IHP



A Plug for My Buddies at Native Edge

- Native Edge is an ONAP service that can help you to pull together all of the resources mentioned here and MORE!!

<http://nativeedge.hud.gov/>



THE END



Working Together to Build Programs and Opportunities

Slide 19



Environmental Review Tips

- Avoid Procedural Problems
- Use the Environmental Process to Improve Project Design



Responsible Entities

- Empowerment

Move components of decision-making to local level

- Federal Downsizing

- Shrinking capacity of feds - shift workload
- Take advantage of local capacity to perform environmental reviews that has been developed over last 25 years (IDBG/HOME)



RESPONSIBLE ENTITY

- POTENTIAL DISTINCTION BETWEEN GRANT RECIPIENT (TDHE) & ENTITY RESPONSIBLE FOR COMPLIANCE WITH ENVIRONMENTAL REQUIREMENTS (TRIBE)
- ONLY UNIT OF GENERAL LOCAL GOV'T (TRIBE) MAY BE RESPONSIBLE ENTITY



RESPONSIBLE ENTITY - 2

- FOR IHBG ONLY, ASSUMPTION OF ENVIRONMENTAL RESPONSIBILITY IS VOLUNTARY
- IF TRIBE CHOOSES NOT TO BE RE, HUD WILL PERFORM ENVIRONMENTAL REVIEW
- IF HUD PERFORMS ENVIRONMENTAL REVIEW PURSUANT TO PART 50, NOTICES & RROF ARE NOT NEEDED



Recipient (TDHE) Responsibility

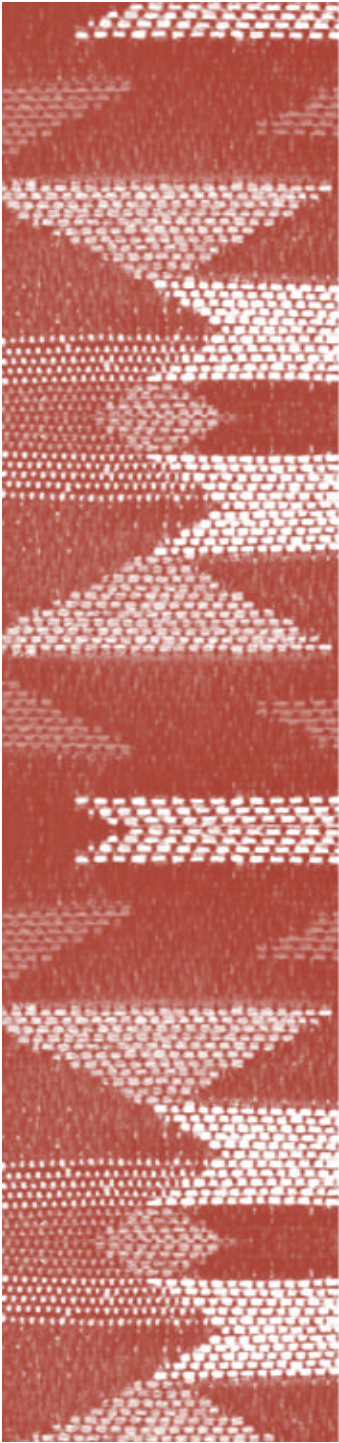
- Contact RE, ask to perform env review
- Provide RE with project & env info
- not obligate or expend any funds on, & refrain from undertaking...
- submit RROF & certification to HUD



Responsible Entity (Tribe)

- Performs env review
- Publishes & disseminates notices
- Prepares & executes RROF & transmits to TDHE
- May be paid for services by TDHE





Certifying Officer

58.2(a)(2)

- Tribal Official authorized to execute the Request for Release of Funds and Certification and who has legal capacity to carry out the responsibilities of Section 58.13
- Assumes the role of “responsible Federal Official” under NEPA and related Federal laws and authorities
- Accepts the jurisdiction of the Federal Courts for the responsible entity in environmental matters
- Is the Tribal Chairperson or other tribal official designee (with written delegation of authority)

Can anyone else do environmental work?

YES!

- TDHE staff
- Private consultant
- Other federal agency (eg. BIA, IHS)

but

Tribe (or HUD) must sign off (be responsible)



PROJECT CATEGORIZATION

- EMERGENCY (58.33)

EMERGENCY, DISASTER OR IMMINENT THREAT

- EXEMPT (58.34)

NO PHYSICAL IMPACT (eg. ADMIN, PLANNING)

- CATEGORICALLY EXCLUDED (58.35)

- (a) Various classes generally continue existing use(eg. Rehab)
- (b) Non-physical activities

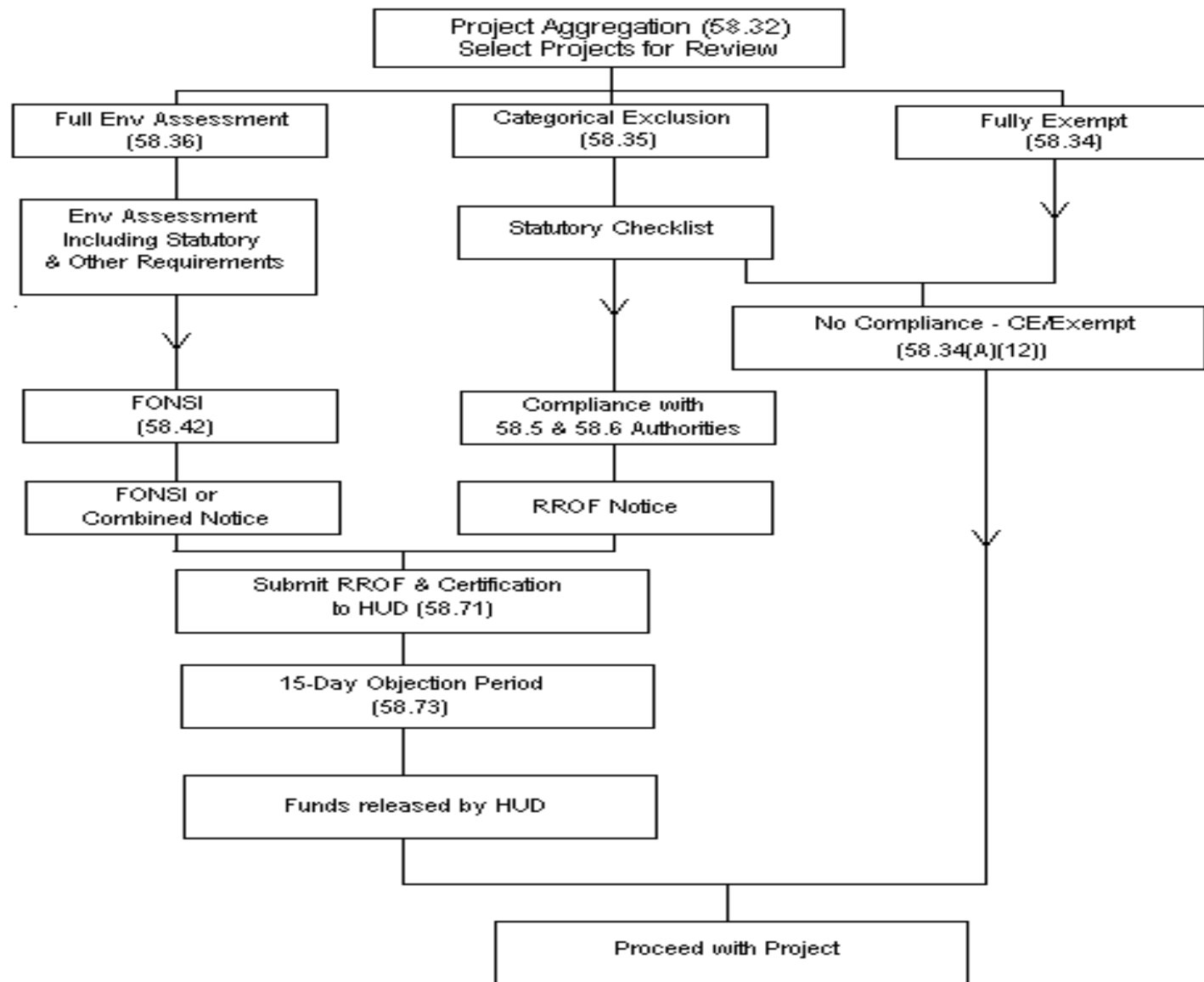
- ENVIRONMENTAL ASSESSMENT

NEW USES, CONSTRUCTION, MAJOR REHAB
(eg. ROADS, UTILITIES, NEW BUILDING)

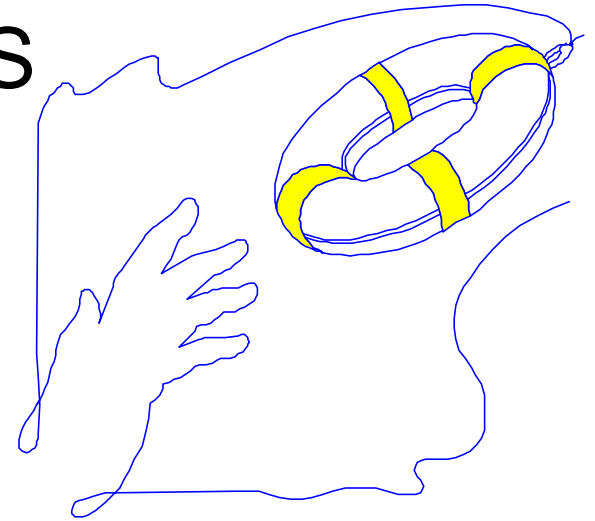
- EIS (ENVIRONMENTAL IMPACT STATEMENT)

MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE
ENVIRONMENT





EMERGENCIES (58.33)



- CAN CONSULT WITH CEQ
 - (40 CFR 1506.11)
- CAN COMBINE NOTICES, COMMENT PERIODS FOR PRESIDENTIAL DISASTERS (58.33(b))
- IF POSSIBLE, BETTER TO TREAT AS EXEMPT UNDER 58.34(a)(10) SO THAT NO PUBLICATION AND/OR ROF IS NECESSARY



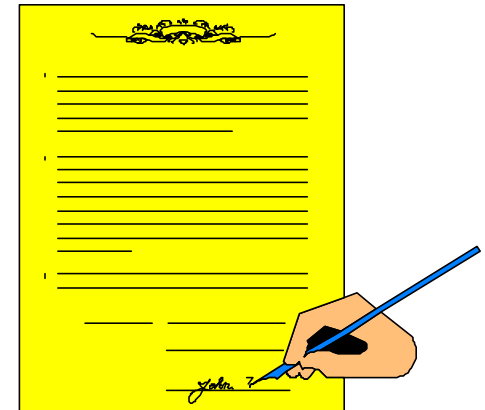
EXEMPT ACTIVITIES - (58.34)

- ENVIRONMENTAL STUDIES - PLANNING
- INFO & FINANCIAL SERVICES - ADMIN
- PUBLIC SERVICE WITHOUT PHYSICAL IMPACT
- INSPECTIONS & HAZARD TESTING
- INSURANCE - TOOLS
- ENGINEERING & DESIGN
- TECHNICAL ASSISTANCE
- TEMPORARY OR PERMANENT IMPROVEMENTS FOR PROTECTION, REPAIR, OR RESTORATION RELATING TO DISASTERS OR PHYSICAL DETERIORATION
- CERTAIN PAYMENTS OF PRINCIPAL & INTEREST
- CATEGORICAL EXCLUSIONS (IF NO COMPLIANCE WITH 58.5 AUTHORITIES)



DETERMINATION OF EXEMPT STATUS

PROJECT NAME _____
LOCATION _____
ID NUMBER _____



1. This activity has been initially determined to be categorically excluded under the provisions of 24 CFR 58.35(a)().
2. This activity complies with all federal laws and authorities listed in 58.5 and other requirements under 58.6. No other additional reviews or analyses are required to be undertaken.
3. A final determination has been made that this activity is exempt from further env review in accordance with the provisions of 24 CFR 58.34(a)(12).



CATEGORICAL EXCLUSIONS

(58.35)

PROJECTS MAY BE CATEGORICALLY EXCLUDED IF THEY CONSIST SOLELY OF:

PUBLIC FACILITIES

CONTINUED USE

REPLACEMENT

UPGRADING (< 20% CHANGE)

REMOVAL OF ARCHITECTURAL BARRIERS

REHAB

MF RESIDENTIAL

UNIT DENSITY NOT INCREASE BY 20%

NO CHANGE IN LAND USE OR CLASS OF RESIDENTIAL USE

COST OF REHAB < 75% REPLACEMENT

- NON-RESIDENTIAL

CONTINUES USE W/O CHANGE IN SIZE, CAPACITY OR CHARACTER

REPLACE, MODERNIZE OR UPGRADE W/ ONLY MINIMAL CHANGE

INDIVIDUAL ACTION ON 1-4 FAMILY DWELLING

ACQUISITION/DISPO OF EXISTING STRUCTURE W/ NO CHANGE IN USE



CATEGORICAL EXCLUSIONS (58.35)

- SUBJECT TO 58.5 AUTHORITIES
- NEED REQUEST FOR RELEASE OF FUNDS & CERTIFICATION
- DON'T HAVE TO CATEGORICALLY EXCLUDE - CAN PERFORM ASSESSMENT (58.35(c))



CATEGORICALLY EXCLUDED ACTIVITIES NOT SUBJECT TO 58.5 AUTHORITIES (58.35(b))

- Tenant-based rental assistance;
- Supportive services
- Operating costs
- Economic development not associated with construction or expansion of existing operations;
- Home-ownership such as closing costs and down payment assistance & interest buydowns
- Affordable housing pre-development costs

Treat as Exempt
Must meet (58.6 but
usually not applicable



PROCEDURAL REQUIREMENTS FOR CATEGORICAL EXCLUSIONS

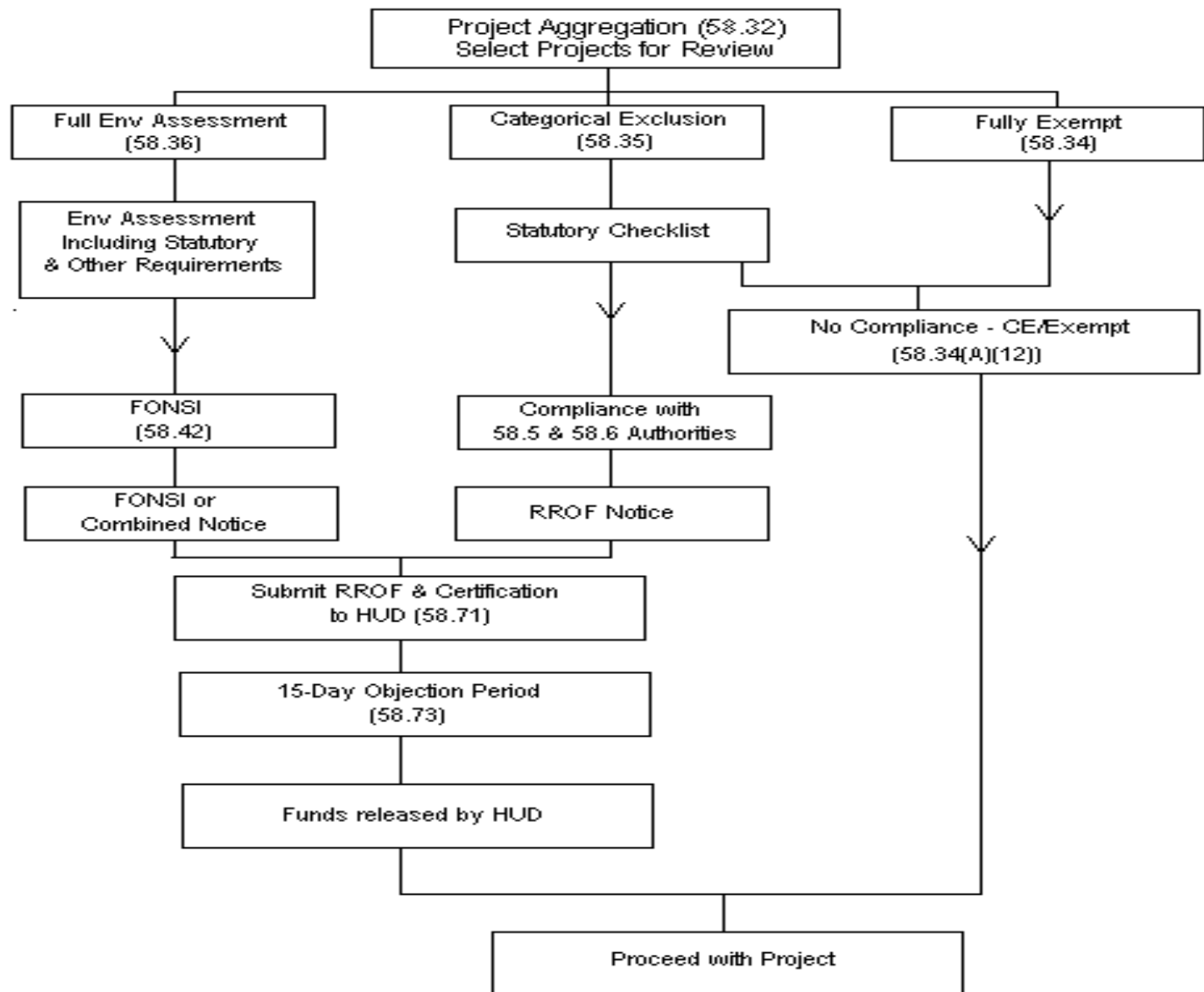
- MUST DOCUMENT FINDING
- NEED TO COMPLY WITH OTHER APPLICABLE AUTHORITIES LISTED IN 58.5 (EXCEPT THOSE LISTED IN 58.35(b))
- UNLESS THEY BECOME EXEMPT (SEE 58.34(a)(12)) GRANTEE MUST PUBLISH & REQUEST RELEASE OF FUNDS



58.34(a)(12)

- WHEN CAN CATEGORICALLY EXCLUDED ACTIVITY BE TREATED AS EXEMPT (NO RROF)?
 - Provided that there are no circumstances which require compliance with any other Federal laws and authorities cited in 58.5



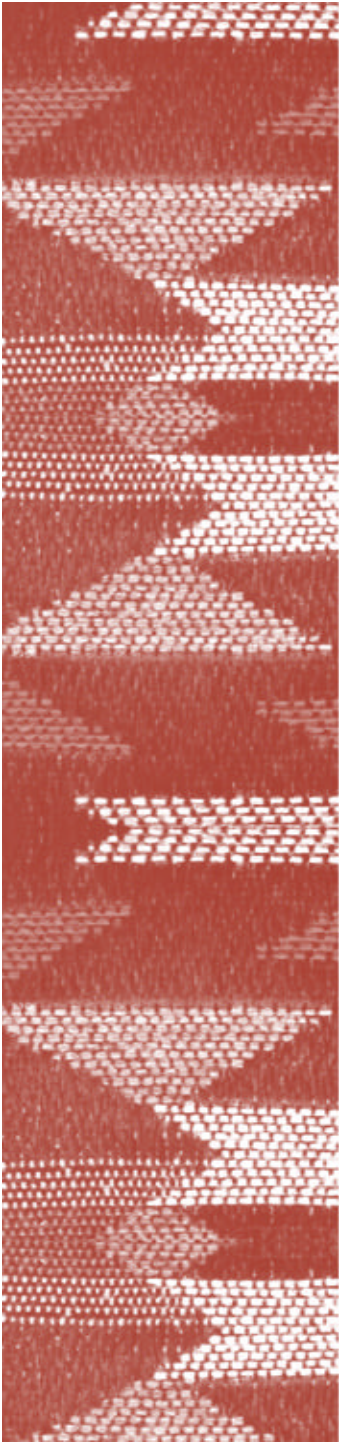


PROJECTS REQUIRING AN EIS (58.37)

- POTENTIAL FOR SIGNIFICANT IMPACT
- RESIDENTIAL 2,500 UNITS
 - REMOVE, DEMOLISH, CONVERT, SUBSTANTIAL REHAB, CONSTRUCTION OR INSTALLATION
 - HOSPITALS & NURSING HOMES (2,500 BEDS)
- WATER & SEWER
 - CONVERT TO HOUSING UNITS & APPLY 2,500 UNIT THRESHOLD TO PORTION SUPPORTING FUTURE DEVELOPMENT

NOTE: 30 DAY FONSI MAY BE USED IF SIZE ALONE TRIGGERS EIS

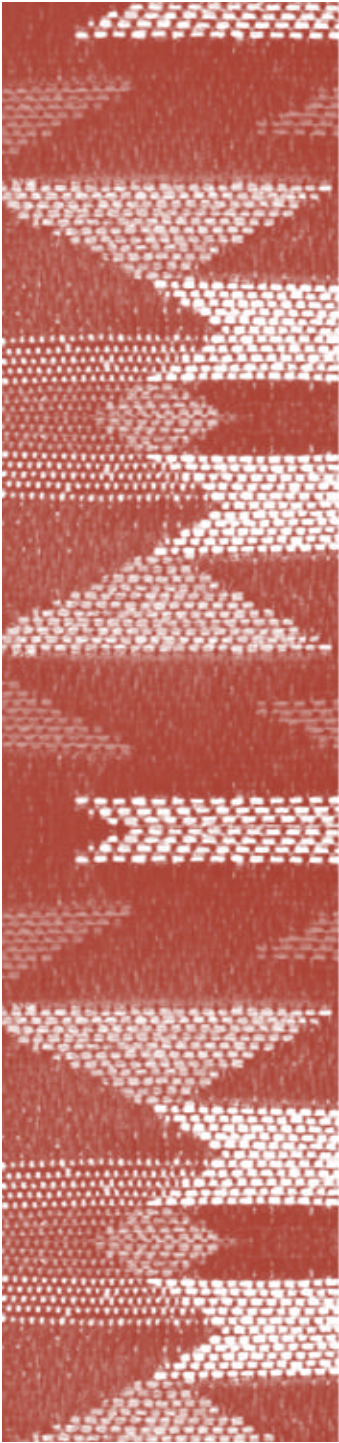




Activities Subject to NEPA

58.36

- These are activities not exempt under 58.34 and not categorically excluded under 58.35
 - If it doesn't fit in 58.34 Exempt
 - 58.35 Categ Exclud
- Responsible entity must make either finding of no significant impact or finding of significant impact
 - It needs an assessment



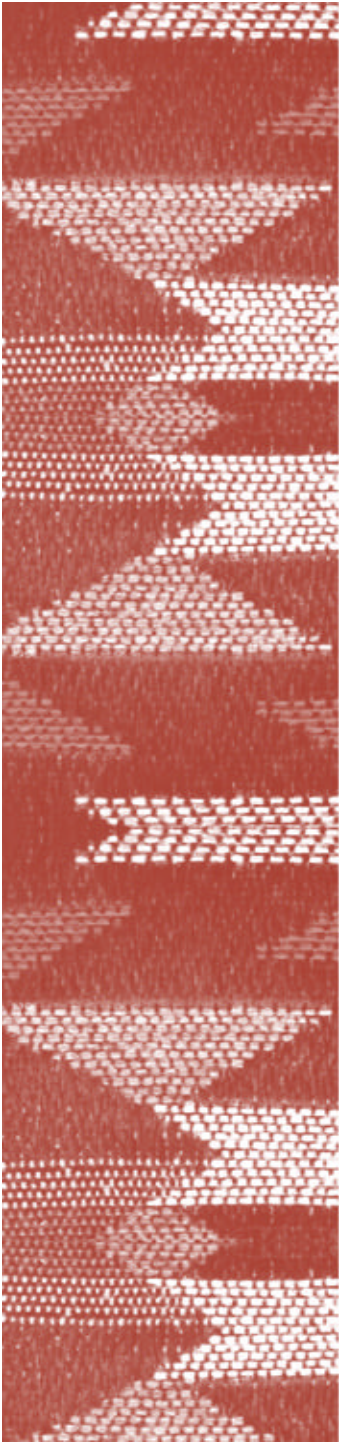
Activities Subject to NEPA

58.36

Examples:

primarily new construction activities or those major rehabilitation activities that exceed the conditions or limits identified under 58.35

Land acquisition for housing development



Projects Subject to NEPA

58.36

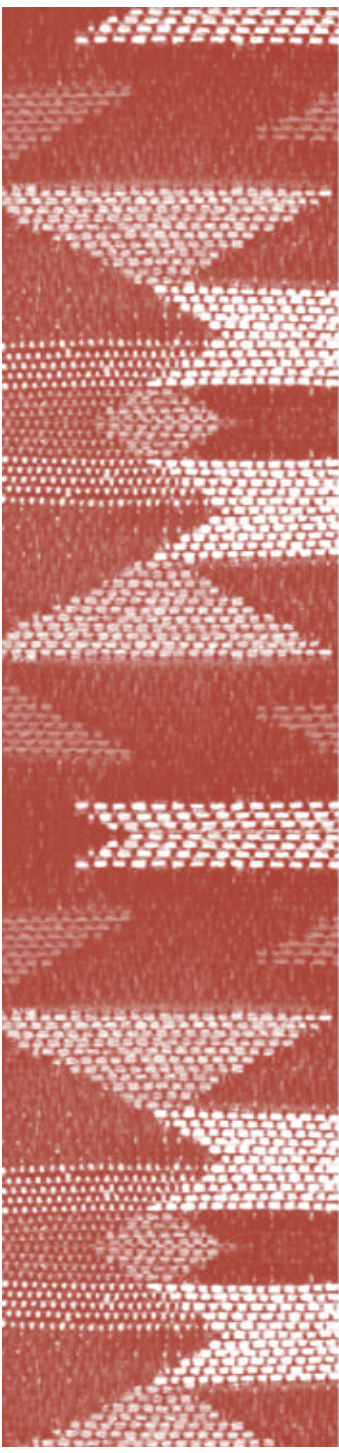
ERR and Action

- Complete Environmental Assessment which includes a Statutory Checklist
- Make Finding [FONSI or FSI (Highly unlikely)]
- If FSI (Significant Impact) go to Environmental Impact Statement

USE OF OTHER AGENCIES' REVIEWS

- EIS (SEE 58.52 & 58.53)
 - MAY MAKE LEAD AGENCY DETERMINATION
 - MAY ADOPT EIS
 - 5 YR GUIDELINE
- FONSI (58.14)
 - YOU MAY USE OTHER AGENCY'S REVIEW
 - YOU MUST STILL PUBLISH NOIRROF
 - YOU MUST STILL GO THRU ROF PROCESS





Environmental Assessment

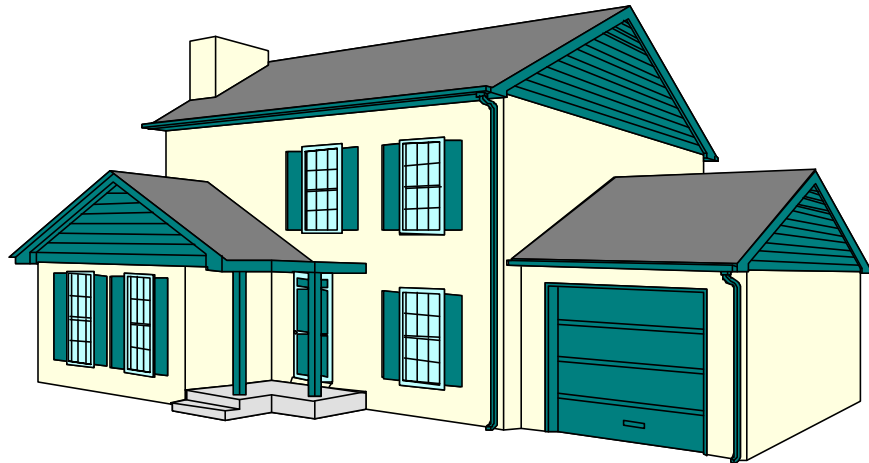
58.40

- A responsible entity may prepare the EA using HUD recommended format or may develop and use its own
- A HUD recommended format is in the Guidebook and is also available as an encrypted Word document

Housing Development Process

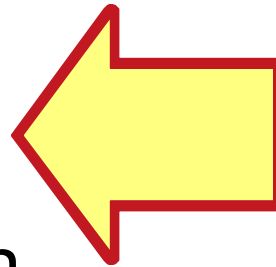
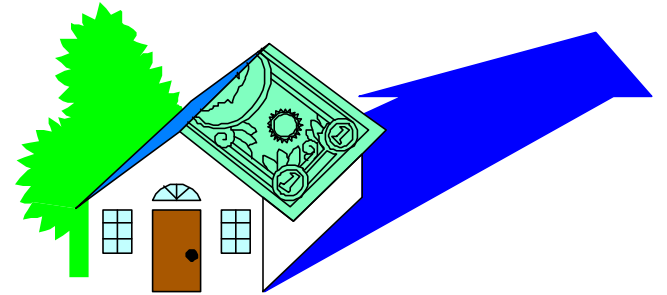


- Assess Needs
 - age
 - size
 - income
 - preferences
- Select Site
- Design
- Financing
- Construction
- Management



Housing Development Process

- Assess Needs
 - age
 - size
 - income
 - preferences
- Select Site
- Design
- Financing
- Construction
- Management

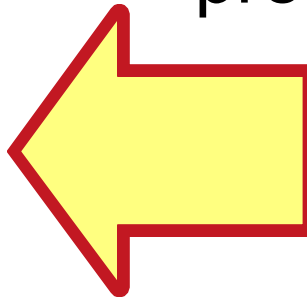


EA #1



Housing Development Process

- Assess Needs
 - age
 - size
 - income
 - preferences
- Select Site
- Design
- Financing
- Construction
- Management



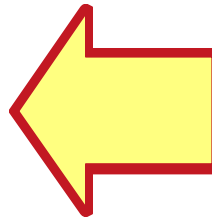
EA #2



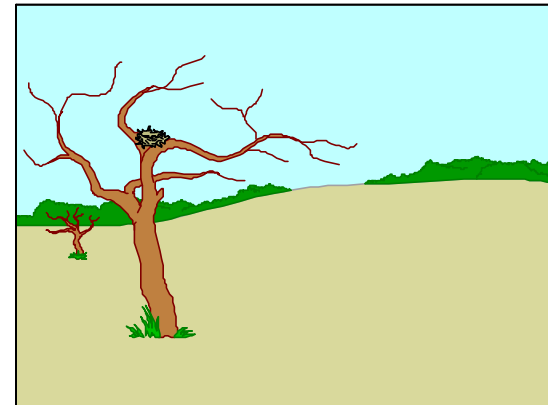
Housing Development Process

- Assess Needs
 - age
 - size
 - income
 - preferences

- Select Site
- Design
- Financing
- Construction
- Management

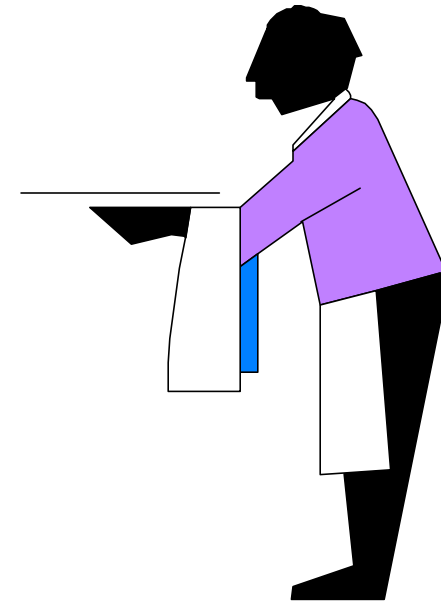


EA #3



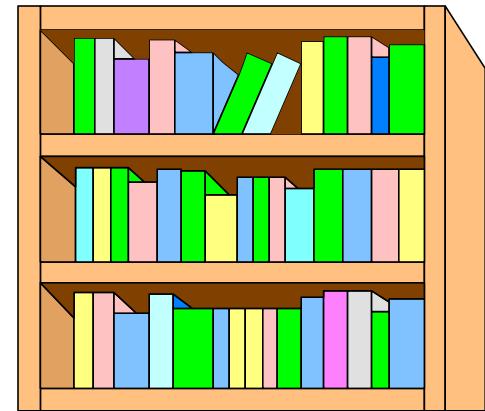
TIPS

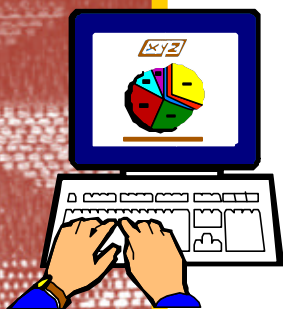
- Develop toolkit (environmental database)
- Issue Oriented approach
- aggregation
- Tiering
- Reevaluation



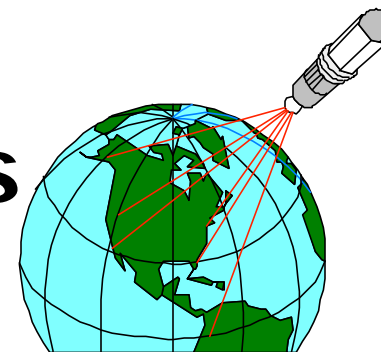
Tools

- Maps
 - Floodplain Emap
 - USGS Topo
 - Land Use Atlas
 - Landview
 - Wetland
 - Local Street
 - Zoning
 - Soils
- HUD Noise Guidebook
- Traffic counts
- Transaction Screen
- Camera





Internet Resources



- Codetalk Env page
<http://www.codetalk.fed.us/SWONAPEnv.html>
- HUD HQ Environmental Home page
<http://www.hud.gov/cpd/cpdenvir.html>
- HUD HQ list of env data sources
<http://www.hud.gov/cpd/envother.html>
- HUD's Office of Healthy Homes (excellent) site
<http://www.hud.gov/offices/lead/>
- USEPA's Environmental mapping
<http://www.epa.gov/enviro/html/em/index.html>
- Wetland Interactive mapper
http://wetlands.fws.gov/mapper_tool.htm
- Chicago Env Page <http://www.hud.gov/local/chi/chienv1.html>



Issue Oriented Approach

ALL PROJECTS



INITIAL SCREENING

All applicable components reviewed
to narrow list of concerns

ISSUE
IDENTIFICATION



HIGHER LEVEL TESTS

In-depth testing performed on
the few components of concern

ISSUE
ANALYSIS



HIGHER LEVEL TESTS

Tests continue until issues crystallized to where well-informed
decision may be made



FINAL DECISION ABOUT PROJECT



ISSUE IDENTIFICATION

IMPACT OF ACTIVITY
RELATIVE TO SPECIFIC
COMPONENT

OBJECTIVE SET
FOR SPECIFIC
COMPONENT

TEST OF CONGRUENCE

IMPACT & OBJECTIVE
ARE CONGRUENT

IMPACT &
OBJECTIVE
ARE NOT
CONGRUENT

- A GAP EXISTS

NO ISSUE - PROCEED

ISSUE



ISSUE ANALYSIS

EVENTS--ISSUE-|---ALTERNATIVE
|--- ALTERNATIVE
|---ALTERNATIVE

HISTORICAL THE POTENTIAL
FLOW OF -----PRESENT-----FUTURES
EVENTS



AGGREGATION

(58.32)

MUST AGGREGATE

- Geographic
different activities,
concentrated/coordinated at same
location
- Functional
same activities, different locations
- Logical Parts of Composite

Extends Beyond HUD Financing (Other gov't, Private)

Distinction between “activity” (58.2(a)(1)) & “project”
(58.2(a)(4))

Especially relevant for economic development



TIERING (58.15)

USE
FOR ONGOING PROGRAM WITH MANY
INDIVIDUAL SITES THAT ARE GRADUALLY
IDENTIFIED ON A CONTINUAL BASIS

FIRST TIER

(PROGRAM OUTLINE, NO SITES)

- DEAL WITH OVERALL IMPACT OF SPECIFIC PROGRAM IN SPECIFIC GEOGRAPHIC AREA
- LIMITS 2ND TIER REVIEW TO COMPONENTS WITH POTENTIAL IMPACTS
- USED AS BASIS FOR NOTICES, RROF

SECOND TIER (SITE IDENTIFIED)

- SITE SPECIFIC IMPACTS
- LIMITED BY FIRST TIER TO FEW SPECIFIC COMPONENTS
- NO NOTICE, RROF



Re-evaluation of Continuing Activities

(58.47)

Previously commenced activity for which environmental review was completed

In general, you can rely on previous ERR

- No new FONSI
- No new RROF

Unless

- Substantial Change
- New Circumstances
- New Alternative

Prepare written record setting forth reasons that no new environmental review is needed

Grant recipient has obligation to inform RE



Purpose of Environmental Process

- Meet Legal Requirements
- Avoid Adverse Env Impacts
- Promote Sustainability
 - energy use & efficiency
 - resource exploitation
 - comfort/harmony with env
- Add Value to Project



Floodplains & Wetland Areas

- FLOOD DISASTER PROTECTION ACT OF 1973
- EXECUTIVE ORDERS 11988 & 11990 (FLOODPLAIN MANAGEMENT & WETLANDS)
- SECTION 404 OF CLEAN WATER ACT





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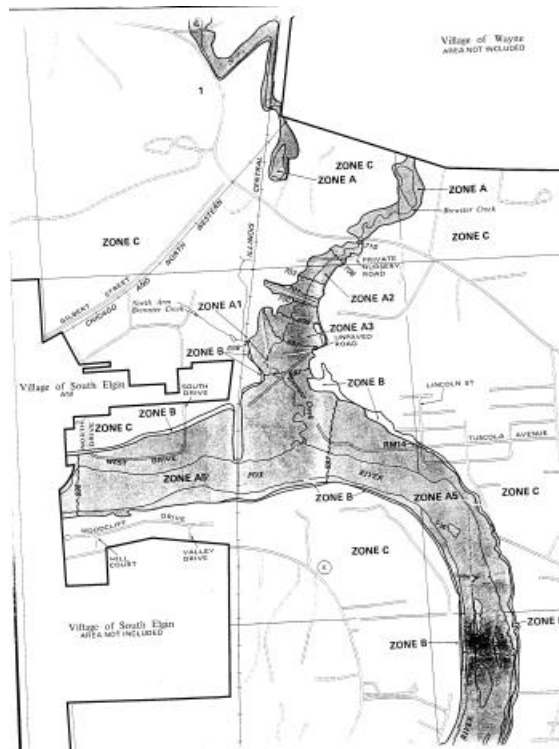


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Floodplain & Wetland Maps



Working Together to Build Programs and Opportunities

NATIONAL FLOOD INSURANCE PROGRAM


FIRM
FLOOD INSURANCE RATE MAP

COUNTY OF
KANE,
ILLINOIS
(UNINCORPORATED AREAS)

PANEL 20 OF 145
(SEE MAP INDEX FOR PANELS NOT PRINTED)

COMMUNITY-PANEL NUMBER
170896 0020 B

MAP REVISED:
MAY 19, 1997



Federal Emergency Management Agency

Historic Preservation

Types of Listings

(on National Register of Historic Places)

- Buildings
- Sites
- Structures
- Districts
- Objects



Districts



Objects



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Types of Historic Sites



Salem Custom House

Association of events
that have contributed
to the broad pattern of
our
history

Cahokia Mounds





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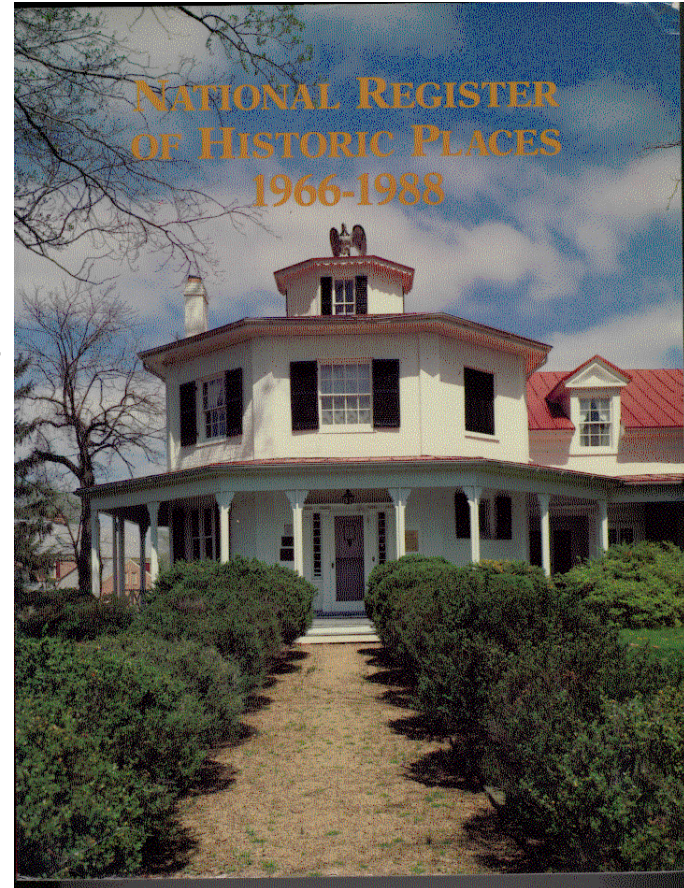
Archaeology

yield or likely to yield
information important
in history or prehistory

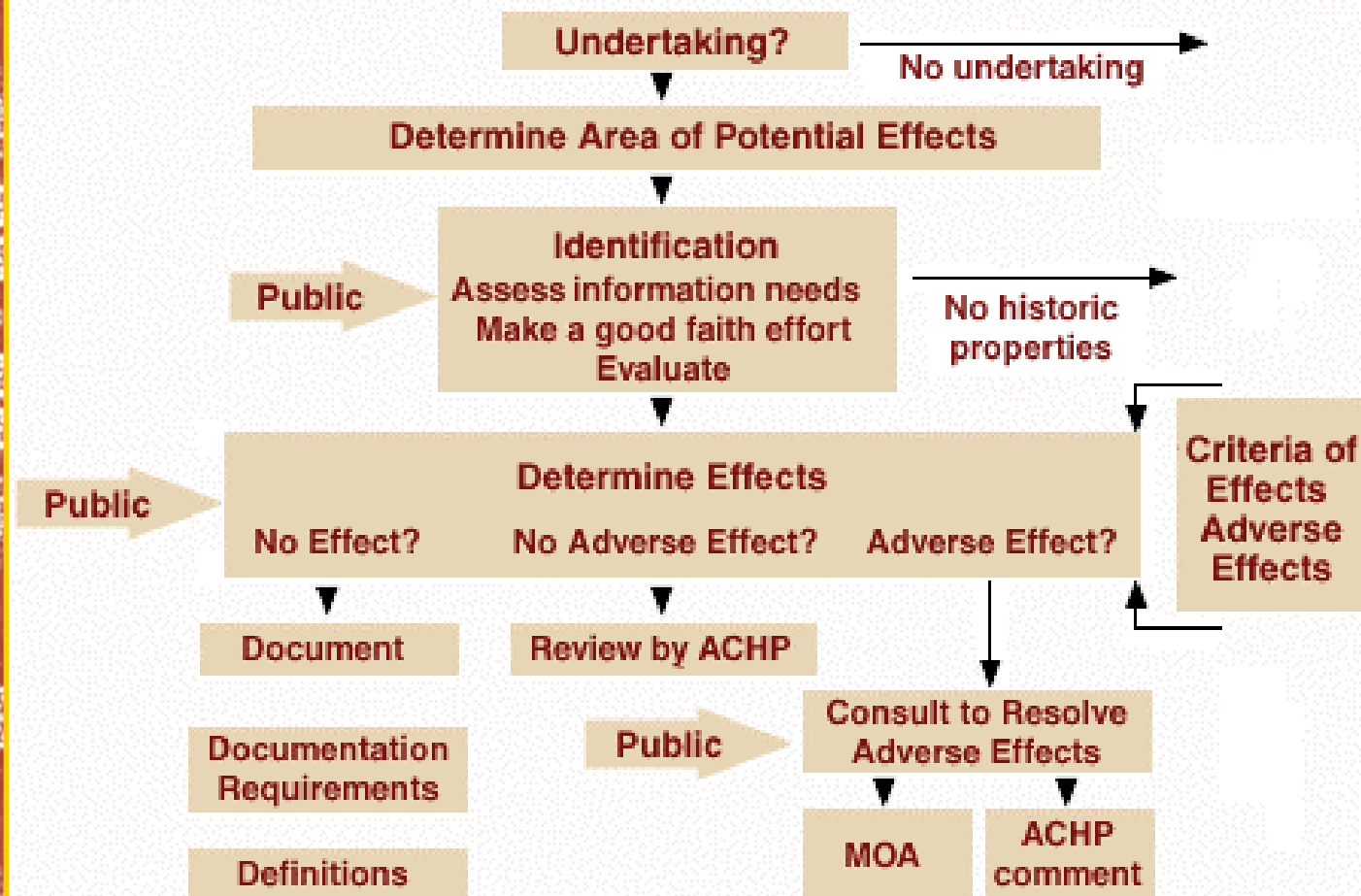


Initial Screening

- National Register of Historic Places
<http://www.cr.nps.gov/nr/nrhome.html>
- Local Historical Societies
- State/Tribal Historic Preservation Officer
(& surveys)



A Brief Look at the Section 106 Review Process



Can add \$\$ to deal with tax credits, easement donations



Hazardous Chemicals

Comprehensive
Environmental
Response,
Compensation &
Liability Act of 1980
(CERCLA)



Superfund (Comprehensive Env Response, Compensation & Liability Act)



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CERCLA

No commercial real estate transaction
without environmental due diligence

- Site investigation (ESA)
- legal opinion

Driven by Lenders, title insurance





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Higher Level Testing

ASTM Phase I

- performed by env professional
- price varies with size, complexity
- needed for all commercial real estate, including HUD MF FHA



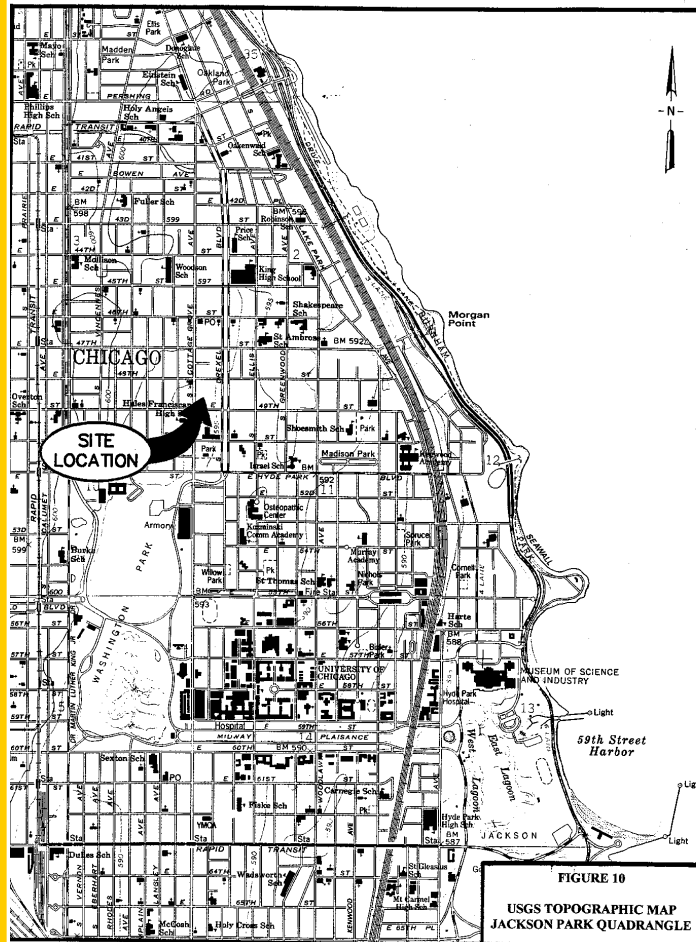
Records Review

NPL	.6 Kilometer
CERCLIS	.8 k
RCRA TSD Facilities	1.6 k
RCRA generators	property & adjoining
ERNS	property only
STATE NPL & CERCLIS	.8 k
LUST	.8 k
UST	.8 k

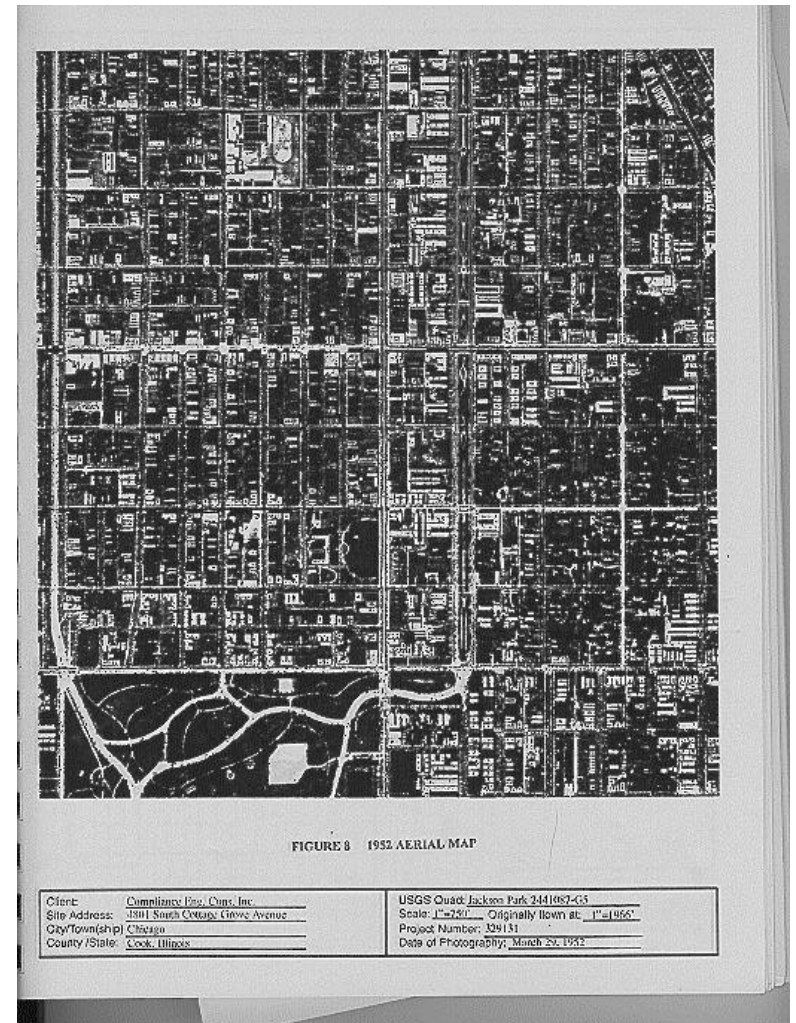


Physical Settings Source

USGS 7.5 minute topographic



1950 Aerial Photo

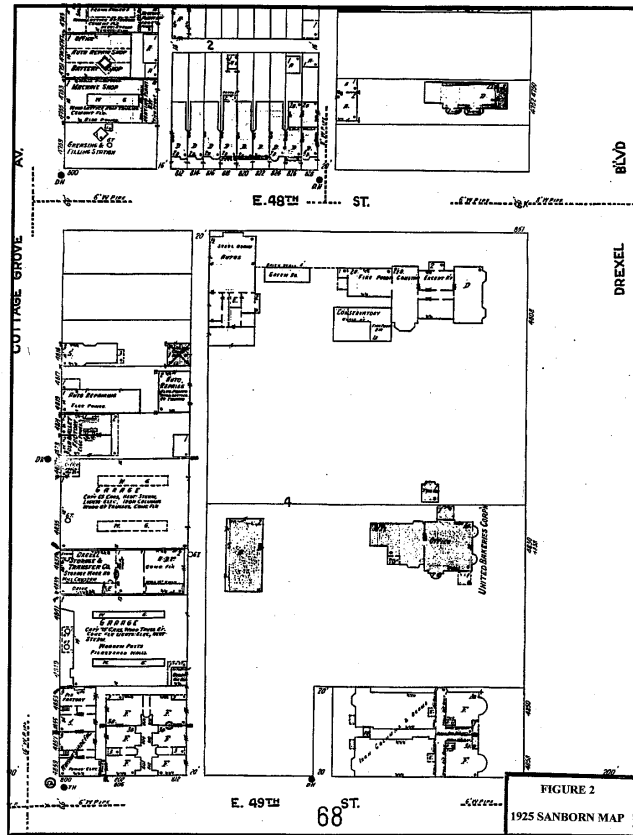


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Uses of the Property

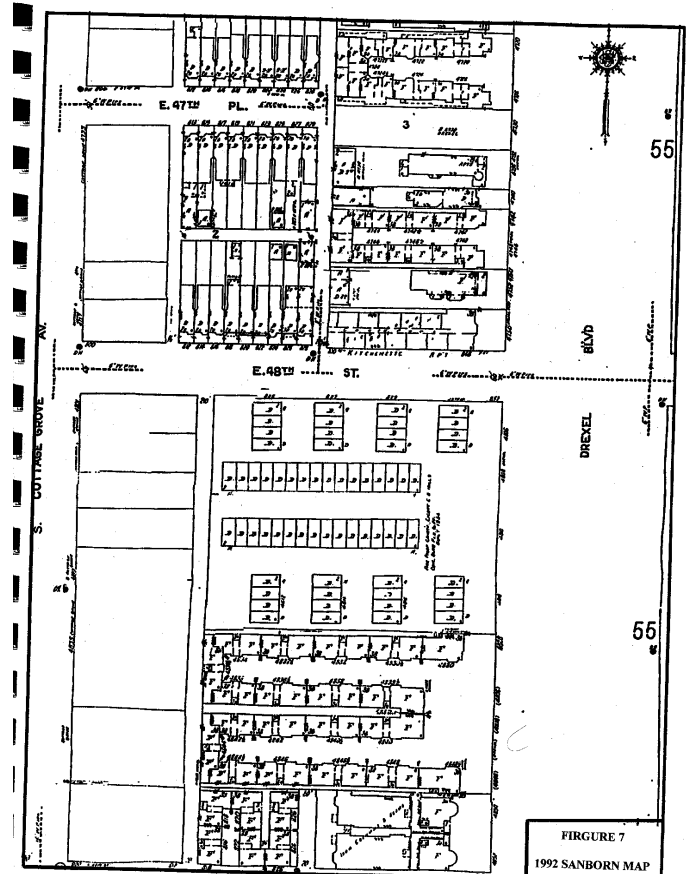
Back to 1940 using standard historical sources
Prior to 1940 until undeveloped



1925

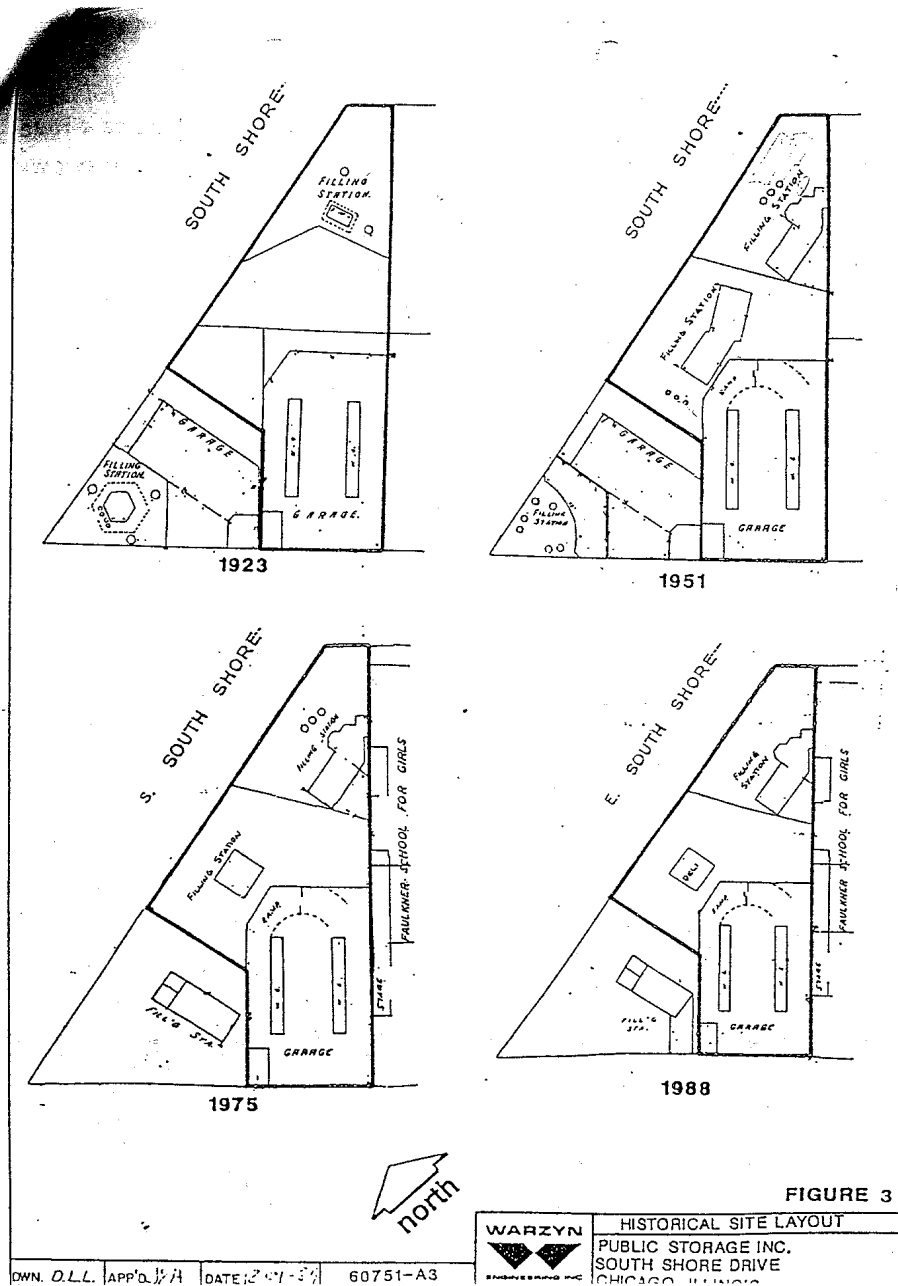
Sanborn
Maps

1992



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8 - Site Reconnaissance

Visually & physically observe the property & any structures.
Identify any current use likely to use hazardous chemicals.
Identify indications of past use if likely to involve chemical use.
Identify current & past uses of adjoining properties if likely to indicate recognized env conditions

General description of structures

Roads

Potable water supply

Sewage disposal system



Working Together to Build Programs and

Evaluation & Report Preparation Credentials

Findings & Conclusions - One of the Following

Either 11.6.1:

We have performed a Phase I Env Site Assessment in conformance with the scope and limitations of ASTM Practice E 1527 of [insert ID] the property.

Any exceptions to, or deletions from this practice are described in Section [insert section] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the property.

Or else 11.6.2:

We have performed a Phase I Env Site Assessment in conformance with the scope and limitations of ASTM Practice E 1527 of [insert ID] the property.

Any exceptions to, or deletions from this practice are described in Section [insert section] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the property except for the following:
(list the exceptions).



Phase 2

- soil borings with chemical analysis
- maps site contamination
- provides recommendation for cleanup

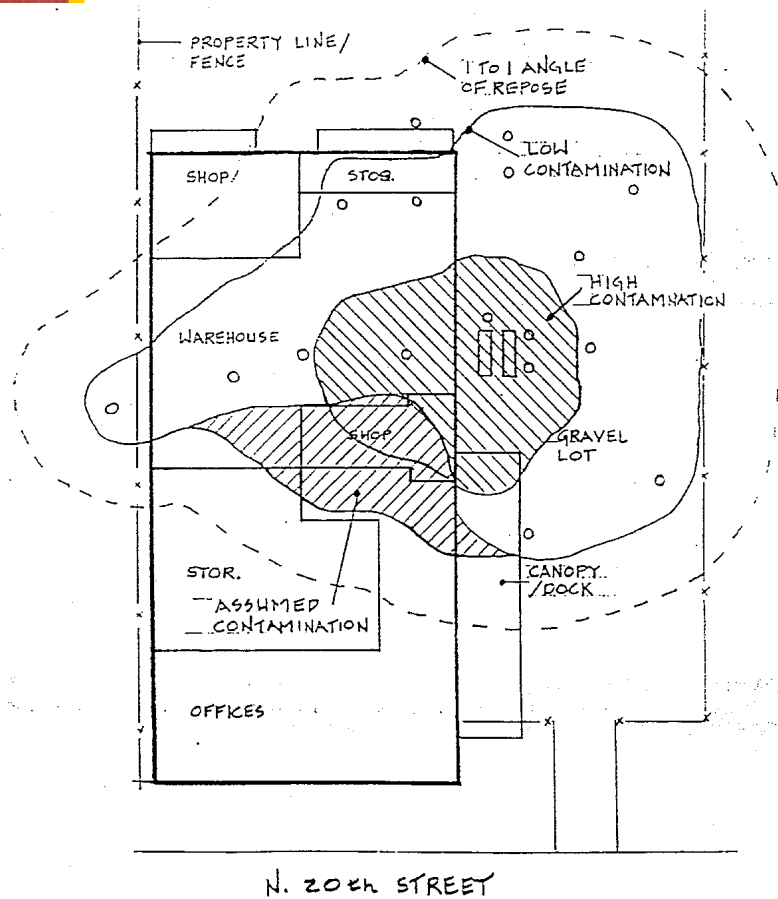




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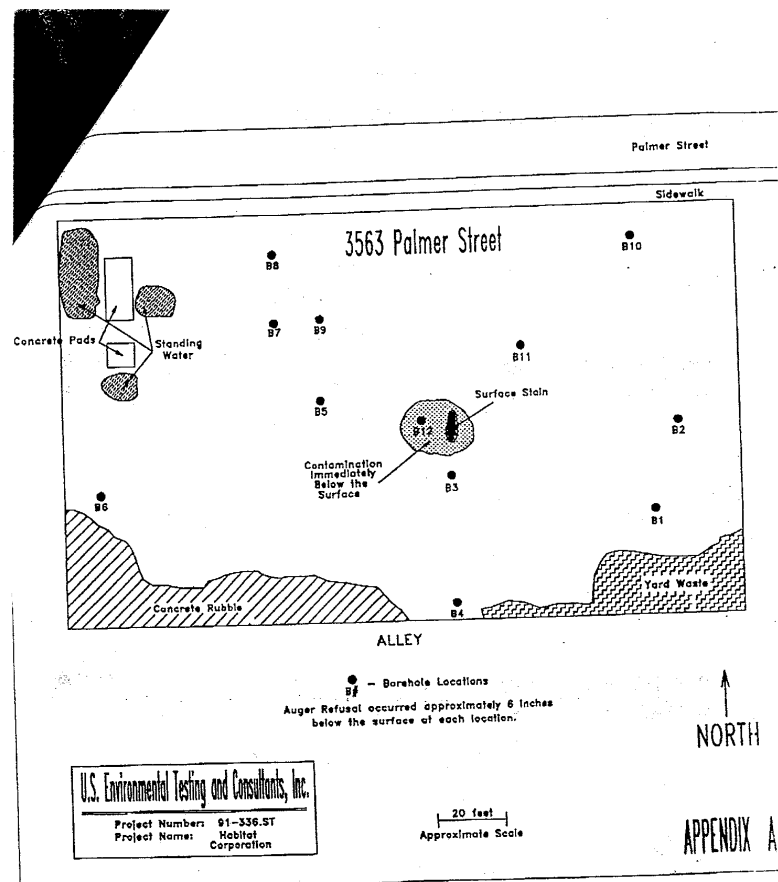
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10-9776-01

CONTAMINATION STUDY



Mitigation

- Remediation/Cleanup
- If real serious -
USEPA supervised
(NPL)
- Most states have
voluntary cleanup
programs & MOA with
USEPA
- Many states do not
have
joint & several liability
(proportionate share)



202 Site in
Elmwood Park



Working Together to Build Pro

Site Design

Stormwater Management

- Don't build in floodplains or wetlands (unless no practicable alternative)



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Site Design

Stormwater Management

- Detain/retain on site. Limit offsite impact to same as predevelopment
- Retention ponds can add value (habitat, recreation)

Limit
impervious
surface
(porous
parking
areas)





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Site Design

Natural Landscaping

(European) lawns require fertilizers, herbicides, high maintenance

Natural landscaping

- saves energy
- minimizes pollution
- provides higher quality habitat





Home



School



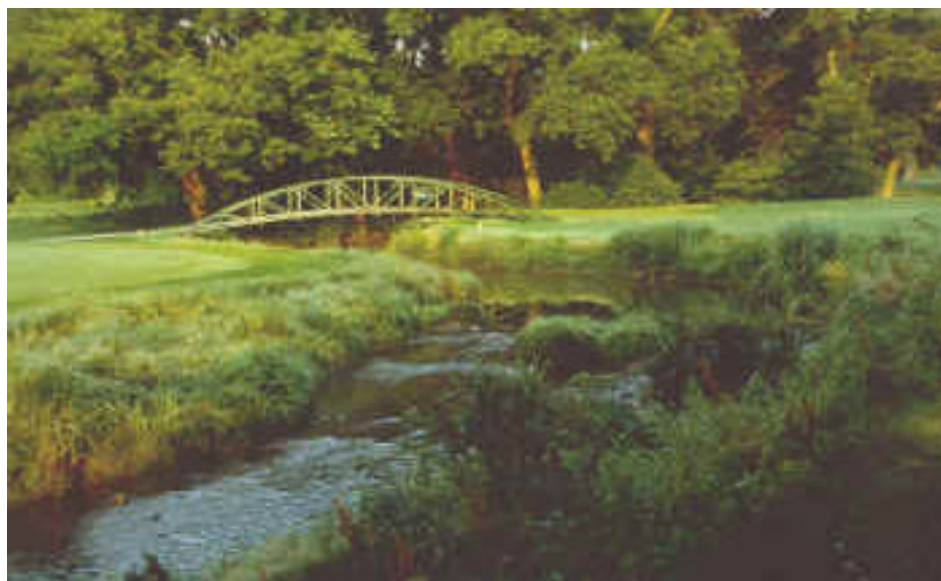
Roadway

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Country Club



Corporate Campus

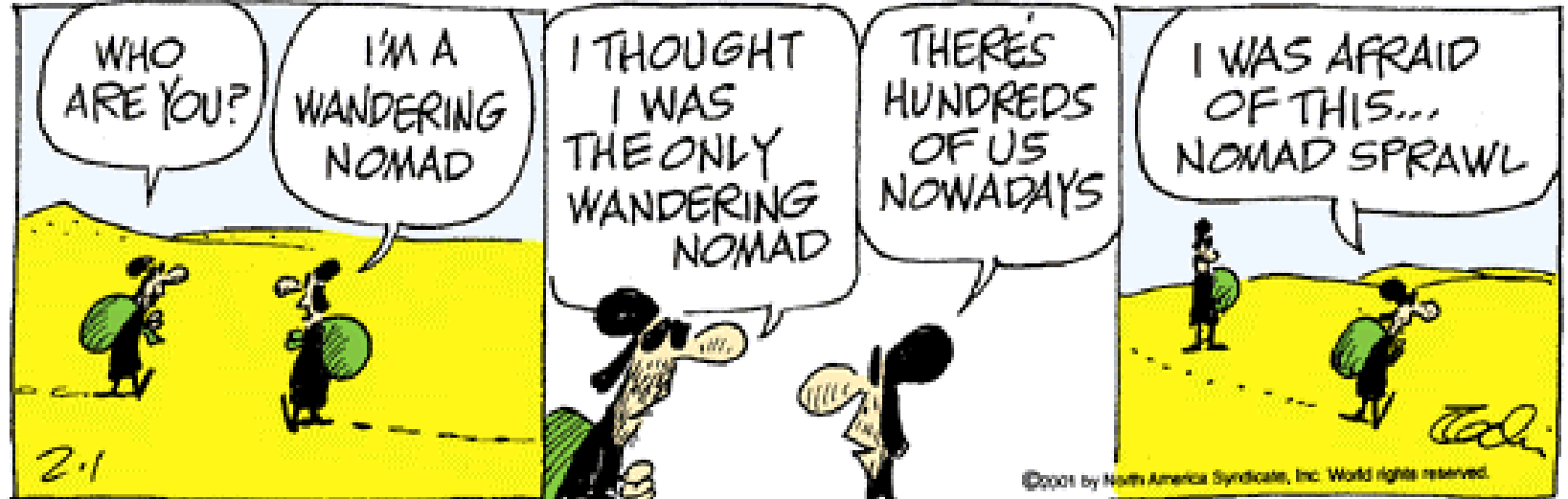


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Sprawl



Site Design Transportation

- Reduce reliance on mechanical bridge by encouraging pedestrian and bicycle trips
- Mixed use developments
 - walkways, bikeways

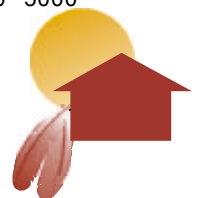
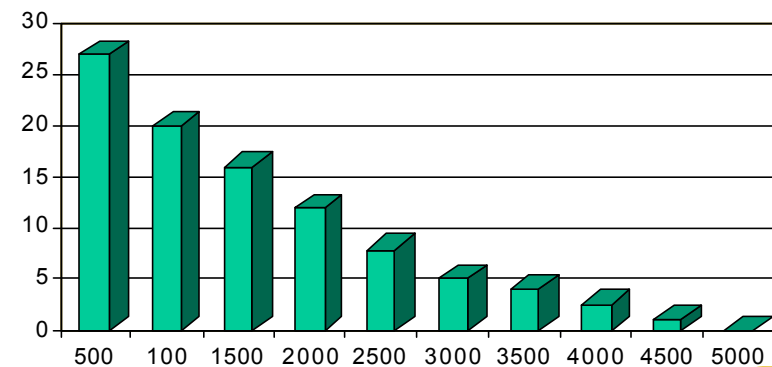


Transit Oriented Development



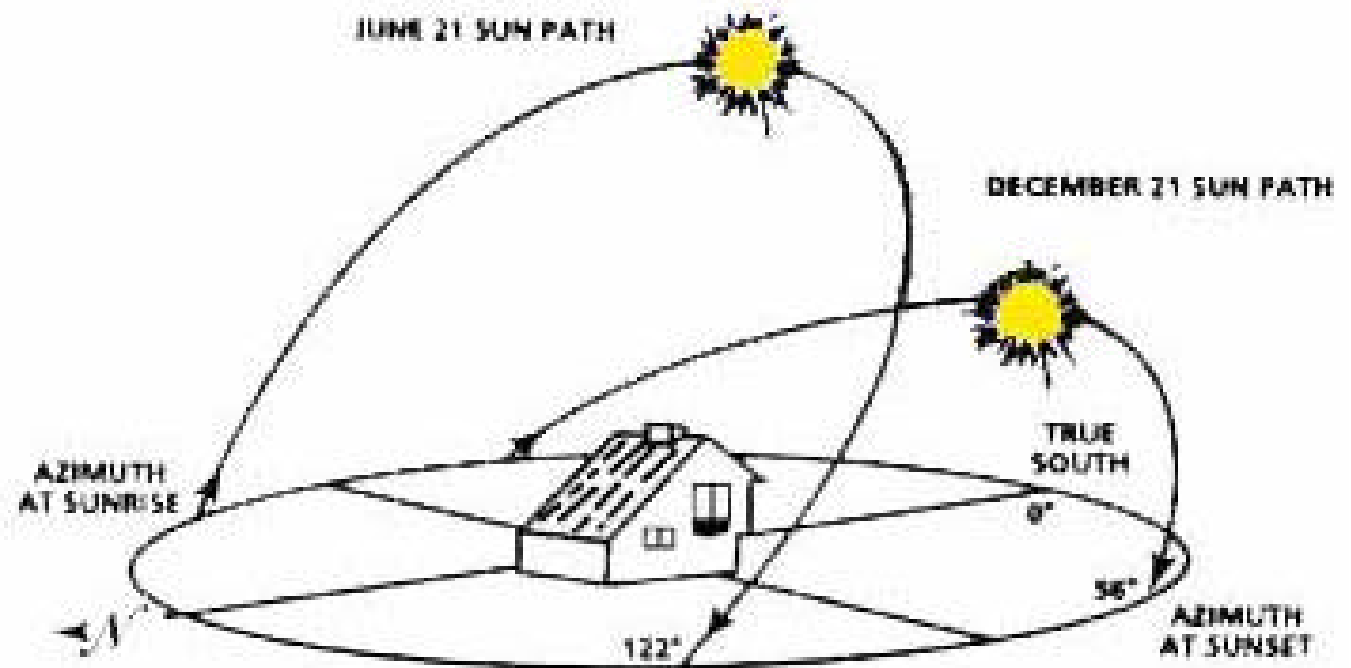
“The Effect of CTA & Metro Stations on Residential Property Values”
RTA Study by Gruen, Gruen & Assoc

% increase
in value



Site Design Orientation

- Solar designs need to be properly oriented



Energy Efficiency



Energy Efficiency

- Heat
 - Insulation
 - Air sealing
- Water
 - Water saving devices
 - Natural landscaping
- Lighting
 - Compact fluorescent bulbs
- Mechanicals
 - High efficiency appliances



Structures

Energy Efficiency - Insulation



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Structures

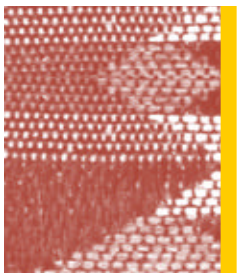
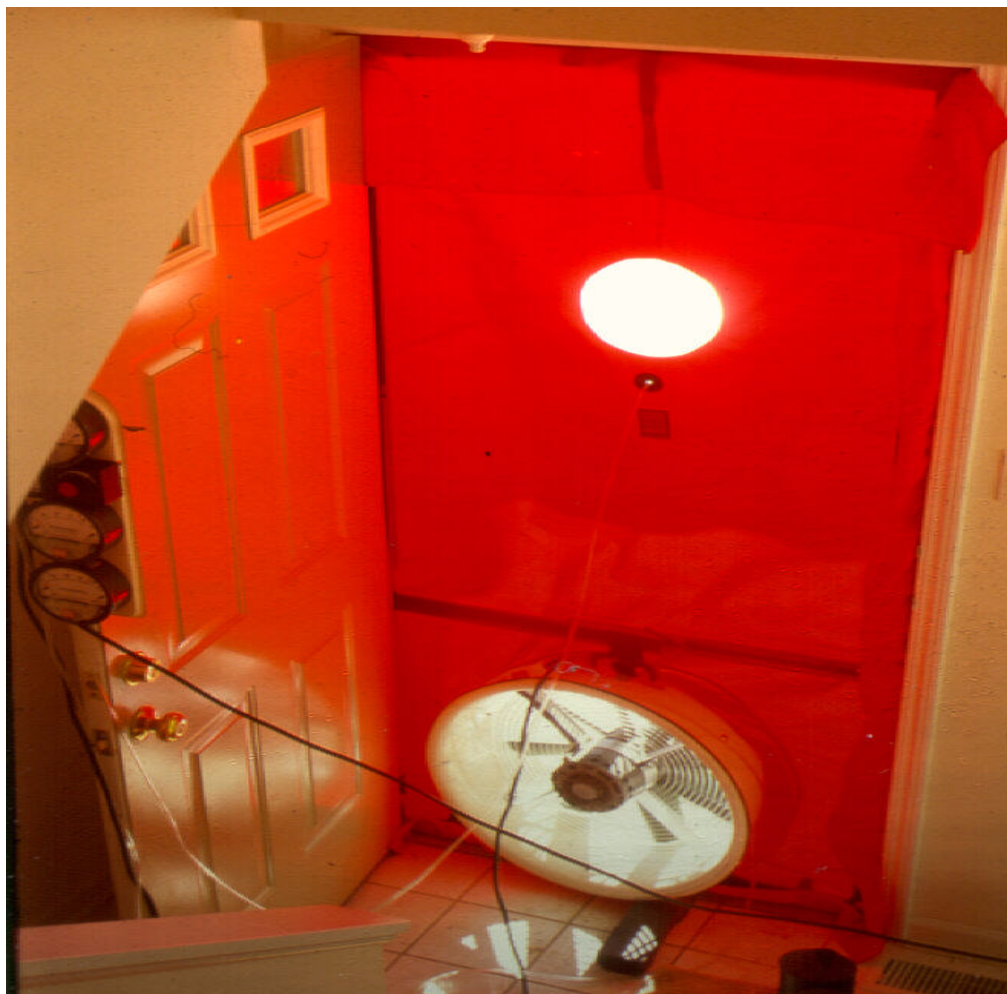
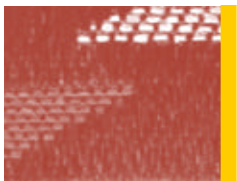
Energy Efficiency - Air Sealing



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Working Together to Build Programs and Opportunities

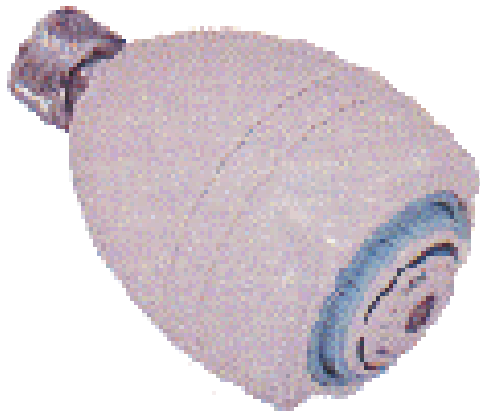
Slide 83



Structures

Energy Efficiency

- Water
 - water saving devices
 - natural landscaping



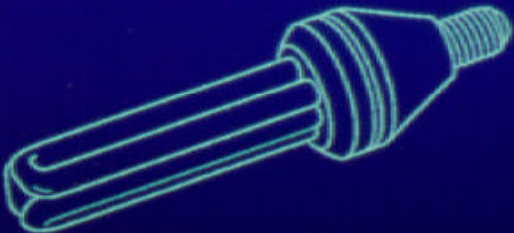
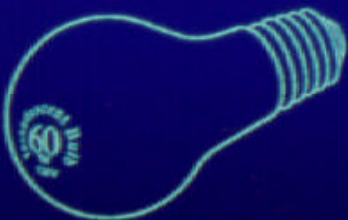


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Lighting

 Fluorescent Bulbs	 Incandescent Bulbs
5 WATTS	25 WATTS
7 WATTS	40 WATTS
13 WATTS	60 WATTS
18 WATTS	75 WATTS
27 WATTS	100 WATTS
32 WATTS	150 WATTS



Appliances
combined
furnace/
hot water
heater



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Structures - Materials



- Services vs. products

(turns capital expenditure in tax deductible expense)
only about 1% of all materials mobilized to serve America is actually made into products & still in use 6 months after sale

- floor covering service vs. carpets

Interface solenium - 40% less material & lasts 4x longer - 86% (7x) reduction in materials intensity. Also free of chlorine & other toxics, stain & mildewproof, can be easily cleaned with water. Since 20% of area shows 80% of wear, by limiting replacements reduces consumption another 80% (5x) (& limits disruption). Result, customer gets cheaper, better services that cost the supplier far less to produce. 5 fold savings in carpeting material x 7 fold savings in material savings = 35 fold (97% reduction in flow of materials)



- vertical transportation vs. elevators

Schindler leases elevators services, allowing it to capture savings from energy & lower maintenance



Re-Use Structures /Materials



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Working Together to Build Programs and Opportunities

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For further information:

- eugene_goldfarb@hud.gov
312-353-1696x2727
- Orientation to Environmental Assessment
Course (5 days)
- Sustainable Development/Smart Growth
Course (5 days)
<http://www.hud.gov/local/chi/chienv2.html>



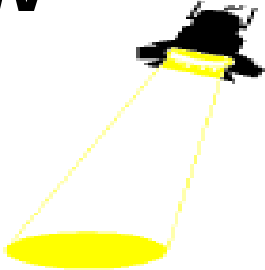
Lead Hazard Control Program Overview



*Office of Lead Hazard Control
U.S. Department of Housing and Urban
Development*



LBP in Housing - Overview

- LBP Task Force, HUD & EPA found:
 - 64 million homes built before 1978 contain LBP (75% of total)
 - 20 million homes with LBP hazards
 - 4 million homes with LBP hazards have a young child
 - 4000,000 homes with a young child are in poor condition and lack the funds to correct hazards

(Sources: HUD, EPA, LBP Hazard Reduction and Financing Task Force)



Why is LBP a Concern?

Childhood lead poisoning is "the most common environmental disease of young children and is entirely preventable."

- Almost one million children have Elevated Blood Lead (EBL)
- Health effects are irreversible
- Brain and nervous system damage
- Reduced intelligence
- Learning disabilities

(Sources: CDC 1997, Pirkly 1994 & EPA 1995)

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Slide 3



Lead Hazard Control Grants



- **Targets LBP hazard reduction**
- **Private Housing**
 - Low Income
 - Owner Occupied
 - Rental
- **Contractor Certification**
 - Build local capability
- **State lead program**
 - EPA Section 402/404



LBP in Residential Housing

- Some homes are more prone to LBP hazards
 - Older units
 - Poor condition
 - Unsafe renovation or maintenance
 - Exterior contaminated soil



Myths about LBP



- Children must eat paint chips to be poisoned
- Only inner-city children are at risk
- It is more hazardous to treat LBP than to leave it alone
- Addressing LBP is an all-or-nothing proposition
- Lead is everywhere, paint is only a small part of the problem



Who is Most at Risk?

- Children under the age of six
- Pregnant Women
- Workers



Hazard Control Grants - Purpose

- Reduce exposure of young children to lead hazards
- Build State and local capacity to address lead hazards
- Educate the public
- Stimulate cost-effective approaches
- Mobilize public and private resources



Benefits of Grant Program

- Protects children by controlling hazards and by promoting:
 - Contractor certification
 - Contractor availability
 - Expertise in public sector
 - National lead hazard network
 - Collaboration between health and housing
 - Introduction of new technology
 - Economic opportunities for local residents
 - Public education



Eligible Activities

- What can recipients do with the grant?
 - Evaluation
 - Hazard reduction (interim controls, abatement)
 - Blood lead monitoring (children)
 - Public education (children, adults)
 - Data collection and evaluation
 - Temporary relocation





Summary of Lead Based Paint Requirements

*Understanding the Rules, and
Implementing Them in Indian Country*



WELCOME

- Session
 - 9:00 AM – Noon
 - Lots of information
 - Please ask questions!
- Speakers (in the order they will speak)
 - Robert Holden
 - Trish Roberts
 - Harry Hudson



Agenda

- Welcome
- Overview of the New HUD Rule
 - *Making Houses Safer in Indian Country*
- Implementing the New Lead Rule
 - *It Can Be Done!*
- Lead Hazard Grant Program
 - *Competitive Program - Money for Implementation*
- Final Questions and Answers





Overview of the New HUD Rule on Lead Safe Housing

Making Houses Safer in Indian Country

Working Together to Build Programs and Opportunities

Slide 4



Why the New Regulation?

- Title X of the HCD Act of 1992 required a new approach
 - Proactive
 - Target conditions that pose health risks
 - Identify and control hazards
 - All lead based paint doesn't have to be removed



Where Do I Find the New Reg?

Title X and New Lead-Based Paint Regulation

- Title X of 1992 CDA
- 24 CFR Part 35
- Final regulation - September 15, 1999
- Effective - September 15, 2000
 - Some extensions



Does the New Reg Apply to All Houses?

Regulation Exemptions

Subsection B

- Houses built after January 1, 1978
- SROs
- Housing designated for elderly or disabled
- Units previously found not to have lead based paint
- Lead based paint previously abated
- Vacant units that will not be occupied
- Rehab that does not disturb paint



Does the New Reg Apply to All Houses?

Regulation Exemptions

Subsection B, continued

- Immediately necessary emergency actions
- Emergency rental or home payment assistance for up to 100 days
- Evaluation or reduction may be delayed for weather
- For historic preservation, interim controls instead of abatement of hazards



What Are the Key Factors?

Key Factors - New Regulation

- Applies to NAHASDA and ICDBG residential activities
- Establishes requirements based on:
 - Nature of the activity
 - Amount of Federal funding
 - Duration of relationship of the program with the property
- Options and flexibility
- Balances cost and duty to protect



What Are Residential Activities?

The Nature of the Activity

- 4 Subsections
 - Project Based Assistance –
Subpart H
 - Residential Rehabilitation –
Subpart J
 - Acquisition, leasing, support services, and operations –
Subpart K
 - Tenant-based rental assistance -
Subpart M



When Should I Take Action?

Requirements for five phases of project:

1. Notification
2. Lead hazard evaluation
3. Lead hazard reduction
4. Ongoing maintenance
5. EIBLL



How is the New Reg Different?

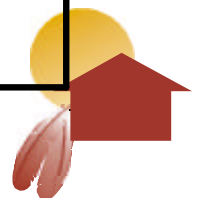
- Old
 - Notification
 - Identification of defective paint
 - Treatment of defective paint
 - Abatement for 1937 Act units
 - Respond to EBL children
- New
 - Notification
 - Hazard evaluation
 - Hazard reduction
 - Ongoing maintenance
 - Respond to children with environmental intervention blood lead levels



Requirements - Program Activity

Project Based Rental Assistance

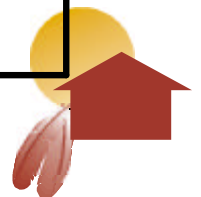
	$\leq \$5,000$	$> \$5,000$
Notification	Yes	Yes
Evaluation	Visual Assessment	Risk Assessment
Reduction	Paint Stabilizatr. SWP Clearance	Interim Controls SWP Clearance
On-going Maint.	Yes	Yes
EIBLL Requrmnt	Yes	Yes



Requirements - Program Activity

Residential Rehabilitation

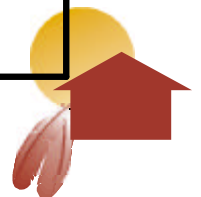
	≤\$5,000	>\$5,000 – \$25,000	>\$25,000
Notification	Same for all Categories		
Evaluation	Test Paint	Risk Assmnt. Test Paint	Risk Assmnt. Test Paint
Reduction	Repair, SWP Site clearance	Interim Controls, SWP Clearance	Abate Hazards SWP Clearance
On-going Maintenance	No	No	No
EIBLL	No	No	No



Requirements - Program Activity

ALSSO

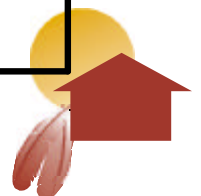
Notification	All apply
Evaluation	Visual Assessment
Reduction	Paint Stabilization SWP Clearance
On-going Maintenance	Yes, if on-going relationship
EIBLL	No



Requirements - Program Activity

TBRA

Notification	All apply
Evaluation	Visual Assessment
Reduction	Paint Stabilization SWP Clearance
On-going Maintenance	Yes
EIBLL	Yes



Implementing Lead Hazard Evaluation and Reduction

Four approaches:

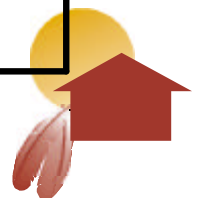
- Do no harm
- Identify and stabilize deteriorated paint
- Identify and control lead hazards
- Identify and abate lead hazards



Lead Hazard Evaluation

Who Can Do It?

Visual Assessment	Certified Risk Assessor, or trained HQS Inspector
Paint Testing	Certified Lead Based Paint Inspector, or Certified Risk Assessor
Risk Assessment, or Lead Hazard Screen	Certified Risk Assessor
Clearance Examination	Certified Risk Assessor, Paint Inspector, or Clearance Technician (Lead Sampling Tech.)



Lead Hazard Reduction

Who Can Do It?

Paint Stabilization	Trained, or supervised workers using SWP
Interim Controls	Trained, or supervised workers using SWP
Standard Treatments	Trained, or supervised workers using SWP
Abatement	Trained and certified abatement supervisors and workers



Other Requirements

- Compliance
 - Penalties for non-compliance
 - Also comply with Tribal, State and local lead requirements
 - When overlap, follow the most stringent
- Record keeping



Can I Address Lead and Have a Successful Program?

Addressing lead hazards will affect program design and program production, but . . .

- Many programs are already responding successfully.
- Practical solutions and help are available.



Resources

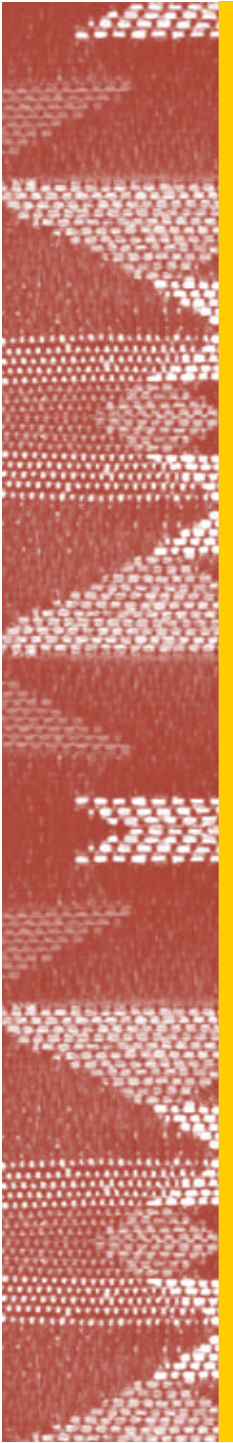
- The Regulation – 24 CFR Part 35
- Regulation Hotline: (202) 755-1822 x104
- HUD Lead Paint Compliance Assistance Center:
1-866-HUD-1012 (toll free)
- email: lead_regulations@hud.gov
- HUD Guidelines *for the Evaluation and Control of Lead-Based Paint Hazards in Housing*
- Lead Safety Field Guide
- Office of Healthy Homes and Lead Hazard Control (OHHLHC)
- Indian and public health departments



Summary

- What three factors influence how the requirements apply to different activities?
- What are the five phases of a project for which there are requirements?
- What are four approaches to addressing lead-based paint?





Implementing the New Lead Rule in Your Programs

It Can Be Done!



Why is Lead-Based Paint a Concern?



Childhood lead poisoning is “the most common environmental disease of young children and is entirely preventable.”

- 890,000 children have too much lead in their blood
- 64 million homes have lead-based paint, the primary source of exposure.
- 20 million homes have conditions that are likely to expose families to unsafe levels of lead

SOURCES: CDC 1991, Pirkle 1994, & EPA 1995



What Does Lead Do?

- May be no symptoms - Can still be serious health effects
 - For Children
 - Damage to brain and nervous system
 - Loss of intelligence / learning disability
 - Slowed growth
 - Coma, convulsions, even death
 - For Adults
 - High blood pressure
 - Kidney problems
 - Problems conceiving and having children



How Does Lead Enter the Body?

- Inhaling dust
 - Primary pathway
 - Normal hand to mouth of small children
 - Vacuuming in contaminated room
 - Unprotected workers
- Ingesting contaminated soil, dust, or paint
 - Not uncommon for small children
 - Unprotected workers – smoking / eating



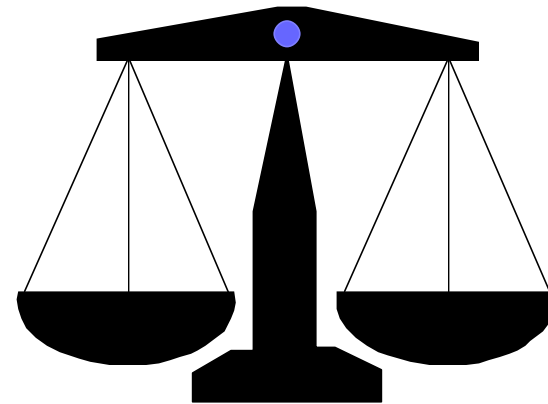
Why Take Action?



PROTECT
CHILDREN
AND FAMILIES



SAFE HOUSING



LIABILITY
AND COST



What is Lead Paint and a Lead Paint Hazard?

- Lead-Based Paint contains at least:
 - 1mg/cm²
 - 0.5% lead
 - 5,000 parts per million by dry weight
- Lead Paint Hazards:
 - Deteriorated lead based paint
 - Friction, impact and accessible surfaces
 - Lead contaminated dust
 - Lead contaminated soil



Lead-Based Paint in Housing

- More likely lead paint hazards in:
 - Pre-1960 units
 - Units in poor condition
 - Units that were renovated without SWP



Requirements for 5 Phases of a Project

1. Notification

- Lead hazard information pamphlet
- Disclosure
- Notice of lead hazard evaluation or presumption
- Notice of lead hazard reduction activities

NEW

NEW



Requirements for 5 Phases of a Project

2. Lead Hazard Evaluation

Three types of methods:


1. Visual assessment
2. Paint testing
3. Risk assessment
(or lead hazard screen)



Requirements for 5 Phases of a Project

3. Lead Hazard Reduction (LHR)

Three types of methods:

1. Paint stabilization 
2. Interim controls, or standard treatments
3. Abatement of hazards



Requirements for 5 Phases of a Project

LHR: Safe Work Practices

- Four types of concerns:
 1. Occupant protection
 2. Worksite preparation and containment
 3. Prohibited methods
 4. Worksite cleanup
- Safe work practice exemptions



Requirements for 5 Phases of a Project

LHR: Clearance

- Ensure correct cleanup, eliminate dust hazards
- Involves
 - Visual assessment
 - Dust testing
 - Report
- Use qualified professionals
- Exemptions
 - No paint disturbance
 - Small area



Requirements for 5 Phases of a Project

4. Ongoing Maintenance

- Timing
- Activities
 - Conduct visual assessment for deteriorated paint or failure of reduction measure
 - Respond with lead hazard reduction activities
 - Provide notices of evaluation and reduction
- Records
- Exemptions



Requirements for 5 Phases of a Project

5. EIBLL Requirements

Responding to Poisoned Children

- Compare and share data
- Risk assessment to identify hazards
- Interim controls or abatement of hazards
- Notices and disclosure



Implementing the Regulation

Getting Started

- What do your current programs look like?
 - Types of activity?
 - Types of units?
 - Average amount of federal dollars invested?
 - What housing code or standard is used?



Implementing the Regulation

Getting Started

- Research costs and project #'s
- Assess availability of lead professionals
- Identify training needs, coordinate training
- Revise procedures, forms, contracts
- Run pilot jobs
- Make presentations so people know what to expect



Research Costs

- Identify experienced parties
- Call:
 - Contractors
 - Health Department
 - Building Inspectors
 - Insurance Agents
 - Lead Hazard Control Grantees
 - Neighboring housing programs



Train Staff and Contractors

- Assess training needs
 - Staff
 - Contractors
- Identify sources of training
- Establish timetable
- Set Policies
 - Who goes
 - Who pays
 - What commitment required to program
 - Determine costs



Assess and Adjust Programs

- Are program guidelines still relevant?
 - Do you offer enough subsidy? Right type?
 - Are your lists of repairs still appropriate?
 - Do your target areas still make sense?
 - Will you continue to offer the program?
- Assess each program
- Revise procedures of programs that will remain
 - Incorporate Requirements for 5 Phases
- May need other programs



Adjust Your Production #'s

- Consider your programs; current and coming year
- Identify additional requirements
 - Quantify additional cost and time per unit
- Estimate # of units affected
 - Quantify cost and time for the program
- Adjust your production goals, or your budget



Make Presentations

- Video – Moving Toward a Lead-Safe America
- Summary of changes
- Changes to production
- Training needs
- Timetable showing all steps
- Costs



Lead Based Paint Regulations for NAHASDA and ICDBG

- All residential units in a project assisted with IHBG, 184 Loan Guarantee, Title VI funds, or ICDBG must comply with the regulation implementing Title X of the 1992 Housing and Community Development Act. This regulation is found at 24 CFR Part 35 – Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally-owned Residential Property and Housing Receiving Federal Assistance, Final Rule.
- This regulation was issued by HUD in September 1999, with an effective date of September 15, 2000. NAHASDA Guidance 01-05 provides additional information on complying with lead regulations.
- The lead-based paint regulation at 24 CFR Part 35 consolidates all lead-based paint requirements for HUD-assisted housing. Whereas previous lead-based paint rules were dictated by individual programs, the consolidated rule establishes lead-based paint requirements *by activity*. For example, all HUD-funded rehabilitation projects, regardless of the source of funds, are subject to the same rules.
- The purpose of the regulation is to identify and address lead-based paint hazards before children are exposed to lead and potentially poisoned. While past lead regulations have focused on the abatement of lead-based paint and response to poisoned children, this regulation implements a framework for evaluating units up-front and addressing identified lead-based paint hazards (rather than all lead-based paint).
- To understand the requirements, it helps to understand that there are four approaches to addressing lead-based paint in NAHASDA and ICDBG-funded projects. The four approaches are called out in Attachment 1, and the requirements for each are listed as part of the attachment.
- Lead-based paint responsibilities occur at five phases of a project:

⇒ Notification. There are four notification requirements for all NAHASDA-funded activities:

- ✓ Lead Hazard Information Pamphlet: Occupants, owners and purchasers of NAHASDA-assisted properties must receive the EPA/HUD/Consumer Product Safety Commission (CPSC) lead hazard information pamphlet, or an EPA-approved equivalent.
- ✓ Disclosure: Property owners of NAHASDA-assisted properties must provide purchasers and lessees with available information or knowledge regarding the presence of lead-based paint and lead-based paint hazards prior to selling or leasing a residence. (This requirement applies to all owners regardless of public assistance.)
- ✓ Notice of Lead Hazard Evaluation or Presumption: Occupants, owners and purchasers must be notified of the results of any lead hazard evaluation work, or the presumption of lead-based paint or lead hazards.

- ✓ Notice of Lead Hazard Reduction Activity: Occupants, owners and purchasers must be notified of the results of any lead hazard reduction work.

⇒ Evaluation.

- ✓ The specific evaluation activity required depends on the activity. Evaluation methods include visual assessments, paint testing and risk assessments. See Attachment 2 for definitions of these evaluation activities.

⇒ Reduction.

- ✓ The reduction activity required depends on the activity. Reduction methods applicable to IHBG and ICDBG include paint stabilization, interim controls, standard treatments and abatement. See Attachment 2 for definitions.

⇒ On-going Maintenance.

- ✓ On-going maintenance includes periodic visual assessments to determine if lead-based paint hazards have reappeared and actions taken to address the hazards. It is required only in rental properties.

⇒ Response to poisoned children.

- ✓ If a poisoned child is found in a unit, certain requirements apply. This requirement applies only to Tenant-Based (TBRA) and Project Based Rental Assistance. See 24 CFR 35.1225 for a full description of the requirements.

⇒ Options.

- ✓ These approaches also allow some flexibility in how they are implemented. The regulation allows several options. For example, instead of performing paint testing or a risk assessment, the grantee may simply presume that lead-based paint or lead-based paint hazards are present and take appropriate action. For more detail on these options, refer to 24 CFR Part 35 as well as HUD's "Interpretive Guidance: The HUD Regulation on Controlling Lead-Based Paint Hazards in Housing Receiving Federal Assistance and Federally-Owned Housing Being Sold." The latest version of interpretive guidance can be found on HUD's website at www.hud.gov/offices/lead.

- Grantees must comply with other regulations – Federal, state, tribal and local – that apply to lead-based paint hazard evaluation and reduction. When multiple regulations cover a program activity, grantees must comply with the most stringent requirements.
- All lead-based paint activities must be performed in accordance with other applicable Federal laws and authorities. For example, the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), OSHA worker safety regulations (29 CFR 1910.1200 and 29 CFR 1926.62), and other environmental laws and authorities cover activities related to lead-based paint evaluation and hazard reduction.

- HUD may modify or waive its lead-based paint requirements if it determines that the requirement duplicates a Federal, state or local requirement that provides a comparable level of protection from lead-based paint hazards.
- There are records that grantees must keep to verify that they have conducted the required lead hazard response activities.

⇒ Lead Hazard Information Pamphlet.

- ✓ A record of the distribution of the lead hazard information pamphlet is recommended but not required.

⇒ Notification, Evaluation and Reduction Reports.

- ✓ The grantee must keep a copy of each notification, lead hazard evaluation report, lead hazard reduction documentation (such as job specifications), and clearance or abatement report for at least three years, or for such other period as specified in the program regulations.

⇒ Reporting to HUD.

- ✓ The grantee will provide a copy of any of the above records to HUD upon request.

- Failure to comply with the lead-based paint requirements under the new regulation will be subject to sanctions authorized under the Federal funding programs providing assistance to the property, and violations may be subject to other penalties available under state or local law.
- Notifying owners, purchasers or occupants of possible lead-based paint hazards does not relieve grantees of the responsibilities under the new regulation.

Attachment 1- Summary of Lead-Based Paint Requirements by Activity

	Homeowner and Rental Rehabilitation (Subpart J)			TBRA (Subpart M)	Acquisition Only and Homebuyer (Subpart K)	Project-based Assistance* (Subpart H)	
	≤\$5,000	\$5,000 - \$25,000	>\$25,000			Single family units, & multi- family units receiving ≤\$5,000	Multi-family units receiving >\$5,000
Approach to Hazard Evaluation and Reduction	1. Do no harm	3. Identify and control lead hazards	4. Identify and abate lead hazards	2. Identify and stabilize deteriorated paint	2. Identify and stabilize deteriorated paint	2. Identify and stabilize deteriorated paint	3. Identify and control lead hazards
Notification	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Lead Hazard Evaluation	Paint Testing	Paint Testing and Risk Assessment	Paint Testing and Risk Assessment	Visual Assessment	Visual Assessment	Risk Assessment	Risk Assessment
Lead Hazard Reduction	Repair surfaces disturbed during rehabilitation	Interim Controls	Abatement (Interim Controls on exterior surfaces not disturbed by rehabilitation)	Paint Stabilization	Paint Stabilization	Paint Stabilization	Interim Controls
	Safe work practices; Clearance	Safe work practices; Clearance	Safe work practices; Clearance	Safe work practices; Clearance	Safe work practices; Clearance	Safe work practices; Clearance	Safe work practices; Clearance
On-going Maint.	No	No	No	Yes	Yes (if ongoing relationship)	Yes	Yes
Response to poisoned children	No	No	No	Yes	No	Yes	Yes
Options	Presume lead- based paint. Use safe work practices on all surfaces.	Presume lead- based paint and/or hazards. Use standard treatments.	Presume lead- based paint and/or hazards. Abate all applicable surfaces.	Test deteriorated paint. Use safe work practices only on lead-based paint surfaces.	Test deteriorated paint. Use safe work practices only on lead-based paint surfaces.	Test deteriorated paint. Use safe work practices only on lead-based paint surfaces.	Presume lead- based paint and/or hazards. Use standard treatments.

* Project based assistance is not a common activity under IHBG. However, HUD may authorize it as a model program. In such cases, the lead-based paint rules summarized above must be followed.

Attachment 2 - "Lead Speak"

Lead-Based Paint: Paint or other surface coatings that contain lead equal to or exceeding 1.0 milligram per square centimeter or 0.5 percent by weight or 5,000 parts per million (ppm) by weight.

Lead-Based Paint Hazards: Any condition that causes exposure to lead from dust-lead hazards, soil-lead hazards, or lead-based paint that is deteriorated or present in chewable surfaces, friction surfaces, or impact surfaces, and that would result in adverse human health effects.

Visual Assessment: A visual inspection of interior and exterior surfaces to identify specific conditions that may be lead-based paint hazards. A visual inspection does not identify lead-based paint. The assessment may be performed by a person trained in visual assessment. Training for visual assessment is available on HUD's website at www.hud.gov/offices/lead.

LEAD HAZARD EVALUATION

Paint Testing: Testing of specific surfaces, by XRF (x-ray fluorescence) or lab analysis, to determine the lead content of these surfaces, performed by a certified lead-based paint inspector or certified risk assessor.

Lead-Based Paint Inspection: A surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation. It is performed by a certified paint inspector or risk assessor.

Risk Assessment: A comprehensive evaluation for lead-based paint hazards that includes paint testing, dust and soil sampling, and a visual evaluation. The risk assessment report identifies lead hazards and appropriate lead hazard reduction methods. A certified risk assessor must conduct the assessment.

Lead Hazard Screen: A limited risk assessment activity that can be performed instead of a risk assessment in units that meet certain criteria (e.g. good condition). The screen must be performed by a certified risk assessor. If the unit fails the lead hazard screen, a full risk assessment must be performed.

Clearance Examination: Clearance is performed after hazard reduction, rehabilitation or maintenance activities to determine if a unit is safe for occupancy. It involves a visual assessment, analysis of dust samples, and preparation of report. The certified risk assessor, paint inspector, or lead sampling technician (called a clearance technician in the HUD regulation) performing clearance must be independent from the entity/individual conducting paint stabilization or hazard reduction.

LEAD HAZARD REDUCTION

Paint Stabilization: An interim control method that stabilizes painted surfaces and addressed the underlying cause of deterioration. Steps include repairing defective surfaces, removing loose paint and applying new paint.

Interim Controls: Set of measures to temporarily control lead-based paint hazards. Interim control methods must be completed by qualified workers using safe work practices. Follow-up monitoring is needed.

Standard Treatments: A complete set of interim control methods that when used together temporarily control all potential lead hazards in a unit. Because they address all conditions, a risk assessment or other evaluation is not needed. Standard treatments must be completed by qualified workers using safe work practices. As with interim controls, follow-up monitoring is needed.

Abatement: Measures to permanently control (i.e., 20 years or more) lead-based paint or lead-based paint hazards. EPA regulations exclude from the definition of abatement “renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but instead are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidentally result in a reduction or elimination of lead-based paint hazards.” [40 CFR 745.223]

LEAD POISONING

Environmental Intervention Blood Lead Level: The level of lead in blood that requires intervention in a child under age six. This is defined as a blood lead level of 20 µg/dL (micrograms per deciliter) of whole blood or above for a single test, or blood lead levels of 15-19 µg/dL in two tests taken at least three months apart.

KEY UNITS OF MEASUREMENT

µg (Microgram): A microgram is 1/1000th of a milligram (or one millionth of a gram). To put this unit into perspective, a penny weighs 2 grams. To get a microgram, you would need to divide the penny into 2 million pieces. A microgram is one of those two million pieces.

ft² (Square foot): One square foot is equal to an area that has a length of one foot (12 inches) and a width of one foot (12 inches).

µg/dL: Micrograms per deciliter used to measure the level of lead in children’s blood to establish whether intervention is needed. A deciliter (1/10th of liter) is a little less than half a cup. As noted above, a microgram is the same weight as one penny divided into two million parts.

mg/gram: Micrograms per gram of sample, equivalent to parts per million (ppm) by weight. Used to measure lead in soil.

µg/ft²: Micrograms per square foot is the measurement used to measure levels of lead in dust samples. The clearance report should have the dust sampling results listed in µg/ft² (micrograms per square foot).

mg/cm²: Milligrams per square centimeter. Used to measure lead in paint.

percent: Percent by weight, used usually for lead-based paint (1 percent = 10,000 µg/gram)

ppm: Parts per million by weight, equivalent to µg/gram (10,000 ppm = 1 percent). Used to measure lead in paint and soil.

LEAD-BASED PAINT STANDARDS

Paint – Definition of Lead-Based Paint

Paint or other surface coatings that contain at least:

- 1 milligram per centimeters square (mg/cm²) of lead;

- 0.5 percent lead; or 5,000 parts per million lead by dry weight.

*In 1978 the Consumer Product Safety Commission banned the residential use of lead-based paint that contained greater than or equal to 0.06 percent or 600 ppm of lead.

Dust – Federal Thresholds for Lead-Contamination (Risk Assessment/Clearance)

- Floors 40 $\mu\text{g}/\text{ft}^2$
- Interior window sills 250 $\mu\text{g}/\text{ft}^2$
- Window troughs (Clearance only) 400 $\mu\text{g}/\text{ft}^2$ *

*Until EPA's final rule on lead-based paint hazards goes into effect, HUD's standards of 800 $\mu\text{g}/\text{ft}^2$ for clearance of window troughs will remain in effect.

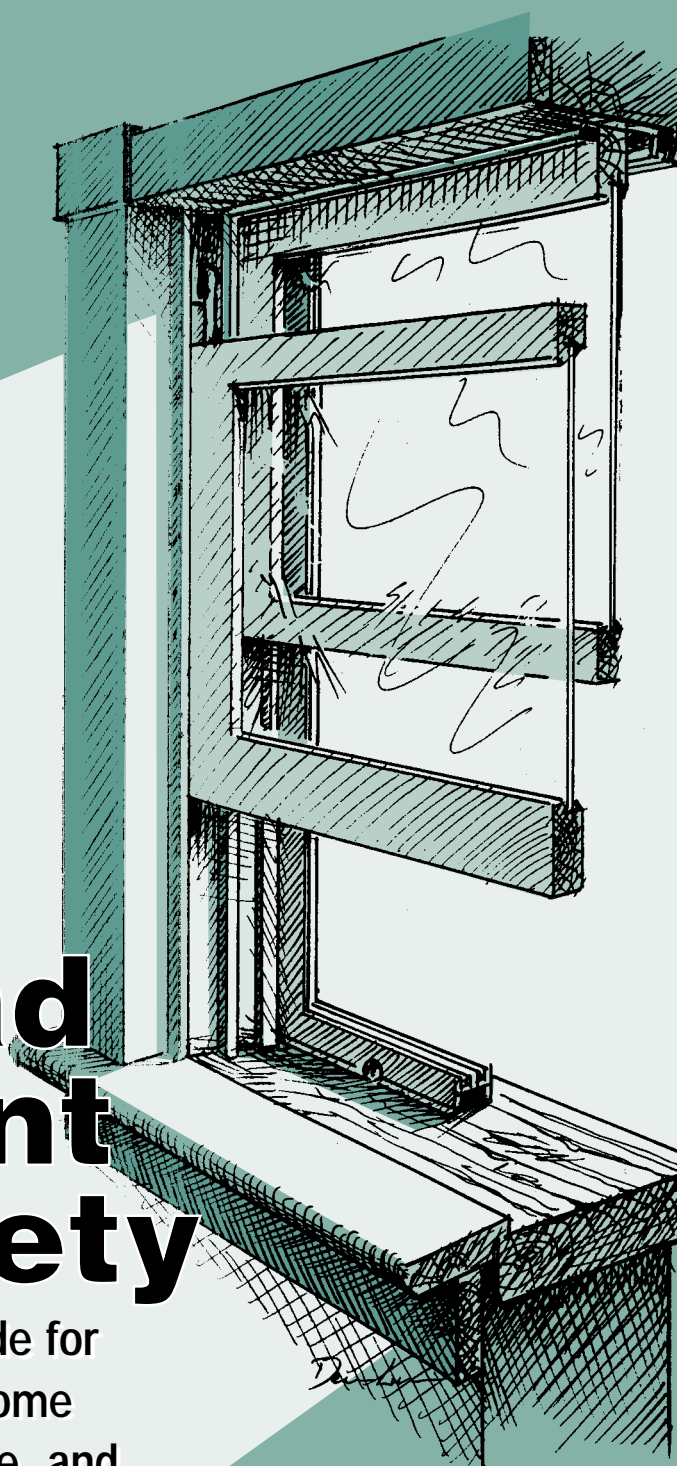
Soil – Federal Thresholds for Bare Soil Contamination

- Play areas used by children under age 6, 400 $\mu\text{g}/\text{gram}$
- Other areas, if more than 9 ft^2 in total area of bare soil per property 2000 $\mu\text{g}/\text{gram}$ *
- Abatement required by HUD 5,000 $\mu\text{g}/\text{gram}$



Lead Paint Safety

A Field Guide for
Painting, Home
Maintenance, and
Renovation Work



U.S. Department of Housing
and Urban Development
Office of Healthy Homes and
Lead Hazard Control

Foreword

Every child should have a lead-safe home. That's why HUD is working to create lead-safe affordable housing through outreach and public education, a lead hazard control grant program, worker training, and the enforcement of regulations.

This guide is one part of HUD's comprehensive approach to lead safety in the home. If you perform routine maintenance on homes or apartments built before 1978, this guide will help you plan and carry out your work safely. Step-by-step instructions and illustrations explain and show what you need to do to protect yourself and your clients if you are working in older housing that could contain lead paint. This Field Guide is a valuable tool that thousands of workers and contractors across the country are using as part of a national effort to eliminate childhood lead poisoning.

Thank you for working lead-safe. It's helping protect America's children.

A handwritten signature in dark ink, appearing to read "Mel Martinez". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Mel Martinez, Secretary

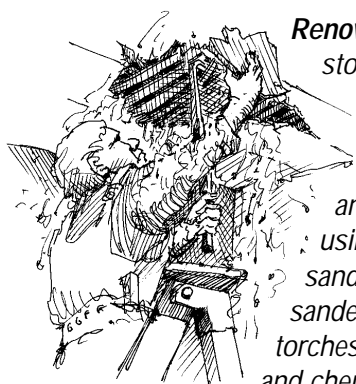
U.S. Department of Housing and Urban Development

Acknowledgements

The U.S. Department of Housing and Urban Development (HUD) developed this guide with the assistance and input of the Centers for Disease Control and Prevention (CDC), the U.S. Environmental Protection Agency (EPA), and the Occupational Safety and Health Administration (OSHA). HUD would like to thank the staff of these agencies for their participation in developing this Field Guide. HUD would also like to thank all of the renovation, painting, maintenance, and lead professionals who provided useful feedback. Vicki Ainslie, Dana Bres, Robert Brown, Kevin Cleary, Alan Isaac, David Levitt, Linda Lewis, Dennis Livingston, Eric Oetjen, Roy Reveilles, Ron Rupp, Joe Shirmer, Aaron Sussell, Peter Tiernan, David Thompson, Richard Tobin, Ellen Tohn, Veda Watts, and Mike Wilson served on the Technical Panel for this project. A special thanks goes to these individuals for their contributions.

This Guide was developed by the U.S. Department of Housing and Urban Development's Office of Healthy Homes and Lead Hazard Control through a contract with ICF Incorporated. Dennis Livingston created the illustrations and provided technical content for this Field Guide.

WHY SHOULD I FOLLOW THIS GUIDE?

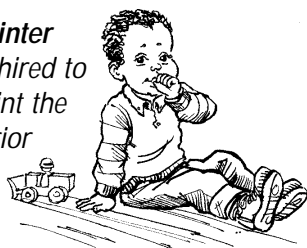


Renovation of a two-story, 19th century house included removing paint from floors and woodwork using power sanders, hand sanders, scrapers, torches, heat guns, and chemical paint strip-

pers. Ceilings were also repaired, and wallpaper and paint were removed from several walls. The family that owned the home temporarily moved out of the house. They returned when the work was only partly completed. There was dust throughout the house.

The family discovered that something was wrong when one of the family's dogs began to have seizures. A veterinarian found that the dog had been lead poisoned. The mother and children had their blood tested, and found that all of them had very high levels of lead in their blood. All three were admitted to the hospital for severe lead poisoning.

A painter was hired to repaint the exterior of an old

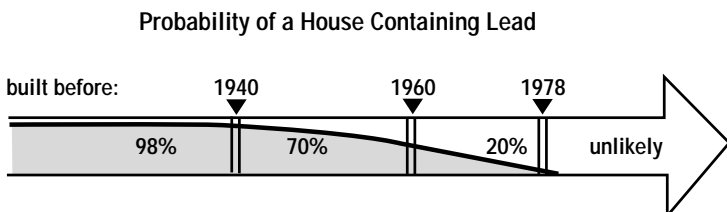


Vermont home occupied by a couple expecting the birth of their first child. The painter used a power grinder to remove the old paint from the exterior siding. While the painter worked, the window to the baby's nursery was left open, and the entire room, including the crib, became covered with dust.

Fortunately, the couple noticed the dust, and understood the potential risk. They called in another painter who was qualified to control lead hazards. He cleaned up the paint dust and the newborn baby moved into a clean, safe home.

Most Old Homes Contain Lead-Based Paint

- Most homes built before 1978 contain some lead-based paint. Lead-based paint is more common and was used more extensively in homes built before 1950.



- Homes built before 1950 also used paint that had a higher concentration of lead.

WHY FOLLOW THIS GUIDE?

Poor Maintenance Endangers Children

- In poorly maintained houses, lead-based paint, which may be several layers down, flakes and peels off. Paint failure is usually caused by moisture problems. Sometimes rubbing or impact causes paint failure. Doing work improperly can also cause a lot of dust.
- Lead-based paint chips and dust then mix with house dust and build up in window troughs and on floors.
- Children are endangered when lead in paint chips, dust, and soil gets on their hands and toys which they may put in their mouths.
- Lead can make children very sick and cause permanent brain and nerve damage. It can also result in learning difficulties and behavior problems. This damage is irreversible. It is a tragedy we can prevent.
- If paint is kept intact and surfaces are kept clean, children can live safely in a home painted with lead-based paint.
- Uncontrolled or uncontained dust and debris from repainting and/or renovation that disturbs lead-based paint in a well-maintained home can also expose children to unsafe levels of lead.

Changing Common Work Practices Can Protect Workers and Children

- Lead-based paint can also pose a threat to workers by causing damage to their brains, and nervous and reproductive systems.
- With small changes in work practices, workers can protect themselves and their customers from lead exposure.
- These changes include:
 - Keeping dust to a minimum.
 - Confining dust and paint chips to the work area.
 - Cleaning up during and after work. Special cleanup procedures must always be used.
 - Taking dust wipe samples to make sure cleaning removed lead-contaminated dust. (Dust wipe sampling is described in Section 5D, p. 71.)

Who Should Use This Guide?

- Building maintenance workers and their supervisors
- Painters
- Repair, renovation, and remodeling contractors
- Property managers and owners
- Homeowners
- Local housing agency staff and public health staff

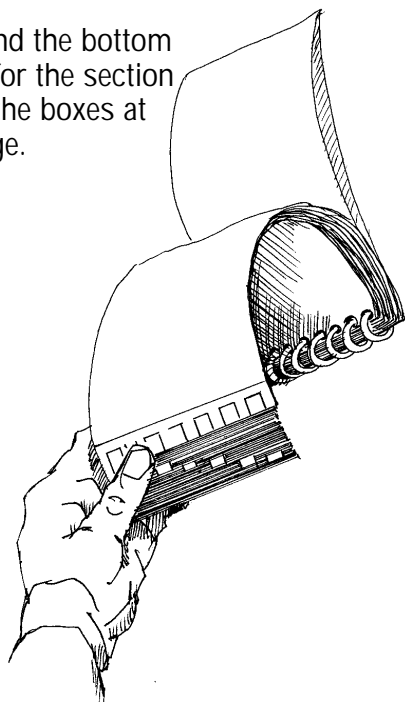
When Should I Follow This Guide?

- To fix a specific problem.
- During routine maintenance or apartment turnover.
- In homes where there may be a young child or a pregnant woman.
- During work supported by Federal funds that must be performed using safe work practices under Federal regulations.

HOW TO USE THIS GUIDE

This guide is divided into 5 sections.

To locate a section, bend the bottom of these pages. Look for the section you want by lining up the boxes at the bottom of each page.



The Basics

Before You Start Work

Doing the Work

At the End of the Job

Resources
(Includes Glossary)

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REMEMBER THESE PRINCIPLES

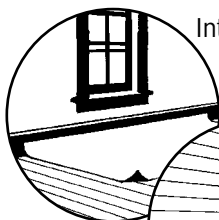
- 1. ASSUME:** **Paint in Homes Built Before 1978 Contains Lead**
(Unless a lead-based paint inspection shows it doesn't.)
Exposing Anyone to Dust, Especially Children, is Bad
- 2. CHECK:** **Federal, State, and Local Regulations**
 - OSHA has rules for worker safety
 - EPA and your local community have rules for waste disposal
- 3. AVOID:** **Creating Dust**
 - Use low dust work practices (for example, mist surfaces with water before sanding or scraping)**Spreading Dust**
 - Cover area under work with durable protective sheeting (plastic or poly)
 - Keep dust contained to immediate work area
- 4. PROTECT:** **Occupants, Particularly Children**
 - Keep them away from work area
 - Clean up work site before they return**Workers**
 - Wear proper respiratory protection for lead dust
 - Keep clean
 - Don't take dust home
- 5. CLEAN UP:** **After All Work**
 - Clean up is particularly important if painted surfaces were broken or wall cavities were opened
 - Take dust wipe samples to make sure that it is safe for children to return
- 6. MAINTAIN:** **A Dry Building**
 - Moisture problems can cause paint failure, building deterioration, and encourage pests**All Painted Surfaces**
 - Well-maintained paint generally does not pose a health risk**Clean and Cleanable Surfaces**
 - Keep floors and painted surfaces smooth
 - Damp mop them often
 - Clean rugs and carpet well

ROUTINE WORK PRACTICES

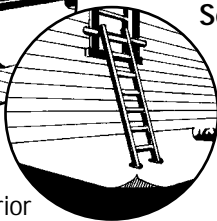
The following pictures appear throughout the Guide and refer to specific sections covering these practices.



Correct the Cause of the Problem. Before work starts, correct the conditions causing damage to the home. See Correcting the Cause of the Problem, p. 7.



Interior

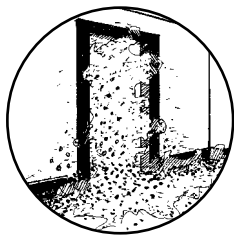


Exterior

Set Up Work Area. Set up the work area properly. See Section 2: Set Up the Work Area - Interior & Exterior, p. 13 and p. 15, respectively.



Clean Up and Clear. Thoroughly clean up the work area using the procedures described in this guide. Then, take dust wipe samples to see if it is safe for children to return. See Section 4: Cleaning Up, p. 47 and Check Your Work, p. 51.



High Dust Jobs. Some activities are likely to create high amounts of dust during the job. See Section 3: High Dust Jobs, p. 45 and follow the guidelines in this section to ensure that this work is performed safely.



Important!! This symbol points out important details where special attention is needed.

CORRECTING THE CAUSE OF THE PROBLEM

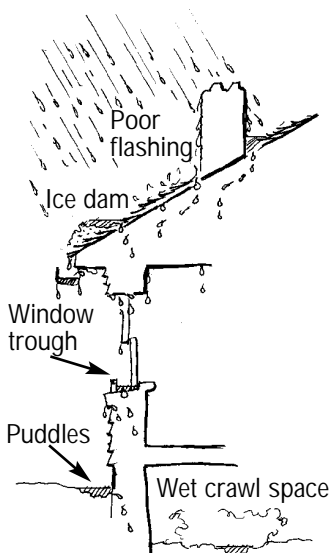
If a job involves repairs to a damaged paint surface, it is important to correct the cause of the damage, or the damage will occur again. Damaged surfaces that contain lead-based paint represent a health threat to the occupants.



The following conditions are examples of potential causes of damage to painted surfaces. Be sure that the planned work will correct these conditions if they are present.

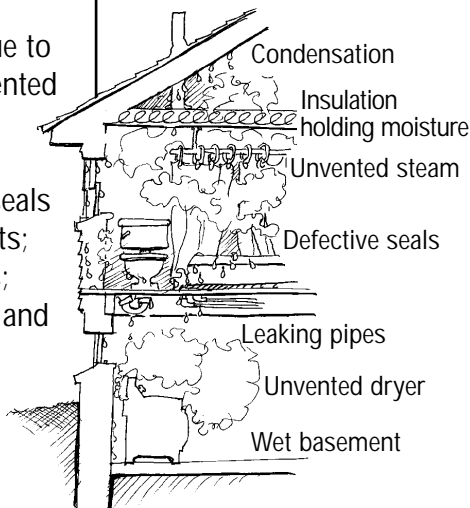
Moisture From Outside

Roof leaks; incorrectly installed flashing; defective downspouts and gutters; water collecting in window troughs; puddles of water at foundations; leaking basement walls; wet crawl spaces.



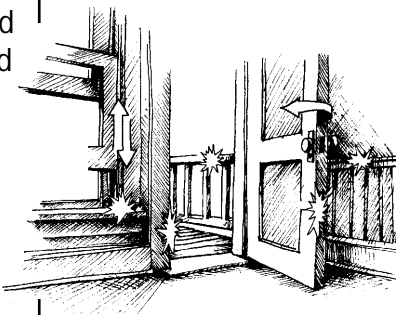
Moisture From Inside

Attic condensation due to poor ventilation; unvented steam from showers and cooking; leaking plumbing and failed seals around tubs and toilets; condensation in walls; unvented dryers; wet and poorly maintained basements.



Rubbing and Impact of Painted Surfaces

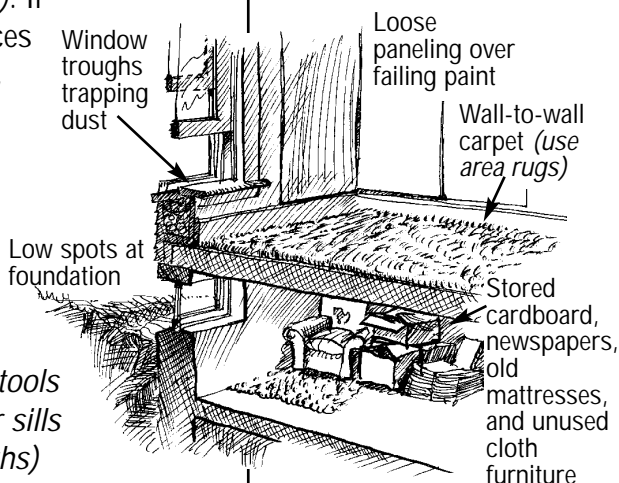
Binding doors; unprotected painted walls and trim; and rubbing from opening and closing painted windows.



Places that Collect Dust and Paint Chips

Where feasible, repair or remove places where dust and paint chips may accumulate and can't be easily cleaned (*such as old wall-to-wall carpet and unused items stored in the basement*). If

these places are damp, they may also be home to mold. Keep flat surfaces (*such as window stools or interior sills and troughs*) clean and cleanable.



Structural Damage

Some surface damage may be caused by structural damage such as wood rot, termites, foundation settlement, and foundation shift. These problems must be addressed before surface repairs are made.

RESTRICTED PRACTICES

Goal: Don't use unsafe work methods. Some work methods create such high levels of dust that they must not be used when working on surfaces that may contain lead-based paint.

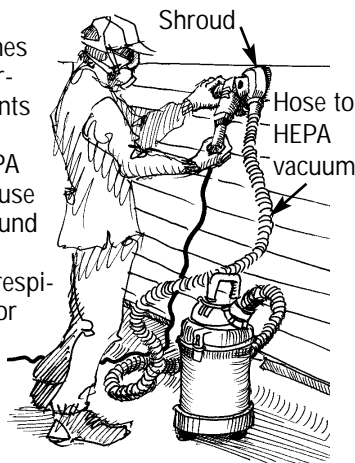


Don't Use Power Sanders or Grinders Without HEPA Vacuum Attachment.

These machines create a lot of dust that can contaminate a building and the ground around a building endangering workers, neighbors, and occupants.

Controlled Sanding or Grinding With HEPA Vacuum Attachment Is Acceptable.

If the sanding or grinding machines are "shrouded," which means surrounded with a barrier that prevents dust from flying out around the perimeter, AND attached to a HEPA vacuum, they can be used. Because some dust may still blow out around the perimeter, workers near the machine should wear half-mask respirators rated by NIOSH as N100 (or HEPA) at a minimum. Also, the work area must be completely isolated if the machine is used inside (see Section 3: High Dust Jobs, p.45). Because these tools can create high levels of dust and require additional precautions, their use is beyond the scope of this guide.



Don't Use Open Flame/High Heat Removal of Paint.

There is no acceptable use of an open flame torch or high temperature heat gun (above 1100 degrees F) to remove paint.

- It produces toxic gases that a HEPA dust canister on a respirator cannot filter out on its own (a second, organic filter is necessary).
- It creates high levels of very toxic dust that is extremely difficult to clean up.
- It can burn down a house.

Do Use a Heat Gun on Low Setting.

A heatgun set below 1100 degrees F may be used with caution. It is recommended for small areas only, such as the edge of a door, the top of a window stool, or the friction surface of a window jamb.



Don't Use Paint Strippers Containing Methylene Chloride.

Many paint strippers are potentially dangerous. Strippers containing methylene chloride should not be used because this chemical is extremely toxic and is known to cause cancer.



Other Chemical Strippers with Appropriate Precautions Are Acceptable.

Chemical strippers without methylene chloride are safer to use, as long as the precautions printed on the container are followed. Take extra precautions to mask areas near stripping.



Don't Use Uncontained Hydroblasting.

Removal of paint using this method can spread paint chips, dust, and debris beyond the work area. This result makes it difficult to clean up these hazards at the end of the job.



Contained Pressure Washing Is Acceptable.

Removal of paint using contained pressure washing within a protective enclosure to prevent the spread of paint chips, dust, and debris may be done. Because this method requires additional precautions that are beyond the scope of this guide, it should only be used by certified lead abatement workers.



Don't Use Uncontrolled Abrasive Blasting.

This work method can also spread paint chips, dust, and debris beyond the work area. This result makes it difficult to clean up these hazards at the end of the job.



Contained Blasting Is Acceptable.

Contained abrasive blasting within a protective, locally exhausted enclosure to prevent the spread of paint chips, dust, and debris may be used. Because this method requires additional precautions that are beyond the scope of this guide, it should only be used by certified lead abatement workers.



Avoid Extensive Dry Scraping or Sanding.

Extensive dry scraping or sanding create large amounts of paint chips, dust, and debris that are hard to contain.



Use Wet Methods or Limited Dry Scraping and Sanding.

Mist surfaces before scraping and sanding. Continue to mist while working. Dry scraping or sanding of very small areas (for example, around light switches or outlets) may be done if flat surfaces below these areas are covered with protective sheeting. These methods should be avoided on areas larger than 2 square feet per room, and workers must have adequate respiratory protection.

KEY STAGES OF A JOB

Quality work requires thinking through the job from start to finish. Here are the basic stages of the jobs described in this guide.

Before Starting	<ul style="list-style-type: none">• Find the causes of damage• Prioritize work• Hand out lead hazard information pamphlet (see note below)
Work	<ul style="list-style-type: none">• Set up work area<ul style="list-style-type: none">— Separate work space from occupied space— Isolate high dust areas• Correct cause(s) of problem(s)• Complete the job using safe work practices, such as those shown in this guide
Finish the Job	<ul style="list-style-type: none">• Clean up thoroughly• Dispose of waste safely• Check quality of work and correct problems
Maintain the Work	<ul style="list-style-type: none">• Educate occupants about risks from lead-based paint• Maintain a safe and healthy home

Renovation Notice About Lead Safety

Note: Federal law requires that owners and occupants of a house or apartment built before 1978 receive the pamphlet *Protect Your Family From Lead In Your Home* prior to the start of renovation work. The requirement applies to any work that will disturb a painted surface larger than 2 square feet when the work is done by:

- Contractors who have been hired to do any kind of work. Among others, this can apply to painting, drywall, and electrical trades.
- Owners of rental properties who have work performed by maintenance staff.

See p. 67 for more information about this requirement.

THE BASICS

SET UP THE WORK AREA — INTERIOR

Restrict Access

- Ask occupants to leave the room where work will be done.
- Have them stay out until final cleanup.
- Place "DO NOT ENTER" tape across doorway or post sign.



Caution: If the work will create a large amount of dust, follow the guidelines in Section 3: High Dust Jobs, p. 45.

Protect Floor

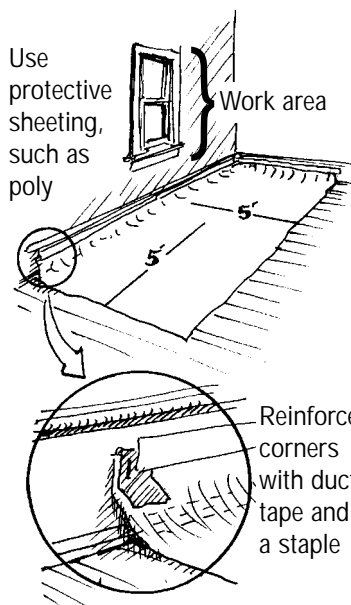
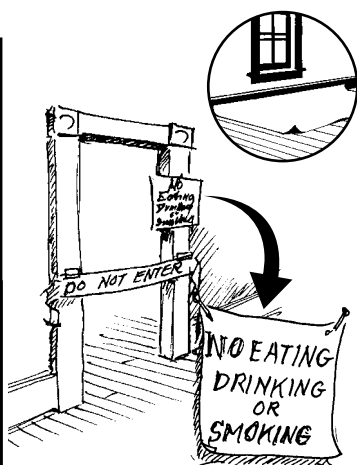
- Place protective sheeting on floor extending about 5 feet from the work area.
- Tape protective sheeting to the baseboard under work area using masking tape (or durable tape where masking tape doesn't work).

Protect Furnishings

- Remove drapes, curtains, furniture, and rugs within 5 feet of work area.
- Cover any furniture within 5 feet of work area that cannot be moved.

Stock the Work Area

- Put all necessary tools and supplies on protective sheeting before beginning work to avoid stepping off the protective sheeting.



BEFORE YOU START WORK

Tracking

- To avoid tracking dust off the protective sheeting, wear non-skid shoe covers on protective sheeting and remove them each time you step off the protective sheeting.

OR

- Wipe both top and bottom of shoes with a damp paper towel each time you step off the protective sheeting.

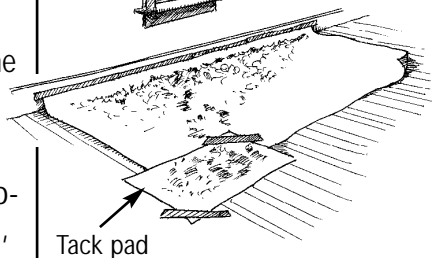
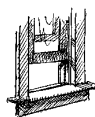
OR

- Clean off shoes using a tack pad (a large sticky pad that helps remove dust).

OR

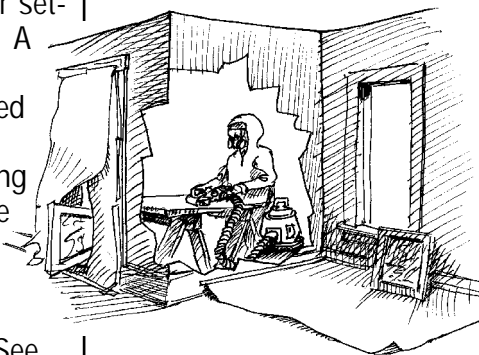
- Remove shoes every time you step off the protective sheeting.

Shoe cover



Set Up Dust Room (Optional)

- When working on components that can be moved, such as doors and window sashes, consider setting up a dust room. A dust room is an area isolated from occupied areas where workers can do dust generating work. The door of the room is covered with a flap and the floor is covered with protective sheeting. See Section 5D: Setting Up a Dust Room, p. 73.



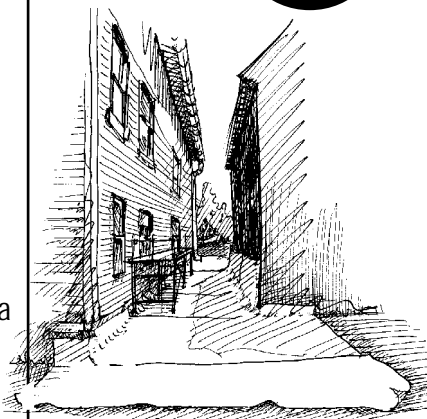
- Using a dust room contains dust and paint chips, and makes cleanup easier. It also helps protect occupants, as well as other workers.

SET UP THE WORK AREA — EXTERIOR

Protect Ground

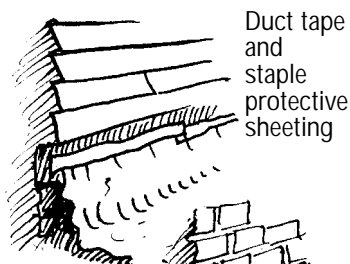
- When working on the ground floor, lay protective sheeting 10 feet from work surface or as space permits. When working on the 2nd story or above, extend the sheeting farther out.
- Vertical shrouding on scaffolding should be used if work is close to a sidewalk, street, or another property, or the building is more than three stories high.

Important: Covering the ground protects the soil from contamination by lead-based paint chips and dust.

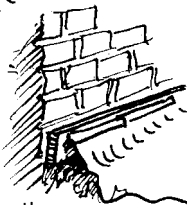


Attach Protective Sheeting to Wall

- Protective sheeting can be taped and/or stapled to wood siding or ribbon board. A wood strip may need to be attached to a masonry wall.



Attach wood strip to brick to secure protective sheeting

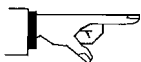
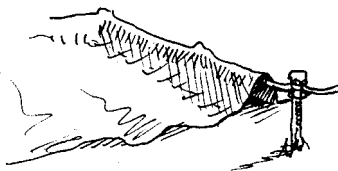


Build Curb

- Build a curb around work perimeter when a sidewalk or another property is near, or when wind may blow debris off protective sheeting.

Caution: This may pose a tripping hazard.

Curb edge of protective sheeting



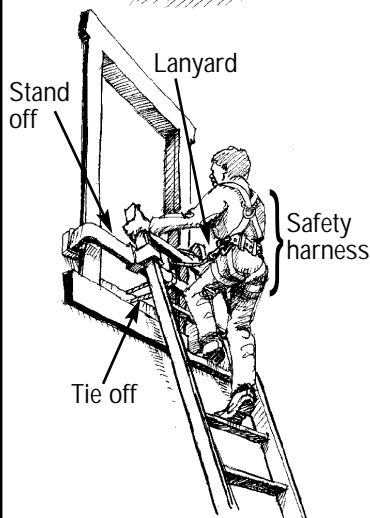
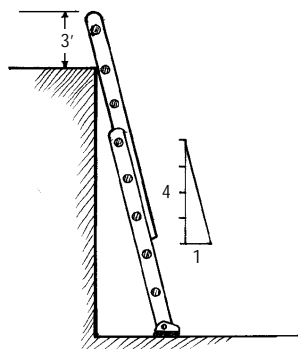
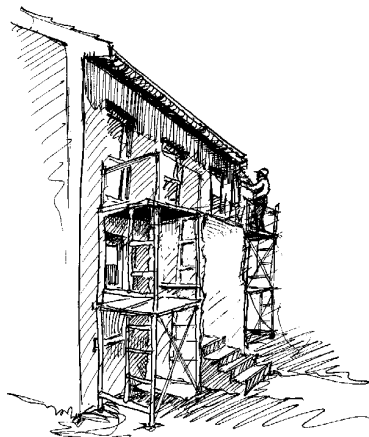
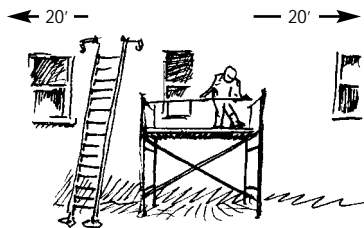
BEFORE YOU START WORK

Cover Windows and Doors

- All windows and doors within 20 feet of the work area must be closed. If they cannot be closed, seal with protective sheeting during work.
- If an entrance must be used that is closer than 20 feet, place a shroud above and on the sides of the entrance.

Use Ladder Safely

- Don't use a metal ladder near power lines.
- Check feet and rungs of ladder to make sure they are sound.
- Place the base of the ladder at a distance from the wall using a height to base ratio of 4:1.
- Ladder should extend 3 feet past the top of the surface area where work will be done.
- If using protective sheeting to cover the ground, cut slots in the sheeting and place the ladder feet directly on the ground—not on top of the protective sheeting.
- Tie off the top of the ladder, where possible.
- If the work is taking place at heights above 10 feet, tie off the ladder and secure yourself with a lanyard and harness.



WORKER PROTECTION

Protect Your Eyes

- Always wear safety goggles or safety glasses when scraping, hammering, etc.

Keep Clothes Clean

- At end of work period, remove dusty clothes and/or vacuum off dust. Wash them separately. Do not use compressed air to blow dust off clothing.

OR

Use Disposable Covers

- Wear disposable protective clothing covers. Disposable protective clothing covers can be stored in a plastic bag and reused if fairly clean and there are no rips. Small tears can be repaired with duct tape.
- Wear painter's hat to protect head from dust and debris.

Wear Respiratory Protection

- When work creates dust or paint chips, workers should wear at least a NIOSH-approved respirator for lead work. See Section 5D: Respiratory Protection, p. 69.

Post Warning

- Post sign and avoid eating, drinking, or smoking on site.

Wash Up

- Wash hands and face each time you stop working.

Disposable suit & shoe covers



Sign at work site entrance

BEFORE YOU START WORK

INTERIOR SURFACE PREP

PROBLEM

A wall or ceiling is sound, but has holes, uneven surfaces, or flaking and peeling paint.

SOLUTION

Prepare wall or ceiling to create a sound, intact surface for painting. Use methods that create a minimum amount of dust.

Set Up

- See Section 2, p. 13.



Remove Deteriorated Paint

- Wet scrape any loose, peeling, or flaking paint.



Fill and Patch Holes

- If removal of damaged edges is necessary, mist surface before removal.
- Skim and fill holes and cracks less than 1/16 inch wide with a non-shrinking spackle compound.
- If sanding is necessary to feather edge, use wet abrasive sponge or wet-dry sandpaper with water.



Prep Surface

- Clean wall, particularly in kitchen area.
- De-gloss surfaces as necessary (use liquid sandpaper or wet-dry sandpaper with water).



Important: Allow surface to thoroughly dry before priming.

- Prime surface using high-grade primer.
- Apply top coat. Use one or two coats as necessary.



Clean Up and Clear

- See Section 4, p. 47.

DOING THE WORK

INTERIOR SURFACE PREP CONT'D

PROBLEM

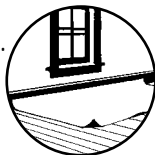
A wall or ceiling has cracking, peeling, or alligating paint, but most of the surface is sound.

SOLUTION

Use a coating designed for longer durability than paint. Some of these coating systems include mesh.

Set Up

- See Section 2, p. 13.



Liquid Coating

Test Surface

- Where a long-lasting system (sometimes called encapsulant) is to be brushed, sprayed, or rolled, surface preparation is very important.
- If an encapsulant is used, use one that is approved by a state government. If your state does not have a list of approved encapsulants, it is recommended that you check with a state that does. Contact the National Lead Information Center at 1-800-424-LEAD for the telephone numbers of states with lists.
- A sample area should be tested before application. Follow manufacturer's instructions exactly.

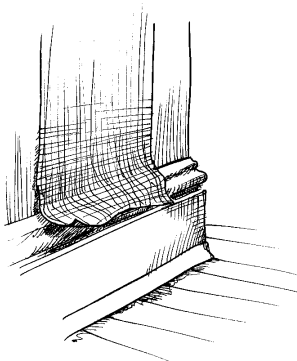
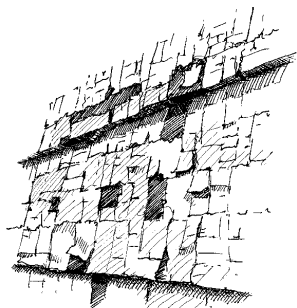
Apply System Base Coat

- Apply system base coat with a high nap (approximately 3/4 inch) roller. Follow the product instructions.

Mesh System

Apply Mesh

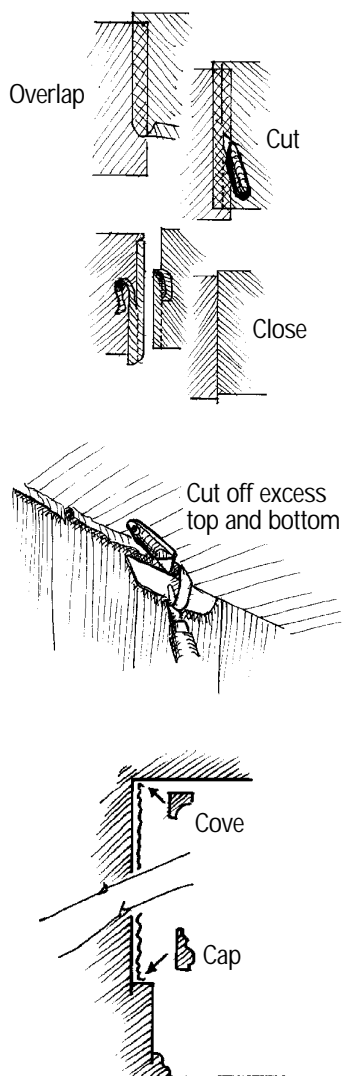
- Where there is extensive cracking or alligating, consider using a system that includes mesh because it can add strength and durability.
- Cut the mesh leaving a 2 inch overlap at ceiling and baseboard.
- Install so that mesh is plumb.



Important: For mesh systems, follow manufacturer's instructions exactly.

Apply Mesh Cont'd

- Press mesh into the base coat with a wall-paper brush, spackle knife, or roller.
- Overlap seams by 1 inch. Cut down the center of the seam and remove the 2 waste strips. Let seams butt against each other.
- Using a spackle knife, press the mesh at the bottom and top. Then cut off the excess.
- Roll on the top coat. Make sure that there is complete and even coverage.
- If there is a risk of further peeling, the top edge of mesh can be reinforced with cove or crown molding, and the bottom reinforced with base cap.



Clean Up and Clear

- See Section 4, p. 47.



EXTERIOR SURFACE PREP

PROBLEM

Exterior wood surface is chipping and peeling and may be painted with lead-based paint.

SOLUTION

Prepare a sound, intact surface for painting. Use methods that create minimal dust.

Set Up

- See Section 2, p. 15.

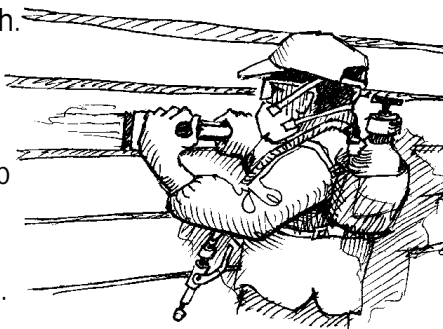


Clean Surface

- Clean wood with detergent (or lead-specific cleaner) and scrub brush.

Wet Scrape

- Wet scrape woodwork and siding. Mist small areas frequently to keep down dust. Using a pump sprayer in a knapsack is convenient.



Mist and Sand

- Wet sand using wet-dry sandpaper or wet sanding sponges. A power sander may be used if attached to a HEPA vacuum, and the worker is wearing respiratory protection.

Paint

- Prime and paint.

Clean Up and Clear

- See Section 4, p. 47.



Dispose of Water

- If you dislodge paint using pressure washing, water must be collected and may need to be tested (see local regulations for water disposal procedures in your area).

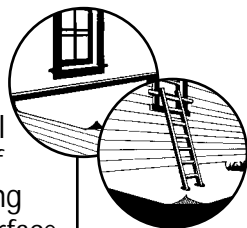
P A I N T R E M O V A L

PROBLEM Areas of paint are peeling or flaking or there is evidence that a child has been chewing on a painted surface. An example of a surface accessible to children is the inside nose of a window stool (inside sill).

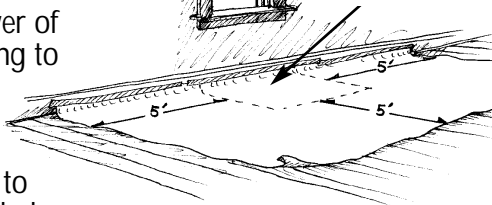
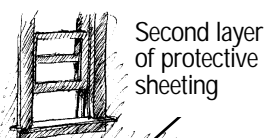
SOLUTION Remove all paint using methods that do minimum harm to the surface, create minimal dust, and are safe for workers.

Set Up

- See Section 2, p. 13 or p. 15.
- When using chemical strippers, the edge of the protective covering below the painted surface must be tightly fastened to the wall so that the stripper doesn't damage other surfaces.



- Recommendations:
 - Use a second layer of protective sheeting to collect stripping waste. The first layer remains in place to protect surfaces below.
 - For removable components, consider having paint stripped off-site or installing an entirely new component.



Chemical Removal

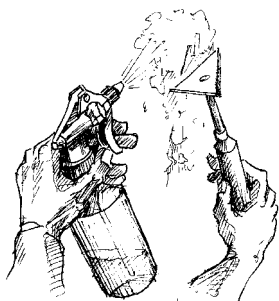
- If a large area of paint is to be stripped, consider hiring a professional.
- Follow the manufacturer's instructions carefully when using chemical paint strippers.



Caution: If using a caustic stripper, neutralize the surface according to the manufacturer's directions before applying new paint.

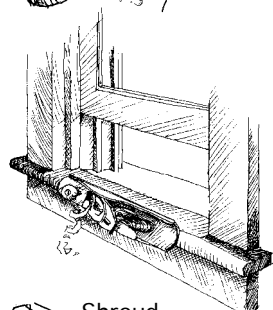
Chemical Removal Cont'd

- After stripping paint from wood, a paint residue will remain in the wood. Use caution when sanding the bare wood because it may contain lead residue.



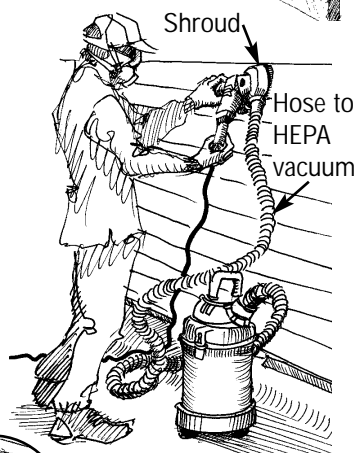
Hand Stripping

- Paint can also be removed with a paint scraper. Be sure to mist areas where paint is to be removed. Using a hand plane removes all paint and all residue. It also creates very little dust.



Mechanical Stripping

- When using power tools, such as sanders or grinders to remove or feather paint, make sure the tool is shrouded and attached to a HEPA vacuum. Respiratory protection is still necessary.

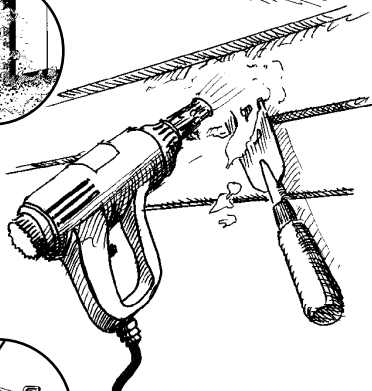


Caution: High dust potential.



Heat Stripping

- When using a heat gun to remove paint, be sure the temperature setting is kept below 1100 degrees F.



Clean Up and Clear

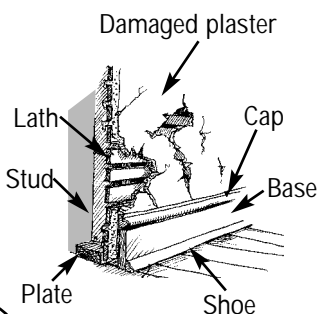
- See Section 4, p. 47.



DAMAGED INTERIOR WALL OR CEILING

PROBLEM Wall or ceiling area is too badly damaged to repair, and demolition would create a large amount of dust.

SOLUTION Install a new durable surface over the damaged area using methods that create little dust and do not require demolition.

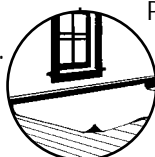


Set Up

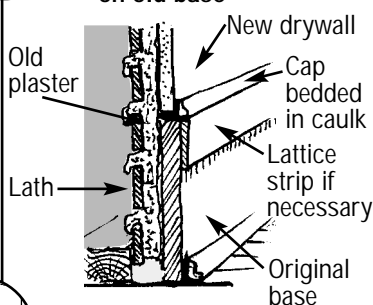
- See Section 2, p. 13.

Cover With Drywall

- Mechanically fasten drywall or veneer board through damaged plaster to studs.
- Seal the perimeter, particularly the bottom edge.



Drywall laminate sits on old base

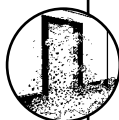


—On Base

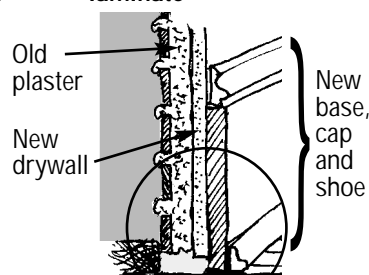


- Avoid removing existing base.

Caution: High dust potential.

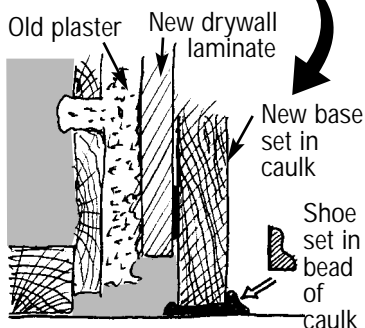


New base over drywall laminate



—Behind Base

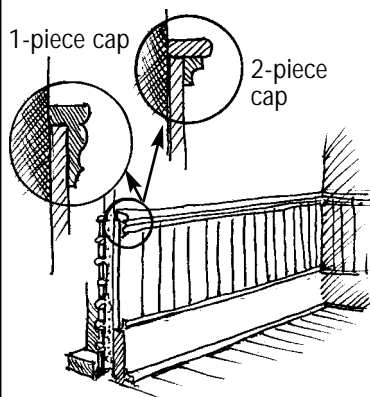
- Where base will be replaced, bed the new base in bead of caulk on the back and bottom. Then, bed shoe molding in a bead of caulk to seal.



DOING THE WORK

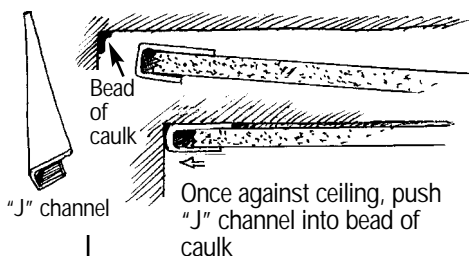
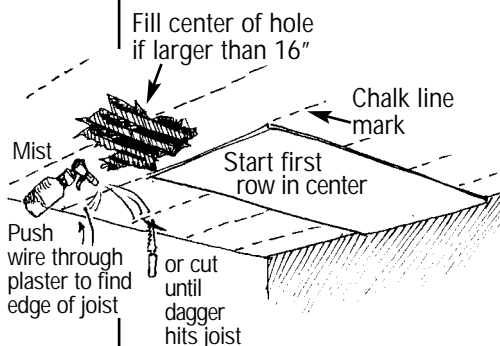
Install Wainscoting

- Where bottom 3 or 4 feet of wall is damaged beyond repair, the wall can be enclosed with wainscoting. The wainscoting can be installed above the existing baseboard.
- Bed the lower edge in a bead of caulk with a trim piece also bedded in caulk.
- Finish top with cap molding.



Repair Holes in Ceilings

- When laminating drywall to ceilings, it is critical to screw into joists, not lath.
- Old joists may be irregularly spaced, so each joist center must be located.
- A drywall dagger can be used to find the joist edge, as can a heavy gauge wire pushed through the plaster.
- The drywall edges should be taped and spackled.
- If walls will not be spackled, perimeter edges can be finished with "J" channel bedded in a bead of caulk.



Clean Up and Clear

- See Section 4, p. 47.

DETERIORATED EXTERIOR SURFACES

PROBLEM

An exterior painted surface is badly damaged.

SOLUTION

Whenever possible, repair the surface, prep, prime, and paint exterior trim and siding, and then maintain the surface. This method is the preferred approach.

When a surface is too badly damaged to repair, install vinyl or aluminum siding, or aluminum wrap to create a safe, durable covering that protects the surface and does not cause further deterioration.

Note: Siding must be installed correctly or it may lead to wood rot and/or interior paint failure. Siding may also become home to insects and mold. Correct installation is critical in both hot and cold climates.

Cover Deteriorated Surface With Siding

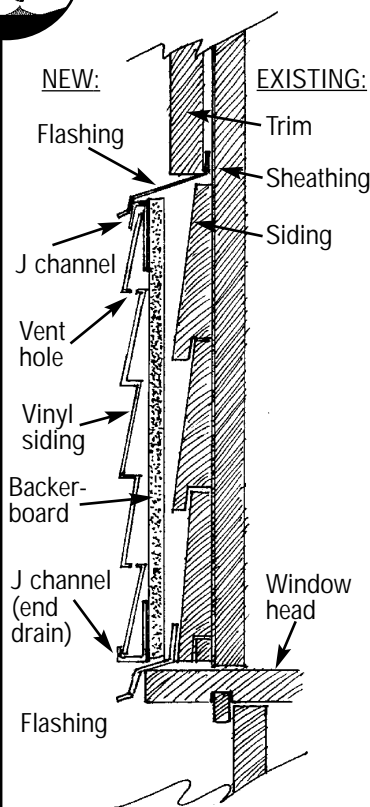
Set Up

- See Section 2, p. 15.



Install Siding

- Carefully follow the manufacturer's instructions for installing siding over an existing surface.
- Use a styrene backboard with an R-value of at least R2.
- Take care to properly install flashing, especially at horizontal trim and window and door heads.
- The siding system must be well vented but sealed at the bottom to prevent flaking and peeling paint from falling from behind the siding to the ground.
- Be sure that water can drain out.



DOING THE WORK



Important: *The entire home should be well ventilated to prevent moisture build-up that can cause structural damage and/or paint failure.*

Clean Up and Clear

- See Section 4, p. 47.



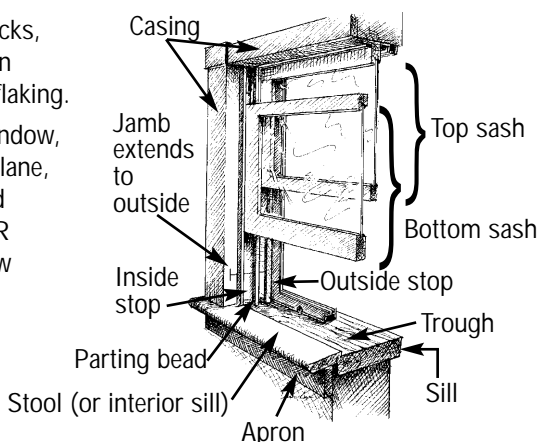
STICKING WINDOW

PROBLEM

Window sticks, and paint on window is flaking.

SOLUTION

Remove window, scrape or plane, repaint, and reinstall, OR install a new window.



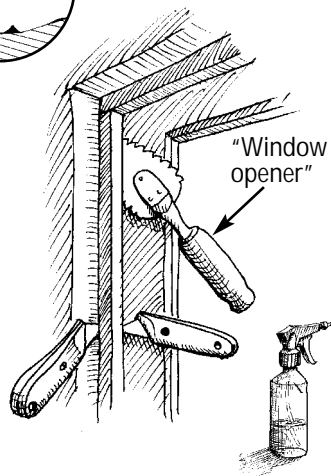
Set Up

- See Section 2, p. 13.



Loosen Painted Sashes

- If window is painted shut, mist and cut window joint with utility knife. Then open joint between sash and stop with a "window opener." Mist while working.



Remove Inside Stop Molding

- Mist and remove stop molding from sides and head. Dispose of properly unless it has historic value.

Remove Bottom Sash

- If counterweight cord or chain is attached to the sash, knot it or tie it to a stick when removing from sash so it does not get pulled into the weight compartment.



DOING THE WORK

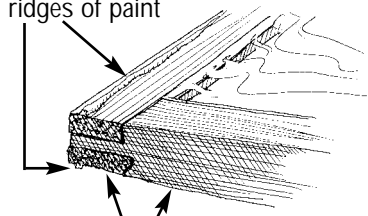
Remove Top Sash

- Mist and remove parting bead. Then remove the top sash.

Wet Scrape or Plane

- Set sash on a work bench, clamp, and wet scrape all surfaces. Or use a power planer attached to a HEPA vacuum.

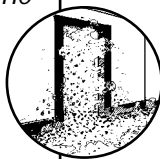
Wet scrape these ridges of paint



Seal this bottom edge very well, particularly the end grain. Use linseed oil or other sealant.



Caution: High dust potential. This work can be done in a dust room. See Section 5D: Setting Up a Dust Room, p. 73.



Repair, Reglaze, Seal, and Paint

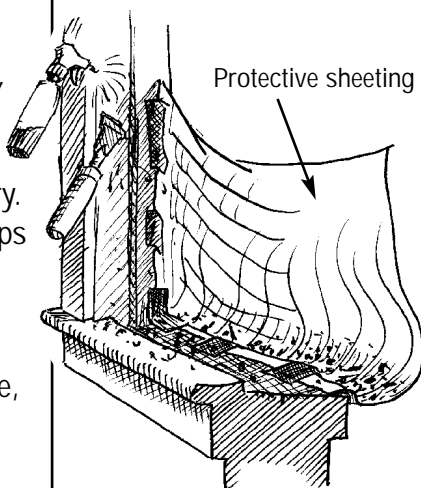
- Reglaze and repair as necessary. Wet sand, prime, and paint sash and jamb. Seal, but do not paint sash edges.



Important: Seal bottom edge of sash, particularly end grain.

Repair and Paint Jamb

- Repair jamb if necessary.
- To prevent dust and chips from falling outside the window, install a scoop of protective sheeting.
- Then wet scrape, prime, and paint.



Reinstall Sash

- Reinstall sash with new or wet scraped and repainted stop and parting bead.



Clean Up and Clear

- See Section 4, p. 47.

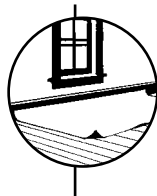
L O O S E W I N D O W

PROBLEM Loose sashes (lower and upper) do not operate smoothly, and they allow heat loss. Also, sashes rubbing against a painted jamb create paint dust.

SOLUTION Install sashes in window compression jamb liner to seal window and allow sashes to move easily without rubbing against jamb. If sashes or window components are badly deteriorated, replace window.

Set Up

- See Section 2, p. 13.



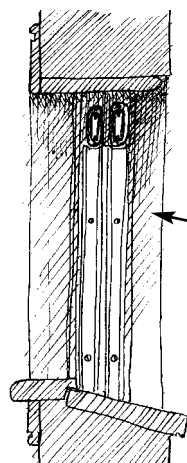
Install Window Jamb Liners

Remove Sashes and Paint

- Follow directions on pages 29 and 30.

Cut Jamb Liners

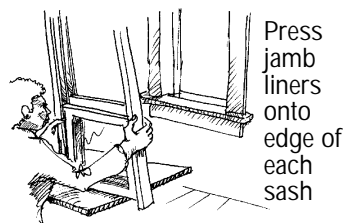
- Cut liners to fit in jamb (1/4 inch short of dimension). If pulley system is being saved, cut off directly below pulley.



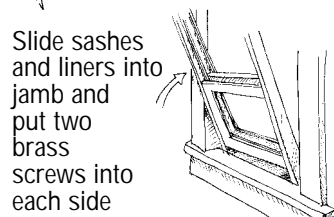
Window jamb liner installed below pulleys to keep counterweight system working

Install Jamb Liners

- Press jamb liners onto sash.
- Attach jamb liners with brass screws on top and bottom of each side.



Press jamb liners onto edge of each sash

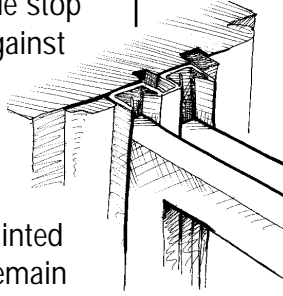


Slide sashes and liners into jamb and put two brass screws into each side

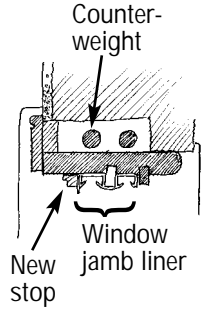
DOING THE WORK

Install Stop Molding

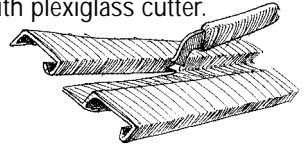
- Install new inside stop molding tight against jamb liner.



- If top sash is painted shut and is to remain fixed, adjust the above steps as follows:
 - Cut away flange between channels of jamb liner.
 - Leave parting bead intact and install bottom sash as above.



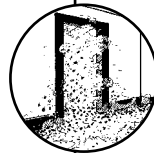
Cut flange of jamb liner with plexiglass cutter.



Replace Sash/Window

Choose an Option

- If the sashes or other components are too badly deteriorated to save, consider one of the following options:
 - Install new sashes in tilt-in jamb liners.
 - Replace sashes, stops, and parting bead with a vinyl or aluminum window unit.
 - Replace entire window including jamb casing, stool, and apron.



Clean Up and Clear

- See Section 4, p. 47.

WINDOW WON'T STAY OPEN

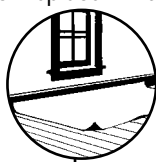
PROBLEM Window sash is loose and won't stay up without support. Propping the window open presents a danger to occupants, particularly children. When a window jamb liner is used, it may not be sufficient to keep the window open. (See page 31.)



SOLUTION Repair counterweight system or install hardware so the window will stay open securely, or replace window.

Set Up

- See Section 2, p. 13.



Option #1: Reinstall Counterweight System

Open Counterweight Panel

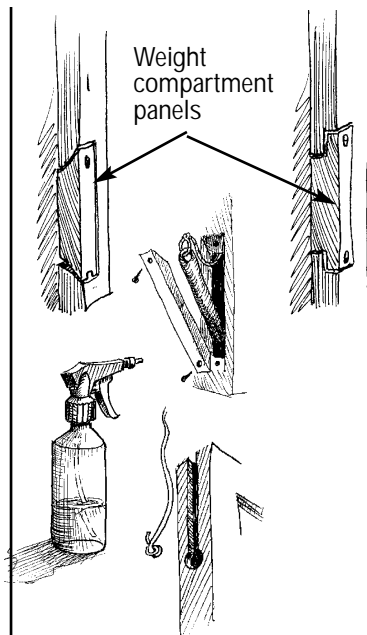
- Find top of panel. Mist and scrape paint from top edge to find screw or nail holding in panel. Remove screw and pry off panel.

Vacuum

- Vacuum weight compartment with HEPA vacuum.

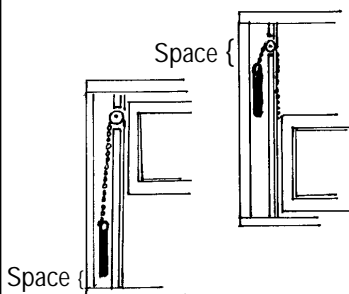
Remove Counterweight System

- Remove old rope or chain from counterweight and edge of sash.



Reinstall Counterweight System

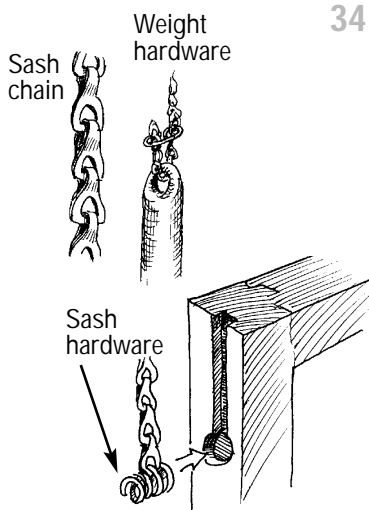
- Cut chain so weight is above bottom of weight compartment when open and weight is below pulley when closed.



DOING THE WORK

Reinstall Counter Weight System Cont'd

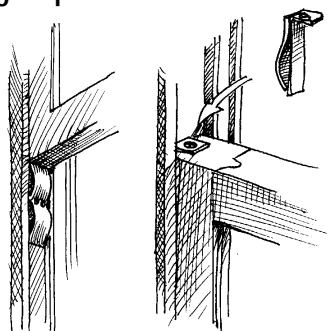
- Drop chain over pulley into weight compartment, pull out through panel opening, and attach to weight.
- Attach other end to edge of window sash using spring fixture. You may want to secure chain with fence staple.



Option #2: Install Spring Clips

Install Spring Clips

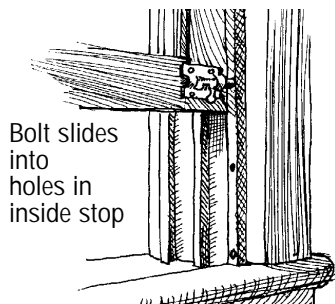
- Screw spring clips on to window as directions indicate. (2 styles shown.)



Option #3: Install "Hold Open" Hardware

Install Slide Bolt

- Screw slide bolt to bottom of window sash. Tap bolt to mark where you want to drill holes for bolt. Drill holes in inside stop at 3 or 4 points.



OR

Attach Hardware

- Attach hardware that uses spring to press against stop. To move sash, press lever. Release lever when window is at desired height.



Clean Up and Clear

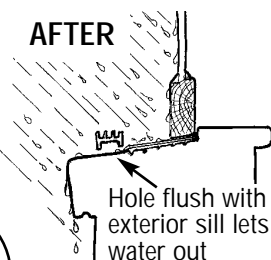
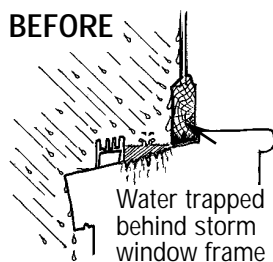
- See Section 4, p. 47.



DETERIORATED WINDOW TROUGH

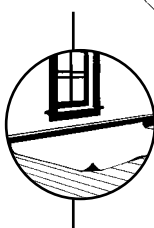
PROBLEM Storm window traps water behind the frame causing paint deterioration and damage to the sill.

SOLUTION Drill a drain hole through bottom of the storm window frame.



Set Up

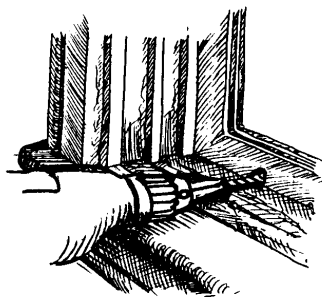
- See Section 2, p. 13.



Drill Drain Hole

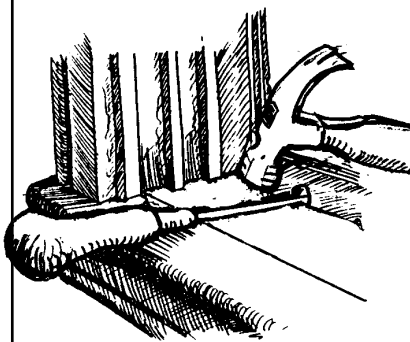
Drill

- To allow drainage, drill 2 holes through frame of storm window flush with sill. Drill holes approximately one quarter of the way from both sides. First, drill a 1/8 inch pilot hole, then the 3/8 inch hole.



Dent

- If flashing is installed in window trough and covers any part of the drain hole, run awl through drain hole. Tap with hammer to form dent in flashing to drain out water.



DOING THE WORK

Cover Trough with Flashing

Wet Scrape

- To make surface flat, wet scrape high points and remove any fasteners from trough.

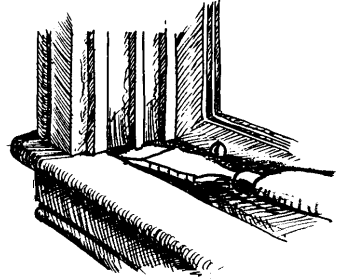


Cut

- Cut flashing 1/4 inch shorter than the width and length of trough.

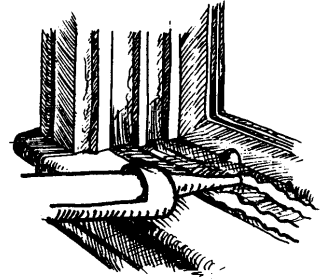
Chisel or Notch

- To allow flashing to fit tight to jamb, drive chisel under parting bead and outside stop — or notch each side of the flashing at these two points.



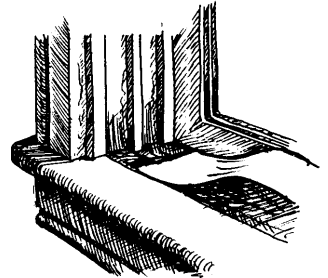
Check Fit

- Then slide flashing in to check fit. Remove and trim if needed.



Fasten

- To fasten flashing, run bead of adhesive caulk around perimeter of trough.

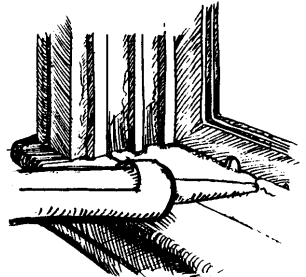


Install Flashing

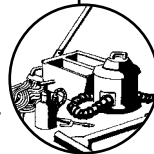
- Bed flashing in adhesive caulk bead and press down.

Seal

- Run a bead of caulk around perimeter of flashing. If necessary wipe off excess caulk with damp cloth. Try not to smear caulk on face of flashing.



Important: Do not cover drain hole with caulk.



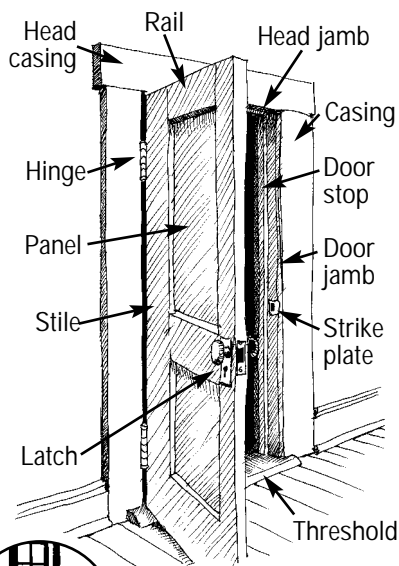
Clean Up and Clear

- See Section 4, p. 47.

DOOR NEEDS ADJUSTMENT

PROBLEM Edge of door is crushing against jamb on hinge side; or door is rubbing on latch side because hinges are loose. When paint on a door rubs or is crushed, dust and paint chips can result.

SOLUTION Adjust the door so that it opens and closes without damaging painted surfaces.

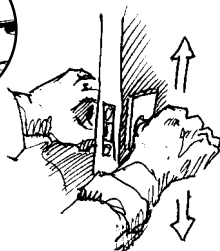


Set Up

- See Section 2, p. 13.

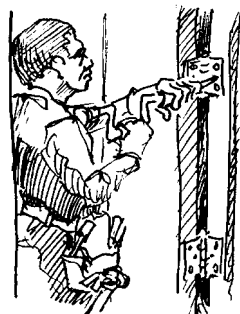
Check Door

- Grasp knob and try to move door up and down. If hinges are loose, door will move.



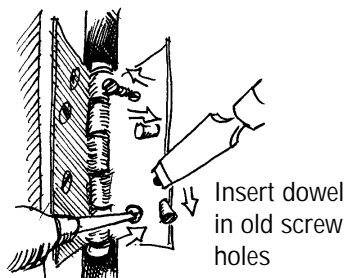
Remove Screws

- Remove screws that are most loose, but not all screws, so door remains hung.
 - Clear paint from screw notch with hammer and small screwdriver.
 - Unscrew. If screw head is stripped, use screwdriver bit in a brace.



Fill Hole

- Drive 3/16 inch or 1/4 inch dowel into screw holes as necessary to fill each hole. Cut dowels flush.



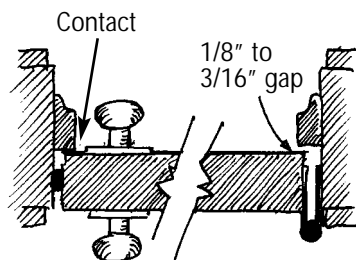
DOING THE WORK

Install New Screws

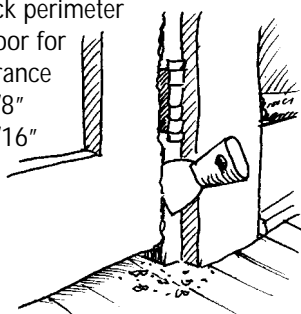
- Replace screws. Use longer screws if necessary. Using a screwdriver bit on a brace makes this easier. Then remove and replace remaining screws as necessary.

Adjust Stop

- Face of door should only contact the stop on the latch side of door frame. It should not crush or rub head or hinge side stop.
- Where stop is nailed, remove and replace with new matching stop. Leave 1/8 inch space between hinge, head stop, and the face of the door.



Check perimeter of door for clearance of 1/8" to 3/16"



Check Clearance

- If putty knife can't fit in gap between door and jamb at all points, crushing of painted surfaces may be occurring.

Adjust Depth of Hinge Leaf

- If door is crushing hinge side and there is more clearance than necessary on the latch side, install metal shims behind hinge leaves. Keep at least 1/8 inch clearance on leaf side and 1/8 inch clearance on latch side. If not enough clearance, see p. 39.
- If only a small increase is needed between leaves of hinge to create a gap between door edge and jamb, place a steel rod between hinge leaves near pin and close door to slightly bend apart leaves.

Crushing

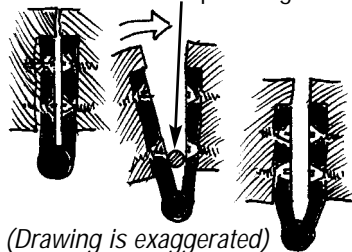


Space



Add shim stock

Use steel rod (like screwdriver) to bend open hinge



Clean Up and Clear

- See Section 4, p. 47.

DOOR RUBS OR STICKS

PROBLEM Door is scraping on latch side; or door is crushing jamb on latch side and there is not enough clearance on latch side to add shims to hinges. When paint on a door rubs or is crushed, paint chips can result.

SOLUTION Plane edges of door so that it operates smoothly and does not rub.

Set Up

- See Section 2, p. 13.

Remove Hinge Leaves

- Remove pins from hinges and hinge leaves from door.
- Set door on edge in a door hold. (See Section 5: Building a Door Hold, p. 74.)

Hand Plane Edge

- Mist surface and hand plane a chamfer edge.
- Use a smooth bench or jointer plane (not a block plane) to remove the rest of the paint from the edge. Continue to mist while working. If a power planer is used to remove paint, it must be attached to a HEPA vacuum. Some power planers need an adaptor to accept HEPA attachments.
- Once paint is removed, use either a hand or power planer.

Recut Gains

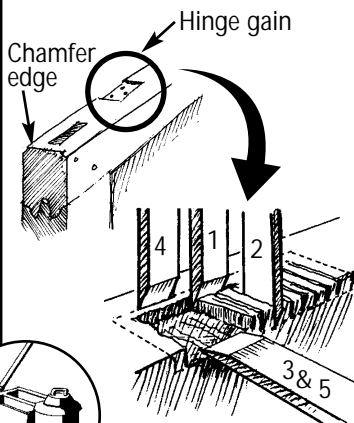
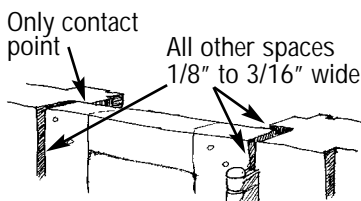
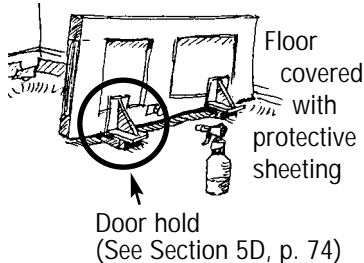
- Then, recut gains as necessary so hinge leaf is set about halfway into gain.

Seal Edges

- Seal edges of door, particularly the bottom, and rehang.

Clean Up and Clear

- See Section 4, p. 47.



DOING THE WORK

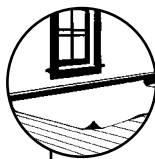
CHIPPING PAINT ON STAIRS OR FLOOR

PROBLEM Painted staircase treads, risers or floors are worn, or the paint is chipping. Paint and other coatings used on staircases and floors in older homes often contain lead. Everyday friction and wear can produce paint chips and dust.

SOLUTION Cover portions of stairs or floor that are worn with durable material.

Set Up

- See Section 2, p. 13.



Stairs – Option #1: Install Tread Covers and Riser Enclosures

Wet Scrape

- Mist and wet scrape any loose paint on treads and risers, particularly on edges.

Prime and Paint

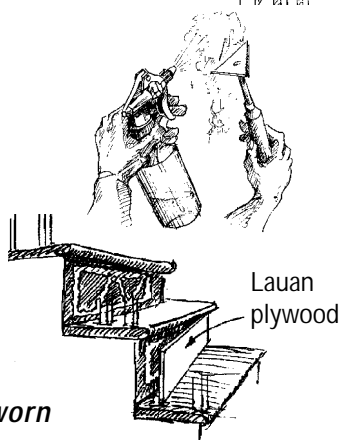
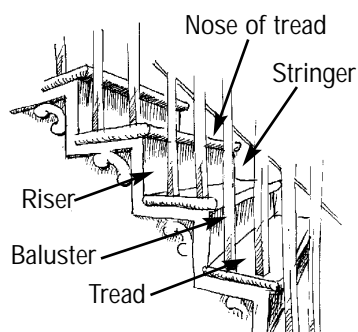
- Prime treads and risers. Paint edges that will not be covered by enclosures.

Install Riser Enclosure

- Cut 1/4 inch lauan plywood to fit each riser. Sand exposed edges of lauan.

Fasten

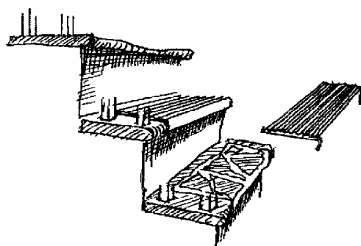
- Back caulk perimeter of riser with adhesive caulk. Press tight or nail with finish nails.



If nose tread is not worn

Cut and Install Tread Cover

- Cut cover to fit over the tread and nose.
- Install cover with adhesive caulk or screws.

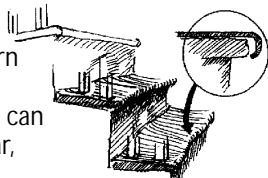


DOING THE WORK

If nose tread is worn

PROBLEM

Installing a rubber tread over a worn tread nose creates a hollow space under the rubber tread cover. This can cause the rubber tread cover to tear, posing a tripping hazard.

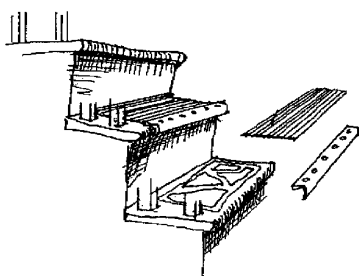


Cut and Install Tread Cover

- Cut tread cover to fit from the riser to rear edge of nose. Install with adhesive caulk or screws.

Install Metal Nose Cover

- Screw metal cover over edge of tread nose. It will span the worn area of the nose.



Stairs – Option #2: Install Staircase Runner

Wet Scrape

- Mist and wet scrape any loose paint on tread and riser, particularly on edges.

Prime and Paint

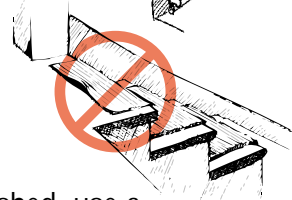
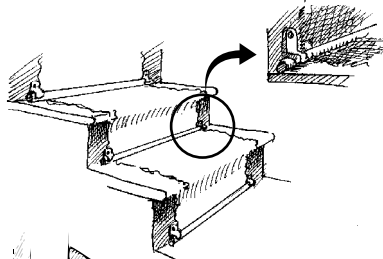
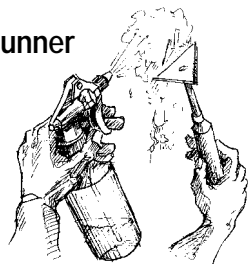
- Prime and paint treads and risers.

Install Runner

- Staple runner to top of top riser. Then fasten with staircase bars so runner may be easily removed for cleaning.



Important: Do not install runner or tread cover on landing of upper floor where its rear edge may become a tripping hazard.



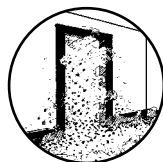
Floors

Prep Surface

- If a floor needs to be refinished, use a floor sander attached to a HEPA vacuum.



Caution: High dust potential.



Cover

- Apply a coating to the floor to keep it smooth and cleanable.
- To maintain a smooth and cleanable surface, it is recommended that the use of wall-to-wall carpeting be avoided. Area rugs can be used instead.



Clean Up and Clear

- See Section 4, p. 47.

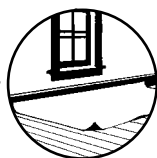
CHIPPED OR DAMAGED IMPACT SURFACES

PROBLEM Outside corners of walls, edges at passages, as well as trim, base cap, and shoe molding are being chipped due to impact from doors, furniture, and other objects. If these surfaces are covered with lead-based paint, the paint chips and the dust created may pose a health threat.

SOLUTION Protecting these surfaces with a durable material can prevent the creation of paint chips and dust.

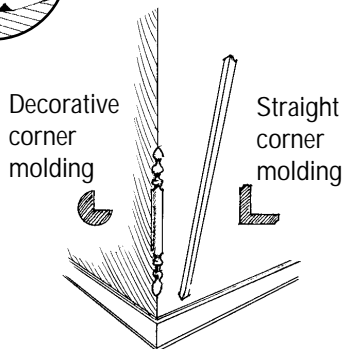
Set Up

- See Section 2, p. 13.



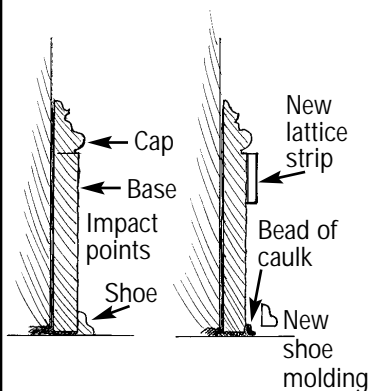
Enclose Outside Corner

- Cover outside corners of walls with corner molding. Attach with nails and/or with a bead of adhesive.



Protect Base

- In places where a base-board shows signs of impact, replace shoe and protect cap with lattice strip.
- When replacing shoe, bed new shoe in bead of caulk to seal out moisture and prevent infiltration of dust.



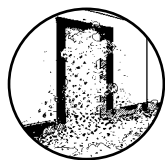
Clean Up and Clear

- See Section 4, p. 47.



H I G H D U S T J O B S

Some jobs create large amounts of dust. To be safe, workers doing this type of work should:



1. Wear half-mask respirators rated by NIOSH as N100 (or HEPA) at a minimum and be trained to wear and maintain them, or conduct air monitoring to show that they are not needed. (See Section 5D: [Respiratory Protection](#), p. 69.)
2. Completely isolate the work space from occupied spaces and use containment to protect other workers. (See next page.)
3. Receive lead worker or supervisor training from an accredited trainer. In most states, accredited courses are available. To locate a course in your state, contact the Leadlisting at 1-888-Leadlist (1-888-532-3547) or www.leadlisting.org.



Remember: All house dust is unhealthy to breathe. It may contain lead, mold, asbestos, gypsum, roach waste, dust mites, coal dust, fiberglass, etc.

Examples of High Dust Jobs

The following types of work are likely to create high levels of dust:

Demolition. Demolition includes tearing off siding and/or demolishing old plaster walls or ceilings.

Opening Up Wall Cavities. These jobs include:

- Removing old paneling and baseboards
- Removing door casings and frames or window casings or jambs



"It's not just what's on the wall, it's the dust behind it."

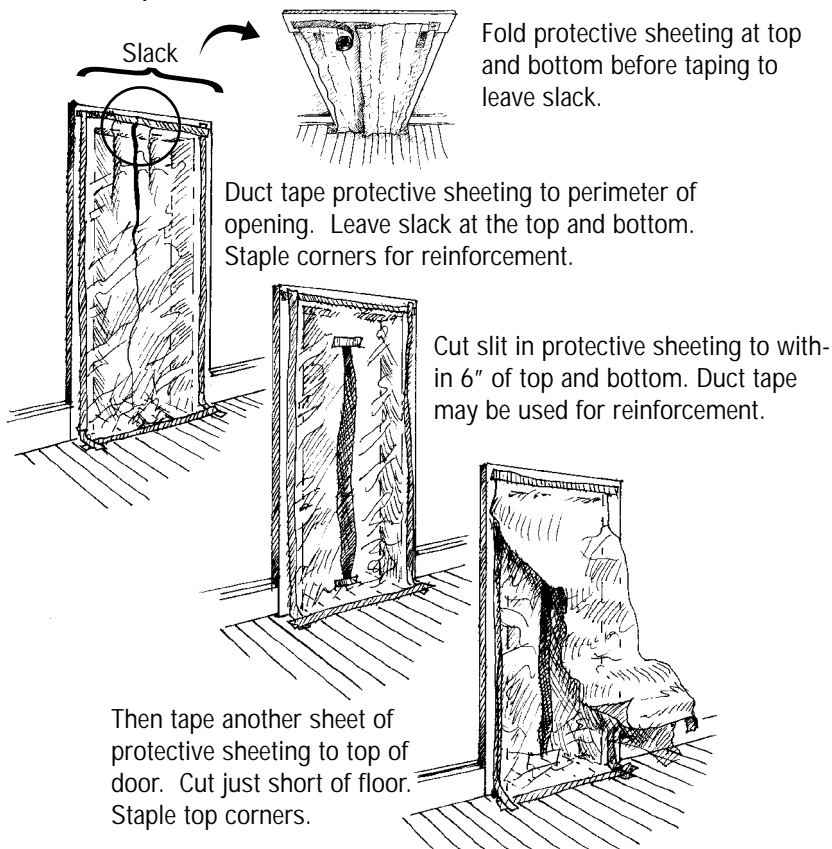
Removing Old Drop Ceilings. Lots of dust can accumulate above ceiling panels.

Improperly Removing Wall-To-Wall Carpet. A carpet that's been on the floor for many years has gathered large amounts of household dust, which may include lead dust. Improperly removing it can release a large amount of dust.

Paint Scraping. Scraping large painted areas, such as the side of a house or an entire room, even when done correctly, can create a large amount of dust.

Containing Dust

Use this system to keep dust from spreading to another room.



If a job creates extremely high amounts of dust (for example, demolition) or large amounts of dust in the air for more than short periods, the protective flap system shown above may not be sufficient to prevent dust from spreading beyond the work area.

For these types of jobs, a more protective system called "isolation" is needed so that dust does not spread beyond the work area. Isolation means that the work area is sealed with no direct access to occupied areas of the home. Workers need to use an entrance that is separate from occupants until cleanup is completed.

C L E A N I N G U P

It is very important to use proper cleanup procedures at the end of the job. Dust and paint chips left behind at the end of the job may contain lead and may endanger children. Have dust wipe samples collected at the end of the job to be sure that it is safe for children to return.



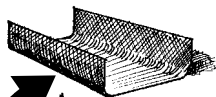
Pick Up Work Area

- Pick up large chips with damp paper towel.

AND/OR

- Mist then push dust into dust pan.

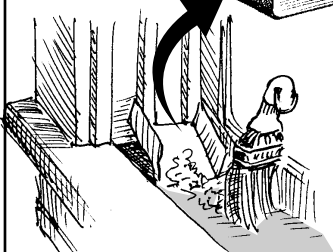
Make dust pan from flashing and clean with a whisk broom.



Pick Up Protective Sheeting

- Clean off protective sheeting. Fold dirty side inward (dirty side to dirty side). Dispose of protective sheeting at the end of each job.

Protective sheeting may be used again within the same work area if it has not already been folded.



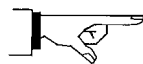
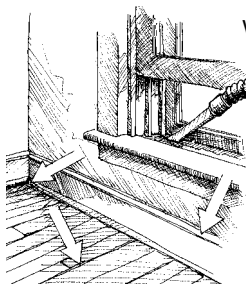
Mist and push dust



Vacuum

- HEPA vacuum all horizontal surfaces—slowly.
- Vacuum all ledges, sills, stools, molding tops, dusty surfaces, etc.
- Vacuum floor under work area. Use corner tool in corners, cracks of trim, and between floor boards.
- Vacuum floor with floor brush and carpet with a carpet tool.

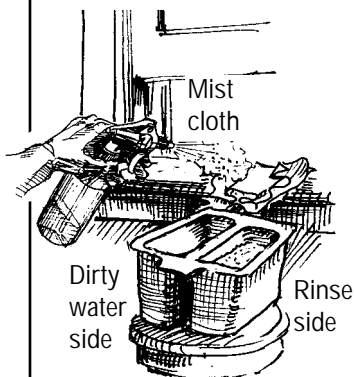
Vacuuming the cracks is very important.



Mist and Scrub

Important: Vacuum carpet very slowly.

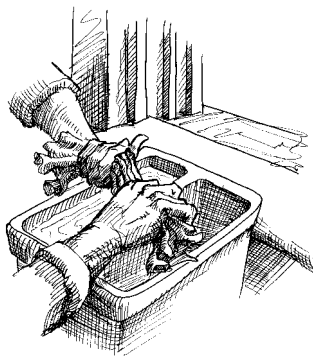
- Wet rag with detergent then wring out.
- Mist surface or rag as you clean.
- Lead needs scrubbing, not just wiping.



AT THE END OF THE JOB

Rinse Rag

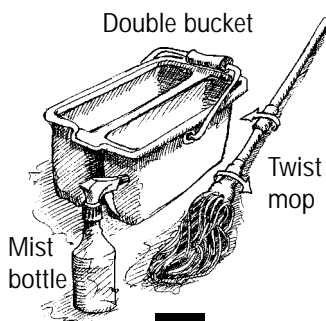
- Squeeze rag into empty side of split bucket. Rinse out rag. Squeeze into empty side. Repeat as needed.
- Change rinse water often.
 - Use paper towels first if surfaces are very dirty.
 - Replace rag when it looks dirty.
- Clean until dust and debris are removed.



Cleaning Floors

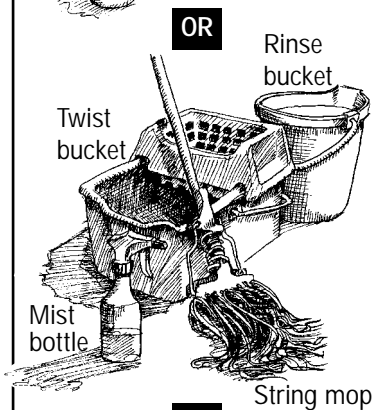
Mist and Scrub

- At start of cleaning, soak mop in detergent water then mist small area with detergent before mopping.
- Scrub with mop.



Squeeze Out and Wash

- Squeeze mop into empty bucket then rinse in rinse water. Rinse often. Squeeze out and rinse again. Mop small areas at a time.



OR

For large jobs

Rinse

- Repeat above process using clean water rather than detergent. When cleaning up a work site, use a new mop head for rinse stage.

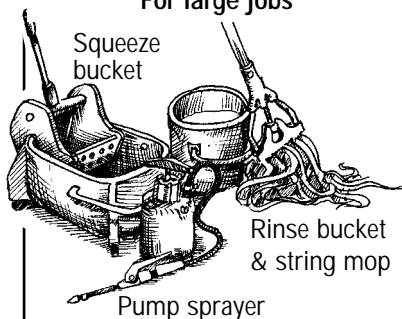
Recommendation: Make a final pass with a HEPA vacuum.

Dispose of Waste

- See following section.

Take Dust Wipe Sample

- See Section 5D: Testing Dust for Lead, p. 71.



D I S P O S A L O F W A S T E

After cleanup of the work area, take care to safely handle and remove dust and debris from the job. Supervisors should check with the EPA and their state's agency responsible for waste to find out about specific Federal, state, and local regulations regarding disposal of waste that may contain lead-based paint.

Key Principle:

Confine dust and waste to the work area that will be cleaned.

Disposal Practices	<p>Specific guidelines are:</p> <ul style="list-style-type: none">• Avoid carrying construction waste through an occupied space. If you must carry it through an occupied space, first place it in a heavy duty plastic bag or wrap it in protective sheeting and seal with tape.• When a dumpster is used, keep the dumpster covered. If a chute is used, cover the chute (or use a barrel chute) and cover the dumpster.• Store all waste in a secure container or dumpster until disposal. Do not transport waste in an open truck, unless it is bagged and sealed.
Water	<p>Water used for clean up should be dumped into a toilet. <u>Never</u> dump this water in a sink, tub, on the ground, or down a storm drain.</p> <p>Water used to remove paint through pressure washing must be collected in drums and may need to be tested to determine if it is hazardous. Check with your state agency responsible for waste.</p>

CHECK YOUR WORK !

Check Quality of Work & Cleanup

Check work quality **during the job** and at the **end of the job**.

- **Was the cause of the problem corrected?**
- **Were proper work practices used?**
- **Was cleanup done thoroughly?**

How to Check:

Checking your work involves two important steps.

1. Visual Checks

Use the checklist inside the back cover of this guide when performing visual checks.

- **During the Job.** Be sure that:
 - the cause of the problem is being corrected;
 - the work area is safely set up;
 - the practices in this guide are being used; and
 - dust and debris are not spreading beyond the work area.
- **End of the Job.** Be sure that the repairs were done properly and that no dust or paint chips remain.

2. Take a Dust Wipe Sample

When interior work disturbs painted surfaces or produces dust, have dust wipe samples taken at the end of the job to check for harmful levels of lead-contaminated dust.

To be accurate, these tests must be done according to specific procedures. See Section 5D, p. 71, for more information about these tests, and who should perform them.

How to Check Cont'd

Dust wipe testing is recommended at the end of any job that disturbs paint or produces dust. It is **strongly recommended** when:

- Work that disturbs paint is done in homes built before 1978.
- A young child or pregnant woman lives in the home.
- Performing unit turnover or regular maintenance in rental properties.

Why Is It Important to Check Work?

Checking that work was done properly is important because:

- Failing to correct conditions causing damage or deterioration results in repairs that do not last.
- Work that fails to follow the recommendations in this guide may spread dust and paint chips beyond the work area and may endanger children in the home.
- Dust and paint chips left behind due to poor cleaning may contain lead and may also endanger children in the home.
- For contractors, checking your work improves the quality of a job and is likely to reduce the risk of a lawsuit in the event a child in the home is later found to have high levels of lead in his/her blood.
- Leaving a clean job site is greatly appreciated by customers.

ONGOING MONITORING & MAINTENANCE

Regularly Check Repairs for Deterioration, Paint Chips, and Dust	<p>Property owners should regularly monitor painted surfaces where maintenance or improvements were performed.</p> <p>Check to see if:</p> <ul style="list-style-type: none">• New evidence of deterioration or paint failure is present.• The cause of the problem was corrected.• Lead dust hazards are present. <i>Important: This can only be done by dust wipe sampling.</i>
Maintain Surfaces and Thoroughly Clean	<p>Then:</p> <ul style="list-style-type: none">• Perform repairs, as needed, to maintain surfaces in a smooth and cleanable condition using the methods recommended in this guide; and• Clean the area thoroughly using the practices described earlier in this section.
Methods of Monitoring	<p>Follow the same methods used to check your work:</p> <ul style="list-style-type: none">• Visual Check. Look for deterioration, paint failure, dust and paint chips. Use the checklist inside the back cover of this guide.• Test for Lead Dust. Have dust wipe samples taken to check for dust that may be contaminated with lead. A test is needed to determine when dust contains harmful amounts of lead. <p>To be accurate, these tests must be done according to specific procedures. See Section 5D, p. 71, for more information about these tests, and who should perform them.</p>
When to Monitor?	<ul style="list-style-type: none">• Annually. Perform a visual check of past repairs and improvements involving painted surfaces.• During Unit Turnover or Routine Maintenance. Perform a visual check of past repairs and improvements involving painted surfaces.• Every Two Years. Get a dust wipe test done at least every two years. This type of test is strongly recommended when a young child or pregnant woman lives in the home.

**Why Is It
Important to
Monitor &
Maintain
Work?**

Monitoring and maintenance helps:

- Plan and implement maintenance tasks
- Protect occupants and neighbors, particularly children, from lead exposure
- Give owners, contractors, and residents a record of the condition of the unit

Aluminum flashing - thin aluminum sheeting, also known as coil stock.

Aviation snips - metal cutters.

Chamfer - a small bevel on an edge.

Enclosure - a rigid, durable construction material that is mechanically fastened to the structure to cover painted surfaces.

Fit testing - a method to check if a respirator fits properly over the face.

Gain - notch chiseled in a door for a hinge leaf.

HEPA filter - High-Efficiency Particulate Air filter. A filter that can remove particles of 0.3 micrometers or larger from the air at 99.97 percent or greater efficiency.

HEPA vacuum - a vacuum with a HEPA filter.

HUD Guidelines - HUD's *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*.

Interim controls - a set of measures to reduce exposure to lead hazards. Interim control measures include special cleaning, repairs, paint stabilization, enclosure, and containment. For a full discussion, see HUD's *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*.

Lauan plywood - 1/4 inch plywood made of lauan with a smooth face.

N100 - a NIOSH filter class that describes a respirator's ability to filter airborne particles. A respirator filter rated as N100 removes particles of 0.3 microns or larger from the air at 99.97 percent or greater efficiency.

NIOSH - National Institute for Occupational Safety and Health, an agency within the Centers for Disease Control and Prevention that tests and certifies safety equipment including respirators.

OSHA - Occupational Safety and Health Administration, an agency of the U.S. Department of Labor that oversees worker safety.

Paint stabilization - a process of wet scraping, priming, and finish coating of a deteriorated painted surface to prevent further deterioration.

Permissible Exposure Limit (PEL) - a dust exposure threshold set by OSHA. Work that creates lead dust levels in the air greater than the PEL must meet OSHA lead safety requirements for workers. OSHA has set the PEL for airborne lead dust at 50 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) as a time weighted average. See Section 5D, p. 69, for technical information about OSHA requirements and Section 5B, p. 61, for information about OSHA regulations.

Pilot hole - a small hole drilled to guide the drilling of a larger hole.

Protective sheeting - made of plastic, poly or other material. Protective sheeting must be puncture and tear resistant, impermeable to liquids, durable, flexible, and lightweight.

R-value - a measure of heat containment; used for rating insulation effectiveness.

Shim - small piece of wood or metal used to fill space between two fastened components.

Shroud - a protective covering that contains dust and chips.

Substrate - a solid surface such as plaster, drywall, wood, etc.

Tack pad - a sticky pad that helps remove dust from shoes.

Window trough - the area of the sill between a window stool or interior sill and the frame of the storm window where the bottom sash rests when closed (also called a window well or exterior sill).

B. FOR MORE INFORMATION

This section lists useful documents, web sites, and other lead-based paint information resources. Additional sources also exist. Use the reference letter on the right to locate the contact for each information resource. Contacts are listed by letter on pages 62-64. Publications marked with an * are for sale; others are available for free.

Where can I get more information on...

Work practices and lead-safety?

Publications	Reference Letter
<ul style="list-style-type: none"> • <i>Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (July 1995).</i>* Technical guidance on methods for identifying and controlling lead-based paint and lead-based paint hazards. The <i>Guidelines</i> can also be downloaded for free from the HUD Office of Lead Hazard Control web site. (About 750 pages) 	B, C
<ul style="list-style-type: none"> • <i>Residential Lead Desktop Reference (2nd Edition, June 1998).</i>* A CD-ROM containing a large variety of lead-based paint information resources. 	C
<ul style="list-style-type: none"> • <i>Maintaining a Lead Safe Home (1997).</i>* A do-it-yourself manual for homeowners and property managers. (89 pages) 	B
<ul style="list-style-type: none"> • <i>Lead-Based Paint: Operations and Maintenance Work Practices Manual for Homes and Buildings (May 1995).</i>* Technical guidance on safe work practices. (200 pages) 	G
<ul style="list-style-type: none"> • <i>Guide Specifications for Reducing Lead-Based Paint Hazards (May 1995).</i>* Technical guidance on purchasing lead-hazard control reduction services and developing lead-hazard reduction work specifications. (About 500 pages) 	G
<ul style="list-style-type: none"> • <i>Lead Safety for Nonprofit Property Owners, Developers, and Managers (July 1998).</i> Practical guide to developing policies and activities that incorporate lead safety in property management. (About 30 pages) 	F

Reference
Letter

Publications

- *Guide to Working Safely with Residential Lead Paint (1999)*. Pamphlet with key lead safety precautions to follow during repainting and home improvement.
- *Reducing Lead Hazards When Remodeling Your Home (September 1997)*. Pamphlet providing basic information about lead-based paint risks and precautions when remodeling pre-1978 homes.

F

B, I, K

Web Sites

- HUD, Office of Lead Hazard Control. Provides information on HUD regulations, technical and educational documents, and links to other lead resources.
- EPA, Office of Pollution Prevention and Toxics. Provides information on EPA regulations, technical and educational documents, and links to other lead resources.

B

K

Worker protection methods?

Publications

- *Protecting Workers and Their Communities from Lead Hazards: A Guide for Protective Work Practices and Effective Worker Training (1993)**. Guidance on worker protection methods, training workers, and complying with OSHA regulations. (About 500 pages)
- *Lead Exposure in the Construction Industry (1993)*. Fact sheets that describe worker protection measures needed to meet OSHA requirements for lead including respiratory protection and protective clothing. (Series of 6 fact sheets)

L

J

Web Site

- OSHA. Occupational Safety and Health Administration. Provides information on OSHA regulations, technical and educational documents, and links to other lead resources.

J

Preventing children's exposure to lead hazards?

Publications

- *Protect Your Family From Lead In Your Home (May 1995)*. Pamphlet that provides basic information about addressing and preventing lead-based paint hazards in the home.
- *Lead Poisoning Prevention: Directory of State Contacts (1997-98)*.^{*} Booklet that contains profiles of state programs to reduce lead hazards. (150 pages)
- *Directory of State and Local Lead Poisoning Prevention Advocacy Organizations (1998)*.^{*} List of state and local non-profit organizations that are working to prevent lead poisoning. (About 300 pages)

Web Site

- Alliance to End Childhood Lead Poisoning. Information on lead poisoning prevention, lead issues, and program design. Site has publications that can be copied from the web.

Public education and outreach materials?

Web Site and Hotline

- National Lead Information Center. Information about lead hazards and poisoning prevention.

Locating certified abatement contractors and clearance inspectors?

Web Site and Hotline

- Leadlisting. List of qualified lead professionals including inspectors, risk assessors, abatement contractors, and analysis laboratories.

Reference Letter

B, I, K

E

A

A

I

D

Disclosure requirements?

Publications

Reference Letter

- *Protect Your Family From Lead in Your Home (May 1995)*. Pamphlet that provides basic information about addressing and preventing lead-based paint hazards in the home. B, I, K
- *Disclosure of Lead-Based Paint Hazards in Housing (March 1996)*. Fact sheet that provides information on how to meet Federal disclosure requirements. K
- *Questions and Answers on the HUD/EPA Disclosure Rule*. Answers to commonly asked questions about Federal disclosure requirements. (5 pages) K
- *Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, Parts I and II (1996)*. In-depth guidance on the disclosure requirements for real-estate professionals. (27 pages) K
- *Resource Handbook on Lead Hazard Disclosure for Homes and Apartments (1996)*.^{*} Comprehensive reference book on disclosure procedures including advice for renters and owners, a glossary of key terms, and copies of disclosure documents. (Approximately 300 pages) A

Respirators?

Web Sites

- National Institute of Occupational Safety and Health. Provides information on the proper use of respiratory protection and various types of NIOSH-approved respirators that are available. H
- Occupational Safety and Health Administration. Provides information on OSHA regulations regarding the use of respiratory protection. J

Where can I find...

HUD's lead regulations?

- 24 Code of Federal Regulations (CFR) 35 (Lead Rule). Contains lead hazard evaluation and reduction requirements for properties that receive HUD funding.

OSHA's lead regulations?

- 29 CFR 1926.62 (Lead in Construction) and 29 CFR 1910.1025 (Lead in General Industry). These regulations cover Federal worker protection requirements for workers in industry, construction, remodeling, and renovation.

EPA's lead regulations?

- 40 CFR 745 (Lead-Based Paint Poisoning Prevention in Certain Residential Structures). Contains the Federal regulations for the disposal of lead waste and contractor notification requirements.
- 40 CFR 745.80 (Residential Property Renovation). Federal rule requiring contractors to provide notification before the start of any work that disturbs a painted surface in pre-1978 homes.

Disclosure regulations?

- 24 CFR 35 (HUD) and 40 CFR 745 (EPA). Regulations for disclosure of known lead-based paint and lead-based paint hazards by home sellers and landlords. This rule was published jointly by HUD and EPA.

Reference Letter

B

J

K

K

B, K

State lead laws?

Publication

- *Summary of Lead Poisoning Prevention Statutes (February 1999)*. A state-by-state listing of local lead-related regulations, such as waste disposal requirements. Available by fax. (24 pages)

Reference Letter

E

Contacts

Reference Letter	Organization	Types of Resources
A	Alliance to End Childhood Lead Poisoning 227 Massachusetts Avenue, NE, Suite 200 Washington, DC 20002 202-543-1147 http://www.aecplp.org	Publications
B	Office of Healthy Homes and Lead Hazard Control; U.S. Dept. of Housing and Urban Development (HUD) 451 Seventh Street, SW, Room P-3206 Washington, DC 20410 202-755-1785 http://www.hud.gov/offices/lead	Publications Program development
C	HUD USER P.O. Box 6091 Rockville, MD 20849 1-800-245-2691 http://www.huduser.org	Publications
D	Leadlisting 1-888-Leadlist (1-888-532-3547) http://www.leadlisting.org	Technical consultation
E	National Conference of State Legislatures 1560 Broadway, Suite 700 Denver, CO 80202 303-830-2200 http://www.ncsl.org	Publications

Reference Letter	Organization	Types of Resources
F	National Center for Lead Safe Housing 10227 Wincopin Circle, Suite 205 Columbia, MD 21044 410-992-0712 http://www.lead safehousing.org	Publications Technical consultation
G	National Institute of Building Sciences (NIBS) Publications Department 1201 L Street, NW, Suite 400 Washington, DC 20005-4014 202-289-7800 http://www.nibs.org	Publications Training
H	National Institute of Occupational Safety and Health (NIOSH) Hubert H. Humphrey Building, Room 7154 200 Independence Avenue, SW Washington, DC 20201 800-35-NIOSH (800-356-4674) http://www.cdc.gov/niosh/home-page.html	Publications
I	National Lead Information Center (NLIC) 8601 Georgia Avenue, Suite 503 Silver Spring, MD 20910 Information Clearinghouse: 1-800-424-Lead (1-800-424-5323) http://www.epa.gov/lead/nlic.htm	Publications Training

Reference Letter	Organization	Types of Resources
J	<p>Occupational Safety and Health Administration (OSHA) U.S. Department of Labor, OSHA Publications Office 200 Constitution Avenue, NW, Room N3101 Washington, DC 20210</p> <p><i>OSHA Lead web page:</i> http://www.osha-slc.gov/SLTC/lead/index.html</p> <p><i>OSHA Respirator web page:</i> http://www.osha-slc.gov/SLTC/respiratory_advisor/mainpage.html</p>	<p>Technical consultation Enforcement</p>
K	<p>Office of Pollution Prevention and Toxics (OPPT) U.S. Environmental Protection Agency (EPA) 401 M Street, SW (7401) Washington, DC 20460 202-260-3810 http://www.epa.gov/lead</p>	<p>Publications Program development</p>
L	<p>Society for Occupational & Environmental Health 6728 Old McLean Village Drive McLean, VA 22101 703-556-9222 http://www.soeh.org</p>	<p>Publications</p>

C. GETTING THE WORD OUT

How Owners and Occupants Can Work Together to Improve Lead Safety In Homes

Gaining tenant cooperation can help rental property owners and managers respond promptly to conditions that could pose a health threat to occupants.

Owner Responsibilities

1. Check the building to be sure that:

- ☐ The building shell is sound.
- ☐ Water isn't coming in from the outside and causing damage.
- ☐ Sources of moisture inside are not causing damage.
- ☐ Painted surfaces are intact.
- ☐ Doors and windows work properly.
- ☐ All surfaces are clean and cleanable.

2. Maintain the building.

- ☐ Train maintenance staff to minimize dust, clean up effectively, and protect themselves.
- ☐ Conduct regular building checks for potential problems, such as:
 - Flaking or peeling paint
 - Water damage to paint, plaster, or wood
 - Plumbing or roof leaks
 - Painted doors and windows that do not operate smoothly

3. Educate occupants and gain their cooperation.

- ☐ Fulfill Federal notice and disclosure requirements.
- ☐ Have occupants inform you of damaged paint and other maintenance problems.

When Maintenance or Renovation Work is Done

Give occupants the Lead Safety pamphlet required by Federal regulations (see page 66).

Tell occupants:

- ✓ Why repairs are necessary.
- ✓ The work schedule.
- ✓ How they and their possessions will be protected.
- ✓ Why they may need to leave during the work.

- ❑ Explain to occupants why steps, such as regular cleaning, prevent lead-based paint hazards. (See below.)
- ❑ Consider providing cleaning supplies and tools (see page 75) to occupants to encourage cleaning.
- ❑ Remind tenants that it is a good practice to provide notice of problems in writing.
- ❑ Make sure occupants understand the property's maintenance reporting procedures and indicate that these problems require priority attention.

Precautions Tenants Can Take to Protect Their Family

Occupants should pay special attention to page 7 of the pamphlet *Protect Your Family From Lead In Your Home*. It describes steps that occupants can take to reduce the chance that they will be exposed to lead hazards. Suggestions from this pamphlet include:

- ❑ Clean floors, window frames, interior window sills, and other flat surfaces each week using warm water and an all-purpose cleaner.
- ❑ Clean up any paint chips immediately.
- ❑ Keep child play areas clean.
- ❑ Wash children's hands often.
- ❑ Keep children from chewing interior window sills and other painted surfaces.

Federal Notice and Disclosure Requirements

(24 CFR Part 35 or
40 CFR Part 745)

- ✓ Landlords and home sellers must notify future occupants about lead-based paint hazards by giving them the pamphlet *Protect Your Family From Lead in Your Home*.
- ✓ Landlords and home sellers must disclose information about known lead-based paint and/or lead-based paint hazards before dwelling leases or home sales contracts take effect. Leases and sales contracts must also include a form about lead-based paint that meets Federal requirements. Contact HUD or EPA for more information about these requirements (see Section 5B, p. 57).

Notice Prior to Renovation

Federal law requires contractors and owners of rental properties to inform occupants about the risks of lead-based paint before non-emergency repair, maintenance, and home renovation work begins. This law applies for all work on surfaces greater than 2 square feet per component. Contractors and property owners must distribute copies of the pamphlet *Protect Your Family From Lead In Your Home* before any work starts. See EPA's regulation at 40 CFR 745.80. Also see Section 5B, p. 57, for sources that can provide copies of this pamphlet.

Contractors and owners must make sure that occupants have received the pamphlet.

- For owner-occupied homes, the contractor must have the homeowner sign an acknowledgement form after receiving the pamphlet. Or, the contractor can send the pamphlet by certified mail.
- For tenants, the contractor or property owner must have an adult occupant sign an acknowledgement form after receiving the pamphlet. Or, the contractor or owner can send the pamphlet by certified mail. If the contractor cannot get a signed acknowledgement, the contractor must sign a statement documenting this.
- For work in common areas, such as the lobby, of an apartment building, the contractor must give the pamphlet to the owner and to the occupants of all affected areas and inform them of the nature, location, timing, and length of the job.

Why Lead Safety Makes Sense for Property Owners and Contractors

Property owners and contractors that use safe work practices benefit in several ways.

Advantages for Owners of Residential Rental Properties

Owners who maintain their rental properties using work practices that increase lead safety can use this information to attract tenants who are concerned for their child's health. Some local agencies may even maintain a listing of housing units that meet certain lead-safety standards. When giving prospective tenants the lead-based paint pamphlet and the required disclosure information, they can tell the tenant that the property has a program to minimize the risk of hazards from lead-based paint. A safety program would include:

- Educating and training maintenance workers.
- Examining property at turnover and then every year for deteriorating paint.
- Correcting conditions that may cause paint to flake and peel (excessive moisture, binding doors, etc.).
- Doing work safely and cleaning up well.
- Making sure surfaces are cleanable and doing a professional cleaning at turnover.
- Performing dust wipe tests before occupancy, and after every maintenance job that disturbs old paint. It is also recommended to perform a dust wipe sample test at least every two years. Keep the results on file.
- Encouraging tenants to inform property owners if there is a problem.

Advantages for Contractors

Doing work safely can enhance a contractor's reputation, maintain the safety of workers, and protect the health of customers and their children.

A program for lead safety can also help contractors when bidding new jobs. For example, contractors performing repairs and improvements in homes built before 1978 must give potential customers a pamphlet about the risk of lead-based paint during renovation.

Contractors that follow practices for lead safety can demonstrate to customers that they understand the risks and show that their workers take specific precautions to protect against lead-based paint hazards. Lead-safety can help *"give you a leg up"* on the competition.

Safe work practices also offer benefits that are important to customers:

- Dust and debris are confined to the work area.
- A "clean" work area at the end of the job.
- Some work offers additional benefits. *(For example, repairs to windows can improve their operation, prevent damage from moisture, and lower energy and maintenance costs.)*
- Lead safety also helps protect you as a contractor. For example, having an independent, certified professional take dust wipe samples of the work area promptly after cleanup provides strong documentation that no lead hazards were present in the work area at the end of the job.

D. MORE ABOUT TECHNICAL TOPICS

Respiratory Protection

Respiratory protection helps prevent workers from breathing harmful amounts of lead and other substances, touching their mouths with dusty hands, or swallowing paint chips.

When work creates high levels of dust in the air, properly trained and certified lead-based paint professionals should do these high dust jobs. If you work for someone, and plan on doing this type of work, your employer must meet the requirements of the OSHA Lead in Construction Standard (29 CFR 1926.62). These requirements include respiratory protection when work creates lead dust in air that exceeds the “permissible exposure limit” (PEL) — see Air Monitoring and Results sections below. See Section 5B, p. 57, for sources of information about OSHA requirements.

Respirators may be required for activities that generate high levels of dust such as:

- Demolishing painted surfaces
- Opening up wall and ceiling cavities
- Using power tools on painted surfaces
- Dry scraping large painted areas

For this type of work, OSHA requirements include the following:

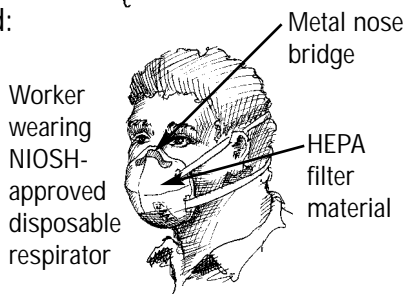
- Training workers on how to properly use and maintain respirators.
- Making sure proper respirators are always available and that workers have been fit tested. Where respirator use is required, workers must be part of a written respiratory protection program that meets OSHA standards (29 CFR 1910.134).

Many types of respirators can be used:

- Disposable respirators can be used if they are rated by NIOSH as N100 (or HEPA) — this information can be found on the respirator’s package or the respirator itself.



Dust mask not NIOSH approved



Worker wearing NIOSH-approved disposable respirator

RESOURCES

- Non-disposable respirators, also rated by NIOSH as N100, often have replaceable cartridges and require regular maintenance.
- Having a trained person do air monitoring that measures the amount of dust in the air to determine if respirators are required by OSHA, and the appropriate level of protection. Workers must wear proper respirators while air monitoring is being done.



Worker wearing a non-disposable respirator

Air Monitoring

Air monitoring is done to ensure that workers are not being exposed to dangerous levels of lead dust in the air, and to comply with OSHA requirements. It must be done by a person with special training. A worker being monitored wears a small plastic canister clipped to his/her clothing near the face. A pump in a device clipped to the belt draws air and dust into the canister. The canister is then sent to a lab to measure how much lead dust was in the air.

What Do the Results Mean?

The results are measured in micrograms per cubic meter ($\mu\text{g}/\text{m}^3$). If the amount of lead dust in the air exceeds the permissible exposure limit (PEL) of $50 \mu\text{g}/\text{m}^3$, workers must wear at least a half-face respirator with an N100 (or HEPA) rating and certain OSHA requirements must be followed.

Results may show that respirators are not necessary or that a greater level of protection is needed. If the results show lead dust levels in the air above $500 \mu\text{g}/\text{m}^3$, a more protective respirator is required.

Other Protection

In addition to respiratory protection for activities that generate high levels of dust, compliance with OSHA's Lead in Construction Standard may involve blood tests for workers, medical monitoring, hand washing facilities, other personal protective equipment, shower and changing areas, and additional training.

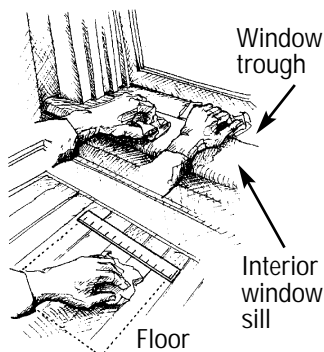
Testing Dust for Lead

By having dust wipe samples taken, job supervisors and property owners can locate dust lead hazards and test the effectiveness of cleaning at the end of a job.

Where Are Dust Samples Taken?

Samples are taken in the area of the dwelling where work has been completed. The following surfaces within the work area should be sampled:

- Floor
- Interior window sills (*also referred to as window stools*)
- Window troughs



When Should Dust Samples Be Taken?

- At the end of a job
- If there is a child or pregnant woman living in the home
- Before a family moves into a home

What Do the Results Mean?

The results of the laboratory analysis will show the amount of lead found in the dust from the area sampled. The results are measured in micrograms per square foot ($\mu\text{g}/\text{ft}^2$).

To determine if a lead-based paint hazard exists, based on EPA's requirements, compare the results to the following standards:

- $40 \mu\text{g}/\text{ft}^2$ on the floor
- $250 \mu\text{g}/\text{ft}^2$ on the interior window sill (stool)

If the results for a sample are higher than these standards, a dust lead hazard is present. For clearance purposes only, a value of $400 \mu\text{g}/\text{ft}^2$ should be used for window troughs.

Who Can Take Dust Wipe Samples?

Following painting, home maintenance, and renovation work:

- In homes receiving Federal assistance, dust wipe samples, if required by regulations, must be taken by appropriately trained personnel who were not involved in the work. This “clearance” testing may be done by a lead-based paint inspector, risk assessor, or sampling technician certified by a State or the EPA. Clearance testing may also be done by a person trained as a sampling technician, as long as a certified lead-based paint inspector or risk assessor approves the technician’s work and signs the clearance examination report.
- For all other homes, it is recommended that dust wipe samples be taken by a trained sampling technician, or, preferably, a certified lead-based paint inspector, risk assessor, or sampling technician. Some states require that dust wipe samples be taken by a certified person.

What Actions Do I Take Based On the Results?

If the results show dust lead levels higher than the standards listed above, the area where the work was performed should be cleaned to remove the dust lead hazard.

If the dust wipe samples were taken as part of ongoing monitoring by maintenance staff or the property owner, the surfaces where work was performed should be examined to see if the work has failed or new conditions that generate dust have developed. In either case, these conditions should be corrected using lead-safety principles and work practices.

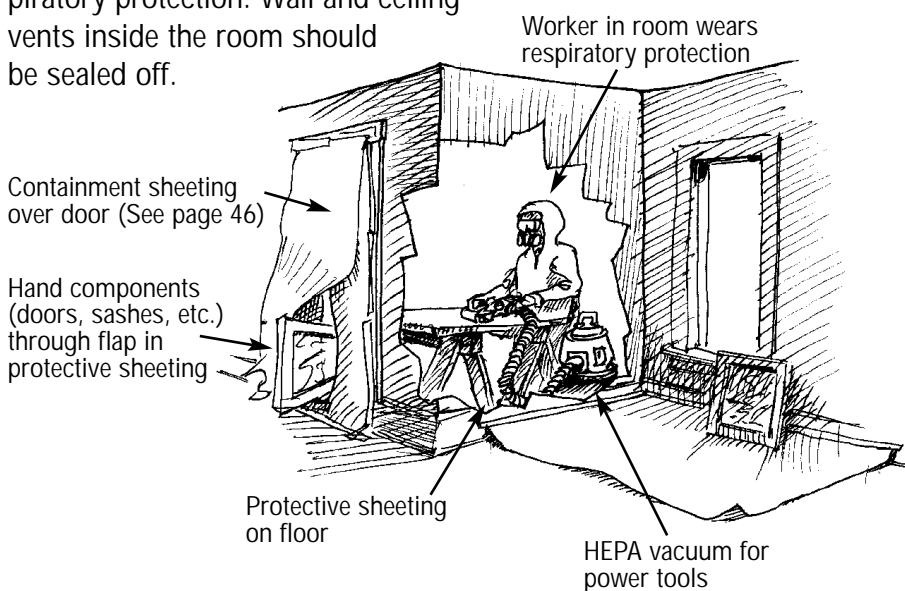
If the work required to correct the likely source of the dust lead hazard is beyond the scope of this guide, the property owner should seek the help of a lead-based paint professional trained to safely correct lead-based paint hazards.

Setting Up a Dust Room

A dust room can be useful for dusty work on building components that can be moved. For example, scraping or planing doors or window sashes can be done in a dust room. A dust room is particularly useful when working in occupied spaces.

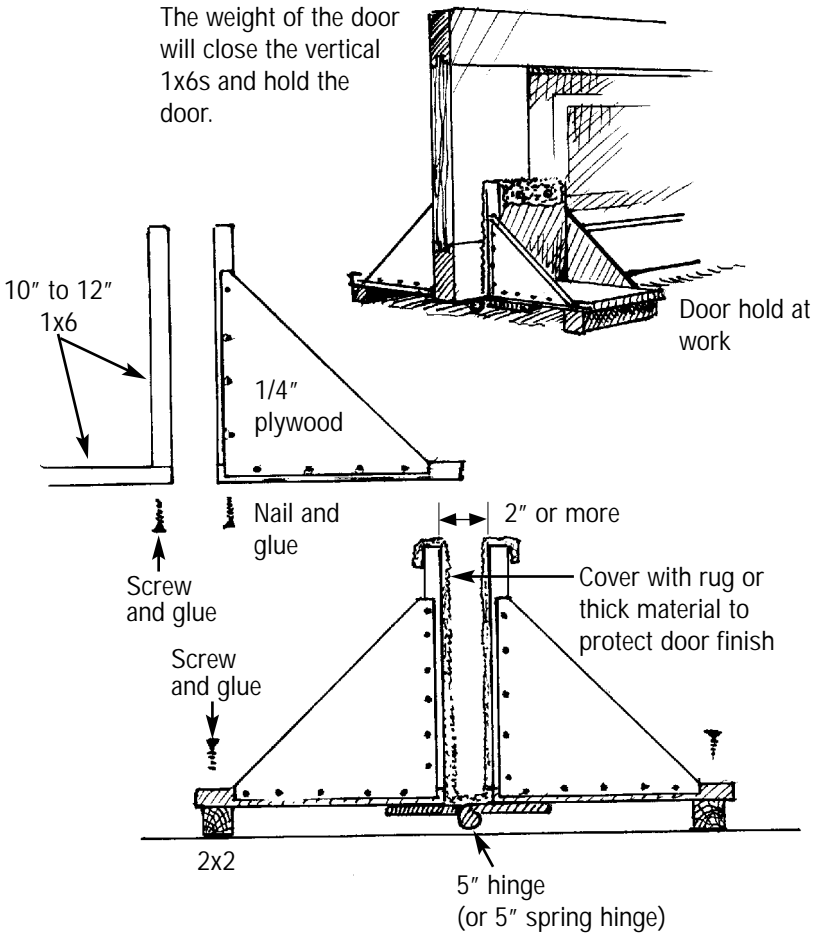
The dust room can be any room that can be closed off. The door can be covered with a flap system (see page 46) and the floor can be covered with protective sheeting taped to the baseboard.

Workers in this room should wear disposable clothing and wear respiratory protection. Wall and ceiling vents inside the room should be sealed off.



Building a Door Hold

A door hold makes working on doors easier and safer.



E. TOOL AND SUPPLY LIST

Additional Tools Needed for Lead-Safety Work

(Not every tool is needed for every job.)

Paint scrapers - A variety of scrapers are useful; carbon blades last longest. A mill file works well to keep scraper blades sharp.

Sanding sponges and wet/dry sandpaper - Where areas need to be smoothed or feathered, these abrasive tools, when used wet, keep dust to a minimum.

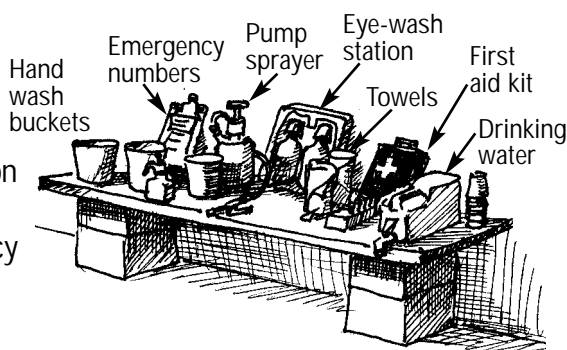
Mist bottles - Misting a surface being scraped or cut keeps down dust. Squeeze bottles work best in small areas. For larger jobs, a pump pressure sprayer in a knapsack works best.

Plane - A jack, smooth, or jointer (not block) plane. Hand planes are good for removing paint from edges such as the edge of a window, stool, or door. They create very little dust.

Cleanup station - A kitchen counter with a working sink is a good place for a cleanup station. If not available, set up a board with 3 buckets and a pump sprayer.

The station should have:

- Paper towels and soap
- Pads for cleaning respirators
- A 2-bottle eye-wash station
- A first aid kit
- Clipboard with emergency numbers
- Drinking water and cups



Personal Protective Clothing and Equipment

- A disposable respirator rated by NIOSH as N100 (or HEPA)
- A half-face, air cartridge respirator rated by NIOSH as N100 (or HEPA)
- Protective, lightweight, disposable suits with elastic sleeves and ankles
- Shoe covers (slip resistant is recommended)
- Safety glasses (vented goggles if working in high dust conditions or when using liquids or strippers)
- Ear protection if using power tools

RESOURCES

Cleaning Equipment

- Bottle mister and pump sprayer for detergent
- Mops and buckets
- Tack cloths for wiping furnishings that may be damaged by water
- Heavy-duty paper towels and/or rags

Vacuums - At the end of a job, use a HEPA vacuum because it will capture even the finest dust. For regular household cleaning, use a HEPA vacuum if available. If one is not available, use a fine filter in your vacuum known as micron or allergen bags.

Painting Supplies

- Use commercial grade cleaners; there are also lead-specific cleaners. (Note: Trisodium phosphate [TSP] is banned in some states.)
- Degreasers may be necessary on some walls.
- Use deglosser or wet sanding supplies.
- Where wood is exposed, use a sealer and then apply a best grade primer or primer-sealer.

Other Tools

- Coil stock for covering window troughs. Coil stock is available with white and brown sides to match window trim color (see page 36).
- Window opening tool for windows that are painted shut (see page 29).
- Brace with screwdriver tips for removing and replacing hinge screws.
- Power planer with exhaust port that can be attached to HEPA vacuum. A power planer can be used for stripping window sashes and doors in a contained work area with respiratory protection.

F. NOTES AND SPECIAL INSTRUCTIONS

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G . W O R K C H E C K L I S T

Before Work Begins

- ☐ Are the possible risks to occupants identified?
- ☐ Are the occupants informed of the possible risks and their responsibilities?
- ☐ Are the causes of the problems located?
- ☐ Is the work area set up?
- ☐ Is the work area closed off from occupants?

During Work

- ☐ Are dust and debris being contained in the work area?
- ☐ Are workers wearing necessary protective clothing and equipment?
- ☐ Are workers cleaning up each time they leave the work site?

At the End of the Job

- ☐ Did workers fix the cause of the problem?
- ☐ Did workers remove visible dust and debris?
- ☐ Did workers properly dispose of dust and debris?
- ☐ Did workers wet wash the surfaces?
- ☐ Were dust samples taken to make sure that cleanup worked?

For Long-Term Maintenance

Is there a plan to:

- ☐ Maintain painted surfaces?
- ☐ Keep surfaces clean and cleanable?
- ☐ Prevent water and moisture damage?

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Why Follow this Guide?



The Simple Work Practice Changes in this Guide Can Protect Children and Workers

- This Guide contains practical steps for lead safety.
- With small changes in work practices, workers can protect themselves, their families, and their customers, especially children, from lead exposure.

Painting, Home Improvement, and Maintenance Work in Older Homes Can Endanger Children

- Most homes built before 1978 contain lead-based paint.
- Doing work improperly can create a lot of paint chips and dust that may contain lead.
- Lead in paint chips, dust, and soil gets on children's hands and toys which they may put in their mouths.
- Lead can make children very sick and cause permanent brain and nerve damage, learning difficulties, and behavior problems.

Poor Maintenance Also Endangers Children

- Paint flaking and peeling is often caused by moisture.
- Rubbing or impact on doors, windows, and trim can cause paint failure.

Who Should Use This Guide?

- Building maintenance workers and supervisors
- Painters
- Repair, renovation, and remodeling contractors
- Property managers and owners
- Homeowners




Ordering Additional Copies

Single copies of *Lead Paint Safety: A Field Guide for Painting, Home Maintenance, and Renovation Work* on paper or on CD-ROM can be ordered from the National Lead Information Center at 1-800-424-5323 or downloaded from the HUD Office of Healthy Homes and Lead Hazard Control web site at www.hud.gov/offices/lead.

For information about obtaining multiple copies, contact the National Lead Information Center.

March 2001
HUD-1779-LHC





Wednesday
September 15, 1999

Part II

Department of Housing and Urban Development

24 CFR Part 35, et al.

Requirements for Notification, Evaluation
and Reduction of Lead-Based Paint
Hazards in Federally Owned Residential
Property and Housing Receiving Federal
Assistance; Final Rule

The following Table of Contents has been electronically inserted by the HUD Office of Lead Hazard Control after publication to guide readers.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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[Docket No. FR-3482-F-06]

RIN 2501-AB57

Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance

AGENCY: Office of the Secretary-Office of Lead Hazard Control, HUD.

ACTION: Final rule.

SUMMARY: The purpose of this rule is to ensure that housing receiving Federal assistance and federally owned housing that is to be sold does not pose lead-based paint hazards to young children. It implements sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, which is Title X of the Housing and Community Development Act of 1992. The requirements of this rule are based on the practical experience of cities, states and others who have been controlling lead-based paint hazards in low-income privately-owned housing and public housing through HUD assistance. It also reflects the results of new scientific and technological research and innovation on the sources, effects, costs, and methods of evaluating and controlling lead hazards. With today's action, HUD's lead-based paint requirements for all Federal programs are now consolidated in one part of title 24 of the Code of Federal Regulations.

DATES: *Effective Dates:* Section 35.140 is effective on November 15, 1999. All other provisions of the rule are effective on September 15, 2000.

FOR FURTHER INFORMATION CONTACT: For questions on this rule, call (202) 755-1785, ext. 104 (this is not a toll-free number) or e-mail your inquiry to lead_regulations@hud.gov. For lead-based paint program information, contact Steve Weitz, Office of Lead Hazard Control, Department of Housing and Urban Development, 451 7th Street, SW, Room B-133, Washington, DC 20410-0500. For legal questions, contact John B. Shumway, Office of General Counsel, Room 9262, Department of Housing and Urban Development. Hearing and speech-impaired persons may access the above telephone number via TTY by calling the toll-free Federal

Information Relay Service at 1-800-877-8339.

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I. Background

A. Lead Poisoning

Childhood lead poisoning causes reduced intelligence, low attention span, reading and learning disabilities, and has been linked to juvenile delinquency, behavioral problems, and many other adverse health effects. Over the past 20 years, the removal of lead from gasoline, food canning and other sources has been successful in reducing population blood lead levels by over 80 percent. Nearly 1 million children, however, still have excessive levels of lead in their blood, making lead poisoning a major childhood environmental disease (See CDC 1997a). Lead-based paint in housing is the major remaining source of exposure and is responsible for most cases of childhood lead poisoning today.

HUD estimates that over 60 million occupied homes, or approximately 80 percent of all homes built before 1980, have some lead-based paint. Many of those 60 million homes have only small amounts of such paint, however; generally, the older the home, the greater the amount of lead-based paint. The use of lead in paint was highest in housing built before 1960. It was completely banned for residential use in 1978 by the Consumer Product Safety Commission.

Higher childhood blood lead levels are associated with lower household income, residence in large urban areas, non-Hispanic African American race, and living in older homes. Recent data from the period 1991–1994 indicate that over 16 percent of young children of less than 6 years of age from low income families had blood levels above the level of concern set by the Centers for Disease Control and Prevention (CDC), compared with only one percent for young children from high income families. Over 8 percent of all young children living in housing built before 1946 had blood lead levels over the CDC level of concern compared to only 1.6 percent for those living in housing built after 1973. Over 11 percent of non-Hispanic African American children were above the CDC level of concern compared to 2.3 percent for non-Hispanic white children. Twenty-two percent of non-Hispanic African American children living in pre-1946 housing were over the CDC level of concern.

Childhood lead poisoning is “the most common environmental disease of young children,” (CDC 1990) eclipsing all other environmental health hazards found in the residential environment (ATSDR 1988). Lead is highly toxic and affects virtually every system of the body. At high exposure levels, lead poisoning can cause coma, convulsions, and death. While adults can suffer from excessive lead exposures, the groups most at risk are fetuses, infants, and children under age 6. At low levels, the neurotoxic effects of lead have the greatest impact on children’s developing brains and nervous systems, causing reductions in IQ and attention span, reading and learning disabilities, hyperactivity, and behavioral problems. These effects have been identified in many carefully controlled research studies (National Academy of Sciences 1993; HUD 1997). The vast majority of childhood lead-poisoning cases, however, go undiagnosed and untreated, since most poisoned children have no obvious symptoms.

The Residential Lead-Based Paint Hazard Reduction Act of 1992 (Pub. L.

101–550; 42 U.S.C. 4851 *et seq.*), which hereafter is referred to as “Title X” because it is Title X of the Housing and Community Development Act of 1992, redefines the concept of “lead-based paint hazards.” Under prior Federal legislation, a lead-based paint hazard was defined as any paint greater than or equal to one milligram of lead per square centimeter (mg/cm²), regardless of its condition or location. Title X states that a lead-based paint hazard is “any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil or lead-contaminated paint that is deteriorated or present in chewable surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects.” Thus, under this definition, intact lead-based paint on most surfaces is not considered a “hazard,” although the condition of the paint should be monitored and maintained to ensure that it does not become deteriorated.

Title X defines two methods of “evaluating” lead-based paint hazards or lead-based paint. One method, “risk assessment,” includes dust wipe sampling and other environmental sampling to identify lead-based paint hazards. The other, “inspection” (or “lead-based paint inspection”), determines the presence only of lead-based paint. Evaluation may also be accomplished by a combination of the two methods. The combination approach results in an identification of all lead-based paint and lead-based paint hazards. Title X provides for three types of lead-based paint “hazard reduction”: Interim controls, abatement of lead-based paint hazards, and complete abatement of all lead-based paint. Interim controls are “measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards.” Abatement means “a set of measures designed to permanently eliminate lead-based paint hazards” or lead-based paint. To ensure that evaluation and hazard reduction are carried out safely and effectively, Title X authorizes new requirements for consistency and quality control.

B. Legislative and Regulatory History

The existing lead-based paint regulations pertaining to the Department’s programs, as well as to all federally owned residential property at the time of sale, were written pursuant to the passage of the Lead-Based Paint Poisoning Prevention Act of 1971, as amended prior to 1992 (42 U.S.C. 4821 *et seq.*). This legislation required the Secretary to “establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning

with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary." HUD interpreted the phrase "housing assistance payments" broadly and therefore in 1976 drafted regulations to eliminate the hazards of lead-based paint for virtually all of its programs. Part 35 of the Department's regulations in title 24 of the Code of Federal Regulations was promulgated setting forth general procedures for the inspection and treatment of defective paint surfaces in HUD-associated housing. The regulation at 24 CFR 35.5(c), however, gave each Assistant Secretary the authority to develop regulations pertaining to their specific areas of responsibility, and varying program regulations concerning lead-based paint now exist throughout title 24.

The Department's lead-based paint regulations have been amended from time to time in response to changes in the law, court orders and increased knowledge about the hazards and treatment of lead-based paint. The most recent Department-wide regulatory revisions pertaining to lead-based paint were made in 1986, 1987 and 1988. Some additional revisions specific to the public and Indian housing programs were issued in 1991, and important changes were made in 1995 to the Housing Quality Standards (HQS) that apply to Section 8 tenant-based rental assistance and certain other HUD programs.

Title X represents a new and sweeping approach to the problem of lead-based paint poisoning of children, necessitating a comprehensive revision of HUD's lead-based paint regulations. Title X amends what had previously been general language contained in the Lead-Based Paint Poisoning Prevention Act and sets out specific requirements for federally owned residential property and housing receiving Federal assistance. Title X stresses identification of hazards, notification to occupants of the existence of these hazards, and control of those hazards. This final rule also reflects current knowledge of the causes of lead poisoning and current lead-based paint hazard evaluation and reduction technologies and practices. The presence of lead-based paint will be more accurately identified, with fewer false negatives or false positives. Likewise, the existence, nature, severity and location of lead-based paint hazards (in dust, soil and deteriorated paint) will be more accurately identified and reported. By improving lead-based paint

hazard evaluation, decisions about hazard reduction activities will be more fully informed, and available resources will be better targeted to reduce exposure to occupants and to the environment.

C. HUD Reinvention

The Department has launched a major restructuring to meet the changing housing and development needs of communities across the country. The restructuring includes program consolidation, organizational changes within the Department, and relocation of some cross-cutting functions outside of Washington, D.C. HUD's reinvention efforts are taking place in the context of a broader, government-wide reinvention process, the National Performance Review, initiated by President Clinton and Vice-President Gore. The goal of the reinvention is to give State, tribal and local decisionmakers maximum flexibility to tailor Federal resources in response to local circumstances, needs and priorities.

In order to keep pace with the changes HUD is undertaking, the Department's program regulations must also change. Although this lead-based paint rule was developed to implement the statutory requirements of Title X for federally owned residential property and housing receiving Federal assistance, the Department saw this as an opportunity to revise all of its lead-based paint regulations to keep pace with changes in the scientific understanding of how childhood lead poisoning occurs, lead-based paint technology and in HUD service delivery.

The rule consolidates numerous lead-based paint regulations found throughout HUD's program regulations into part 35 of title 24 of the Code of Federal Regulations. This eliminates redundant lead-based paint regulations and achieves consistency among the lead-based paint requirements for different HUD programs. Before this rule, many HUD clients received funding from several HUD programs with separate and sometimes inconsistent sets of program regulations.

This rule groups HUD programs by the type of assistance provided to make it easier to understand and implement. For instance, a client receiving HUD funds for rehabilitation will find only one rehabilitation subpart. In addition, grouping HUD programs by type of assistance allows greater flexibility for local governments and recipients of HUD funds.

Finally, the rule reflects HUD's efforts to balance the practical need for cost-effective, affordable lead-based paint hazard notification, evaluation and

reduction measures with the statutory requirements of Title X as well as with HUD's duty to protect children living in a residential property that is owned or assisted by the Federal government.

D. Public Input on Rulemaking

Consistent with Executive Order 12866, Regulatory Planning and Review, and with Executive Order 13045 on Protection of Children From Environmental Health Risks and Safety Risks, HUD has increased public participation in the regulatory development process, with attention to the special needs of children. Because of the magnitude of the changes required in HUD's lead-based paint regulations and the potential impact of these changes, public involvement was crucial to the rulemaking process. The three main avenues for public involvement in the development of the proposed rule were the HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995) (HUD Guidelines), the recommendations from the Task Force on Lead-Based Paint Hazard Reduction and Financing (Task Force), and three major meetings of HUD clients to seek input on the implementation of Title X. In addition to these three methods of public involvement, there was, of course, the opportunity for public comment on the proposed rule.

1. *HUD Guidelines.* The HUD Guidelines were mandated by section 1017 of Title X. They were developed by housing, public health and environmental professionals with broad experience in lead-based paint hazard identification and control. The HUD Guidelines form the basis for many of the lead-based paint evaluation and reduction methods described in subpart R, and are intended to help property owners, government agencies and private contractors sharply reduce children's exposure to lead-based paint hazards, without adding unnecessarily to the cost of housing.

2. *Title X Task Force.* The Task Force on Lead-Based Paint Hazard Reduction and Financing (Task Force) was mandated by section 1015 of Title X. The Task Force submitted its report with recommendations, Putting the Pieces Together: Controlling Lead Hazards in the Nation's Housing, to then-HUD Secretary Henry Cisneros and EPA Administrator Carol Browner in July 1995. Members of the Task Force included representatives from Federal agencies, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the building and construction industry, landlords, tenants, primary lending

institutions, private mortgage insurers, single family and multifamily real estate interests, nonprofit housing developers, property liability insurers, public housing agencies, low-income housing advocacy organizations, lead-poisoning prevention advocates and community-based organizations serving communities at high-risk for childhood lead poisoning. The mandate of the Task Force was to address sensitive issues related to lead-based paint hazards in private housing, including standards of evaluation and control, financing, and liability and insurance for rental property owners and hazard control contractors. Methods found in this rule for ongoing lead-based paint maintenance and the option for standard treatments are drawn from the Task Force recommendations. Further discussion of ways the Department used the Task Force recommendations in developing this rule is provided below under "Other General Issues."

3. *Meetings with HUD Clients.* Prior to the development of the proposed rule, the Department held three meetings with HUD clients on the potential implications of Title X on HUD programs. The meetings involved HUD constituents, grantees, and field staff of the Offices of Public and Indian Housing (PIH), Community Planning and Development (CPD), and Housing, as well as advocacy and tenant representatives. Participants shared their thoughts on several Title X issues including: Risk assessment and interim controls, hazard reduction activities during the course of rehabilitation, occupant notice of evaluation and hazard reduction activities, and responding to children with elevated blood-lead levels. Additional written comments were accepted from participants after the meetings.

4. *Comments on Proposed Rule.* Under the authority of Title X, HUD published a proposed rule in the **Federal Register** of June 7, 1996 (61 FR 29170). The proposed rule set forth new requirements for lead-based paint hazard notification, evaluation, and reduction for federally owned residential property and housing receiving Federal assistance. Comments on the proposed rule were requested on or before September 5, 1996.

Most of the 93 comments were from persons representing organizations that would be directly affected by the rule. More than a third of the comments (34) came from agencies of State or local government: Community development agencies, public housing authorities, planners, mayors, health departments and other organizations directly or indirectly involved with federally

assisted programs involving housing. Groups representing the housing and community development industry, or segments of it, accounted for an additional nine comments.

Fourteen Federal agencies submitted comments on the rule, including 11 agencies affected by it as potential regulated entities, and three others with their own regulatory role in some aspect of health and safety regulations associated with lead poisoning. Four comments were received from hospitals, physicians or health agencies other than those included in the count of State or local agencies, above. Four lead poisoning prevention advocacy groups submitted comments, along with three more broadly based environmental groups and five law firms or legal aid organizations.

Housing developers, or representatives of developers, accounted for five comments. Eight others were received from persons identifying themselves as consultants or experts on some aspect of the rule, or individuals who did not explain the basis of their interest in the rule. In addition, two comments were received from standards-setting entities, and one each from a bank, a secondary mortgage market organization, a coalition of tenant action groups, a child welfare group, and an advocacy group representing industries that manufacture or use lead.

Comments are summarized below in Section II of this preamble and described in more detail in Section III of this preamble.

E. Related Actions by EPA and HUD

Title X requires EPA and HUD to take other very important actions that are complementary to and in some cases binding on this final rule. Five such actions are: (1) The HUD-EPA regulation on notification and disclosure during real estate transactions; (2) the EPA standards for certification of firms and individuals performing lead-based paint activities, and associated work practices standards; (3) EPA standards for determining hazardous levels of lead in paint, dust and soil; (4) the EPA program for the accreditation of laboratories for analysis of lead in paint, dust and soil; and (5) EPA requirements applying to renovation and remodeling activities.

1. *Disclosure Rule.* Section 1018 of Title X (42 U.S.C. 4852d) directs EPA and HUD to issue joint regulations requiring disclosure of known lead-based paint or lead-based paint hazards by persons selling or leasing most housing built before 1978. Under that

authority, the two agencies published a final rule on March 6, 1996, which became effective on September 6, 1996 for owners of more than four dwelling units and on December 6, 1996 for owners of four or fewer dwelling units. The rule requires that, before completing the transaction, sellers and lessors of applicable housing must: (1) Provide purchasers and lessees (tenants) with the lead hazard information pamphlet approved by EPA; (2) disclose all known information about the presence of lead-based paint or lead-based paint hazards; (3) provide purchasers and lessees with any available records or reports pertaining to the presence of lead-based paint or lead-based paint hazards; (4) include, as an attachment to the contract or lease, certain disclosure and acknowledgement language and a warning statement about the dangers of lead-based paint; and (5) include certain disclosure and acknowledgment language in the contract or lease. In addition, sellers must allow purchasers a ten-day opportunity to inspect the dwelling for lead-based paint or lead-based paint hazards. Purchasers and sellers are free to negotiate another mutually-agreeable time period and all other aspects of the inspection or risk assessment. Agents must ensure compliance with these requirements. Section 1018 does not require either the buyer or the seller to conduct an inspection, nor does it require either the buyer or the seller to take action to reduce any lead-based paint or lead-based paint hazards. Also, with lease agreements, neither the landlord nor the tenant is required by section 1018 to conduct any type of inspection or hazard reduction.

Section 1012 of Title X (42 U.S.C. 4822) directs HUD to require that tenants and purchasers of "target housing" receiving Federal assistance be provided the same EPA-approved pamphlet that must be used in compliance with the section 1018 notification and disclosure regulation. ("Target housing" is a statutorily defined term in Title X that means housing constructed before 1978, except housing for the elderly and persons with disabilities unless a child of less than 6 years of age resides or is expected to reside in the housing, and except any zero-bedroom dwelling.) As described below, HUD has avoided duplication of pamphlet dissemination requirements if the pamphlet has already been provided in compliance with the disclosure rule.

2. *EPA Certification Requirements and Work Practices Standards.* Title IV of the Toxic Substances Control Act (TSCA, 15 U.S.C. 2681-2692), as

amended by Title X, section 402(a) (15 U.S.C. 2682(a)) requires EPA to establish a regulatory framework governing lead-based paint activities that will ensure that individuals engaged in risk assessments, inspections and abatement are properly trained, that contractors are certified (licensed), and that training programs are accredited. TSCA section 404 (15 U.S.C. 2684) mandates a process under which EPA will approve State programs for training and certification of individuals and firms under section 402. In States lacking their own programs, EPA must establish, administer and enforce Federal programs. EPA published a final rule on August 29, 1996 (40 CFR part 745, subparts L and Q, 61 FR 45777-45830) implementing sections 402 and 404 as they pertain to target housing and "child-occupied facilities" (generally, certain facilities regularly visited by children under 6 years). The regulations contain the following requirements: Training and certification to ensure the proficiency of individuals who offer to conduct lead-based paint inspections, risk assessments or abatement services; accreditation requirements to ensure that training programs provide quality instruction; work practice standards to ensure that lead-based paint activities are conducted safely, reliably and effectively; and procedures for States and Tribes to apply to EPA for authorization to administer these elements. It is expected that many States and Tribes will have EPA-authorized certification programs in place prior to the effective date for the 402/404 rule, which is August 29, 1999. Regardless of the status of EPA authorizations, however, after that time, all lead-based paint inspections, risk assessments and abatements must be conducted by individuals and contractors certified in accordance with the EPA rule and the work practice standards contained in that rule.

HUD requires that lead-based paint inspections, risk assessments and abatements done in compliance with its final rule on lead-based paint activities in federally owned and assisted housing be conducted in accordance with the EPA rule implementing TSCA sections 402 and 404, i.e., that individuals and firms be certified and the work be done in accordance with the work practices standards. It should be noted that the EPA regulation is not applicable to interim controls. It has been necessary, therefore, for HUD to include basic standards for such procedures in this rule.

3. *EPA Standards for Hazardous Levels of Lead in Paint, Dust and Soil.*

TSCA section 403 (15 U.S.C. 2683) requires EPA to issue regulations identifying, for the purposes of Title X, levels of lead in paint, dust and soil that are considered hazardous. EPA published a proposed rule on June 3, 1998. When promulgated and effective, the final rule implementing section 403 will contain standards that affect the risk assessments required in this rule. In the meantime, the interim levels of lead in paint, dust and soil set forth in this rule issued by HUD shall be followed in housing covered by the rule. When the TSCA 403 rule is effective, HUD will issue any technical amendments that are needed to make clear what standards are applicable to this rule at that time.

4. *EPA Laboratory Accreditation Program.* Under TSCA section 405(b) (15 U.S.C. 2685(b)), EPA has established the National Lead Laboratory Accreditation Program (NLLAP). NLLAP recognizes laboratories which have demonstrated the ability to accurately analyze lead in paint, dust, and soil samples. To be NLLAP recognized, laboratories must successfully participate in the Environmental Lead Proficiency Analytical Testing (ELPAT) program and undergo a systems audit. EPA has recognized the American Association for Laboratory Accreditation (A2LA) and the American Industrial Hygiene Association (AIHA) as NLLAP accrediting organizations. The National Lead Information Center Clearinghouse (1-800-424-LEAD) provides the public with a continually updated list of NLLAP recognized laboratories. In this rule on lead-based paint requirements in housing receiving Federal assistance and federally owned housing, HUD is requiring the use of NLLAP recognized laboratories for laboratory-based analysis of lead in paint, dust and soil samples.

5. *Possible EPA Regulations Pertaining to Renovation and Remodeling.* TSCA section 402(c) (15 U.S.C. 2682(c)) requires EPA to study the extent to which various types of renovation activities create a lead-based paint exposure hazard for workers or occupants where the work is being conducted. The same section directs EPA to revise the regulations implementing section 402(a) to apply to renovation and remodeling activities or to determine that such regulations are not required. EPA has not yet made the determination as to whether regulatory revision is necessary. If EPA does decide to issue such regulations, it is possible that they would apply to interim controls, which are a type of hazard reduction activity commonly required in this HUD rule but not currently regulated by EPA. Other types

of work may also be affected. Until EPA promulgates and makes effective a new regulation under TSCA section 402(c), the requirements in this rule issued by HUD shall be followed in housing covered by the rule.

II. **Summary of Public Comments on Proposed Rule**

A. *Diversity of Comments*

With only a few exceptions, commenters on the proposed rule agreed that lead-based paint hazards are a serious health problem deserving to be addressed. There was, however, an extraordinary diversity of views regarding how best to control lead-based paint and its associated risks. Additionally, commenters varied widely on the question of what relative priority lead-based paint control efforts should enjoy, given the shortage of resources for the provision of housing services generally, and the costs associated with lead hazard control measures.

Commenters also perceived the proposed rule in different ways. Some considered it biased in favor of lead-based paint abatement as opposed to less expensive interim control procedures. Several argued that in recent years interim controls have become accepted as a wiser response to lead hazards than more elaborate abatement processes. Other commenters, however, warned against what they saw as undue readiness in the proposed rule to undertake limited measures to control hazards in circumstances where, *these* commenters believed, such measures would be inadequate and would afford only temporary solutions of unknown duration.

Spokespersons for State and local funded agencies, despite providing many comments on ways to make the rule more effective, were concerned that the cost of compliance with the rule would severely affect their housing programs.

Most, although not all, of the commenters representing the health industry or environmental concerns pleaded for a stronger rule, for more rapid effectiveness, and for a more strenuous program of hazard control than the proposed rule required.

Regulated Federal agencies, like their State and local counterparts, worried about costs and often advocated wider discretion. Many State and Federal commenters advocated more deference on HUD's part to hazard control programs, present or future, that have been or will be developed elsewhere.

Commenters from varying backgrounds suggested that HUD's rule

was likely to become the nationwide "standard" for compliance, i.e., that courts (through tort litigation) and lending institutions (through underwriting standards) eventually would establish a standard of care applicable to *private* housing suppliers that was closely patterned after the standards set out in this rule. Most often, this observation was accompanied by expressions of concern that the proposed rule was not adequate to provide the appropriate standard of care for the nation's housing stock.

B. Commenters' Broad Concerns

Following is a brief description of the most common concerns expressed by the commenters. The Department's response to these concerns is described and explained in Section IV of this preamble below.

1. *"Missed Opportunities"*. Some argued that the proposed rule was misdirected, set the wrong priorities, spent limited resources less wisely than they could be spent, or failed to take important additional considerations into account. Most typical are comments suggesting that the rule:

- (1) Should stress abatement more (or less);
- (2) Is inadequately focused on controlling lead in units currently occupied by small children;
- (3) Pays insufficient attention to soil-related hazards;
- (4) Pays too little deference to EPA and/or private-sector standards-setters;
- (5) Stresses liability risk-management over health-based hazard control measures; or
- (6) Otherwise misses an opportunity to apply the most effective possible rule to an acknowledged problem.

2. *Cost of Compliance*. A very large number of commenters expressed concerns about costs. Cost-related comments took many forms, but the most frequently raised assertions were variations on the following:

- (1) The cost-benefit analysis in the Economic Analysis is inaccurate and grossly underestimates the impact the rule will have on the ability of federally funded entities to carry out their programs.
- (2) Because of high costs, the regulation will divert resources that could be better used to meet other critical housing needs.
- (3) Costs will be so extreme that many housing programs currently in existence will be forced to close down or drastically curtail their productivity.
- (4) The rule will cause existing housing to deteriorate as it becomes too expensive to rehabilitate, or will distort local selection processes by steering

them away from older dwellings most in need of rehabilitation.

(5) Landlords in HUD's tenant-based rental assistance program will not accept the additional financial burden of participating in the program.

3. *Legality of Portions of the Rule*.

Two of the issues presented raised challenges to the legitimacy of portions of the rule, asserting that:

(1) Lead hazard controls in the tenant-based subsidy programs and controls on properties receiving less than \$5,000 in project-based assistance are beyond the scope of the statute.

(2) The rule's soil-testing and soil-abatement/control provisions are outside the scope of HUD's authority, to the extent they fail to differentiate the sources of lead in dust.

4. *Perceived HUD Overreaching*.

Beyond the aforementioned legal challenges, some commenters thought that the rule exceeded proper bounds. They asserted that:

- (1) The rule is an "unfunded mandate," in that it would require expensive undertakings by those regulated, without the offer of a new source of financial assistance.
- (2) The rule, by imposing new risk assessment requirements and/or new obligations to control hazards, would endanger existing contracts.
- (3) The underlying statute makes no distinction between HUD-assisted and other housing receiving Federal assistance, while the rule provides for this dichotomy without providing any justification.
- (4) The rule fails to provide real support to local hazard control efforts, instead imposing requirements that fail to recognize important community concerns.

III. Response to Public Comments and Final Rule Provisions

A. *Scope and Applicability*

This rule implements the requirements of the Lead-Based Paint Poisoning Prevention Act (LPPPA), as amended by section 1012 and section 1013 of Title X.

Throughout this rule, lead-based paint hazard notification, evaluation, and reduction requirements represent the minimum activities required. Parties may voluntarily undertake more extensive lead-based paint activities if appropriate or permitted under the specific housing program with which the dwelling unit or residential property is associated.

If the requirements of this rule for a dwelling unit or residential property differ from those of the State, tribal or local government, the more protective requirement applies.

Section 302 of the LPPPA requires HUD "to establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program." In addition, the LPPPA requires HUD to establish procedures for the inspection and reduction of lead-based paint hazards in Federally owned housing at disposition. Accordingly, this final rule covers all target housing that: (1) HUD is associated with; (2) receives more than \$5,000 in project-based assistance under a program of an agency other than HUD; and (3) is being disposed of by the Federal government.

Since 1975, when it first proposed regulations implementing section 302, HUD has taken a broad interpretation of the phrase "covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary." The scope of HUD's lead-based paint regulations has always included all HUD-associated housing, and this final rule continues that policy. The phrase, "or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program," was added to section 302 by Title X in 1992. HUD's interpretation of that phrase is explained below.

1. *Housing Receiving Less Than \$5,000 in Project-Based Rental Assistance*. Section 1012(a) amends the first sentence of the Lead-Based Paint Poisoning Prevention Act to add the phrase "or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program" so that 42 U.S.C. 4822(a) now reads as follows: "The Secretary of Housing and Urban Development * * * shall establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program."

One commenter asserted that HUD is "clearly outside of its statutory authority" in imposing requirements on multifamily properties receiving less than \$5,000 in project-based assistance. Quoting the 1992 amendments, the

commenter declared that despite HUD's imposing only minimal procedures on these under-\$5,000 properties, the rule would result in additional costs and regulatory burdens on property owners that the Congress "never intended to regulate."

HUD disagrees. The statute does not prohibit the Department from establishing lead-based paint hazard reduction requirements for housing receiving less than \$5,000 in project-based assistance under a program administered by the Secretary of HUD. The legislative history makes this clear. The Senate committee report accompanying the bill states, "Title X would expand the coverage of the LPPPA to include pre-1978 housing suitable for occupancy by families * * * which is covered by an application for mortgage insurance or housing assistance payments *under a HUD program* or receives more than \$5,000 in housing assistance *through another federal program*" (emphasis added, Senate Report 102-332, page 117).

Although the statute gives HUD authority to impose the same requirements on HUD assisted housing receiving less than \$5,000 as on that receiving more than \$5,000, the Department recognizes that the Congress intended that the stringency of the requirements would be related generally to the amount of financial assistance from the Government. HUD is not requiring, therefore, housing receiving multifamily project-based rental assistance of \$5,000 or less per unit per year to comply with the statutorily specified requirements for multifamily housing receiving project-based rental assistance of more than \$5,000 per unit per year. Instead, the rule requires such housing to comply with the less stringent procedures established for tenant-based rental assistance.

2. Tenant-Based Rental Assistance. Some commenters thought that the Congress never intended for the rule to impose duties on landlords in the tenant-based rental assistance programs. This group argued that there exists a "statutory, program-wide exemption for housing receiving tenant-based Section 8 assistance."

The statute is silent on whether the new minimum procedures for lead-based paint hazard notification, evaluation and reduction apply to tenant-based rental assistance. Congress did not amend the first sentence of the Lead-Based Paint Poisoning Prevention Act, set out above, to delete or amend the phrase "housing assistance payments." HUD has historically interpreted this general phrase to cover

virtually all types of housing assistance, including tenant-based rental assistance—the type of assistance that it seems to cover most obviously. The legislative history for Title X states, however, that housing receiving tenant-based rental assistance would be exempt from the Lead-Based Paint Poisoning Prevention Act, as amended by Title X. Congress was concerned that, due to the tendency of residential properties to pass in and out of tenant-based Federal assistance programs, it would be unworkable and inequitable to impose greater burdens on owners of such properties than on other private landlords (Senate Report 102-332, page 117).

Clearly, Congress did not intend for HUD to apply the new minimum procedures set out in section 1012(a) of Title X to tenant-based rental assistance. HUD does not believe, however, that Congress intended to abolish HUD's current procedures, which serve to protect, in a minimal way, the children in families receiving this type of housing assistance. Rather, HUD infers that Congress intended for the Department to effectively retain its present lead-based paint requirements for tenant-based rental assistance. In its current regulations, HUD requires units with tenant-based rental assistance occupied by families with children under 6 to meet the minimal standard for lead-based paint found in its Housing Quality Standards (HQS) (see 24 CFR 982.401). In this rule, then, HUD continues to require tenant-based rental property to meet HQS. To streamline requirements, HUD has modified the lead-based paint requirements in the current HQS slightly, in order to be consistent with recent scientific information on how to protect children who are exposed to lead-based paint hazards. The requirements in this rule for tenant-based rental assistance continue to apply only to units in which children of less than 6 years of age reside. HUD does not believe Congress intended that Federal funds be used to subsidize housing that can poison children.

3. Federally Owned Housing and the Availability of Appropriations. Section 1013 of Title X amends the Lead-Based Paint Poisoning Prevention Act at section 302 to modify existing requirements for the sale (disposition) of all residential property constructed before 1978 and owned by a Federal agency. Section 302(a)(3)(C) (42 U.S.C. 4822(a)(3)(C)) states that:

"To the extent that subparagraphs (A) and (B) (which contain evaluation and abatement requirements for pre-1960 housing, and evaluation and notification requirements for

housing constructed between 1960 and 1978) increase the cost to the Government of outstanding direct loan obligations or loan guarantee commitments, such activities shall be treated as modifications under section 504(e) of the Federal Credit Reform Act of 1990 and shall be subject to the availability of appropriations. To the extent that paragraphs (A) and (B) impose additional costs to the Resolution Trust Corporation and the Federal Deposit Insurance Corporation, its requirements shall be carried out only if appropriations are provided in advance in an appropriations Act. In the absence of appropriations sufficient to cover the costs of subparagraphs (A) and (B), these requirements shall not apply to the affected agency or agencies."

In the proposed rule, the Department interpreted this language to mean that HUD (and other Federal agencies that own residential property) need not comply with the requirements set out in section 302(a)(3) if sufficient funds are not appropriated to the agency for this purpose. The Department then proposed in the absence of sufficient appropriations to include requirements to identify and treat deteriorated paint in HUD-owned properties (similar to current procedures), even if funding is not made available to the Department to carry out more extensive lead-based paint evaluation and reduction.

Commenters expressed strong objections to basing the rule's requirements on the adequacy of appropriations. Several commenters questioned whether a determination that appropriations were "inadequate" would or could ever be made. There was also sentiment against using such a two-pronged system for determining regulatory responsibility at all: "Letting our standards be set by appropriation levels is dreadful public policy when the health of children [is] at stake."

A commenter urged HUD to retain high standards in the regulations and "let the legislative process deal with the fiscal responsibility [for] this community health issue." If more costly requirements are optional, money will not be appropriated, predicted another commenter. Others agreed, saying that since adequate (separate) appropriations are not at all likely to be forthcoming for each program, contemplating them confuses "an already complex regulation."

State and local funded agencies and others expressed their resentment concerning the "adequate appropriations" approach taken in the subparts affecting HUD and other Federal agency responsibilities in the proposed rule: "HUD has two standards, depending on whether there is a Federal appropriation. We find this interesting as HUD has *refused* to seek an

appropriation since the legislation was passed in 1992. Instead, subpart G (HUD without appropriations) will be used.”

Two commenters posed the question, “may CDBG and HOME recipients ignore *their* regulations if there is not additional or sufficient funding to properly do the work?”

Another commenter roundly condemned the appropriations-based dichotomy as “seriously misguided”:

“ * * * There will never be explicit ‘sufficient’ appropriations, and the Secretary is unlikely ever to make an explicit pronouncement that appropriations are ‘insufficient.’ HUD should be adopting a single set of requirements that stipulate minimum levels of hazard controls as part of the price of doing business, not as a matter of fiscal convenience.”

An environmental health advocacy group discussed the statutory exception that is provided for the disposition of certain federally owned housing—where inspection and risk assessment is called for (under section 302(a)(3)) *except* when compliance would increase the cost to the Government of outstanding direct loan obligations or loan guarantee commitments (or would impose additional costs on RTC or FDIC)—*and* there are no appropriations to fund those increased costs.

The described exception, the commenter maintained, was the *only* such exception/exemption in the statute:

“ * * * Absolutely no evidence exists to support the contention that Congress implied or otherwise intended that HUD should be able to grant federal agencies broad discretion to opt out of lead hazard evaluation and control requirements. Such an interpretation would allow federal agencies such as the General Services Administration and the Department of Defense to simply dispose of their properties without paying heed to their condition or habitability
* * *.”

The group urged that, in its final property disposition regulations, HUD clearly limit waiver availability only to those agencies that qualify, based on the cited statutory exemptions. The commenter also urged that HUD revise the regulation to describe “minimum steps” that even agencies entitled to the waiver must undertake. A “sweeping exemption” is clearly unacceptable, the group declared, and HUD “must not condone such an irresponsible policy and must instead set some floor of minimum requirements with which all federal agencies must comply, regardless of appropriations.”

HUD acknowledges the validity of many of these comments. In the final rule, the Department includes single subparts for HUD-owned single family

property and HUD-owned multifamily property, rather than providing separate subparts for when HUD has sufficient appropriations and when HUD does not have sufficient appropriations. An additional subpart is included for residential property owned by Federal agencies other than HUD; the requirements in this subpart are identical to those in Title X. Each affected agency must decide whether the requirements of Title X apply to it; HUD feels that it is inappropriate for the Department to decide this issue for other agencies.

HUD maintains, however, that the language of section 302(a)(3)(C) makes the lead-based paint requirements for HUD-owned residential property conditional on the sufficiency of appropriated funds to be used to conduct inspections and abate lead-based paint hazards in HUD-owned residential property. HUD has never received such an appropriation for these purposes and it did not receive such a line item in the most recent appropriations act. Therefore, in the Department’s view, “appropriations” are not presently sufficient to conduct the lead-based paint activities required under section 302(a)(3)(A) and (B) and HUD is not required to implement these procedures. If sufficient appropriations become available at a later time, this final rule may have to be amended.

It should be noted that HUD interprets the first sentence of section 302(a)(3)(C) to apply only to HUD programs where the cost of conducting lead-based paint evaluation or abatement activities under section 302(a)(3)(A) and (B) increase HUD’s outstanding direct loan obligations or loan guarantee commitments. Since appropriations are not sufficient for the Department to conduct inspections and abatement of lead-based paint hazards in accordance with section 302(a)(3)(A) and (B), a determination of the effect of such activities on HUD’s direct loan obligations or loan guarantee commitments is unnecessary.

Although HUD has made the determination for purposes of section 302(a)(3) that it does not have “sufficient appropriations” and therefore, the Department is not required to implement the procedures set out in section 302(a)(3) for its HUD-owned properties, the Department nevertheless has included lead-based paint procedures in this final rule which the Department can afford to implement and which, in HUD’s view, are fully protective. While Congress under Title X did not require the Department to carry out the requirements in section 302(a)(3)(A) and (B) in the absence of

sufficient appropriations, Congress was silent concerning what activities the Department should carry out to reduce lead-based paint hazards in HUD-held properties in the absence of appropriations. This created a “gap” for HUD’s interpretation. Under *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), where a statute is silent or ambiguous on a specific issue, the Department’s interpretation of the statute will be upheld if it is based on a permissible or reasonable construction of the statute. The Department believes that Congress did not intend for HUD to ignore lead-based paint in its properties, even in the absence of sufficient appropriations. As a consequence, HUD has developed procedures for HUD-owned properties, as set forth in subparts F and I, which it believes are reasonable.

4. *Soil and Dust Standards.* a. *Legal Issues.* A legal question raised by commenters had to do with the Department’s authority to regulate in the area of dust and soil. Two basic questions were raised: authority to regulate in the asserted absence of a nexus with lead-based paint, and authority to regulate in the absence of EPA regulations defining hazardous levels of lead in dust and soil under section 403 of the Toxic Substances Control Act.

One commenter claimed that HUD is exceeding its authority and has moved “arbitrarily and capriciously” by setting interim controls and abatement levels for lead in soil and dust without reference to the risk posed by the *type* of lead contained in soil or dust, or to the bioavailability of the lead. Because HUD’s action is in advance of EPA’s statutorily mandated determinations of soil cleanup levels, HUD is overreaching, in the commenter’s opinion, because the Congress intended that EPA’s regulatory action—identifying what are hazardous levels of lead in dust and soil—was to be the “first step” in rulemaking on that subject matter. According to the commenter, the Congress gave HUD and EPA authority to implement interim controls and abatement with respect to hazards from lead-based *paint*, including the dust *from lead-based paint and soil contaminated by lead-based paint*. Thus, HUD set *ad hoc* standards for lead dust and soil in the absence of any EPA study results *and* without any nexus to lead-based paint.

Further, the commenter stated that HUD was attempting to “decouple” dust and soil testing and abatement from any necessary relation to lead-based paint itself. The “unstated premise” of HUD’s rule would be that all lead in dust is

assumed to come from paint, although this is not the case. HUD's approach would unfairly burden property owners with the costs of cleaning up soil and dust which may have become contaminated from "sources not under the property owner's control." This regulatory requirement, the commenter asserted, would raise the constitutional questions of a "taking without just compensation and deprivation of property without due process of law under the Fifth Amendment * * *."

The commenter concluded that HUD should not "decouple" lead found in dust and soil from the *source* of that lead, and should reconsider its imposition of a single dust-lead standard unrelated to the source of the lead or its bioavailability. Where there is a source of dust related to lead paint, HUD's standards may be workable, the commenter acknowledged, although waiting for EPA's upcoming standards under section 403 of the 1992 Act "would have been more consistent with Congress' intent." HUD's proposed standards, however, would be "unfair" to the extent there are other sources of lead involved, because the Department assertedly lacks authority to regulate lead that is from non-paint sources, and because the regulations would bear "no relationship to cause or risk."

HUD and EPA, after careful consideration, do not agree with the commenter's argument. EPA, which has the relevant regulatory authority under TSCA section 403, has concluded that the language of Title X supports an interpretation that dust and soil lead are covered regardless of the source of the lead. Definitions in Title X do not limit the source of lead in soil or dust to lead from lead-based paint. The definitions of "lead-contaminated dust" and "lead-contaminated soil" do not specify that the source of lead in the dust or soil must be lead-based paint. In fact, the definition of "lead-based paint hazard" specifies lead-contaminated dust and soil as sources of lead contamination separate from and not explicitly linked to lead-contaminated paint.

Furthermore, as a practical matter, it is not possible to determine through routine chemical analysis the source of the lead in the dust and soil at any given site, not to mention every site of pre-1978 housing in the nation. Also, it is well known that the scientific literature has determined that lead in dust is an important source of childhood lead exposure and that dust lead is well correlated with paint lead (Lanphear, 1996). It is unlikely, therefore, that the Congress meant to curtail the reduction of lead in dust at each individual property covered by this regulation until

it is established that paint is the source of the lead in dust at the site.

HUD acknowledges, however, that owners cannot be expected to have protected their properties from dust-lead deriving from such sources as gasoline combustion, nearby bridge repainting, or nearby industrial activity. It is reasonable that this final rule should give the highest priority to the reduction of lead in old residential paint that may cause lead exposure in children. As explained below in Section III.A.5.b of this preamble, HUD has exempted from the requirements of this final rule residential properties that are found not to contain lead-based paint or that have had all lead-based paint removed. (This exemption is consistent with a similar exemption in the real estate notification and disclosure rule that was issued jointly by HUD and EPA on March 6, 1996.) Thus, in this final rule, dust-lead hazards and soil-lead hazards are regulated only in properties in which lead-based paint is known or presumed to be present.

b. *Coordination With EPA Rulemaking.* With regard to coordination with EPA rulemaking on hazardous levels of lead in dust and soil, HUD agrees that the standards set forth in final regulations promulgated and made effective by EPA pursuant to TSCA section 403 will be relevant to this rule. The final rule states that the section 403 standards shall be referenced when such standards are promulgated and effective. There may be a period of time, however, between the effective date of this final rule and the 403 regulations. Therefore, the Department is including in this final rule interim standards for levels of lead in dust and soil that are based on a recently-completed, peer-reviewed, pooled analysis of virtually all available epidemiological studies that directly measure the relationship between lead in children's blood and lead in dust and soil (Lanphear et al. 1998). This ensures that HUD's interim standards are scientifically valid. The interim standards promulgated in this rule are reasonably consistent with the standards recently proposed by EPA. For further discussion of the interim standards, see Sections III.E.15.a and b of this preamble, below.

The Department does not agree with the comment (cited above in Section III.A.4.a of this preamble) that it should delay all regulatory action pertaining to lead in dust and soil until final 403 regulations are promulgated. HUD has previously established standards for dust lead and soil lead to ensure that hazard controls are properly targeted and are effective in the housing it assists

or owns. Such standards were published in Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing, September 1990 (Interim Guidelines); and again in Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing, June 1995 (HUD Guidelines). These standards have already been widely used in HUD programs. The scientific literature has confirmed that lead in dust and soil are important pathways to childhood lead exposure, as discussed below in Section III.E.15.b of this preamble.

When EPA regulations implementing TSCA section 403 are final and effective, they will apply to this HUD rule and will supersede most of the HUD interim standards for dust and soil. If the final section 403 rule does not establish a standard for an activity or situation that is covered by the HUD interim standards, there may be a question as to whether that aspect of the interim standards is retained. HUD expects that, after the section 403 rule is published, the Department will publish a technical amendment to this rule or engage in additional rulemaking to make clear what the applicable standards are.

5. *Exemptions.* a. *Housing for the Elderly.* This rule applies most broadly to "target housing," which is defined in Title X as housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in the unit) or any 0-bedroom dwelling unit. As in the proposed rule, HUD interprets the exemptions for elderly and disabled housing to apply only to residential property which is designated exclusively for elderly or disabled use.

Some commenters complained about this restrictive interpretation and urged that it should be enough that elderly or disabled persons reside in a dwelling unit and that no young children are expected to reside there. After careful consideration, HUD has decided to retain the interpretation of the exemption that was adopted in the proposed rule. This is consistent with the definition of target housing used in all regulations issued pursuant to Title X. The statute has never been interpreted as providing an exemption for each dwelling that happens to be occupied by elderly or disabled persons. Such a policy, in the judgment of the Department, would be contrary to the intent of the statute, which is to eliminate as far as practicable lead-based paint hazards in all housing receiving Federal assistance and in federally owned housing at disposition.

Most dwellings currently occupied by elderly persons or persons with disabilities will probably be occupied by a child in the future.

The Department defines the phrase "expected to reside" in the statutory definition of target housing as meaning that there is actual knowledge that a child is expected to reside, rather than a general presumption that a child will probably reside in the dwelling unit sometime in the future. If a woman residing in the dwelling unit is known to be pregnant, there is actual knowledge that a child is expected to reside in that unit. However, in the context of most residential real estate transactions it is not advisable to inquire as to whether a woman is pregnant. The term "expected to reside" is used in the statutory definition of "target housing" in Title X, but it is not defined there. It would not be unreasonable for people seeking to comply with the law to think that the term might refer to the distant future, that is "expected to reside at some time, however far in the future." That uncertain potentiality is not part of HUD's interpretation of statutory intent. Therefore HUD is providing this tightened definition to minimize confusion.

b. *Absence of Lead-Based Paint, or Prior Hazard Reduction.* The proposed rule provided exemptions from certain requirements if a residential property was found to contain no lead-based paint, but such exemptions did not apply to all programs. To streamline the final rule, exemptions are provided for properties found not to have lead-based paint by a certified lead-based paint inspector and for properties in which all lead-based paint has been identified and removed in accordance with procedures established by an EPA-authorized State or tribal program or by EPA in accordance with 40 CFR part 745, subparts L and Q. If the method of abatement is enclosure or encapsulation, this exemption does not apply because lead-based paint is still present.

An owner or recipient of Federal assistance hoping to qualify for this exemption may question whether correcting for possibly incorrect (or outdated) positive findings during lead-based paint inspections is permissible. In the rule, the owner or recipient always retains the option of having additional tests performed by a certified lead-based paint inspector. Nothing in the regulation is intended to revoke or restrict that option. An additional test can sometimes clarify whether lead-based paint is or is not present. Actions may be taken based on the results of the

most recent inspection by a certified lead-based paint inspector, provided appropriate technology is used. Laboratory analysis of a properly taken paint sample is a more reliable method of measurement than the use of a portable X-ray fluorescence (XRF) analyzer on site. Therefore a new laboratory analysis of a paint sample can overturn either an old portable XRF reading or an old laboratory test, but a new portable XRF reading can overturn only an old portable XRF reading.

These general exemptions are intended to apply only if the entire residential property is free of lead-based paint or has had all lead-based paint removed. The term "residential property" is defined in the rule as including such things as outbuildings, fences, and play equipment affixed to the property as well as dwelling units and common areas.

HUD is providing this exemption to assure that the highest priority in the use of scarce lead-based paint hazard control resources is given to residential properties with lead-based paint. The Department recognizes that some properties have dust-lead hazards and/or soil-lead hazards but do not have any lead-based paint. These properties are expected to be a small proportion of the total affected stock, however.

c. *Housing To Be Demolished.* In response to questions from various sources, the rule provides that housing to be demolished is exempt, provided the housing remains unoccupied until demolition. Owners should be aware, of course, that other local, State and Federal regulations pertaining to environmental protection and occupational safety and health may apply to demolitions.

d. *Nonresidential Property.* The final rule also states explicitly that property that is not and will not be used for human habitation is exempt. In the case of a mixed use property, HUD intends that only those parts of the property normally associated with residential use shall be covered by this rule. For example, retail and office establishments in an apartment building would not be covered, but hallways leading to such uses would be covered if the hallways also service dwelling units that are covered by the rule.

e. *Rehabilitation Disturbing Little or No Painted Surface.* Commenters also complained that existing exemptions in HUD rules for weatherization, emergency repairs, water/sewer hookups, installation of security devices, and other special work were no longer included in the rule, even though, the commenters said, these were "realistic and necessary"

exemptions. The commenters were concerned primarily with rehabilitation activities funded under the Community Development Block Grant or HOME programs.

With regard to weatherization, the Department believes this is too broad a category on which to base an exemption from this rule. Weatherization often includes window replacement, which can generate lead dust and therefore should be performed with safe work practices. With regard to such activities as water and sewer hookups and installation of security devices, HUD has provided in subpart B of the final rule an exemption for rehabilitation that does not disturb a painted surface. Also, activities that disturb painted surfaces of no more than a "de minimis" amount of 2 square feet in any one interior room, 20 square feet on exterior surfaces, or 10 percent of the total surface area on an interior or exterior component with a small surface area are not required to use "safe work practices," and worksite clearances are not required for such work. (This de minimis is stated in the section on safe work practices in subpart R of the rule.) Therefore, installation of security devices under rehabilitation assistance will generally not require special precautions usually associated with lead-based paint hazard reduction. Furthermore, in situations in which security devices are being installed as a part of the operation and maintenance of a residential property that is required under this rule to incorporate ongoing lead-based paint maintenance as a part of the everyday maintenance of the property, the same "de minimis" exemption applies.

f. *Emergency Actions and Natural Disasters.* The proposed rule provided a general exemption for properties undergoing emergency repairs in response to natural disaster. The Department believes that there are circumstances in which the time required for compliance could adversely affect life or property and, consequently, an appropriately tailored exemption is needed.

Two commenters requested additional exemptions beyond the "natural disaster" exemption set out in the proposed rule. They believed it was too narrow in scope, arguing that any form of disaster should be the basis for an exemption from the rule's requirements. On the other hand, others claimed that no justification existed for exempting damaged properties. At a minimum, these properties need risk assessment and full disclosure before any sale, one commenter said.

In the final rule, HUD has provided in subpart B a more carefully worded provision that provides an exception for "emergency actions immediately necessary to safeguard against an imminent danger to human life, health or safety, or protect property from further structural damage (such as when a property has been damaged by a natural disaster, fire, or structural collapse) * * *". The exemption states, however, that in such cases "occupants shall be protected from exposure to lead in dust and debris generated by such emergency actions to the extent practicable." It is HUD's intent that such protection would include a thorough cleanup. The exemption extends only to the completion of repairs necessary to respond to the emergency; after that, the requirements of the rule apply.

g. *Law Enforcement Seized Property.* A spokesperson for the Treasury Department's Asset Forfeiture Program urged that law enforcement agencies seizing real properties should be able to dispose of those properties without the financial burden of compliance with the rule, with only a duty to warn potential transferees or purchasers of the possible presence of a lead-based paint hazard. The Justice Department's U.S. Marshals Service made similar comments, adding that the regulations will create "an economic disincentive to seizing and forfeiting pre-1978 residential property."

In view of the special nature of law enforcement, HUD has added a provision in subpart B of the final rule that exempts seized properties owned for 270 days or less from the evaluation and hazard reduction requirements of subpart C of this rule, which sets requirements for the disposition of residential properties owned by Federal agencies other than HUD. For seized properties owned longer than 270 days, the requirements of subpart C will apply. Ownership begins upon receipt of a judicial order of forfeiture. Approximately 400 seized, pre-1978 dwelling units are disposed of annually by the Department of the Treasury and the Federal Marshals Service of the Department of Justice combined. HUD expects that the Federal law enforcement agencies, in exercising their managerial responsibilities over seized residential property, will make every reasonable effort to maintain the property in a lead-safe condition.

h. *Emergency Rental and Foreclosure Prevention Assistance.* Some State and local agencies urged that programs providing emergency rental assistance or foreclosure prevention assistance be exempted. The final rule provides a limited exemption for such programs

subject to subpart K, Acquisition, Leasing, Support Services, or Operation. The exemption for any specific dwelling unit expires after 100 days. HUD does not intend that multiple households receiving emergency assistance can be recycled through a unit without subjecting the unit to the requirements of subpart K.

i. *Adverse Weather.* In the proposed rule, the subparts covering disposition of HUD-owned single family property included an exception allowing delay of repainting if weather conditions make such work infeasible. In the final rule, the concept behind this exception has been broadened to apply to evaluation and reduction activities under all subparts, allowing delay "for a reasonable time during a period when weather conditions are unsuitable for conventional construction activities." HUD intends that this exception will allow reasonable delay only and will not be an excuse for noncompliance.

j. *Historic Properties.* The National Park Service commented that HUD should provide greater flexibility to allow a balance to be achieved in specific cases between the objectives of the National Historic Preservation Act and those of the Lead-Based Paint Poisoning Prevention Act. Conflicts between the two goals, the protection of historically significant buildings and the creation of lead-safe housing, may occur where abatement is required. For example, the use of artificial siding and the replacement of historic trim and doors is generally not appropriate for historic buildings. In response, HUD has added a general exception in subpart B that allows designated parties to use interim controls instead of abatement methods, if requested by the State Historic Preservation Office, on properties listed or determined to be eligible for listing in the National Register of Historic Places or contributing to a National Register Historic District. If interim controls are conducted, ongoing maintenance and reevaluation shall be conducted as required by the applicable subpart. For comprehensive guidance on eliminating lead-based paint hazards from historic housing without removing historically significant features, see Chapter 18 of the HUD Guidelines or the National Parks Service publication, "Preservation Brief 37: Appropriate Methods for Reducing Lead Paint Hazards in Historic Housing," by S.C. Park and D.C. Hicks, National Parks Service, Washington, DC 20013-7127 (1995).

k. *Insufficient Appropriations.* In the proposed rule, the Department included in the subpart covering disposition of residential property by a Federal agency

other than HUD an exemption from that subpart if a Federal agency determines that sufficient funds are not appropriated to carry out the requirements of the subpart. In the final rule, this exemption, which implements a provision of section 1013 Title X, has been moved to the Exemptions section of subpart B (See Section III.A.3 of this preamble).

6. *Deference to Other Agencies.* Commenters sought, in varying forms, "exemptions" providing for deference to State or local agencies or other Federal agencies based on State lead-control laws or an agency's demonstrated performance.

In the final rule, the Department has provided such deference in specific situations. First, HUD is requiring that inspections, risk assessments and abatements be conducted in accordance with the work practices standards of a State or Indian Tribe with a program authorized by EPA under subpart Q of 40 CFR part 745 or, in the absence of such a program, with EPA's standards at 40 CFR part 745, subpart L. Therefore HUD is in effect incorporating the opportunity that is built into the EPA regulations for States to determine, within the EPA framework, procedures for evaluation and reduction. With regard to the policies of Federal agencies other than HUD, the final rule gives such agencies the authority to determine whether appropriations are sufficient to implement the requirements of section 1013 of Title X. (See further discussion of this matter in Section III.A.3 of this preamble, above.)

One agency suggested that high-performing public housing agencies with good property maintenance records should be exempt from the additional evaluations provided in the rule. Because the current performance rating instrument used by HUD and public housing agencies does not include a specific grade for lead-based paint activities, HUD does not believe it has a valid way to identify "high-performing public housing agencies" for the purposes of this rule. It is not possible, therefore, to provide such a broad exemption at this time.

7. *Changes and Deletions to Current HUD Regulations.* In the proposed rule, HUD did not include specific provisions for the deletion of existing part 35 provisions being replaced by this rule or the numerous lead-based paint requirements set out in various program regulations in Title 24. It was stated, however, in the preamble to the proposed rule that such deletions would be made, and this final rule provides such changes and deletions.

8. *Indian Housing Programs.* In the proposed rule, two subparts were applicable to Indian housing programs: the one pertaining to rehabilitation (which was to apply to the Indian Community Development Block Grant Program), and the one pertaining to public and Indian housing programs (which was to apply to housing owned and operated by Indian housing authorities under public and Indian housing programs). With the enactment of the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA, Pub. L. 104-330, 25 U.S.C. 4101 *et seq.*), it has been necessary to revise the way this rule applies to Indian housing programs. NAHASDA separated Indian housing from public housing and made funding for Indian housing under the United States Housing Act of 1937 unavailable. The primary program created by NAHASDA is the Indian Housing Block Grant Program, which can be used for many different forms of housing assistance. Therefore the following subparts have been made applicable to the Indian Housing Block Grant program: Subpart H, Project-Based Rental Assistance; subpart J, Rehabilitation (also applicable to the Indian Community Development Block Grant program); subpart K, Acquisition, Leasing, Support Services, or Operation (also applicable to the Indian Community Development Block Grant Program); and subpart M, Tenant-Based Rental Assistance. Tribes and tribally designated housing entities receiving funds from the Indian Housing Block Grant and Indian Community Development Block Grant programs must determine which subpart of this final rule applies based on the type of activity being conducted or assistance being provided to a particular dwelling unit or residential property. If more than one type of assistance is being provided, the most protective requirements apply.

9. *Applicability of Subparts to Programs and Dwelling Units.* Subparts C, D, and F through M of the final rule each set forth requirements for a specific type of Federal housing activity or assistance, such as mortgage insurance, rehabilitation assistance, project-based rental assistance, tenant-based rental assistance, or public housing. Each of these subparts applies to more than one program. For example, there are at least five HUD programs that provide tenant-based rental assistance, so all five are therefore subject to subpart M, which states the lead-based paint requirements for housing receiving tenant-based rental assistance.

In the proposed rule, HUD listed in the applicability section of each subpart

the programs to which the subpart was to be applicable. This led to concern within the Department that such lists may be incomplete or go out of date. Therefore, in the final rule these lists have been removed from the applicability sections. In the applicability sections, care has been taken to try to describe clearly what types of housing assistance is and is not covered by each subpart. A current list of programs covered by each subpart is available on the internet at www.hud.gov, or by mail from the National Lead Information Center at 1-800-424-LEAD.

Several HUD housing assistance programs have more than one type of eligible activity, so some programs are subject to more than one subpart of this rule, as was mentioned above in regard to the Indian Housing Block Grant program. In fact, there are at least nine such programs at the time of this writing. These programs, with the subpart designations in parentheses, are as follows: Indian Housing Block Grant program (H, J, K, and M), Indian Community Development Block Grant program (J and K), Home Investment Partnerships program (HOME) (J, K, and M), Community Development Block Grant program (J and K), Supportive Housing Program (H, J, and K), Shelter Plus Care (H and M), Housing Opportunities for Persons With AIDS (HOPWA) (J and M), Homeownership of Multifamily Units (HOPE 2) (J and K), and HOPE for Homeownership of Single Family Homes (HOPE 3) (J and K). Grantees, participating jurisdictions, Indian tribes and other entities administering these flexible programs must decide which subpart or section of this rule applies to the type of assistance being provided to a particular dwelling unit or residential property. If more than one subpart or section applies, the one with the most protective requirements applies. To assist in making this judgment, HUD is providing in subpart B of the rule a table listing subparts and sections in order from the most to least protective initial hazard reduction requirements. In some cases, more than one program as well as more than one subpart or section may apply to a property or dwelling unit. In this case also the most protective requirements apply.

A multifamily residential property may have some dwelling units subject to one set of requirements and other units subject to other requirements. In this case, the owner has the choice of either operating the property with different sets of requirements or operating the entire property at the most protective

level. An example of this situation is provided in subpart B of the rule.

B. Structure of the Rule

1. *Organization.* In the interests of simplicity and streamlining, all of the Department's lead-based paint requirements, including the disclosure rule, are now located in part 35. The proposed rule set forth lead-based paint requirements in three parts, including new parts 36 and 37 that, together with part 35, subpart H, were to comprise all of HUD's regulatory requirements for lead-based paint in a single place. Part 36 was to describe the lead-based paint requirements for each program covered under the Lead-Based Paint Poisoning Prevention Act, grouped in subparts according to the agency or office responsible and the type of assistance. Part 37 was to describe the standards and procedures for conducting the lead-based paint evaluation and hazard reduction activities required in part 36, with different activities described in different subparts.

In the preamble to the proposed rule, however, HUD indicated that it was considering consolidating parts 36 and 37 in the final rule. This has been done. The entire rule consists of 12 subparts (B, C, D, F through M, and R, with E and N through Q reserved), all in part 35. Subpart A of part 35 is the rule requiring disclosure of known lead-based paint hazards upon sale or lease of residential property (disclosure rule), which was promulgated on March 6, 1996. EPA published the same rule at 40 CFR part 745, subpart F. In this current rulemaking, HUD is moving the location of the disclosure rule from subpart H to subpart A of 24 CFR part 35. No text or section number changes are being made to the disclosure rule. The general requirements found in subpart A of the proposed rule are located under subpart B of today's final rule.

Subpart B of the final rule provides all the general requirements, definitions, exemptions, and options that apply to subparts B, C, D, F through M, and R. Subpart B does not apply to the Disclosure Rule in subpart A. All residential properties and dwelling units subject to this final rule are also subject to the Disclosure Rule. Subparts C, D, and F through M set forth the requirements for each program or type of assistance. Subpart R of the final rule contains the required standards and methods for conducting evaluation and hazard reduction activities formerly found in part 37 of the proposed rule. The provisions of subpart R are referenced in subparts B, C, D, and F through M. As explained below, the standards and methods requirements of

this rule have been streamlined considerably.

One commenter suggested that the requirements for notice to residents of the results of evaluation and hazard reduction be located at the beginning of the rule so that they need not be repeated for each program or type of housing. This has been done. The notice requirements are found in subpart B at § 35.125 and are referenced in the program-specific subparts.

2. *Simplicity and Overall Strategy.* Several commenters complained that, despite the effort to consolidate lead-paint regulations in a single rule, the format of the proposed rule remained "program specific". Others called it "cumbersome". Because community development and housing administrators must work with a variety of programs, they will be required to operate under different subparts. Calling the rule lengthy and technical, one commenter said it would be helpful if it could be organized "in a more user-friendly fashion," using cross-references. Several commenters regarded the rule as "confusing" or in need of further consolidation.

One commenter complained that there remained "at least 14 different requirements," based on the program authority or on the amount of assistance provided.

In the final rule there are seven evaluation and hazard reduction strategies for HUD housing programs. These strategies vary in stringency, costliness, and lasting effectiveness in preventing childhood lead poisoning. They are applied to the various forms of housing assistance, based generally on: (1) The amount, nature and duration of financial assistance provided under the program; (2) the risk of childhood lead poisoning in the housing (based on year of construction); and (3) whether the housing is generally rental or owner-occupied.

There are two primary differences between the strategies of the final rule and those of the proposed rule: (1) Paint repair has been replaced by paint stabilization; and (2) clearance is required in the final rule after paint stabilization, and the clearance requirement has replaced the dust-testing requirement for pre-1950 housing with tenant-based rental assistance.

In order from least to most stringent, the seven strategies are:

(1) Safe work practices during rehabilitation;
(2) Ongoing lead-based paint maintenance practices to assure that paint is maintained so that it remains intact, and that safe work practices are

used (similar to the "essential maintenance practices" recommended by the Task Force);

(3) Visual assessment and paint stabilization;

(4) Risk assessment and interim controls (with the option of performing specified standard treatments);

(5) Lead-based paint inspection and risk assessment, and interim controls;

(6) Risk assessment and abatement of lead-based paint hazards; and

(7) Lead-based paint inspection, and abatement of all lead-based paint.

These strategies include the following fundamental principles. Whenever hazard reduction methods are employed (except for disturbances of only a small area of paint surface) clearance is required to ensure that the job is done properly. Second, ongoing lead-based paint maintenance practices are required in rental housing whenever HUD has a continuing relationship with the property. Third, to ensure that the controls are still intact and effective over time, reevaluation is required whenever a risk assessment and interim controls are required and there is a continuing HUD subsidy or ownership of rental housing. Fourth, special procedures are required in programs with a continuing subsidy or HUD ownership of rental housing whenever a child is identified with a blood lead level that calls for environmental assessment and intervention (called an "environmental intervention blood lead level" in the rule).

The first strategy, safe work practices during rehabilitation, is applied only to rehabilitation assistance of no more than \$5,000 per unit. This is a "do no harm" policy that is intended to assure that low-cost rehabilitation does not generate lead-based paint hazards. It allows low-cost rehabilitation to go forward without costly lead-based paint requirements; but it does not necessarily determine whether or not the entire dwelling unit or property is "lead safe," because, for this strategy, clearance must be conducted only for the worksite, which may not include the entire unit.

The goal of the second strategy, ongoing lead-based paint maintenance only, is to ensure that paint is kept stabilized and that the work is done in a safe manner. Clearance is required only of the worksite. This strategy does not provide full assurance that a property is free of lead-based paint hazards, but it will minimize such hazards over time. It is applied to properties that are subject to an application for multifamily mortgage insurance and were built between 1960 and 1977. These are rental properties with no subsidy, only mortgage

insurance, but there is a continuing relationship between the Department, the borrower and the lender through the insurance agreement. These properties were built toward the end of the period when lead-based paint was used in housing and are less likely to have lead-based paint hazards than older housing. This strategy is also applied as a transitional requirement for multifamily properties receiving project-based assistance during the phase-in period before a risk assessment is conducted.

The third strategy, visual assessment, paint stabilization and clearance, provides assurance that the housing to which it is applied is "lead safe." To provide such assurance, HUD intends that clearance be unit-wide, not just for the worksite. It should be noted that clearance is required only if paint stabilization is performed, so a unit that passes the initial visual assessment (i.e. no deteriorated paint is identified) undergoes no dust testing. Also, if the housing is in poor physical condition, or if there are high levels of lead in the soil, lead-based paint hazards may reappear. Therefore, ongoing maintenance is required whenever HUD has a continuing relationship with rental property. The final rule applies this strategy to HUD-owned single family housing that is sold with a mortgage insured by HUD; properties with acquisition, leasing, support services, or operation assistance; tenant-based rental assistance programs where a child of less than 6 years of age resides; multifamily housing receiving up to and including \$5,000 per unit per year in project-based rental assistance; and single family properties assisted under the project-based certificate or voucher program, the moderate rehabilitation program, or another HUD-funded project-based rental assistance program.

The fourth strategy, risk assessment and interim controls, with the option to conduct standard treatments, provides assurance that all lead-based paint hazards have been eliminated. Unit-wide clearance is always required. Ongoing maintenance of painted surfaces is required whenever HUD has a continuing relationship with the property; and reevaluation is required if HUD is the owner, if there is project-based rental assistance in a multifamily property exceeding \$5,000 per unit per year, and in public housing. This strategy is applied to properties that are subject to an application for multifamily mortgage insurance and were built before 1960, housing receiving multifamily project-based assistance of more than \$5,000 per unit annually, and housing receiving rehabilitation

assistance of \$5,000—\$25,000 per unit. A risk assessment and interim controls are also required in public housing developments that have lead-based paint that has not yet been abated.

The fifth strategy, lead-based paint inspection, risk assessment, and interim controls, is applied only to HUD-owned multifamily housing. It differs from the fourth strategy in that it requires a lead-based paint inspection as well as a risk assessment. Most of these properties are being sold, frequently without HUD mortgage insurance, so HUD will not have a continuing relationship with them and thus will not be able to ensure that ongoing lead-based paint maintenance practices and reevaluation are practiced. With a lead-based paint inspection, HUD will provide the buyer with information on the location of any remaining lead-based paint on the property that the buyer and later owners can use to avoid generating dust-lead hazards in the future.

The sixth strategy involves risk assessment and abatement of lead-based paint hazards. This strategy is used when Federal rehabilitation assistance is greater than \$25,000 per unit. When Federal funds are used to make such a substantial investment in a property, it is logical that long-term hazard control measures be implemented at a time when substantial concurrent rehabilitation is being done. Paint testing of surfaces to be disturbed during rehabilitation is called for to ensure that new lead-based paint hazards are not inadvertently created, but the designated party has the option to presume the presence of lead-based paint on such surfaces.

The objective of the seventh strategy, lead-based paint inspection and abatement of lead-based paint, is abatement of all lead-based paint. This strategy applies to public housing and to properties that are being converted from nonresidential to residential use or are subject to major rehabilitation and are being financed with HUD/FHA multifamily mortgage insurance. This is not a new requirement for public housing. Current public housing regulations require a lead-based paint inspection and, at the time of modernization, abatement of all lead-based paint. However, because complete modernization (and therefore complete abatement) may not occur for many years in some housing developments, and because modernization (and therefore abatement of lead-based paint) can occur on a piecemeal basis (e.g., kitchens one year, bathrooms another), the final rule, like the proposed rule, adds the requirements of strategy four, risk assessment and interim controls,

during the period prior to completion of abatement to assure that all public housing occupied by families will be free of lead-based paint hazards. The requirement for conversions and major rehabilitations financed with multifamily mortgage insurance is new, however. HUD believes that such properties, after undergoing such substantial renovation, should be as free as reasonably possible of any future lead-based paint hazards.

3. *Prescriptiveness.* There were several comments to the effect that the rule was too prescriptive. These commenters generally recommended a movement toward "performance-based" requirements, arguing that a performance-based rule would stand up better to future technical innovations.

One commenter recognized that adopting performance-based standards was not always a simple matter. Decisions to do so must be made "requirement-by-requirement," but the commenter urged looking for means to use such standards wherever feasible, and cautioned against "locking in" requirements which new technology or research may well show to be inappropriate in the future. For example, the commenter recommended against specifying HEPA vacuuming in the rule, indicating that research underway may suggest that in some cases less specialized equipment or less extensive procedures can be just as effective. Another commenter suggested basing requirements on performance, but including a more prescriptive "safe harbor" optional alternative. Sometimes, the commenter observed, performance-based standards are simply unhelpful to those regulated due to lack of clarity or information about the method of obtaining the desired performance.

Several commenters recommended against "too rigid" regulatory requirements that would require "full-blown" future rule making proceedings to overturn. Some suggested incorporation of guidelines into the rule by reference.

Although the proposed rule included prescriptive requirements, § 37.1(b) of the proposed rule stated that those requirements did *not* apply to lead-based paint inspections, risk assessments and abatements performed by inspectors, risk assessors, abatement supervisors and workers certified in accordance with EPA regulations under the Toxic Substances Control Act (TSCA). Rather, the prescriptive standards in proposed part 37 were to apply only when such activities were performed by individuals who were not certified in accordance with EPA

requirements, should certification mechanisms not be in place.

The effective date of the EPA certification requirements and the EPA work practices standards is August 31, 1999. By that date, individuals conducting inspections, risk assessments and abatement must be certified and all such activities must be performed pursuant to the work practices standards in that regulation or in requirements of EPA-authorized State or Tribal programs. There is no need for HUD to issue detailed requirements for risk assessment, inspection and abatement. They have been omitted, therefore, from the final rule, except for interim dust and soil standards.

This leaves the question of whether the proposed requirements for interim controls and related procedures that are not covered by the EPA regulations are too prescriptive. Related procedures include standard treatments, occupant protection and worksite preparation, clearance, ongoing lead-based paint maintenance, reevaluation, and safe work practices. In the final rule, HUD has tried to strike a balance between the need to assure that the procedures will be effective in preventing childhood lead poisoning and the goal of providing flexibility and avoiding rigidity.

C. Effective Date

The proposed rule included an effective date of 12 months after publication of the final rule, and the Department explained in the preamble that this time period was chosen to allow all affected parties time to prepare for implementation of the new requirements.

Some commenters urged that the effective dates in the rule be moved up in whole or in part, while others asked for a further delay to allow affected parties to secure expert assistance or training opportunities. One commenter urged waiting to make the rule effective until EPA's upcoming rule on health-based standards for lead in dust and soil was promulgated and made effective.

Advocates of rapid effectiveness pointed out that the rule already was "overdue," and claimed that important health benefits could be realized by the regulation's becoming operational sooner rather than later. Several commenters advocated immediate effectiveness for portions of the rule dealing with occupant protection, worksite preparation and the prohibitions against unsafe practices.

HUD considered imposing an immediate effective date because the statutory effective date of January 1, 1995 had already passed and because of the risk to the health of children from

a further delay in implementing these requirements. On the other hand, HUD noted that program administrators at all levels of government, as well as property owners and contractors performing lead-based paint activities, would not have adequate time for education, training, planning and budgeting to implement fully the new technical standards, requirements and procedures with an effective date earlier than proposed.

After thorough consideration of these varying points of view HUD has decided to retain the proposed 12-month time period following publication for a phasing in of the effective date of the final rule, with one exception: the prohibition of certain methods of paint removal or surface preparation set forth in § 35.140 shall be effective 60 days after publication of this final rule. In addition, designated parties may choose to comply with the requirements of this final rule before the effective date, instead of complying with existing requirements, if they desire and provided there is not a programmatic limitation that would preclude such an action.

The exception to the 12-month phase-in policy is appropriate for prohibited practices. These are already well known; many are in HUD's current regulations and guidance and are prohibited by the EPA final rule on training and certification, which was published on August 29, 1996. Many States already prohibit these practices, and other safer paint removal methods are well known. (See Section III.E.2.g. of this preamble.)

One commenter requested clarification of the effective date's impact on pre-rule lead-based paint control activities already undertaken and partially completed, and urged that it be made clear that this ongoing work could be carried forward after the effective date "without revision." The Department's policy on this matter varies somewhat from program to program, because of differences in regulations and administrative procedures. Therefore the applicability sections of subparts F through M include statements specific to each program. In subpart F, pertaining to HUD-owned single family housing, any property to be sold with a HUD-insured mortgage and which is offered for sale on or after the effective date of this final rule must comply with the requirements of the rule. In the case of subpart G, pertaining to multifamily mortgage insurance, any property for which a HUD or FHA commitment is made on or after the effective date must comply with the rule. With regard to subpart H,

project-based rental assistance, properties that are receiving Section 8 assistance on or after the effective date of this rule must comply. In the case of competitively awarded grants under the HOPWA, Supportive Housing, and Shelter Plus Care programs, the requirements apply to grants awarded pursuant to NOFAs issued on or after October 1, 1999. For formula grants under HOPWA, the requirements apply to activities for which program funds are first obligated on or after September 15, 2000. Subpart I states that HUD-owned multifamily properties and properties for which HUD is mortgagee-in-possession must comply with the rule if they are offered for sale or held or managed by HUD on or after the effective date of this rule. Subpart J, pertaining to rehabilitation assistance, includes program-specific information on the effective date for projects funded under the HOME program, the Community Development Block Grant (CDBG) programs, the Indian Housing Block Grant (IHBG) program, HUD-administered homelessness assistance programs, and the Indian Community Development Block Grant program. Project-specific effective date policies for housing subject to subpart K, Acquisition, Leasing, Support Services, or Operation, are the same as for subpart J. With regard to public housing, subpart L states that all housing to which the subpart applies is covered by the rule as of the effective date of this final rule. Finally, subpart M, which pertains to tenant-based rental assistance, states that housing receiving such assistance becomes subject to the requirements of this rule at the time of an initial or periodic inspection that occurs on or after the effective date of this final rule. (The initial or periodic inspection referred to in the previous sentence is the inspection conducted by the public housing agency (PHA) or other administering agency to determine whether the housing unit meets the requirements of the program. It is not a lead-based paint inspection.)

D. Other General Issues

1. *Policy on Abatement.* Some commenters saw in the proposed rule an undue emphasis on abatement, as opposed to more limited lead hazard control measures. "As such," one organization declared, "the rule appears inadequately protective of children's health, and unlikely to realize the full benefits predicted by the Economic Analysis as justification for the costs of compliance." Abatement should not be a defined term in the rule, nor used at all, this commenter stated. The recommended term was "hazard

abatement," used to mean "any set of measures to permanently eliminate lead-based paint hazards." This should be the "maximum requirement" of the rule. While abatement of intact lead-based paint would always remain an option, it need not and should not be required, the commenter urged.

The same commenter urged that the definition of abatement should *not* include reference to lead-based paint (i.e., intact paint). By doing so, there is a deviation from the definition of abatement in Title X itself. Failing to make the distinction between intact LBP and lead hazards is likely to "recreate * * * the scenarios that Title X was supposed to end: Paralyzed non-compliance because of the costs and burdens of performing abatement of non-hazardous intact LBP."

A commenter who felt the rule didn't stress abatement enough was "troubled by the rule's implicit acceptance that it is infeasible to abate lead paint from housing." Arguing that the societal returns more than justified the cost, the commenter declared that the obstacles to abatement as a predominant policy were "not economic, but political."

HUD agrees that abatement should be targeted toward hazards, not the mere presence of lead-based paint, except in public housing, where lead-based paint abatement is required by statute, and for conversions and major rehabilitation projects seeking HUD/FHA multifamily mortgage insurance. The final rule defines abatement accordingly but retains the existing lead-based paint abatement requirements for public housing. The legislative history of Title X shows that Congress did not intend for the existing public housing program requirements to be changed.

2. *Cost of Compliance.* Many commenters—particularly State and local funded agencies, housing developers, and their national and regional spokespersons—expressed serious concerns about the rule's cost.

While many suggestions for change in details of the rule were provided by these commenters, the tenor of their comments was not so much against the rule as against the idea of carrying out its mandate without separate funds earmarked solely for that purpose.

Some commenters felt that HUD had grossly underestimated the costs of compliance and that these costs, in many circumstances, would divert already-limited funding from its principal purpose of providing shelter. Rural housing suppliers, especially, lamented the anticipated problems the rule would bring. One commenter expressed the fear that the rule would "severely hamper rehabilitation in rural,

small communities and would potentially drive the cost of doing business so high that many communities may decide that it is simply not worth it to try and repair existing, older substandard housing."

Some commenters suggested that the dangers of lead paint were exaggerated or that local health department controls were adequate to locate children with high blood lead levels and cope with the problem on a case-by-case basis.

Other public agency commenters were more positively disposed toward the goal of preventing childhood lead poisoning *before* a child is poisoned, instead of waiting until the damage has already been done, but still worried about funding. Typical of these comments was that of a middle sized city with an active lead-hazard control program. Calling the rule (and Title X) an "unfunded mandate," the commenter cited the staff costs associated with the rule's monitoring expectations, calling them unrealistic: "If additional funds were provided for hard and soft rehabilitation as well as staff costs, this [rule] would be a good policy initiative that we could fully support and implement. However, without additional funds, * * * it presents a major problem for cities trying to address an overall need for affordable housing."

A frequent suggestion was that the rule would cause "redundant and unnecessary" lead-based paint work to be performed. The focus, these commenters argued, should be on reducing and controlling lead hazards in units occupied by small children or children who had already been lead poisoned.

A major housing industry organization asserted that the proposal contains unnecessary impediments to the performance of paint repair work and interim control tasks by employees of owners and managers, or by the owners themselves, and urged the Department to eliminate these wherever feasible.

One commenter, a municipal health department lead poisoning prevention program, predicted that the proposed rule's changes would "seem daunting" to community-based agencies at first. The commenter generally agreed with the rule's approach and predicted that compliance costs would be "minimal." The commenter said, however, that "government support and leadership to ensure that training, inspection/risk assessment services, and dust wipe resources are available and sometimes subsidized could prove to be instrumental in effective implementation."

In response to these comments, HUD does not believe that the childhood lead poisoning problem has been "overblown," in light of the results of the National Health and Nutrition Evaluation Survey (described in Section II.A of this preamble, above) showing that approximately 900,000 children still have blood lead levels equal to or greater than 10 µg/dL, the CDC level of concern. HUD also disagrees that the rule should impose requirements only on units housing young children. HUD believes that it is not practical in most housing programs to expect managers to know when children are or are not residing in particular units, especially in light of the significant resident turnover rates and inconsistencies in program administration among comparable units receiving comparable Federal assistance. Title X holds that it is far better to identify and correct lead-based paint hazards before a child is poisoned. Such prevention is especially important, because some effects of lead poisoning appear to be irreversible. The one exception to this policy is in the tenant-based rental assistance programs, in which income certification requirements facilitate the determination of childhood occupancy and for which there is legislative history indicating Congressional concern that lead-based paint requirements could deter landlords from program participation.

With regard to the cost of the rehabilitation requirements, it is important to note that the requirements of the rule are limited for housing receiving up to and including \$5,000 per unit in rehabilitation assistance. Also, the option to perform standard treatments instead of a risk assessment and interim controls may reduce costs in certain situations. (See further discussion below in Section III.E.10 of this preamble.) HUD intends to work closely with local housing and community development agencies to further develop ways to efficiently meld lead-based paint hazard reduction with rehabilitation.

With regard to the public housing program, HUD does not believe that long-term annual cost increases will be significant, although there will be one-time risk assessment and interim control costs in the short term for some housing agencies. HUD encourages public housing agencies to schedule completion of abatement of lead-based paint in order to put this issue behind them.

3. Use of Task Force Recommendations. Numerous commenters called upon HUD to assure that the rule maintain consistency with

the 1995 report of the Task Force on Lead-Based Paint Hazard Reduction and Financing (Task Force), which was a Federal advisory committee appointed by the Secretary of HUD pursuant to section 1015 of Title X.

Two recommendations of particular interest are the standards or procedures referred to as "essential maintenance practices" and "standard treatments." These procedures were directed toward rental housing. Essential maintenance practices are the steps the recommended steps that a landlord should take to reduce the risk of childhood lead poisoning in pre-1978 dwelling units and associated common areas. Standard treatments are more aggressive measures to assure that possible lead-based paint hazards are controlled in older housing. These procedures were not incorporated by name in the proposed rule, although many of their elements or concepts were included.

In the final rule, HUD is requiring that all rental housing which has a continuing financial or regulatory involvement with HUD must be maintained in a manner similar to that recommended in the Task Force's essential maintenance practices. Also, the Department has adopted the concept of standard treatments, as set forth in the Task Force report, as an option to the basic requirement of a risk assessment and interim controls. This option is set forth in § 35.120(a). Clearance testing is required after standard treatments as well as interim controls.

Another Task Force recommendation mentioned favorably by some commenters is the "lead hazard control plan," which is a plan to be developed by a property owner that lays out when and where certain hazard control measures will be conducted within a residential property. The plan allows an owner to prioritize the work and undertake the most important tasks or dwelling units first, followed by lower priority work later, as for example at apartment turnover. The proposed rule did provide for a hazard reduction plan for multifamily properties receiving more than \$5,000 per unit in HUD project-based assistance.

Although the lead hazard control plan was intended to provide property owners with flexibility in scheduling lead-hazard control work, many commenters perceived the plan requirement as "red tape" of limited value and questioned whether HUD would have the staff resources and expertise to review and approve such plans on a timely basis. HUD shares these concerns and, in the interests of regulatory streamlining, has decided to

delete the plan requirement. The Department continues to believe that it would be a useful document for property managers, especially those with responsibility for large multifamily developments, and encourages owners to develop such plans. The American Society for Testing and Materials (ASTM, West Conshohocken, PA 19428-2959) has developed a Standard Guide for Evaluation, Management, and Control of Lead Hazards in Facilities, and is developing an accompanying user guidebook. These materials can provide the basis for developing a lead hazard control plan. They are particularly appropriate for owners of multifamily dwellings.

4. *De Minimis Exceptions.* The proposed rule included de minimis levels of paint deterioration, consistent with the HUD Guidelines, below which no action would be required. These de minimis levels were defined as not more than 10 square feet of deteriorated paint on an exterior wall; not more than 2 square feet on an interior component with a large surface area including, but not limited to, interior walls, ceilings, floors and doors; or not more than 10 percent of the total surface area on an interior or exterior component with a small surface area including, but not limited to, window sills, baseboards and trim.

Commenters objected to the de minimis levels on four grounds: (1) That the de minimis exception is arbitrary and not supported by science; (2) that the levels are too large, potentially allowing a total of over ten square feet of defective paint per room (counting four walls plus a ceiling plus small components); (3) that some owners or inspectors may use the de minimis exception as an excuse for overlooking hazardous conditions; and (4) that it is likely to shift the attention of workers from the importance of practicing lead hazard control and maintaining painted surfaces in a lead-safe manner to measuring the size of defective paint surfaces in order to document that surfaces fall above or below the de minimis level.

HUD acknowledges the merit of these comments, and after careful consideration has decided to eliminate the de minimis exception for deteriorated paint from the final rule. All deteriorated lead-based paint (either known or presumed to be lead-based paint) must be addressed. This will simplify the rule's implementation considerably. HUD *did* retain, however, a de minimis exemption for safe work practices and clearance, which is consistent with the EPA provision at 40 CFR 745.227(e) that allows dry scraping

during abatement on surfaces totaling no more than 2 square feet per room or 20 square feet on exterior surfaces. This de minimis exemption is separate from the safety-related exception allowing dry scraping in conjunction with the use of heat guns or within 1 foot of electrical outlets; that is, the area covered by the safety-based exception is not part of the area covered by the safe work practices de minimis exemption).

5. *Distinction Between HUD Programs and Those of Other Federal Agencies.* Several commenters asserted that the rule distinguishes between HUD-assisted housing and that assisted by other Federal agencies without any statutory basis and without providing any justification. The Department's response is that, although the Secretary is given authority to develop regulations for other agencies (with respect to project-based assistance and Federally-owned property), HUD cannot and should not make lead-based paint policy decisions for other agencies beyond what is set forth in Title X. HUD does not have the knowledge of other agencies' housing programs that is necessary to draft detailed lead-based paint regulations for all other Federal agencies, and achieving consensus among all agencies on such regulations is unlikely. The sections concerning HUD project-based assistance and HUD-owned property, therefore, should remain separate from the sections provided for other agencies. Other Federal agencies can be expected to develop their own regulations or guidance, using HUD's regulations as a starting point.

6. *Response to Children with Lead Poisoning.* The Department's primary focus in this rule is on prevention of childhood lead poisoning, not on case management of children who have already been poisoned. Title X specifically calls for the identification and correction of hazards in all housing. Nevertheless, HUD feels special requirements are needed for lead-poisoned children who have already been poisoned by lead-based paint hazards. HUD cannot ignore the possible connection between a child's blood lead level and the condition of the dwelling unit where the child lives, particularly in view of research on the relation of dust-lead to blood-lead levels (see Section III.E.15.b of the preamble, below). Therefore, in housing where the Federal Government maintains a continuing financial or ownership relationship, requirements were included in the proposed rule to evaluate and reduce lead-based paint hazards when a child with an elevated blood lead level (EBL) is identified.

Such requirements have existed in current HUD regulations for many years. In the final rule, as in the proposed rule, they are included in the subparts pertaining to project-based rental assistance, disposition of HUD-owned and mortgagee-in-possession multifamily housing, public housing, and tenant-based rental assistance.

Commenters addressing EBL-related requirements raised several different concerns: The measurement standards that trigger environmental intervention, the terminology used to refer to such a level, information exchange requirements between housing authorities and health departments, hazard control requirements for units occupied by young children with an EBL condition, reoccupancy requirements for dwelling units that were previously occupied by an EBL child but have not undergone evaluation or hazard reduction, relocation requirements, and the potential for discrimination by landlords against families with young children generally and EBL children in particular.

In the proposed rule, HUD defined "elevated blood lead level (EBL) (requiring the evaluation of lead hazards)" as meaning "an excessive absorption of lead that is a confirmed concentration of lead in whole blood of 20 µg/dL (micrograms of lead per deciliter of whole blood) for a single venous test or of 15–19 µg/dL in two consecutive venous tests taken 3 to 4 months apart." One commenter argued that HUD should not use a standard other than 10 µg/dL, which is the basic CDC level of concern, because it is "illogical to take no action when we know a child is poisoned * * * but instead to wait until the child is more poisoned," and because defining an EBL at a level higher than that known to cause adverse effects will create potential liability for public housing authorities and assisted owners.

HUD has consulted again with CDC and has concluded, as it did prior to issuance of the proposed rule, that CDC did not and does not intend to recommend a full home inspection or assessment in response to blood lead levels below 15 µg/dL. CDC advises that a blood lead level of 10–14 µg/dL should trigger monitoring, certain parental actions, and perhaps community-wide education, but not hazard control in an individual child's home. CDC recommends follow-up blood lead testing of such children in about 3 months, the provision of information to parents on lead hazards, nutrition and housekeeping if appropriate, and the taking of an environmental history to try to identify

an obvious source of lead exposure (CDC 1997).

EPA noted that it is confusing to define the term "elevated blood lead level" or "EBL" differently than normal usage. The agency pointed out that CDC, in their 1997 screening guidelines, uses the term to refer to 10 µg/dL or greater and that most public health agencies and others in the field of lead poisoning prevention do the same. HUD agrees that this is potentially confusing and has therefore substituted in the final rule the term "environmental intervention blood lead level" to replace "elevated blood lead level" or "EBL" when the latter terms refer to the blood lead level requiring evaluation and hazard reduction of the child's home.

One State public health department urged HUD to modify the rule's standards for determining when environmental intervention is needed. Requiring tests showing *two* blood lead levels of 15–19 micrograms per deciliter in consecutive tests three to four months apart is "problematic," the commenter said, because many children do not get follow-up tests at the required three-four month interval, but rather more frequently—or less. Two tests showing levels of 15 or higher, *whether or not consecutive, and whether or not at a fixed time interval*, should be adequate to identify the child, and it is important that the rule not define the test intervals too strictly. It is not in the best interests of the child to recognize test results that come in only at precise intervals, the commenter said. A child may have two tests of 15–19 µg/dL, but because of seasonal variations in lead exposure, the high-level results may not be consecutive. At least two commenters recommended that this standard should be consistent with CDC guidance.

HUD agrees. In the final rule, the Department has defined environmental intervention blood lead level to conform to the new guidelines by CDC issued in 1997 (CDC 1997b). The revised definition is "a confirmed concentration of lead in whole blood equal to or greater than 20 µg/dL (micrograms of lead per deciliter) for a single test or of 15–19 µg/dL in two tests taken at least 3 months apart." This revision removes the word, "consecutive," and allows for nonconsecutive readings that are more than 3 months apart. The final rule has also removed the requirement that blood lead levels be determined only by venous blood specimens. This decision is best left to the child's health care provider, and may be affected by technological advances. HUD expects housing agencies, grantees, property owners, and other parties to which this rule applies to rely on medical health

care providers where judgment is required in interpreting this definition.

Another issue is how best to make housing agencies aware of when there is a child with an environmental intervention blood lead level living in a dwelling unit under tenant-based rental assistance or under another program to which the requirements of subpart M of this rule apply. The proposed rule required that, to the extent practicable, the housing agency or other administering agency would attempt to obtain annually from the State or local health department the names and addresses of children less than age 6 identified with environmental intervention blood lead levels. The housing agency was then required to match this information with the names and addresses of families receiving Federal assistance. If a match occurred, the agency was to require a risk assessment and interim controls in the child's home. These requirements are similar to those currently in HUD regulations pertaining to tenant-based rental assistance. They were issued in response to the United States General Accounting Office report entitled "Children in Section 8 Tenant-Based Housing are not Adequately Protected" (GAO/RCED-94-137, May 13, 1994). The intent of this requirement is to ensure that families with young children that receive tenant-based rental assistance are obtaining housing free of lead-based paint hazards. At the same time, the CDC is urging local public health departments to provide environmental intervention blood lead level-related information to housing agencies.

A few commenters indicated that they had encountered difficulty in securing the cooperation of health authorities in making these records available because of the authorities' concerns about the privacy of medical information. While these access problems can be overcome, one commenter said, by securing a release signed by the child's parent or guardian, there are other concerns besides the question of invasion of privacy. If the agency administering the tenant-based assistance program has information concerning the environmental intervention blood lead level status of a family's children and the information is disclosed to potential landlords, the information "becomes a barrier for the family in its housing search," because some landlords may illegally refuse to rent to the family.

Several other commenters expressed concern about the potential for housing discrimination against families with children in general, and those with children with identified environmental

intervention blood lead levels in particular. These comments ranged from suggestions to penalize the landlords involved to indications that, in the absence of funding assistance, it was unfair to "penalize (owners) for participating in the Section 8 (Voucher and Certificate) Program in a way *not required of owners in the private market*." (Emphasis in original.) In response, HUD believes that the environmental intervention blood lead level requirements in this rule are *not* in fact fundamentally different than those covering private-sector owners who do not receive subsidies. Local ordinances often permit health or housing departments to order lead hazard control work in any home where an environmental intervention blood lead level child is identified. For an explanation of the antidiscrimination provisions of the Fair Housing Act, see Section IV.D.7 of this preamble.

The Department has concluded that it is very important that local housing agencies know when there is a child with an environmental intervention blood lead level residing in an assisted unit and that owners comply with requirements designed to make the units free of lead-based paint hazards. It is well known that, while local health departments are able to identify poisoned children, they often do not have the resources to correct the cause.

HUD is making, therefore, the following changes to the requirements pertaining to exchange of information on environmental intervention blood lead level conditions:

(1) The housing agency or other local agency administering tenant-based rental assistance must attempt at least quarterly (instead of annually as in the proposed rule) to obtain from the State or local public health department, or the Indian Health Service as applicable, the names and/or addresses of children of less than 6 years of age with environmental intervention blood lead levels. This change is being made to assure that poisoned children will receive help on a more timely basis. The Department encourages health departments and housing agencies to voluntarily enter into agreements to exchange information more frequently, e.g., monthly, especially in jurisdictions in which childhood lead poisoning is a frequent occurrence in housing occupied by families receiving tenant-based rental assistance.

(2) Also on a quarterly basis, the housing agency or other local agency administering the tenant-based rental assistance must provide health departments with addresses of assisted units (as well as attempt to obtain

addresses of environmental intervention blood lead level children from the health department), except that such a report to the health department is not required if the health department states that it does not wish to receive it.

(3) The address match may be done by either the housing or the health agency. HUD's intent is to encourage workable cooperative arrangements between the two types of agencies for the purpose of matching environmental intervention blood lead level and housing assistance information on a timely basis.

With regard to the evaluation and hazard reduction that must be done if a child with an environmental intervention blood lead level is found to be residing in a HUD-assisted or HUD-owned unit, the final rule sets one uniform requirement for all programs: risk assessment and interim controls, followed by ongoing lead-based paint maintenance. One commenter complained that the proposed rule failed to require anything beyond interim controls—a standard, the commenter said, that is “too low and ineffective in the face of a poisoned child.” Current information shows that interim controls are as effective as abatement methods in the short term and will continue to provide adequate protection if continuing maintenance standards are met (National Center 1998). In the final rule, ongoing lead-based paint maintenance is required in all HUD housing programs for which there is also a requirement that interim controls be conducted in response to a case of a child with an environmental intervention blood lead level. To ensure that these requirements are not avoided, the rule states that the requirements apply regardless of whether the child with the environmental intervention blood lead level is or is not still living in the assisted unit. Furthermore, it is HUD's intent that the requirements apply to the unit even if no child of less than six years of age resides in the unit, because the requirements were triggered when a child was in residence. Also, if a public health department performs the evaluation of the dwelling unit or, after the hazard reduction work is performed, certifies the unit to be lead safe, it is not necessary for the housing agency or other designated party to perform those functions. Finally, in the case of housing to which subpart M (tenant-based rental assistance) applies, if the hazard reduction is not performed, the unit does not meet Housing Quality Standards.

Some local housing agencies have asked for guidance on what their response should be to information on a child's blood lead level if the

information is brought to the agency by a party other than a medical health care provider. In response, the Department is including a provision requiring verification of such data with the public health department or other medical health care provider. If it is verified that a child has an environmental intervention blood lead level, the agency, owner, or HUD (as the case may be) must complete a risk assessment and conduct interim controls of identified hazards.

7. Fair Housing Requirements. Several commenters expressed concern about the potential for housing discrimination against families with children in general, and those with children with environmental intervention blood lead levels in particular. Therefore HUD is providing the following discussion of the application of the Fair Housing Act and other laws pertaining to persons with disabilities to lead-based paint issues.

The Fair Housing Act prohibits discrimination in housing based on race, color, national origin, religion, sex, disability, and familial status. Familial status, for purposes of the Fair Housing Act, includes children under 18 (regardless of age or number), pregnant women, and people seeking custody of children under 18. Only providers of housing that meets the specific definition of housing for older persons may refuse to rent to families with children. Children with elevated blood lead levels and persons with Multiple Chemical Sensitivity (MCS) may fall under the definition of persons with disabilities. Among the actions prohibited under the Fair Housing Act are any action which differentiates on a prohibited basis for any of the following: Refusal to rent or sell housing; refusal to negotiate for housing; making a dwelling unavailable; denying a dwelling; providing different housing services or facilities; falsely stating that housing is not available for inspection, sale, or rental; refusing to make a mortgage loan; imposing different terms or conditions on a loan; setting different terms, conditions, or privileges for sale or rental of a dwelling; segregating a portion of the population into special buildings or areas; maintaining different lease conditions; and advertising or making any statement that indicates a limitation or preference based on any prohibited basis of the Fair Housing Act.

Based on this law, it is illegal for owners of housing to discriminate against families with children, or EBL children, even if the unit is known to have lead-based paint hazards. The prohibitions of the Fair Housing Act

would further make it inadvisable to ask questions about EBL status, pregnancy, or intentions to become pregnant. Restrictive covenants against children, including EBL children, are also illegal. Therefore, no renter or buyer may be asked to sign a statement that a child, or EBL child, is not expected to reside in the dwelling. Owners of rental housing may eliminate lead-based paint hazards in a percentage of units and hold those units available for families with children and affirmatively market them to appropriate families. An owner may also tell families of the danger of moving into a unit which has not been treated and recommend an alternative comparable unit. In no case may an owner refuse to allow a family to occupy the unit, however, because of the presence of a child or require that a family move because lead is found. Laws against discrimination will be enforced by HUD.

Title II of the Americans With Disabilities Act (ADA) establishes a clear and comprehensive prohibition against discrimination on the basis of disability in State and local government services. Section 504 of the Rehabilitation Act of 1973 provides for nondiscrimination against persons with disabilities in Federally-assisted housing. Both laws define a person with a disability as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of an impairment, or is regarded by others as having such an impairment. Under both laws, EBL children and persons with MCS may fall under the definition of persons with disabilities. Among the actions prohibited under Title II of the ADA and Section 504 are those which discriminate, on the basis of disabilities, in Federally-assisted programs, services, and activities. Such actions include a refusal to (1) allow participation in a program, service, or activity; (2) provide programs, services and activities in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity; (3) eliminate unnecessary eligibility standards or rules that deny an equal opportunity to enjoy a program, service or activity unless “necessary” for the provisions of the program, service or activity; (4) make reasonable modifications in policies, practices, and procedures that deny equal access, unless a fundamental alteration in the program would result; (5) make reasonable accommodations, unless an undue burden or fundamental alteration would result, e.g., furnish auxiliary aids and services when necessary to ensure effective

communication (e.g., interpreters, or accessible formats, such as braille, large print, or audio cassette) and/or provide notice to and relocate residents with MCS prior to removing lead-based paint hazards with harmful toxic chemicals; and (6) operate programs so that, when viewed in their entirety, they are readily accessible to, and usable by, individuals with disabilities. A covered housing provider must not impose special charges to pay for measures necessary to ensure nondiscriminatory treatments, such as relocation expenses when necessary to remove lead-based paint hazards, or making modifications to provide accessibility. Finally, it is unlawful under these laws for a covered housing provider to make inquiries into the nature and severity of a person's disability, although that information may be volunteered when a reasonable accommodation is requested.

8. *Qualification Requirements.* The proposed rule required that most lead-based paint inspections, risk assessments and abatements be conducted by individuals or firms that are certified in accordance with national EPA requirements for lead-based paint activities developed pursuant to sections 402 and 404 of the Toxic Substances Control Act (TSCA). EPA published a final rule on August 29, 1996 that takes full effect on August 29, 1999. After that time, all lead-based paint inspections, risk assessments, and abatements nationwide will have to be conducted in accordance with the EPA work practices standards at 40 CFR 745.227 or State or tribal standards that have been authorized by EPA under procedures set forth at 40 CFR part 745, subpart Q. Recognizing that there might be temporary limitations on the supply of certified personnel, HUD proposed to provide for the possibility of temporary qualifications.

The proposed rule included two apparent exceptions to this general certification requirement. Public and Indian housing agencies ("HAS") conducting dust and soil testing for public and Indian housing were not required to be certified in accordance with the EPA requirements. The Department pointed out that HASs were required to complete lead-based paint inspections by December 6, 1994, and that many HASs have already taken the initiative to conduct risk assessments in housing projects. Further, HUD did not extend the certification requirement to dust testing conducted by HASs for the Section 8 tenant-based rental assistance program. The Department, however, did require that a risk assessment conducted in response to an identified environmental intervention blood lead

level child be conducted by a certified risk assessor.

Certification requirements in the proposed rule were somewhat different for interim controls than for abatement. Recognizing that the EPA regulations do not cover interim controls, HUD proposed that all workers performing interim controls be trained in accordance with the basic Occupational Safety and Health Administration (OSHA) hazard communication standard at 29 CFR 1926.59 and supervised by a certified abatement supervisor.

Comments on the qualifications requirements dealt with five issues: (1) Whether housing agency personnel had to be certified to perform dust and soil testing; (2) the availability of qualified personnel and firms, and temporary qualifications in case of an inadequate supply of certified personnel; (3) qualification requirements for interim controls; (4) the independence of the clearance examiner; and (5) the authority of a trained technician to perform clearance examinations.

EPA objected to the exemption of public and Indian housing authorities from certification requirements related to dust and soil testing. EPA did not accept HUD's rationale for suggesting that noncertified personnel could perform lead-based-paint-related functions for public and Indian housing agencies, other than under emergency circumstances. On the other hand, another commenter said he was "pleased" that dust testing would be permitted in that program by non-licensed Housing Quality Standards (HQS) inspectors trained in lead-hazard evaluation. The commenter recommended that "non-licensed, but trained" rehabilitation inspectors similarly be allowed to accomplish clearance testing in the funded rehabilitation programs. A public interest commenter remarked that "HUD should begin the process of educating these workers at once, so that a qualified work force is available when the requirements go into effect."

A local funded agency indicated that its State law would not allow Section 8 housing inspectors to perform inspections requiring dust wipes, and the agency went on to say that licensure for inspectors costs \$250, renewable every two years, and that risk assessment training ran to \$300 per person. Costs to housing authorities, and to landlords, for importing licensed personnel to perform inspections and assessments were regarded as prohibitive by the commenter.

The Department has decided to require in the final rule that dust and

soil testing in public housing be conducted by personnel certified in accordance with an EPA-authorized State or tribal program or EPA regulations, a provision that is also in accordance with many State laws. Also, dust testing in housing assisted through tenant-based rental assistance will not be required at the evaluation stage, so the qualification issue for that function is no longer relevant; but clearance of the dwelling unit (or, in some cases, only the worksite) will be required if paint stabilization, interim controls or abatement is required. See the discussion below of the authority of trained technicians to perform clearance examinations.

There was much concern among commenters about the availability of a qualified (and affordable) work force of persons certified (or otherwise adequately trained) to perform the necessary work called for in the rule. Rural housing suppliers claimed such trained people would have to be imported from far away—and at premium rates. There were also calls for reciprocity for State-approved training programs until the EPA-approved programs are implemented.

HUD expects that most States will have EPA authorized certification programs by the effective date of this rule. Those that do not will be covered by the EPA certification program directly. After August 29, 1999, inspections, risk assessments and abatements must be done in accordance with the standards of EPA or an authorized State or tribal program. While this fact does not in itself eliminate the possibility that there will be shortages in the supply of certified personnel for inspections, risk assessments and abatements in some parts of the country, it increases the likelihood that the certification mechanisms will be in place in most of the nation when this rule becomes effective. At the time of this writing, 37 States have already enacted lead-based paint hazard control laws. In the final rule, the Department has made one change to the qualifications requirements that may result in increased availability of persons qualified to perform clearances. See the discussion below of the authority of technicians to perform clearance examinations.

The Department intends to monitor the availability of qualified personnel. One source of information is likely to be the "Lead Listing," a nationwide listing of inspectors and risk assessors developed by the National Lead Assessment and Abatement Council (NLAC) with HUD assistance. The

"Lead Listing" can be accessed by calling 1-888-LEADLIST (this is a toll-free number) or can be found on the Internet at www.leadlisting.org. HUD notes the constructive suggestion by one commenter that such monitoring should be done in cooperation with the States, as is being done with the development and maintenance of the Lead Listing. HUD would also expect to coordinate with EPA in the development of such information and in determining whether any further Federal response is needed.

One national organization questioned the requirement that workers performing "interim control treatments" be supervised by a certified abatement supervisor. Arguing that the definition of "interim controls" was too broad, the commenter recommended breaking the definition down so that "painting, maintenance and similar routine tasks" could be performed without a certified supervisor. Such a change, the commenter said, would be in accord with Congress' intent that certification requirements not be imposed on interim control workers, and the change would decrease routine property maintenance costs. A similar complaint was directed at the requirement that the appropriate worksite preparation be determined by a certified risk assessor, abatement supervisor or planner/designer. The commenter feared that the rule could be construed as requiring professional worksite design for "mere paint repair work and for such basic interim control tasks as rehanging of doors. . . ." and asked that the rule be clarified to eliminate the worksite preparation requirement for interim control work.

Noting that the Task Force had recommended a one-day training course for maintenance supervisors, one commenter advocated HUD/EPA cooperation in developing a short course geared for maintenance workers that is inexpensive, requires one day or less to complete, and is frequently offered. Other commenters endorsed the short training course idea. The idea was a popular one, not only among cost-conscious funded agencies, but with public interest organizations as well.

A national environmental group disagreed with the emphasis on limiting the occasions for use of expert personnel. All hazard control activities, *including* paint repairs, should be conducted by trained personnel, the organization declared. A landlord who has permitted paint to become deteriorated to the point that it presents a lead hazard is "unlikely to have the skills or inclination to perform a paint repair in a manner that does not increase exposure," the group said.

HUD agrees that persons performing interim controls should be prepared to protect themselves and the occupants from exposure to lead, should know how to protect interior and exterior environments from contamination and how to clean up the worksite, and should understand the importance of an independent clearance examination. In the final rule, HUD is requiring that persons performing interim controls, including paint stabilization, be trained in lead hazards in accordance with OSHA regulations at 29 CFR 1926.59 and either be supervised by a certified abatement supervisor (the requirement of the proposed rule) or successfully complete one of the following training courses: (1) An accredited abatement supervisor course; (2) an accredited lead-based paint worker course; (3) the Lead-Based Paint Maintenance Training Program, developed by the National Environmental Training Association for EPA and HUD; (4) the Remodeler's and Renovator's Lead-Based Paint Training Program, prepared by HUD and the National Association of the Remodeling Industry (NARI); or (5) another course approved for this purpose by HUD after consultation with EPA. HUD intends that any person performing hands-on, interim controls work on the worksite in compliance with the final rule must have satisfied one of the optional requirements. With regard to the OSHA training requirements, OSHA regulations at 29 CFR 1926.62 require that workers exposed to airborne lead below the OSHA action level of 30 µg/cu.m. be trained under the hazard communication construction standard, which is at 29 CFR 1926.59. If airborne lead is at or above the action level, OSHA requires a more complete training program. Workers performing interim controls of lead-based paint hazards are not expected to be exposed to airborne lead above 30 µg/cu.m. Therefore the final rule states that the required training must be in accordance with 29 CFR 1926.59.

A national housing organization questioned the language barring a clearance examiner from being "affiliated with, paid, employed or otherwise compensated by the entity performing the hazard reduction and cleanup." The provision assumes, the commenter said, that the hazard reduction work has been performed by an independent contractor. In the case of paint stabilization and interim controls, this assumption will often be incorrect. Where only paint stabilization and simple interim controls are required, it was argued, the rule should permit owners and their employees to

perform the work themselves. The "independence" provision would make this impossible. The commenter recommended, first, eliminating the clearance testing requirement for hazard reduction work involving only "basic interim controls." A second solution would be to remove from the quoted provision the words "paid" and "or otherwise compensated", so that clearance testing by employees and affiliates of a contractor would be prohibited, but the owner could retain an independent, certified risk assessor to perform the clearance testing work.

HUD agrees that a property owner or manager should be able to employ both hazard reduction and clearance personnel. The final rule requires that clearance examinations and hazard reduction activities be conducted by entities that are independent of each other unless the owner or designated party uses qualified in-house employees to conduct clearance. The final rule, however, does not permit the same individual employee to conduct both hazard reduction and clearance, due to the clear conflict of interest this would pose.

As mentioned, HUD has made a change in the final rule that may increase the availability of persons qualified to perform clearance examinations, and thus may reduce the cost. The proposed rule required that clearances be performed by either a certified risk assessor or a certified lead-based paint inspector. One group of commenters urged that a technician with less training than a risk assessor or inspector be authorized to perform clearances in situations where interim controls of lead-based paint hazards or ongoing lead-based paint maintenance has been conducted. These commenters argued that the skills needed for the clearance function are modest compared to those required for lead-based paint inspections or risk assessments and, further, that the speed and affordability of clearance is of critical importance to the practical workability of the system of requirements to be set forth in the rule.

In the conference report on the VA-HUD-Independent Agencies Appropriations Act for FY 1999, the Congress urged EPA "to develop a relevant one-day sampling technician training course and to encourage the recognition of this discipline." As of this writing, it is HUD's understanding that EPA plans to develop such a course and that an important purpose of the course will be to train people to perform clearance examinations. Therefore, anticipating that trained clearance technicians may be available, HUD is

providing in the final rule two ways they could perform clearances following interim controls or maintenance: first, as a technician who is uncertified or unlicensed and whose work must be approved in writing by a certified risk assessor or lead-based paint inspector; or, second, as a technician who is certified or licensed to perform clearance examinations without the approval of a risk assessor or inspector. Uncertified or unlicensed clearance technicians must have successfully completed a training course on clearance examinations (or similar title) that is developed or accepted by EPA or by a State or tribal program authorized by EPA pursuant to 40 CFR part 745, subpart Q (the EPA regulations implementing TSCA section 404). The course must be given by a training provider accredited by a State, Indian tribe or the EPA for training in lead-based paint inspection or risk assessment. HUD assumes that certified or licensed clearance technicians would also be required to complete such training. Certification or licensing of clearance technicians must be by a State or Indian tribe or EPA.

With regard to the training course taken by an unlicensed or uncertified clearance technician, there are several possible arrangements that are acceptable to HUD under this rule. The course can be developed by EPA, or it can be developed by a State or Indian tribe with a program authorized by EPA pursuant to TSCA section 404. A State or Indian tribe may adopt or accept a course prepared by another EPA authorized State or tribe. While the training provider from whom the course is taken must be accredited by EPA or an EPA-authorized State or tribal program, it is not necessary from HUD's point of view that the technician be trained within the State or Indian nation where the clearance is being performed or by a training provider accredited by that State or tribe. The ultimate responsibility for quality control rests with the certified lead-based paint inspector or risk assessor who approves the work of the technician and signs the clearance report.

Under this policy, an unlicensed or uncertified but properly trained clearance technician could perform a clearance examination on site, prepare the report, and send the report (by e-mail, fax, or other method) to a certified risk assessor or certified lead-based paint inspector, who may be located in another area. The risk assessor or inspector could review and sign the report and forward it to the client, taking responsibility for the quality of the clearance examination and report.

The Department assumes that the risk assessor or lead-based paint inspector would require the technician to work as an apprentice until the inspector or assessor is satisfied that the technician's work is of satisfactory quality, but HUD leaves that process and decision to the risk assessor or inspector. In the rule, HUD places no restrictions on the scope or scale of clearance examinations that could be performed in this manner.

HUD is setting a limitation, however, on the authority of a certified or licensed technician who is taking full responsibility for the clearance examination without written approval of a risk assessor or lead-based paint inspector. In this case, the authority extends, under the HUD rule, only to clearances of single family units or individual units and associated common areas in a multi-unit property. The authority does not extend to clearance examinations of multifamily properties, or parts thereof, in which the clearance examiner engages in random sampling of dwelling units and common areas. In the opinion of the Department, it is unlikely that a one-day course will be adequate to teach all the techniques, procedures and judgments required to conduct random sampling of dwelling units and common areas in large multifamily clearance examinations. Under the HUD final rule, however, clearance technicians may perform multifamily clearances involving random sampling with the written approval of a certified risk assessor or lead-based paint inspector. Furthermore, certified clearance technicians may, without written approval of an inspector or risk assessor, conduct clearance examinations of any number of individual dwelling units and associated common areas in multifamily properties, provided results from the units and areas in which clearance examinations are conducted are not used to represent units and areas for which no examination or testing has been conducted.

Under this policy on technicians, people can prepare themselves to perform clearances with less investment in training and equipment than is required to become a risk assessor or lead-based paint inspector. HUD is hopeful, therefore, that the policy will contribute to an increased availability of persons authorized to perform clearances and a reduction in the cost of clearances. The policy retains the reliance on a certification or licensing process. Certification by a State or other entity provides a way to take action against fraudulent or otherwise unprofessional clearance examiners.

HUD recognizes that performance of clearance examinations by a certified or uncertified technician may not be permissible under some State or tribal regulations, even with the written approval of a risk assessor or lead-based paint inspector. Where that is the case, the State or tribal regulation would apply. HUD also recognizes that EPA may, in the future, establish certification procedures for clearance technicians (or a similar discipline) and, at that time, may make it illegal nationwide for uncertified technicians to perform the on-site work of a clearance examination. However, HUD thinks it will be efficient to have trained technicians, certified or not, working with higher level certified personnel and encourages other regulatory entities to permit it.

9. *Paint Stabilization vs. Paint Repair.*

The proposed rule established a procedure called "paint repair," which was a repainting of a deteriorated paint surface using safe work practices to minimize the generation of dust, protect occupants and the environment, and leave the site clean. The procedure was widely used in the rule; it was required in the subparts or sections applicable to single family mortgage insurance, disposition of HUD-owned single family property (without sufficient appropriations), multifamily insured property, disposition of HUD-owned and mortgagee-in-possession property (without sufficient appropriations), residential property receiving an average of less than \$5,000 per unit in Federal rehabilitation assistance, CPD non-rehabilitation, and tenant-based rental assistance.

Many commenters questioned this procedure. The most common position was a caution against leaving anything in the rule that implied that "mere overpainting" of surfaces, without addressing the substrate, could ever be considered an appropriate course of action. A typical comment was the following: "HUD's final regulations should require that whenever deteriorated paint is repaired, the cause of the deterioration must be corrected and the substrate stabilized." Another commenter argued that paint repair, by itself, was "inconsistent with the HUD Guidelines."

HUD agrees that it can be ineffective to try to put paint on a damaged substrate, such as crumbling plaster. Old lead-based paint on such a surface could shortly become deteriorated again after repainting. On the other hand, HUD is aware that substrate stabilization requires case-by-case judgment in the field as to when substrate repair is necessary and what extent and method of repair is

appropriate. There is reason to be concerned that cautious administrators may sometimes insist on repairs that are overly expensive or that others will not correct the underlying problem.

After careful consideration, the Department has eliminated "paint repair" throughout the final rule and instead is requiring "paint stabilization," which calls for the repair of any physical defect in the substrate of a painted surface or component that is causing deterioration of the surface or component. It should be noted that the purpose of this requirement is not complete renovation but merely to try to assure that the integrity of the repainting will survive for a reasonable period of time. Also, if a substrate is being damaged because of a water leak, repair of the leak would be necessary in any case to meet housing or building codes. In situations in which a costly repair may be necessary to stabilize a damaged substrate, designated parties should always determine through paint testing whether or not the surface has lead-based paint. Frequently the paint will not be leaded at the Federal standard of 1.0 mg/sq.cm., so paint stabilization will not be required under this rule. If the deteriorated paint is lead-based paint, the designated party may consider alternative methods for controlling the hazard, such as enclosure of the surface.

E. Subparts

1. *Subpart A—Disclosure of Known Lead-Based Paint Hazards Upon Sale or Lease of Residential Property.* This subpart contains the requirements for disclosure of known lead-based paint and/or lead-based paint hazards in the sale or lease of target housing. This joint HUD/EPA regulation was promulgated as required by section 1018 of Title X (42 U.S.C. 4852d), and was originally published at 24 CFR part 35, subpart H. Subpart H has been transferred unchanged to this subpart A, so the regulations implementing sections 1012 and 1013 of Title X can be published in consecutive subparts B, C, D, F through M, and R.

2. *Subpart B—General Lead-Based Paint Requirements and Definitions For All Programs.* This subpart sets out general requirements for federally owned residential property and housing receiving Federal assistance.

a. *Definitions.* In the proposed rule, HUD used the definitions, where possible, that were included in section 1004 of Title X (42 U.S.C. 4851b). In cases where the statute either failed to define terms, or where the definition was inadequate for the purpose of a regulation, the Department drew

definitions from the HUD Guidelines, existing HUD or EPA regulations, and from definitions compiled and set forth by the American Society for Testing and Materials (ASTM), West Conshohocken, PA 19428-2959, in a document entitled "Standard Terminology Relating to Abatement of Hazards from Lead-Based Paint in Buildings and Related Structures" (ASTM Standard E 1605-94).

In most cases public comments on definitions concerned the scope of the definition rather than the meaning, and the commenters wanted the scope to be either expanded or limited. In response to comments, the definition of *residential property* was revised in the final rule to more precisely define its scope to "a dwelling unit, common areas, building exterior surfaces, and any surrounding land, including outbuildings, fences, and play equipment affixed to the land belonging to an owner and available for use by residents but not including land used for agricultural, commercial, industrial, or other non-residential purposes, and not including paint on the pavement of parking lots, garages, or roadways" rather than the proposed rule language of "a dwelling unit, common areas and any surrounding land belonging to an owner and accessible to occupants." Paint striping on parking lots, garages, and roadways will not be covered by this rule. *Common area* was expanded in scope to mean "a portion of a residential property that is available for use by occupants of more than one dwelling unit" rather than "generally accessible to occupants of all dwelling units". Throughout the final rule, HUD has avoided using the term "accessible" if its meaning might be confused with that in regulations implementing the Americans With Disabilities Act. *Hazard reduction* was expanded to include standard treatments. *Paint testing* was added, replacing the proposed rule's *limited paint inspection* for reasons explained below in the discussion of options in Section III.E.2.c.(4) of this preamble.

The publication of the EPA regulation at 40 CFR part 745, subparts L and Q, significantly affected the definitions section as it did the remainder of this regulation. The definitions of several technical terms have been deleted from the final rule, since they were associated with the evaluation and hazard reduction activities now covered by the EPA regulation.

In the definition of *abatement*, the statement that "permanent means at least 20 years effective life" was relocated to a separate definition of "permanent." This was done to conform

the definition of abatement more closely to that in Title X. Also the terms "lead-contaminated dust" and "lead-contaminated soil" were changed to "dust-lead hazard" and "soil-lead hazard" respectively to conform with terminology being used by EPA in their proposed regulation implementing TSCA section 403, which was published on June 3, 1998 (63 FR 30301-55). The latter change of terminology has been made throughout this final rule; the definitions of *lead-contaminated dust* and *lead-contaminated soil* have been replaced with definitions of *dust-lead hazard* and *soil-lead hazard* respectively, and the same substitution of terms has been made in the definition of *lead-based paint hazard*. In the proposed section 403 rule, EPA has adopted the position that "lead-contaminated dust" and "lead-contaminated soil" are general terms referring to dust and soil with varying levels of lead concentration but not necessarily to levels that are considered hazardous. In the definition of "soil-lead hazard" in this final rule, HUD is including a de minimis area of bare soil outside of play areas that is not considered a hazard. To be considered a soil-lead hazard according to this definition, spots or areas of bare soil outside of play areas must total more than 9 square feet per residential property and have a lead concentration of an average of equal to or exceeding 2000 micrograms per gram.

The term *accessible (chewable) surface* has been replaced with *chewable surface*. This was done for two reasons: (1) It avoids confusion with the use of the word "accessible" in regulations and guidance implementing the Americans With Disabilities Act (ADA), which is an important law affecting residential real estate; and (2) it substitutes an easily understood term, "chewable," for a somewhat ambiguous term, "accessible," that might imply "reachable" as well as "chewable." The substitution of "chewable" for "accessible" was also made in the definition of "lead-based paint hazard." In response to many requests for further clarity as to what constitutes a chewable surface, HUD has added to the definition of "chewable surface" a statement that, "Hard metal substrates and other materials that cannot be dentured by the bite of a young child are not considered chewable." In most homes, the only chewable surfaces are likely to be protruding, interior wooden window sills.

A new term, *designated party*, has been added to simplify and reduce the length of the rule. It means "a Federal agency, grantee, subrecipient,

participating jurisdiction, housing agency, CILP recipient, tribe, tribally designated housing entity (TDHE), sponsor, or property owner responsible for complying with applicable requirements." The definition of the term *dwelling unit* has been changed to conform to the Title X definition of "residential dwelling." The substantive meaning does not change. As in the proposed rule, HUD prefers to use "dwelling unit" instead of "residential dwelling" because the former term is more commonly used and understood and is more distinct from a related term used in the rule, "residential property." As explained in Section III.D.6 of this preamble above, in the discussion of policy on responding to children with elevated blood lead levels, the defined term *elevated blood lead level (EBL)* has been changed to *environmental intervention blood lead level*, and the definition has been changed slightly to conform to CDC guidance. The term *emergency repair* has been removed from the definitions section, because it is only used once in the rule, in the section later in subpart B setting forth the exception for emergency actions; and its meaning there is clear.

The definition of *evaluation* has been changed. Title X defines this important term as meaning a risk assessment, inspection, or combination of the two. The proposed rule added "visual evaluation" and made the determination of the presence of deteriorated paint one of the purposes of evaluation as well as the determination of the presence of lead-based paint hazards and lead-based paint. In the final rule, HUD has removed "visual evaluation" from the definition of "evaluation," has removed the related purpose of identifying deteriorated paint, and has added "lead hazard screen" and "paint testing" as evaluation methods. "Visual evaluation" was removed because it is quite different from the activities mentioned in the statutory definition of "evaluation." It does not involve any testing of paint, dust or soil for lead concentration, nor does it determine the presence or absence of lead-based paint hazards or lead-based paint. Therefore it does not produce "evaluation" results that, in the opinion of the Department, have to be reported to occupants. For additional clarity, HUD has changed the term *visual evaluation* to *visual assessment*. A "lead hazard screen" and "paint testing," however, do involve testing and produce reportable results. *Lead hazard screen* means a limited risk assessment that involves paint testing, dust testing and soil testing. If a property passes a screen using the

criteria in subpart R, it is not necessary to conduct a full risk assessment. This term was not defined or used in the proposed rule, but HUD now believes that the option to conduct such a screen should be available, because it is potentially less costly than and often as effective as a full risk assessment, especially in housing built after 1959 that is in good condition. The term *paint testing* replaces the proposed-rule term *limited paint inspection* in response to a comment from EPA that it would be helpful to differentiate more clearly between a full "inspection," as specified in the EPA rule implementing TSCA section 402, and a more limited procedure to determine the presence of lead-based paint only on deteriorated paint surfaces or surfaces to be disturbed by rehabilitation.

Title X exempts housing for the elderly and persons with disabilities unless a child of less than 6 years of age resides or is expected to reside in such housing. Believing that *expected to reside* requires interpretation, the Department is introducing in this final rule a definition stating that "expected to reside" means there is actual knowledge that a child will reside and that if a resident woman is known to be pregnant there is actual knowledge that a child will reside in the dwelling unit. (As mentioned, it is not advisable to inquire as to pregnancy status in most real estate transactions. See Section III.D.7 of this preamble, above, on fair housing requirements.)

Firm commitment, a term used only in subpart G, Multifamily Mortgage Insurance, is defined for purposes of clarity to mean a valid commitment issued by HUD or the Federal Housing Commissioner setting forth the terms and conditions upon which a mortgage will be insured or guaranteed. In this rule, *grantee* is a term used only in subparts J, Rehabilitation, and K, Acquisition, Leasing, Support Services or Operation. It is defined to mean any State or local government, Indian tribe, IHBG recipient, or insular area that has been designated by HUD to administer Federal housing assistance under a program covered by subparts J and K, except the HOME program or the Flexible Subsidy-Capital Improvement Loan Program (CILP). The defined term *participating jurisdiction* is used in the HOME program, and *CILP recipient* is the defined term used to mean an owner of a multifamily property which is undergoing rehabilitation funded by the CILP program. The definition of *hard costs of rehabilitation* has been changed, in response to comments requesting greater clarity, to add the following statement: "Hard costs do not include

administrative costs (e.g., overhead for administering a rehabilitation program, processing fees, etc.)."

The definition of *HEPA vacuum* has been made more precise. The proposed rule definition was "a vacuum with an attached high-efficiency particulate air (HEPA) filter capable of removing particles of 0.3 microns or larger from air at 99.97 percent efficiency." The final definition requires that a HEPA filter be integral to the vacuum cleaner and gives an actual-performance, rather than potential-performance, definition of HEPA filter. Both definitions use performance measures of filter collection efficiency, with values common in the hazardous dust standard setting, e.g., EPA in asbestos rules (40 CFR 763.83, 763.121), OSHA in a lead rule (29 CFR 1926.62(f)(3)), and DOE in a HEPA filter specification (DOE-STD-3020-97). Current technology for assessing personal respirator filter performance is used by NIOSH in its respirator rule (42 CFR 84.181), by OSHA in citing the NIOSH rule (63 FR 1297, January 8, 1998), and by DOE in the specification cited above.

The technological precision reflected in the regulations just cited is not seen in the HEPA vacuum industry, however, so the rule can not specify the procedure for testing conformance. Performance and operational criteria of the manufacturer(s) of the filter and the vacuum unit as a whole are to be used for filter efficiency and particle size criteria. HUD is promoting research and development of standards on collection efficiency measurement applicable to HEPA vacuums. For example, it supports research at the University of Cincinnati (Cincinnati, OH 45267-0056) on vacuum cleaner dust penetration. HUD staff participates on the American Society for Testing and Materials' (West Conshohocken, PA 19428-2959) Task Force F11.23.01 on vacuum cleaner system filtration efficiency working on a vacuum dust penetration measurement standard. HUD is aware of the American Society of Mechanical Engineers' (New York, NY 10017-2392) Air and Gas Cleaning Group work on protocols to assess HEPA filter application performance. DOE cites the testing procedures of ASME Code AG-1, Section FC, HEPA Filters. Because the standards above are not yet directly applicable to fully assessing HEPA vacuums, HUD will monitor and support research and standards development, and revise its definition as needed. HUD welcomes data on research and measurement criteria for HEPA vacuums and HEPA filters.

The proposed-rule definition of *HUD-owned property* has been changed to

conform to the definition of *federally owned property* that is in Title X. The definition in the final rule is "residential property owned or managed by HUD, or for which HUD is a trustee or conservator." The Department acknowledges, however, that although this definition conforms word for word to the Title X definition, it does not represent common usage. For practical and programmatic purposes, HUD considers property it owns to be only that to which it has title; it distinguishes between owned and managed property. However, this distinction does not affect the application of the rule. The rule covers both HUD-owned and HUD-managed property. Subpart I of the rule applies to multifamily property that is HUD-owned or for which HUD is "mortgagee-in-possession." A property for which HUD is mortgagee-in-possession is one for which title has not passed to HUD but which is being managed by HUD prior to foreclosure.

The definition of *Indian tribe (tribe)* has been changed to conform to the Native American Housing Assistance and Self Determination Act of 1996 (Pub. L. 104-330). The proposed rule term "paint inspection" has been changed to *lead-based paint inspection* in the final rule to avoid confusion with inspections of paint that are conducted for purposes other than determining the presence of lead-based paint. The definition of *project-based assistance* is changed for purposes of clarity to indicate that the term applies to *rental* assistance and that it does not include Federal rehabilitation assistance or assistance to public housing developments. In the proposed rule, the definition of *risk assessment* was identical to that in Title X. In the final rule, the specificity of this definition has been reduced to minimize regulatory rigidity and to avoid potential conflict with EPA regulatory definitions and work practices standards.

Finally, the definition of *lead-based paint* has been edited somewhat. Although no substantive change has been made, one modification is worthy of note. The definition in the proposed rule, after the phrase "equal to or exceeding 1.0 milligram per square centimeter or 0.5 percent by weight or 5,000 parts per million," included the phrase "or another level that may be established by the Secretary." The latter phrase has been removed from the definition in the final rule to avoid possible confusion that might result from the absence of such a phrase in other recent regulations promulgated pursuant to Title X. Its inclusion in the proposed rule was based on the

statutory provision found in section 302(c) of the Lead-Based Paint Poisoning Prevention Act, which states that "the Secretary (of HUD) shall periodically review and reduce the level below 1.0 milligram per centimeter squared or 0.5 percent by weight to the extent that reliable technology makes feasible the detection of a lower level and medical evidence supports the imposition of a lower level." While HUD has no plans to propose a lower level, the statutory responsibility remains whether it is mentioned in the rule or not.

b. *Exemptions.* A detailed discussion of the exemptions provided in subpart B is found in Section III.A.5 of this preamble, above.

c. *Options.* In addition to exemptions, the final rule provides several options that HUD believes will provide owners and other parties with flexibility and thus greater efficiency in carrying out evaluation and hazard reduction activities.

(1) *Standard treatments.* Where interim controls are required, the designated party has the option to presume that lead-based paint or lead-based paint hazards or both are present throughout the property, omit the risk assessment or lead-based paint inspection or both, and conduct standard treatments in accordance with requirements set forth in subpart R of part 35 in lieu of interim controls. Standard treatments are: (a) Stabilization of all deteriorated paint, interior and exterior; (b) the provision of smooth and cleanable horizontal hard surfaces; (c) the correction of dust-generating conditions (i.e., conditions causing rubbing, binding, or crushing of surfaces known or presumed to be coated with lead-based paint); and (d) treatment of bare soil to control known or presumed soil-lead hazards. Safe work practices and clearance are required. Individuals performing standard treatments must be trained in how to control lead-based paint hazards. The training requirement is identical to that for interim controls. This option, which was not provided in the proposed rule, derives from a recommendation by the Task Force on Lead-Based Paint Hazard Reduction and Financing. The Task Force recommended standard treatments as an option to the risk assessment/interim control approach because standard treatments "offer the advantage of devoting resources directly to hazard control—and their cost may be minimal for units in good condition." Also, the Task Force noted that standard treatments can be carried out by "in-house maintenance staff who have sufficient knowledge of lead-based paint

hazards." On the other hand, because no risk assessment is done, standard treatments may be implemented in some units that have no lead-based paint hazards, and resources may be expended unnecessarily. HUD is including the standard treatments option in the final rule in response to public comments that certified risk assessors may be in short supply in some parts of the nation, that the cost of risk assessments may be excessive, and because the decision to test is best left to the discretion of the designated party.

(2) *Presumption in the case of abatement.* Where abatement is required, the designated party may presume that lead-based paint or lead-based paint hazards or both are present throughout the property, omit the evaluation, and conduct abatement on *all* painted surfaces. This option, however, is not available in public housing, because a lead-based paint inspection has been a statutory requirement for all target housing that is public housing since 1994.

(3) *Lead hazard screen.* Where a risk assessment is required by this rule, the designated party may choose to first conduct a lead hazard screen to determine whether a full risk assessment is necessary. The lead hazard screen is a limited risk assessment activity that involves dust sampling and soil sampling, and may include paint testing on deteriorated paint surfaces (if present). The screen must be conducted in accordance with State or tribal work practices standards under an EPA-authorized program or in accordance with EPA standards at 40 CFR part 745, subpart L. Because EPA regulations do not include specific standards for dust lead in lead hazard screens, HUD, in this final rule, is setting such standards at approximately one-half those of a full risk assessment (see Section III.E.15.a and b of this preamble, below). The standards for soil are the same for a lead hazard screen as for a risk assessment. If State or tribal standards for a lead hazard screen are more stringent than those in this rule, the State or tribal standards prevail. If they are less stringent, the standards of this rule apply. The standard for lead-based paint is the same for the screen as for a risk assessment or lead-based paint inspection. If a dust sample is found to be positive, i.e. have a level of lead equal to or greater than the dust-lead standards for the lead hazard screen, or there is lead-based paint on a deteriorated paint surface, a full risk assessment must be performed. If the lead hazard screen is negative, the risk assessment is not required. The lead

hazard screen option was not provided in the proposed rule because the cost differential between a full risk assessment and a screen was perceived to be small (essentially the cost of soil testing and a somewhat more elaborate report) and because HUD felt that a certified risk assessor would be empowered by EPA and/or State or tribal regulations to use a screen anyway. HUD is including explicit mention of the screen in the final rule to assure that all parties will be aware that the option is available to try to achieve cost savings, which are most likely in post-1959 properties in good condition.

(4) *Paint testing.* Under the proposed rule the requirements of certain subparts of the rule would not apply for a specific deteriorated paint surface to be disturbed if a "limited paint inspection" indicated the absence of lead-based paint on that surface. EPA objected to the proposed rule's definition of "limited paint inspection," noting that EPA work practices standards for inspections (40 CFR 745.227) do not include or envision a "limited" paint inspection or any other inspection activity not including a "comprehensive inventory of all of the lead-painted surfaces in a residential dwelling." Accordingly, a "limited" paint inspection would be a violation of EPA work practice standards. If a similar procedure is retained, EPA said, the use of the word "inspection" in the definition should be dropped, and HUD should identify the circumstances under which this "limited" activity would be conducted, set out procedures and requirements for conducting it, and state the qualifications required for individuals who would conduct the activity. Another comment from a legal services organization recommended elimination from the regulation of the "limited paint inspection" option.

In the final rule, the term "limited paint inspection" has been replaced with the term "paint testing." Where paint stabilization or interim controls of a deteriorated paint surface is required by this rule, paint testing of non-intact paint surfaces may be conducted to determine the presence of lead-based paint instead of conducting a complete lead-based paint inspection or presuming the presence of lead-based paint. Paint testing may also be employed to determine if intact paint on a surface to be disturbed during rehabilitation contains lead-based paint. If the paint testing indicates the absence of lead-based paint, paint stabilization, interim controls or abatement of that surface is not required. Paint testing

must be performed by a certified lead-based paint inspector or risk assessor.

d. *Notice of Evaluation and Hazard Reduction Activities.* Title X requires the provision of notice to occupants describing the nature and scope of any risk assessment, lead-based paint inspection, or hazard reduction activities undertaken. In general, the Department believes that detailed matters of notice, format and distribution are best determined by the property owner or other recipient of Federal housing assistance, under the general framework provided in this rule. In the final rule as well as the proposed rule, the Department has interpreted this provision to require the following: (1) Within 15 calendar days of receiving a risk assessment, lead-based paint inspection, or paint testing report, a written notice must be provided to occupants containing a summary of the nature, scope and results of the evaluation and a contact for more information or access to the actual reports; and (2) within 15 calendar days of completing hazard reduction activities, a notice must be provided to occupants of actual hazard reduction activities conducted. The notice must contain a summary of the nature, scope and results of the hazard reduction activities, a contact for more information, and information on any identified remaining lead-based paint on a surface-by-surface basis. This notice shall be updated, based on any reevaluation of the dwelling unit or if additional lead-based paint hazard reduction work is conducted. The notices must be posted in centrally located common areas or distributed to each occupied dwelling unit, must be of a size and type that are easily read by occupants, and must be made available in a format accessible to persons with disabilities, to the extent practicable. The proposed rule required that, if possible, the notice must be provided in the occupant's primary language. The final rule, in response to comments that some apartment projects may have more than a dozen primary languages represented, deleted the "if possible" phrase and added the option to provide the notice in the language of the occupant's contract or lease.

The statute does not specifically require that separate notices be provided to occupants after an evaluation has been conducted and again after hazard reduction activities have been undertaken. In the Department's view, however, withholding information of the results of an evaluation until after hazard reduction activities have been performed poses a potential risk to

occupants. The sooner occupants are provided with this information, the better they can protect their children and themselves.

The Department requested comment on the content, format and distribution of the notices. One commenter suggested that the notice be provided both when evaluation has taken place, and then again before hazard reduction activities are undertaken. HUD has not adopted this suggestion, because it believes it should not regulate tenant-landlord relations this closely. This comment was made to insure that occupants can prepare their units for hazard reduction activities. Actually, all hazard reduction activities require occupant protection by the owner (or contractor), who would coordinate these actions with the occupant even if no separate notice is provided.

Some commenters recommended that the notice be given to each occupant. HUD continues to believe that it is reasonable to expect that occupants can read the notice if it is posted in central locations. In the final rule, this decision is left to the discretion of the owner or other designated party, except that the notice must be distributed to the dwelling unit of a head of a tenant household if the owner knows that the head of household is a person with a disability that would make a posted notice inaccessible to that person.

One commenter asked for more time to provide occupants with the notice of evaluation results. The commenter felt that 15 days is not enough time for management to digest the evaluation and prepare the documentation needed to explain the results to residents. In response, HUD has added to the final rule a strong recommendation, but not a requirement, that paint inspectors and risk assessors provide summary statements of inspections and risk assessments suitable for posting or distribution. This provision is located in § 35.1320, in subpart R. For further discussion and sample formats, see Section III.E.15.c, of this preamble below, and appendices B through E of the rule.

One commenter noted that the proposed rule did not include notice requirements for HUD-owned properties. In the final rule, HUD has included notice requirements for HUD-owned properties that are similar to those for other housing programs, even though such a requirement is not called for by statute.

e. *Lead Hazard Information Pamphlet.* Title X requires that the lead hazard information pamphlet developed by EPA, CPSC and HUD pursuant to TSCA section 406(a) be provided to purchasers

and tenants of housing affected by section 1012 of the statute. Provision of the pamphlet is not required for housing affected only by section 1013 of Title X. In response to comments, the Department has made three types of changes to the pamphlet-provision requirement that was in the proposed rule. The first change is largely editorial and is intended to increase policy consistency across programs and to reduce the length of the rule. HUD has provided a statement of the general requirement in subpart B, § 35.130, and referenced that section in each of the program-specific subparts where pamphlet provision is required. Section 35.130 states that the designated party shall provide the pamphlet to each occupied dwelling unit.

Acknowledgment of receipt is not required, but it is recommended. The program-specific subparts of the rule state more explicitly who shall provide the pamphlet—e.g., the public housing agency, the owner, the sponsor, the grantee, or the participating jurisdiction.

Second, HUD has made substantive changes to further minimize duplicative requirements for the provision of the pamphlet. Section 1012 is one of three different sections of Title X that call for provision of the pamphlet. The other two are section 1018 (which requires provision of the pamphlet and disclosure of known lead-based paint hazards prior to sale or lease), and TSCA section 406(b) (which requires persons performing renovation for compensation to provide the pamphlet before beginning the renovation). The proposed rule recognized potential overlap with the HUD-EPA rule implementing section 1018 (the disclosure rule) but did not discuss EPA's then-proposed rule implementing section 406(b) (the renovation rule).

For most rental housing, HUD's proposed rule required that the pamphlet be provided only if the tenant had taken residence before the effective date of the disclosure rule (which was either September or December 1996, depending on the number of housing units owned by the landlord). This policy did not address the case of a tenant who took residence before the effective date of the disclosure rule but received the pamphlet at the time of renewal or revision of the lease. The proposed-rule policy also did not address the case of a landlord who, acting as a renovator's designated representative, provided the pamphlet to a tenant before renovation in compliance with the renovation rule. Therefore, to allow landlords the flexibility to minimize duplication of pamphlet provision, the final rule, in

§ 35.130, states simply that it is not necessary to provide the pamphlet if it can be demonstrated that it has already been provided in accordance with the disclosure rule or the section 406(b) renovation rule. Prior provision of the pamphlet is best demonstrated by retaining an acknowledgement by the occupant of receipt of the pamphlet. Such acknowledgment is required by the disclosure rule and, with some exceptions, by the renovation rule.

In the proposed rule, the two subparts pertaining, respectively, to rehabilitation assistance and to CPD non-rehabilitation programs required provision of the pamphlet to the tenant, owner occupant or purchaser regardless of whether the pamphlet had been provided under the disclosure rule. In the final rule, this has been changed to conform with the general policy in § 35.130. HUD expects that most local and State rehabilitation programs will be administered so that provision of the pamphlet by the renovator in compliance with the renovation rule will also meet the requirements of this final rule.

Third, some commenters requested that EPA-approved State equivalents to the pamphlet be specifically permitted. In the interest of streamlining and simplicity, the final rule includes such a provision.

f. *Use of Paint Containing Lead.* The final rule continues the prohibition against use of new paint containing more than 0.06 percent by weight of lead in federally owned or assisted housing. This provision has been in HUD regulations since the late 1970's and is based on the 1977 regulation promulgated by the Consumer Product Safety Commission (16 CFR Part 1303). If a State or local jurisdiction banned the residential use of paint containing lead before 1978, the rule allows the Secretary to apply a date earlier than 1978 to activities covered by this rule in that jurisdiction.

g. *Prohibited Methods of Paint Removal.* The final rule includes the same prohibited practices as in the proposed rule (open flame burning, machine sanding without HEPA exhaust control, abrasive blasting without HEPA local exhaust control, heat guns operating above 1100 degrees Fahrenheit, dry scraping or sanding except in certain situations), plus one addition: paint stripping using a hazardous volatile substance in a poorly ventilated space. OSHA says that adults exposed to methylene chloride "are at increased risk of developing cancer, adverse effects on the heart, central nervous system and liver, and skin or eye irritation. Exposure may occur

through inhalation, by absorption through the skin, or through contact with the skin." (62 FR 1493, January 10, 1997).

The Consumer Product Safety Commission/EPA consumer notice, *What You Should Know About Using Paint Strippers* (CPSC Document 4423, EPA document EPA 747-F-95-002), recommends to persons who "use paint strippers frequently, (that) it is particularly important that you...Never use any paint stripper in a poorly ventilated area. If work must be done indoors under low ventilation conditions, consider having the work done professionally instead of attempting it yourself." This is of particular importance in lead-based paint removal work larger than the de minimis level (such as 2 sq. ft. per room). CPSC and EPA recommend that persons who strip paint "cross-ventilate (the worksite) by opening all doors and windows (and make sure there is fresh air movement throughout the room)." This practice deviates from the worksite protection for larger lead-based paint stripping projects, which typically involves protecting the work area and occupants from dispersal of lead debris and dust by sealing off ventilation systems and/or erecting barriers between the work area and the rest of the residence to reduce ventilation (see the HUD Guidelines, chapter 8). The CPSC/EPA notice also recommends precautions for firesafety, eye protection, skin protection, and waste disposal for paint strippers.

Some paint strippers are hazardous, and are addressed as such by regulatory agencies. HUD has considered the type of work in identifying the applicable definition to consider. The definition of "hazardous substance" used by the CPSC (see 16 CFR 1500.3), based on the Federal Hazardous Substances Act (15 U.S.C. 1261-74), applies to paint stripping work that does not involve employment, such as paint stripping by the owner of HUD-assisted housing who performs the work personally. The definition of "hazardous chemical" used by the Occupational Safety and Health Administration, and based on the Occupational Safety and Health Act (29 U.S.C. 655(a)), applies to paint stripping that does involve employment. OSHA's definition for the general industry at 29 CFR 1910.1200 currently applies to building maintenance, custodial, or construction work, because OSHA's hazard communication standard for the construction industry, at 29 CFR 1926.59, is identical to that for general industry.

Employers of paint removal workers are expected to know that OSHA

recently reduced its permissible exposure limit for methylene chloride in air from 500 to 25 parts per million (29 CFR 1910.1052 for general industry, and the identical 29 CFR 1926.1152 for construction, 62 FR 1492-1619, January 10, 1997). Methylene chloride can not be detected by odor at the permissible exposure limit, and organic vapor cartridge negative pressure respirators are generally ineffective for personal protection against it. Alternative paint strippers may be safer but have their own safety and/or health concerns, as indicated in the CPSC/EPA notice, so caution in the selection and use of any paint stripper is prudent. Paint stripping in a poorly ventilated space using a volatile substance that is hazardous should be done in accordance with CPSC regulations (16 CFR 1500.3), and/or OSHA's hazard communications standards (29 CFR 1010.1200 or 29 CFR 1926.59, which are currently identical), and with any substance-specific standards applicable to the work.

h. Compliance With Other State, Tribal, and Local Laws. In response to comments urging deference to State, tribal and local laws and regulations, HUD has added a provision to the final rule that makes it clear that HUD may modify or waive requirements of subparts B, C, D, F through M, and R, if the Department determines that a State, tribal, or local law provides a comparable level of protection and that such a modification or waiver will promote efficiency.

The final rule also indicates that this regulation is not intended to relieve program participants from compliance with State, tribal or local law.

i. Minimum Requirements. The final rule retains the policy included in the proposed rule that the requirements of subparts B, C, D, F through M, and R, are intended to be minimum requirements. Nothing in this rulemaking is intended to preclude designated parties from conducting a more protective method than the one required. Thus, for example, if the requirement is interim controls, a designated party may choose to use an abatement method instead.

Similarly, where more than one requirement covers a condition or activity, the most protective shall apply.

j. Waivers. Also retained from the proposed rule is the authority of the Secretary of HUD to waive any provision of this rulemaking, subject to statutory limitations. This conforms to, and cites, § 5.110, the general waiver section for HUD programs under title 24.

k. Prior Evaluation or Hazard Reduction. Some commenters requested

clarification as to the validity under HUD's rule of lead-based paint activities conducted prior to the effective date of the rule. In the final rule, conditions under which a prior evaluation or hazard reduction meets the requirements of the rule have been specified.

Section 1013 of Title X gives the Secretary authority to waive the lead-based paint inspection and risk assessment requirement for federally owned housing built between 1960 and 1978 if a federally funded risk assessment by a certified contractor shows an absence of lead-based paint hazards. The Department believes case-by-case waivers to be inefficient and inappropriate and therefore has developed a broader policy on prior activities that covers all properties for which an acceptable risk assessment, lead-based paint inspection, abatement, or clearance has been performed. The Department believes that the conditions set forth in this section provide the necessary quality control measures for prior lead-based paint activities while avoiding unnecessary duplication.

A lead-based paint inspection or a risk assessment conducted at a residential property or dwelling unit prior to the property or unit becoming subject to the requirements of subparts C, D, F through M, and R, need not be repeated if it was conducted in the following manner or under the following circumstances:

(1) If the lead-based paint inspection or risk assessment was conducted prior to August 30, 1999 (the effective date of the EPA regulations at 40 CFR 745.227), results of the evaluation may be used if it was conducted in accordance with 40 CFR 745.227 or by an individual or firm otherwise certified under a State or Indian tribal lead-based paint inspector or risk assessor certification program, except that the risk assessment must be no more than 12 months old to be considered current; and furthermore a lead-based paint inspection of public or Indian housing meets the requirements of this rule if it was accepted by the housing agency in fulfillment of the lead-based paint inspection requirement of the public and Indian housing program prior to the effective date of this rule.

(2) If the inspection or risk assessment was conducted after August 29, 1999, the results of the evaluation may be used if it was conducted in accordance with 40 CFR part 745, subparts L and/or Q, except that the risk assessment must have been completed no more than 12 months prior to the date of reference.

The provisions in subpart B regarding prior risk assessments do not apply in

cases where a risk assessment is required in response to the identification of a child under 6 years of age with an environmental intervention blood lead level. In such cases the risk assessment must be conducted in the child's dwelling unit shortly after the child's blood was last sampled.

Interim controls conducted prior to a property or unit becoming subject to the requirements of subparts B, C, D, F through M, and R, need not be repeated if such controls were conducted in accordance with a risk assessment that meets the requirements of this rule; however, ongoing lead-based paint maintenance and reevaluation must be conducted as required by this final rule.

Abatements conducted before August 30, 1999 and before the property or unit becomes subject to the requirements of subparts B, C, D, F through M, and R, need not be repeated if conducted by an abatement supervisor approved by a State or Indian tribe to perform abatement of lead-based paint or lead-based paint hazards. It is not necessary that the State or tribal approval program had EPA authorization. Abatements conducted after August 29, 1999, must have been conducted by a lead-based paint abatement supervisor certified by a State or Indian tribe with an EPA-authorized lead-based paint certification program or by EPA in accordance with 40 CFR 745.226. State law may impose different requirements. A lead-based paint abatement project meets the requirements of this rule if it was accepted by the housing agency in fulfillment of the abatement requirement of the public or Indian Housing program prior to the effective date of this rule.

With regard to the policy on prior lead-based paint inspections in public and Indian housing, it should be explained that in the late 1980's, pursuant to a statutory requirement, HUD began requiring public and Indian housing agencies to conduct lead-based paint inspections in all pre-1978 family developments. All inspections had to be completed by December 1994.

Abatement of any lead-based paint was required at the time of modernization. HUD estimates that by 1998, virtually all of the pre-1978 family developments have been inspected, representing approximately 900,000 dwelling units. Also, HUD estimates that housing agencies have completely abated lead-based paint in over 200,000 units. The Department does not think it would be acceptable now to require that all lead-based paint inspections be redone. However, the rule does recommend that housing agencies conduct quality

assurance testing for all inspections that might be questionable.

l. *Enforcement.* Every commenter who addressed the question of enforcement of the rule remarked that penalties for noncompliance needed to be spelled out in the rule. The Lead-Based Paint Poisoning Prevention Act does not provide any independent enforcement provisions. Remedies will vary based on which program's requirements have been violated. For example, a designated party that is not in compliance with this rule may be considered in default of the regulatory agreement or housing assistance payments contract with the Department, may be debarred from receiving assistance from the Department or denied future participation in HUD programs, may be forced to surrender grant funds or may be otherwise subject to civil money penalties or other sanctions. Recipients of assistance under the Community Development Block Grant program will find enforcement provisions at 24 CFR 570.910, 570.911 and 570.913; those for other programs are found in other parts and sections of the CFR. HUD does not think it necessary to restate each program's sanctions in this lead-based paint rule but has included a general provision under § 35.160 that states the consequences of noncompliance with this regulation. HUD intends to vigorously enforce all requirements of this regulation.

m. *Records.* HUD has retained a record keeping requirement in this final rule for designated parties conducting lead-based paint activities. The Department strongly recommends that designated parties keep for the life of the property a copy of each notice to occupants of the results of evaluation and hazard reduction (including clearance) and each report from a certified individual or firm performing lead-based paint inspections, risk assessments, abatement, or clearance. Such notices and reports document compliance in case of a legal or administrative question; and evaluation and hazard reduction reports provide information on where lead-based paint may remain on the property so it can be managed safely, or, if such reports document that there is no lead-based paint remaining on the property, they can be used to support exemption from the requirements of this rule and the disclosure rule. At a minimum, the Department requires that such documentation be retained for three years. Records applicable to a portion of a residential property for which ongoing maintenance and/or reevaluation activities are required shall be kept until

at least three years after such activities are no longer required. This policy is designed to provide a basis for helping ensure that Federal funds have been expended properly.

3. *Subpart C—Disposition of Residential Property Owned by a Federal Agency Other than HUD.* This subpart establishes minimum lead-based paint requirements for residential property built before 1978 that is owned and to be sold by a Federal agency other than HUD and is consequently subject to the requirements of section 1013 of Title X. The subpart basically restates the requirements set out in section 1013 of Title X, with minimal elaboration. The Department believes that the details of how another Federal agency should carry out the requirements of section 1013 are best determined by the affected agency.

The proposed rule required that for residential property built before 1960, the Federal agency shall conduct a lead-based paint inspection and a risk assessment, and shall abate all lead-based paint hazards. In the case of a purchaser who is not to be an owner occupant, the agency could make abatement a condition of sale with sufficient funds escrowed. For properties built after 1959 and before 1978, the proposed rule required that the agency conduct a risk assessment and a lead-based paint inspection. Under the disclosure rule implementing section 1018 of Title X, the agency would be required to provide the results of the risk assessment and inspection to the purchaser.

The Department of the Navy commented that the requirement that both a risk assessment and a lead-based paint inspection be conducted appeared to exceed the statutory requirement. Section 1013 calls for "the inspection and abatement of lead-based paint hazards" in pre-1960 housing and "an inspection for lead-based paint and lead-based paint hazards" in housing built between 1960 and 1978. HUD is calling for both an inspection and a risk assessment because the statutorily defined term "inspection" refers to a procedure that identifies the location of lead-based paint, if any, on a property but does not identify the location of "lead-based paint hazards," as that term is defined in the statute. Identification of lead-based paint hazards is the function of a risk assessment. Thus, because lead-based paint hazards must be identified to comply with section 1013, a risk assessment must be conducted as well as an inspection. HUD expects that the two evaluation procedures will be performed concurrently.

The Air Force, Army and the General Services Administration (GSA) all asked for greater flexibility to permit negotiation with transferees regarding hazard control requirements "built into the contract of sale." These agencies argued that, while the proposed rule allowed abatement to be made a condition of sale, it required the escrow of sufficient funds, and it may not be feasible for a bidder on large blocks of units to escrow large sums for long periods of time. It was pointed out that purchasers do not always know at the time of transfer what the reuse of a property, or a part thereof, will be. It was recommended that other conditions be permitted to be attached to the sale—for example, certification and indemnification requirements not requiring escrow deposits, and deed restrictions. GSA also complained that limiting an agency's authority to make abatement a condition of sale to when the purchaser is not an owner occupant could cause unnecessary complications in the bidding process. Bidders intending not to be owner occupants might discount their bids to account for the cost of the evaluation, while those intending to be owner occupants would not.

HUD believes that allowing the Federal agency a choice of conducting the abatement itself or making it a condition of sale facilitates efficiency and timeliness in the disposition process. The Department finds the agencies' comments about making abatement a condition of sale in pre-1960 properties to be reasonable and has changed the relevant provision to allow that "where abatement of lead-based paint hazards is not completed before the closing of the sale, the Federal agency *shall be responsible for assuring that the abatement is carried out by the purchaser before occupancy* of the property as target housing" (emphasis added) and in accordance with the requirements of either a State or tribal program authorized by EPA under subpart Q of 40 CFR part 745 or EPA's requirements at subpart L of 40 CFR part 745. This revised wording is intended to provide agencies more choice, while retaining their responsibility to assure compliance with the statute; and it eliminates the potential for confusion and complications in the bidding process by removing the provision that confined the authority to make abatement a condition of sale only to those sales in which the purchasers will not be owner occupants of the property. Further, it should be noted that it is HUD's interpretation that abatement

will not be required if the reuse is not to be target housing.

With regard to disposal of military property, HUD recognizes that there are several statutory, regulatory and policy requirements pertaining to the cleanup, disposal and reuse of BRAC (base realignment and closure) properties and that agencies of the Department of Defense are using provisions in contracts for sale and deeds to assure that lead-based paint hazards in target housing built before 1960 will be abated prior to occupancy. Typical of such contract or deed provisions is the following: "Purchaser agrees that purchaser will be responsible for the abatement of any lead-based paint hazards (as defined in Title X and implementing regulations) by a certified contractor in accordance with Title X and implementing regulations before the use and occupancy of such improvements as a residential dwelling (as defined in Title X)." To document compliance with such a provision, HUD recommends that Federal agencies include as a contractual condition the requirement that the purchaser send a copy of the certified abatement report, including clearance, to the agency.

The Department of the Army recommended that the rule be changed to allow the lead-based paint inspection and risk assessment, as well as the abatement, to be conducted following the sale of the property. HUD is of the opinion that evaluation must be conducted by the Government before the sale for two reasons: (1) Unless the evaluation is done prior to bidding, bidders will be unable to estimate the cost of abatement in pre-1960 properties and to consider that amount in calculating their bids; and (2) for properties built after 1959 and before 1978, the statute explicitly states that "the results of such inspections shall be made available to prospective purchasers."

One advocacy organization argued that the regulations should do away with the artificial distinction they create between HUD-owned property and housing owned by some other Federal agency stating that "the Federal government must provide consistent leadership in ensuring that all housing it sells or * * * disposes of is free of lead hazards." HUD's rationale for distinguishing between HUD Programs and those of other Federal agencies is discussed under Section III.D.5 of this preamble, above.

As mentioned above, in Section III.A.3 of this preamble, the statute states that the requirements of section 1013 do not apply "in the absence of appropriations sufficient to cover the

costs." Therefore this final rule provides in subpart B, at § 35.115, that each Federal agency other than HUD must determine whether appropriations are sufficient.

With regard to a sale of housing owned by Federal agencies other than HUD and in which more than one Federal agency is party to the sale, HUD leaves to the agencies involved the responsibility to determine which Federal agency is responsible for compliance with this subpart.

4. *Subpart D—Project-Based Assistance Provided by a Federal Agency Other Than HUD.* This subpart sets out minimum requirements, consistent with section 1012, for Federal agencies other than HUD that have housing programs and provide more than \$5,000 of project-based assistance. The subpart basically restates the minimum requirements set out in section 1012. Few comments were received on this subpart of the proposed rule and therefore, the requirements remain largely unchanged.

HUD has modified the proposed-rule requirements for notification of occupants about the results of evaluation and hazard reduction. In the final rule, the notification requirements that apply to this subpart are basically the same as those that apply to HUD-assisted housing instead of the more general proposed version. The Department believes that this change will result in more uniform and complete notification practices among all federally owned and assisted housing, consistent with government-wide regulatory streamlining.

In response to a question from the Department of Agriculture regarding how the "more than \$5,000" figure is to be applied, HUD is indicating in the final rule that the requirements apply to housing that receives annually more than \$5,000 *per project*.

5. *Subpart E reserved.* This subpart is reserved for possible future rulemaking on lead-based paint poisoning prevention requirements in single family housing covered by an application for HUD mortgage insurance or guarantee. Existing requirements at 24 CFR part 200, subpart O, as revised by this final rule, shall continue to apply to housing covered by an application for single family mortgage insurance.

6. *Subpart F—HUD-Owned Single Family Property.* This subpart sets out the requirements for HUD-owned single family property. In the proposed rule, two subparts addressed HUD-owned single family property; one subpart set out the requirements when sufficient appropriations were available, and

another set out the requirements for such property in the absence of sufficient appropriations. In the case of sufficient appropriations, the requirements were identical to those of section 1013 of Title X: for housing built before 1960, a risk assessment and lead-based paint inspection followed by abatement of lead-based paint hazards; for housing built between 1960 and 1978, a risk assessment and lead-based paint inspection, followed by disclosure as required under the disclosure law. In the case of insufficient appropriations, the requirements were a visual-assessment for deteriorated paint followed by paint repair and cleanup. The Department has removed the appropriations distinction, and set forth a single policy under subpart F, as explained in Section III.A.3 of this preamble, above.

A childhood lead poisoning prevention advocacy group argued for stronger protection in both the single-family and multifamily subparts, asserting that HUD and other Federal agencies selling residential properties have a "particular responsibility" to ensure that sold properties contain no lead-based paint hazards. The commenter declared, "HUD has complete discretion and ample existing authority to require the evaluation and control of lead hazards before the sale of federally owned housing." An environmental organization joined in all these points, and remarked that "one of the most obvious opportunities for lead hazard control is during turnover, such as that accompanying change of ownership. HUD can, and should, be a leader in assuring that hazards are corrected at the time of sale * * *". The groups called for revisions to include the requirement of a risk assessment and hazard identification and control for any older structure.

In the final rule, the requirements for HUD-owned single family properties being purchased with a mortgage insured by HUD are: a visual assessment to identify deteriorated paint, paint stabilization, and unit-wide clearance. HUD has added the clearance requirement to provide assurance that the work is done properly and that no hazards remain after paint stabilization. Clearance is required only if paint stabilization is conducted. The Department has the option to test deteriorated paint and to confine paint stabilization only to those surfaces with deteriorated lead-based paint. No requirements are established for properties being purchased without a HUD-insured mortgage, except for the requirements of the disclosure rule. Many of the properties purchased

without HUD-insured mortgages are in need of major rehabilitation. The cost of paint stabilization and cleanup would be substantial relative to the value of the property, and there is a high likelihood that subsequent rehabilitation would negate the effectiveness of the cleanup in removing dust-lead hazards. HUD will acquaint purchasers of the risks of generating lead-based paint hazards during rehabilitation; this will occur during the notification and disclosure required by subpart A of 24 CFR part 35. Approximately one-half of all HUD-owned single family properties are purchased with HUD-insured mortgages.

This subpart does not require specific action regarding an environmental intervention blood lead level child. Less than 1 percent of single family properties are occupied when HUD acquires ownership, and, in most cases, HUD-owned single family property is vacant within three months of the transfer of ownership to HUD. Further, HUD-owned single family properties are generally sold within six months after acquisition. Because of the limited occupancy and relatively short HUD involvement with these properties, the Department finds it impracticable to impose environmental intervention blood lead level requirements.

7. Subpart G-Multifamily Mortgage Insurance. This subpart sets out the requirements for the Department's multifamily mortgage insurance programs. As in the proposed rule, applications for mortgage insurance in connection with a refinancing transaction are excluded from coverage if an appraisal is not required under the applicable procedures established by HUD. This exemption, which affects applications under section 223(a)(7) of the National Housing Act, is sensible because the properties are already under mortgage insurance, the mortgage amount is not being changed, there is no equity-take out, and the processing is very streamlined, often involving no on-site inspection by HUD.

The proposed rule required visual assessment for deteriorated paint, paint repair and cleanup for these programs. One commenter said that the HUD regulation will serve as "a model standard of care for the private mortgage insurance industry" and asked that HUD require the implementation of essential maintenance practices, risk assessments and lead hazard controls in all pre-1960 multifamily insured properties, and essential maintenance practices and risk assessments in all other federally insured properties. HUD agrees that rental housing must receive greater protection from lead-based paint

hazards than owner-occupied housing because tenants have less ability than owners to make the repairs necessary to reduce hazards. The Department has revised, therefore, the procedures of the proposed rule to ensure, to the extent HUD considers practicable, that pre-1960 units are free of lead-based paint hazards and that the risk of lead exposure is minimized in housing built after 1959.

A major housing industry organization pointed out that it would not be practicable to implement the proposed-rule requirement that deteriorated paint in a multifamily property be repaired "before the issuance of a firm commitment," because it would compel a mortgagor to expend sums on paint repair "based on chance and speculation." Other factors could prevent issuance of the commitment, or market conditions might prevent closing on the commitment's terms. It was suggested that HUD escrow 125–150% of the estimated cost of the repair work, and permit the paint to be repaired within 90 days after closing, using a repair escrow. The Department has addressed this comment by providing for a repair escrow in the final rule.

In the final rule, a multifamily insured property constructed before 1960 must have a risk assessment before the issuance of a firm commitment, and interim controls of identified lead-based paint hazards must be completed before firm commitment or made a condition of the sale and insurance agreement with sufficient funds escrowed. Also, there must be notices to occupants regarding the results of the evaluation and hazard reduction. The sponsor must also agree to incorporate ongoing lead-based paint maintenance into regular building operations. Ongoing maintenance activities in this final rule are comprised of many of the same elements as the essential maintenance practices recommended by the Task Force. The Department is not requiring reevaluation in housing covered by this subpart, because there is no continuing Federal subsidy. For a multifamily insured property constructed after 1959 and before 1978, no evaluation or hazard reduction is required in the final rule; but for these properties, the sponsor must agree to incorporate ongoing lead-based paint maintenance practices into regular building operations. Due to the limited relationship between the purchaser and the Federal government, HUD deemed it impracticable to include in this subpart requirements for responding to a child with an environmental intervention blood lead level. In cases where

multifamily mortgage insurance is combined with another HUD program (e.g., project-based assistance), the environmental intervention blood lead level requirements for that program would apply.

A new section has been added to this subpart of the final rule to clarify Departmental mortgage insurance policy on lead-based paint in buildings being converted from nonresidential use to multifamily residential use (conversions) and in multifamily residential properties undergoing major rehabilitation. Major rehabilitation is defined as rehabilitation that is estimated to cost more than 50 percent of the estimated replacement cost after rehabilitation. The requirement for both types of property is that all lead-based paint be abated and that the abatement methods be, to the extent practicable, paint removal or component replacement. Enclosure or encapsulation may be used if paint removal or component replacement are not practicable, as for example if they would damage substrate material considered architecturally significant. If the building is an historic property, interim controls can be used at the request of the State Historic Preservation Office (as explained in Section III.E.2.b of this preamble, above).

HUD considers conversions and major rehabilitations a special case because they usually involve major renovation of the interior, including new partitioning, new heating, ventilating, mechanical and electrical systems, plus new windows and doors. Also, conversions are, in effect, newly built housing. Such major construction activity provides an opportunity to remove lead-based paint and thus assure that such properties will be free of any possibility that lead-based paint hazards will be generated in the future as a result of the disturbance of paint during building operations, maintenance or future renovations. The incremental cost of abatement of all lead-based paint relative to the total conversion or rehabilitation cost will, in most cases, be modest, and, once done, the properties will be free of lead-based paint requirements, except to monitor any encapsulation or enclosure treatments or to engage in ongoing lead-based paint maintenance if interim controls are used in an historic property.

8. Subpart H-Project-Based Rental Assistance. This subpart sets out the requirements for the Department's project-based rental assistance programs. The Indian Housing Block Grant Program has been added as a covered program under this subpart.

The legislative history of Title X indicates that it was the intent of Congress that the requirements of a risk assessment and interim controls would apply to housing receiving project-based assistance. Therefore these procedures are required in the final rule, as they were in the proposed rule. The final rule also requires ongoing maintenance and reevaluation to assure that the housing remains lead safe, which is similar to the monitoring requirement in the proposed rule, and it has additional requirements to respond to a case of a child with an environmental intervention blood lead level, as did the proposed rule.

There is ample evidence, however, in the statute and in legislative history that Congress felt that evaluation and hazard reduction requirements should be reasonably related to the level of Federal financial assistance. Therefore, as in the proposed rule, the requirements of a risk assessment and interim controls apply only to multifamily properties receiving more than \$5,000 per dwelling unit annually in project-based rental assistance, calculated as an average of per assisted unit. For all other properties receiving project-based rental assistance under a HUD program, the initial evaluation and hazard reduction requirements are: A visual assessment to identify deteriorated paint, stabilization of deteriorated paint, and clearance (if paint stabilization is required). This less stringent requirement applies to multifamily properties receiving an average of up to and including \$5,000 per assisted dwelling unit annually in project-based rental assistance and all single family properties receiving Section 8 Moderate Rehabilitation or Project-Based Certificate assistance or project-based rental assistance from another HUD program. The stringency of the requirement is less for these properties because the amount of financial assistance is less and because the Department wanted to relieve owners of single family rental property with limited financial resources from the more extensive lead-based paint requirements that apply to owners of large multifamily projects with a high level of rental assistance. On average, the costs per dwelling unit of evaluation and hazard reduction are significantly higher for single family than for multifamily housing.

A commenter believed that the rule's definition of "project-based assistance" could be read to include assistance delivered by local governments using HUD's Community Planning and Development (CPD) program funds. It is the Department's expectation and intent that most housing-related programs

using CPD program funds will be covered by subparts J (rehabilitation), K (acquisition, leasing, support services, and operation), and M (tenant-based rental assistance). However, a CPD-funded program may be covered by subpart H if it is providing rental assistance that is tied to a particular property through contract or agreement.

The Department has decided that the term "project-based" should be given its traditional meaning of housing assistance payment programs where the funding is tied to the residential property and not to the tenant. Further, the requirement for risk assessment only makes sense when it is applied to traditionally "project-based" housing assistance payment programs, where HUD maintains an ongoing relationship with the owner and is able to require a phase-in of risk assessment requirements.

Section 1012 of Title X (at 42 U.S.C. 4822(a)(1)(B)) sets out a schedule in which risk assessments and interim controls must be performed, i.e., all pre-1960 dwelling units before January 1, 1996; 25 percent of 1960–1978 dwelling units by January 1, 1998; not less than 50 percent of 1960–1978 dwelling units by January 1, 2000; and the remainder by January 1, 2002. The Department is not issuing a final lead-based paint rule in time to meet the January 1, 1996 deadline. Therefore, the Department has delayed the start of the risk assessment schedule but is establishing an expedited phase-in schedule that is somewhat simpler than that in the statute: September 17, 2001, for properties constructed before 1960, and September 15, 2003, for properties constructed after 1959 and before 1978.

This risk assessment phase-in schedule applies only to multifamily properties receiving more than \$5,000 per unit annually in project-based rental assistance. The schedule for all other properties covered by subpart H is based on the schedule of initial or periodic inspections.

The revised schedule for risk assessments is based on the comments received on the proposed rule's risk assessment schedule, and it also takes into account the delay in meeting the deadlines established by the Congress. It is HUD's view that the revised schedule still provides adequate time for education and training in order to implement the new technical standards, requirements and procedures. The proposed rule provision that allows the Secretary to develop an alternative schedule, if necessary, remains in this subpart. The provision was included to provide the Department with flexibility in working with HUD clients whose

housing assistance payment contracts are due to expire close to the required date for completing risk assessments—an issue raised by commenters.

The final rule does not include the proposed rule's requirement that an owner develop a hazard reduction plan. The hazard reduction plan, a concept suggested by the Task Force, was intended to provide the owner with flexibility to design his or her own schedule for completing interim controls. However, it was perceived by commenters and by the Department to be a paperwork requirement that could be a burden for owners and an unsolvable administrative problem for the Department. HUD has established, therefore, the following schedule for interim controls: Dwelling units occupied by families with children under 6 years of age and common areas servicing those units shall have interim controls completed no later than 90 days after the completion of the risk assessment for those units. Dwelling units not occupied by families with children under 6 years of age, common areas servicing those units, shall have interim controls completed within 12 months of the completion of the risk assessment for those units. If the owner chooses to conduct standard treatments rather than a risk assessment and interim controls (see "Options" above), standard treatments for units occupied by children of less than 6 years of age must be completed no later than 90 days after the final date for completion of a risk assessment, and for other units no later than 12 months following the final date for completion of a risk assessment. Completion of standard treatments as well as interim controls includes clearance testing.

These policies regarding interim controls and the standard treatment option must be complied with only by owners of properties receiving more than \$5,000 per unit annually in project-based rental assistance. Other properties must complete paint stabilization and clearance, if needed, within 30 days of receiving notification of the results of the visual assessment.

HUD assumed in drafting the proposed rule that multifamily properties receiving more than \$5,000 per unit annually in project-based rental assistance would be subject to the same lead-based paint requirements that currently apply until they are required to comply with this new regulation. Commenters pointed out that more clarity and precision is needed on requirements during the phase-in period. Therefore the Department is adding to this subpart a paragraph on transitional requirements that will be

effective on September 15, 2000. Until the phase-in date that is applicable to a property, or until the owner conducts a risk assessment, whichever is first, the owner must practice ongoing lead-based paint maintenance. This consists mainly of three activities: (1) Visually assessing, at least once a year, the condition of painted surfaces to identify deteriorated paint; (2) stabilizing any deteriorated paint; and (3) using safe work practices when performing any maintenance or renovation that disturbs paint that may be lead-based paint.

As explained in Section III.D.6 of this preamble, above, environmental intervention blood lead level requirements that apply to this subpart have been revised.

9. Subpart I—HUD-Owned and Mortgagee-in-Possession Multifamily Property. In the proposed rule, two subparts addressed the disposition of HUD-owned multifamily property; one subpart set out the requirements that would apply when sufficient appropriations were available to comply with the statutory requirements of section 1013, and another set out the requirements in the absence of sufficient appropriations. The section 1013 requirements are: for pre-1960 properties, an inspection and risk assessment followed by abatement of lead-based paint hazards, and, for properties built after 1959 and before 1978, an inspection and risk assessment followed by disclosure. In the absence of sufficient appropriations, the proposed rule called for a visual evaluation to identify deteriorated paint followed by repair of deteriorated paint and cleanup of the worksite. Additional requirements were included in the case of a child with an environmental intervention blood lead level, and monitoring of paint conditions was required for properties retained in the HUD-owned inventory for more than one year. No distinction was made for the period of construction, e.g., before or after 1960.

In the final rule, the Department has removed the appropriations distinction, and set forth a single policy under this subpart, as discussed under Section III.A.3 of this preamble, above. The Department's intent in setting lead-based paint policy for HUD-owned and mortgagee-in-possession multifamily property in this final rule is to make the requirements similar to those for multifamily properties receiving more than \$5,000 per unit annually in project-based rental assistance while recognizing the intent of Congress as expressed in section 1013 of Title X. HUD finds no reason to require of itself a less stringent standard than it requires

of private owners of assisted multifamily housing. The Department must conduct a lead-based paint inspection and risk assessment before publicly advertising the property for sale, followed by interim controls of all identified lead-based paint hazards. A lead-based paint inspection is required as well as a risk assessment so information on the location of lead-based paint can be given to the purchaser pursuant to the disclosure rule at subpart A of 24 CFR part 35, who can then use it to assure that lead-based paint hazards are not generated inadvertently during future maintenance or renovation work. For dwelling units occupied by families with children of less than 6 years of age and common areas servicing such units, interim controls shall be completed no later than 90 days after the completion of the risk assessment; while dwelling units not occupied by families with children younger than 6 and associated common areas must have interim controls and clearance completed no later than 12 months after the risk assessment. If a unit becomes newly occupied by a family with a child of less than 6 years of age or such a child moves into a unit, interim controls must be completed within 90 days after said move-in if they have not already been completed. The schedule for completion of standard treatments is also the same as for multifamily housing receiving more than \$5,000 per unit annually in project-based rental assistance. The Department must provide a notice to occupants if evaluation or hazard reduction is undertaken.

If conveyance of the title by the Department at a sale of a HUD-owned property or a foreclosure sale caused by the Secretary when HUD is mortgagee-in-possession occurs before the required schedule for completion of interim controls or standard treatments, the Department must complete the hazard reduction before conveyance or foreclosure sale, or the Department shall be responsible for assuring that interim controls are carried out by the purchaser according to the following schedule: (1) In units occupied by families with children of less than 6 years of age and common areas servicing such units, no less than 90 days after the date of closing of the sale or 90 days after a family with a child less than 6 moves in; and (2) in all other units and associated common areas, no later than 180 days after the closing of the sale. The schedule for completion of hazard reduction by the purchaser is keyed to the closing date, because it is only at that time that the purchaser can begin

to make firm arrangements to conduct the treatments; but the duration of time from the closing date is somewhat less than that which HUD must meet in relation to the risk assessment date because of concern that the risk assessment may go out of date. Similar to requirements for multifamily properties receiving project-based assistance, ongoing maintenance and reevaluation are required under this subpart if the Department retains ownership of the property for more than 1 year.

This subpart requires specific actions in response to a child with an environmental intervention blood lead level; the requirements are similar to those for housing receiving project-based rental assistance.

10. Subpart J—Rehabilitation. This subpart sets out the requirements for the Department's programs which provide assistance for housing rehabilitation. The majority of this assistance is provided through programs administered by the Office of Community Planning and Development (CPD), principally the Community Development Block Grant program and the HOME program. Other rehabilitation assistance is provided under the Flexible Subsidy-Capital Improvement Loan Program (CILP) and the Mark-to-Market Program for multifamily property. Rehabilitation assistance may also be provided under the Indian Community Development Block Grant Program and the Indian Housing Block Grant Program. This subpart does not apply to the following HUD programs that may have rehabilitation activities: Mortgage insurance programs, the Section 8 Moderate Rehabilitation program, and the public housing modernization programs. Those programs are covered by other subparts.

The requirements of Title X pertaining to federally assisted residential rehabilitation are quite specific. The statute sought to take advantage of the rehabilitation event as a cost-effective opportunity to sharply reduce lead-based paint hazards in the assisted stock. Many types of rehabilitation, such as window replacement or installation of new walls or doors, often reduce lead-based paint hazards. Section 1012 requires at a minimum: (1) Inspection for the presence of lead-based paint prior to federally-funded renovation or rehabilitation that is likely to disturb painted surfaces; (2) interim controls of lead-based paint hazards in housing receiving less than \$25,000 per unit in Federal rehabilitation assistance; and (3) abatement of lead-based paint hazards

in housing receiving more than \$25,000 per unit.

Among those commenters on the proposed rule who directed their remarks towards specific HUD programs, the rehabilitation programs drew by far the most attention, largely because compliance was perceived as complex and costly. Some commenters felt that the rule would reduce the impact that rehabilitation assistance funds can have on the community and would make smaller communities determine that rehabilitation projects are "not worth it." Pointing out that some local rehabilitation assistance is provided in the form of a loan, local agencies feared that they would have difficulty getting homeowners to borrow the additional funds needed to comply with the lead-based paint hazard reduction requirements. As a long time proponent and funder of housing rehabilitation, the Department understands and shares these concerns and has attempted to provide local agencies with ways to incorporate as efficiently as possible the statutory requirements of Title X into their rehabilitation programs.

At the outset, it should be noted that rehabilitation that does not disturb a painted surface is exempt from this rule. Thus, for example, roof repairs or heating system improvements are likely to be exempt unless such activities disturb painted surfaces.

In both the proposed rule and the final rule, HUD has interpreted the statutory requirement of a lead-based paint inspection to apply only to surfaces to be disturbed by rehabilitation. In the proposed rule this procedure was called a "limited paint inspection." In response to concerns of EPA regarding possible confusion if the word "inspection" is used differently than in EPA regulations, HUD is using the term "paint testing" instead (see Section III.E.2.c. of this preamble, above). Furthermore, HUD provides the option of either conducting paint testing of the painted surfaces to be disturbed or replaced during rehabilitation or presuming that all such painted surfaces are coated with lead-based paint. Paint testing is not necessary if a complete lead-based paint inspection has been conducted of the property.

In the final rule as well as in the proposed rule, the Department has added a category of housing receiving up to and including \$5,000 per unit in Federal rehabilitation assistance to allow a lower level of lead-based paint treatment for rehabilitation of modest expenditure. HUD's intent in setting requirements for housing in this category of assistance is to allow low

level rehabilitation to occur without incurring the full expense of the statutory lead-based paint requirements but at the same time to minimize the possibility of exposure to lead-based paint hazards as a result of the assisted rehabilitation work. This has been referred to as a "do-no-harm" policy. The impact of this policy is significant. HUD estimates that the average amount of rehabilitation assistance per unit from the Community Development Block Grant program is between \$5,000 and \$6,000. The proposed rule would have required visual assessment to identify deteriorated paint on surfaces to be disturbed by rehabilitation, repair of such deteriorated paint surfaces, and cleanup of the worksite. The final rule requires paint testing of surfaces to be disturbed or presumption of lead-based paint, and, if the paint is found or presumed to be lead-based paint, the following are required: safe work practices (as specified in subpart R of the final rule) during rehabilitation, repair of any paint disturbed during rehabilitation, and clearance of the worksite. The main differences between the proposed and final rules are (1) the more explicit emphasis on safe work practices during rehabilitation as the way to avoid causing exposure to lead-based paint hazards, and (2) the clearance requirement, which assures that no lead-based paint hazards are left at the worksite. The worksite consists of only those rooms or areas where the rehabilitation is conducted. Safe work practices include the following: Not using prohibited practices of paint removal, occupant protection and worksite preparation, and specialized cleaning. These practices were included in the requirements of the proposed rule for paint repair. HUD estimates that the average cost per unit of complying with today's rule for housing receiving no more than \$5,000 in Federal rehabilitation assistance will be approximately \$150 for single family and \$115 for multifamily units.

For housing receiving more than \$5,000 and up to and including \$25,000 in Federal rehabilitation assistance, the final rule makes one significant change to the requirements in the proposed rule (which derive directly from the statute), and that is the standard treatment option. This option allows the use of standard treatments (as suggested by the Task Force; see Section III.D.3 of this preamble, above) instead of conducting a risk assessment and interim controls. If standard treatments are used, no evaluation is required. Standard treatments include stabilization of deteriorated paint, the provision of

smooth and cleanable horizontal surfaces, the correction of conditions causing rubbing, binding or crushing of painted surfaces, and the treatment of bare soil—all using safe work practices and followed by clearance. When conducted as a part of rehabilitation, standard treatments must include stabilization of paint disturbed as a result of the rehabilitation work, and clearance must be conducted after completion of rehabilitation, as is the case if interim controls are conducted. Standard treatments may be an appropriate option in housing in which experience indicates there is a high likelihood of extensive lead-based paint hazards. In such housing the risk assessment would just confirm what is expected. Standard treatments may also be appropriate in housing that is otherwise in good condition but is undergoing rehabilitation in one or more confined areas, in which case the extent of deteriorated paint, surfaces that are not smooth and cleanable, and dust-generating conditions might be minor. Another potential advantage of standard treatments is that they are a known and limited group of activities that crews can be trained to perform efficiently. A possible disadvantage is that such treatments may be performed unnecessarily on surfaces without lead-based paint, because no testing is conducted.

In Title X, the statutory requirement for hazard reduction in properties receiving more than \$25,000 per unit in Federal rehabilitation assistance is "abatement of lead-based paint hazards in the course of substantial rehabilitation projects." In the proposed rule, the statutory phrase "in the course of * * * rehabilitation" was interpreted to mean that lead-based paint hazards on surfaces to be disturbed by rehabilitation were to be abated (i.e. permanently eliminated), while hazard reduction (which includes less costly, but more temporary, interim controls as a minimum) could be conducted on lead-based paint hazards on other surfaces. This interpretation was questioned by those who thought the Congress meant that all lead-based paint hazards should be abated in these major rehabilitation projects, regardless of whether the surface was or was not being disturbed by the rehabilitation. Supporters of the proposed-rule interpretation claimed that the cost of abating lead-based paint hazards on the exterior of old houses with wood siding would be exorbitant. In the final rule, the Department has revised the proposed-rule requirement to require abatement of all lead-based hazards

identified by paint testing and/or a risk assessment and any lead-based paint hazards created as a result of the rehabilitation work, *except* that interim controls are acceptable on exterior surfaces that are not disturbed by rehabilitation.

HUD believes that the exemptions and options in this rule provide designated parties with enough flexibility to achieve the statutory objectives with maximum efficiency. For instance, in very old housing with a high likelihood of extensive lead-based paint and undergoing Federally assisted rehabilitation of between \$5,000 and \$25,000 per unit, the grantee, participating jurisdiction or CILP recipient may find it most efficient to forego the evaluation, presume the presence of lead-based paint and lead-based paint hazards, and conduct standard treatments using trained and efficient crews. Conversely, if the presence of lead-based paint or lead-based paint hazards is questionable, a grantee, participating jurisdiction or CILP recipient may choose to test the paint and conduct a risk assessment to determine whether it is necessary to treat all, some or any of the paint as lead-based paint.

Beyond the broad objections regarding the cost impact of the rule, commenters had many questions and concerns. A frequent complaint among commenters was their inability to determine, from the proposed rule, "exactly what rehabilitation is, what are rehab soft costs, and exactly what activities are to be used to determine the various types of costs." In the final rule, HUD has adopted the policy that the determination of the category of assistance (up to and including \$5,000, more than \$5,000 and up to and including \$25,000, or more than \$25,000) will be based on the hard costs of ordinary rehabilitation, not including the additional costs of complying with this rule. The Department has made efforts to clarify the definition of hard and soft rehabilitation costs through the use of examples.

A commenter also questioned the Department's decision not to include additional provisions for dwellings occupied by children with environmental intervention blood lead levels under rehabilitation-related rules. In general, the requirements for units receiving rehabilitation assistance of more than \$5,000 (risk assessment and either interim controls or abatement of lead-based paint hazards) are similar to or more stringent than the activities that would be required in the case of an environmental intervention blood lead level child. Also, rehabilitation

assistance is usually provided at one point in time, so there is often no continuing financial involvement of HUD with the property. However, in the case of a multifamily property receiving Federal rehabilitation assistance under the HOME program or the Flexible-Subsidy-CILP program, the grantee, participating jurisdiction or CILP recipient must require the property owner to incorporate ongoing lead-based paint maintenance activities into regular building operations. Ongoing lead-based paint maintenance practices are designed to ensure that new lead-based paint hazards do not occur in the property.

A commenter representing developers noted that "subrecipient" was defined to exclude an owner or developer receiving rehabilitation assistance. "Thus the responsibility of performing subrecipient duties must fall on the local government grantee.* * *" The commenter urged that the final rule permit duties to be delegated to the owner or developer, with only monitoring and oversight functions necessarily remaining with local government grantees. Although many of the requirements under this subpart refer to the grantee or participating jurisdiction, as is the case with many CPD programs, it is the Department's intent that the grantee or participating jurisdiction may require virtually all of these functions to be performed by a subrecipient or other designated party. The exclusion of an owner or developer, however, from the definition is retained in the final rule to permit at least some degree of independent oversight of the use of public funds.

Another funded agency commenter said that the rule's requirements would "cripple" the agency's ancillary programs. The commenter stated that the agency provides funds to an organization that implements an emergency rehabilitation program for county residents. This program, the commenter argued, is staffed by volunteers, and will not be able to comply with the extensive lead-based paint requirements. The Department has attempted to respond to this concern by tailoring the requirements to the amount of Federal assistance. While even the minimum requirements of the \$5,000-or-less category may require workers to undergo a modest amount of training, such training may be necessary to protect children who may live in the unit, and it should not be inefficient where such workers are volunteers who work on multiple projects.

In the final rule, the Department has established separate requirements for insular areas operating rehabilitation

programs under the HOME and Community Development Block Grant (CDBG) programs. Insular areas include the U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa. The requirements for insular areas are less stringent than the regular requirements for properties receiving more than \$5,000 per dwelling unit in Federal rehabilitation assistance. There is no difference in requirements for properties receiving up to \$5,000 per unit in rehabilitation assistance. The rationale for the lesser requirements is that insular areas do not currently have the capacity to comply with more stringent requirements applicable to other CDBG grantees and HOME participating jurisdictions, nor is it likely that capacity can be developed in the foreseeable future. The remote location of the insular areas, their small populations and the limited volume of HOME- and CDBG-funded housing activity makes the development of a competitive lead "industry" (i.e., certified lead inspectors, risk assessors and contractors) unlikely.

For properties receiving more than \$5,000 per unit in rehabilitation assistance, the final rule requires, in insular areas, stabilization of all deteriorated paint and paint being disturbed by rehabilitation instead of the normal requirements of a risk assessment and interim controls or abatement of lead-based paint hazards. (As is always the case, stabilization is not required of paint found by a certified lead-based paint inspector not to be lead-based paint.) Safe work practices must be used, including occupant protection, worksite preparation and clearance. HUD believes that clearance is very important and that, if laboratory analysis of dust samples is not available on an island, it can be obtained at reasonable cost through air mail of samples and electronic response by the laboratory, as is often the practice elsewhere in the United States.

These separate requirements for rehabilitation assistance of more than \$5,000 per unit in insular areas are protective of children and other occupants. They are the same as those in the final rule for units receiving tenant-based rental assistance (subpart M), assistance for acquisition, leasing, support services or operation (subpart K), and HUD-owned single family properties at disposition (subpart F). However, when undertaking Federally-funded rehabilitation, the Department encourages insular areas to use, to the maximum extent feasible and in consultation with their respective Field Office, the more rigorous and thorough

methods and procedures required of other grantees and participating jurisdictions in subpart J.

Finally, subpart J requires that all occupants shall be provided with the lead hazard information pamphlet by the grantee, participating jurisdiction or CILP recipient (or their representative). In all cases where evaluation or hazard reduction or both are undertaken, each grantee, participating jurisdiction or CILP recipient shall post or distribute a notice to occupants of the results of the evaluation. The grantee, participating jurisdiction or CILP recipient shall also post or distribute a notice of the results of the hazard reduction activities.

11. Subpart K—Acquisition, Leasing, Support Services, or Operation. This subpart sets out the requirements for certain CPD programs and the Indian Community Development Block Grant program and the Indian Housing Block Grant program when such programs are providing Federal funding for acquisition, leasing, operating or support services for a residential property. In the proposed rule, this subpart was entitled "Community Planning and Development (CPD) Non-Rehabilitation Programs." The title has been changed because of the addition of Indian programs to the coverage of the subpart and because the new title is more descriptive than the term, "non-rehabilitation," used in the proposed rule. The main CPD programs that fund activities covered by this subpart are the HOME program, the Community Development Block Grant program, the Supportive Housing program, the Emergency Shelter Grant program, and Housing Opportunities for Persons with AIDS (HOPWA). Persons with AIDS are considered persons with disabilities, so assisted housing for them is exempt from the rule except when there is a child of less than 6 years of age who resides or is expected to reside in the dwelling unit.

Examples of the types of housing assistance to which subpart K applies are acquisition or leasing of a homeless facility, downpayment assistance, mortgage and utility payments for persons with AIDS (if a child under 6 resides), and payment of security deposits. Other examples are payment of the day-to-day operating expenses of housing for the homeless and assistance for various support services that are provided on site at a residential facility, such as child care, employment assistance, outpatient health care including drug treatment or counseling, case management, nutritional counseling, security arrangements, and assistance in getting permanent housing.

For properties built between 1950 and 1978, the lead-based paint requirements for these activities in the proposed rule were visual assessment, paint repair and cleanup. For properties built before 1950, the requirements were visual assessment, dust testing for the presence of dust-lead hazards, paint repair, cleanup of the dwelling unit if the dust testing finds dust-lead hazards, or cleanup only of the paint-repair worksite if the dust testing does not find dust-lead hazards. In certain instances, ongoing monitoring of paint conditions was required. For all activities, provision of the pamphlet developed by EPA under TSCA section 406 was required.

Some commenters expressed concern regarding the adverse impact that these requirements would have on small-grant acquisition assistance programs. The Department believes that families receiving such assistance should be able to move into lead-safe housing. HUD has a statutory responsibility under the Lead-Based Paint Poisoning Prevention Act to establish procedures that achieve that objective to the extent practicable.

In the final rule, as in the proposed rule, HUD has set requirements for this subpart that are the same in most aspects as those for tenant-based rental assistance, which is covered by subpart M. The basic strategy set forth in the final rule consists of a visual assessment to identify deteriorated paint, stabilization of deteriorated paint, clearance of the dwelling unit, and, where there is a continuing and active financial relationship with the property, ongoing lead-based paint maintenance. This procedure is the minimum needed to assure that the housing is lead-safe. Many of the households inhabiting residential properties assisted through programs covered by subpart K include young children. Many of the assisted households are homeless. A basic level of protection against exposure to lead-based paint hazards is essential.

In the final rule, HUD has changed the proposed rule's requirement of paint repair to paint stabilization, as it has throughout the final rule. This is explained above in Section III.D.9 of this preamble. Also, the dust testing requirement in pre-1950 housing has been eliminated, and in its place the Department has required clearance of the dwelling unit, as it has for all other HUD-assisted and HUD-owned housing. Clearance is required, however, only if paint stabilization is required. Also, the final rule eliminates the proposed rule's distinction between pre-1950 and post-1949 housing. In the interest of regulatory streamlining, a single set of requirements applies to all pre-1978

housing. As in the proposed rule, the grantee or participating jurisdiction must provide the lead hazard information pamphlet to all occupants except those who have received the pamphlet under the disclosure rule. Also, each grantee or participating jurisdiction must provide a notice to occupants describing the results of the clearance examination. The notice requirement does not apply to the visual assessment but does apply to clearance results after paint stabilization, because the clearance report provides known information about the presence or absence of lead-based paint hazards. Finally, the final rule requires that ongoing maintenance of painted surfaces and safe work practices be incorporated into regular building operations, where appropriate under HUD-administered programs.

The Department has given the grantee or participating jurisdiction the discretion to determine whether the cost of paint stabilization and clearance is to be borne by the owner/developer, the grantee or a combination of the owner/developer and the grantee, based on program requirements and local program design. This helps to ensure maximum flexibility for local authorities and is consistent with HUD's reinvention initiative. Because the relationship between the HUD grantee or participating jurisdiction and the property owner or developer is often a one-time event, HUD deemed it impracticable to include special requirements in the case of a child with an environmental intervention blood lead level.

12. Subpart L—Public Housing Programs. This subpart sets forth requirements for eliminating lead-based paint hazards in public housing. The proposed rule included Indian housing under this subpart, but, as explained above in Section III.A.8 of this preamble, Indian housing programs are now covered under other subparts of this rule. Section 1012 of Title X does not specifically add new requirements to public housing. The Senate Committee Report states that Congress did not intend the changes to the Lead-Based Paint Poisoning Prevention Act introduced by Title X to pose a barrier to ongoing efforts by public and Indian housing agencies to conduct risk assessments, lead-based paint inspections and abatement activities. According to the Report, "the changes made by Title X to the public housing provision of the LPPA are intended merely to conform the terminology of Title X's definition of terms" (Senate Report 102-332, page 118). Nevertheless, in order to consolidate all

of the lead-based paint requirements for HUD in a single place, the Department is including subpart L for public housing in this rulemaking. This subpart implements the requirements set out in 42 U.S.C. 4822(d)(1)(3) prior to Title X; where necessary, however, the Department has modified these requirements in order to be consistent with the intent of Title X. Such modifications are noted below.

The Lead-Based Paint Poisoning Prevention Act requires PHAs to complete lead-based paint inspections of all pre-1978 family developments by December 6, 1994. This statutory requirement has existed since 1987. HUD has data indicating that most developments have been inspected, as mandated by Congress. Those that have not must be inspected no later than the effective date of this final rule, which is September 15, 2000. Where a PHA has not complied with the statutory requirement to complete lead-based paint inspections of pre-1978 family units, the PHA is eligible only for Emergency Modernization or work needed to complete the inspections as described in 24 CFR 968.210. The Lead-Based Paint Poisoning Prevention Act also has required for many years that PHAs abate all lead-based paint found in the inspections. This is a continuing activity conducted at the time of modernization.

The Department's primary concern in developing this rule is with the safety of occupants of housing developments that have lead-based paint but have not yet been abated. In such cases, modernization (and hence abatement) may be years or decades away, and nothing is required in the interim to control lead-based paint hazards. In the proposed rule, HUD set forth the following additional requirements for these developments with the goal of assuring that they are lead-safe: visual assessment for deteriorated paint, matching the visual assessment with the lead-based paint inspection to identify the locations of deteriorated lead-based paint, dust and soil testing to determine the presence of dust-lead hazards or soil-lead hazards, and interim controls of lead-based hazards found.

A principal concern of commenters was the financial burden, the asserted "unfunded requirement," the rule would place on public housing agencies. Based on these financial hardships, a group representing public housing agency interests recommended eliminating the rule's new requirements (dust and soil testing and interim controls) as they pertained to public and Indian housing. Acknowledging the need for addressing the issue of lead in

the environment, one commenter asserted that most local housing agencies already had made a good faith effort to comply with the requirement to complete lead-based paint inspections by the end of 1994.

A more specific issue addressed by some commenters was the acceptance by the proposed rule of dust and soil testing by non-certified personnel. Some commenters objected to this because it appeared to violate the requirements of EPA's regulations implementing TSCA sections 402 and 404. Others urged HUD to establish a major training activity to assure that public housing maintenance staff would be able to conduct such sampling properly and interpret the results accurately.

In the final rule, HUD is requiring that, instead of soil and dust testing by non-certified personnel, risk assessments must be conducted by certified risk assessors in developments with lead-based paint that has not yet been abated. The Department has concluded after careful consideration that it would be wasteful and ineffective to allow PHAs to skirt the EPA certification requirements for dust and soil testing. For further discussion of this issue, see Section III.D.8 of this preamble, above.

Another question has to do with the reliability of the lead-based paint inspections that have already been conducted. In a study of prior inspections in public housing, HUD has found that approximately 13 percent of the inspections were of questionable accuracy. In the proposed rule HUD, therefore, encouraged PHAs to engage in quality control activities to determine whether a lead-based paint inspection is reliable. The final rule continues this policy. HUD's Office of Public and Indian Housing issued a detailed Notice in 1995 (PIH 95-8(HA)) explaining how quality control can be implemented for lead-based paint inspections that have already occurred.

The final rule also continues the proposed rule requirement that occupants be informed of the results of all evaluation and hazard reduction activities, and it continues the additional requirements that are triggered if a child with an environmental intervention blood lead level is identified in a public housing development. The basic requirement is that a risk assessment and interim controls be completed in the dwelling unit quickly. A more detailed explanation of the requirements for response to a child with an environmental intervention blood lead level is provided above in Section III.D.6 of this preamble.

Under this subpart the Department has included references to the liability insurance provisions found in the public housing program requirements. Also, the rule describes the circumstance under which a PHA may use financial assistance received under the modernization program for the evaluation and reduction of lead-based paint hazards, and references sections of the public housing regulations for additional information on eligible costs.

13. *Subpart M—Tenant-Based Rental Assistance.* This subpart sets out lead-based paint requirements for the Department's tenant-based rental assistance programs, including those operated under the HOME, Housing Opportunities for Persons With AIDS (HOPWA), Shelter Plus Care, and Indian Housing Block Grant programs as well as Section 8. Because there are different types of local organizations that administer tenant-based rental assistance under HUD programs, this subpart uses the general term "designated party" to refer to housing agencies, grantees, participating jurisdictions or Indian Housing Block Grant recipients. Unlike other subparts, this subpart applies only to housing occupied by families with children of less than 6 years of age.

The lead-based paint requirements for tenant-based rental assistance in the proposed rule were virtually the same as those proposed for the subpart now titled Acquisition, Leasing, Support Services, or Operation (formerly CPD Non-Rehabilitation). For properties built between 1950 and 1978, visual assessment, paint repair and cleanup; for properties built before 1950, visual evaluation, dust testing for the presence of dust-lead hazards, paint repair, cleanup of the dwelling unit if the dust testing finds dust-lead hazards, or cleanup only of the paint repair worksite if the dust testing does not find dust-lead hazards.

Comments ranged from declarations that it was illegal under the statute to apply the rule to tenant-based programs to assertions that stringent lead-control standards must be applied, *especially* in the case of the tenant-based programs. Commenters opposed to the requirements argued that there exists a "statutory, program-wide exemption for housing receiving tenant-based Section 8 assistance." One commenter asserted that only landlords agreeing to accept assistance under a section 1011 grant (i.e., the HUD Lead-Based Paint Hazard Control Grant program) are required to adhere to requirements associated with lead-based paint testing and control. HUD disagrees. The Department's response to the question of the legality

of imposing lead-based paint requirements on tenant-based rental assistance programs is discussed above, under Section III.A.2. of this preamble.

Many commenters discussed the fair housing implications of the rule because of its focus on families with young children. Some commenters advocated simply relocating a family to another unit upon discovery of a lead hazard (leaving the unit available for other families without small children). Others advocated making special funding available in pilot programs for particular localities, to finance any necessary control or abatement activities, or providing tax or other special incentives to owners faced with unexpected repair costs arising out of the discovery of a lead hazard. Still other commenters advocated coverage for all tenant-based units without regard to family makeup.

The Department believes limiting the requirements of subpart M to dwelling units in which a family with a child less than age 6 resides is a reasonable policy because of the unique ability of designated parties to identify changes in the composition of an assisted family through the income certification process. In addition, the designated parties are able to monitor the property owner's compliance with lead-based paint requirements through initial and periodic dwelling unit inspections. These two safeguards will help to ensure that a designated party will know whether a child of less than 6 years of age resides in a dwelling unit. An owner who refuses to rent a dwelling unit to a family with a child under the age of 6 may be in violation of the provisions of the Fair Housing Act prohibiting discrimination on the basis of familial status. The same possibility applies to a designated party that requires that a family with a young child make an involuntary relocation. (See the discussion of the requirements of anti-discrimination statutes in Section III.D.7 of this preamble above.)

Comments included repeated expressions of fear that the cost of compliance with this subpart would result in a "shortfall" of housing available to families with tenant-based rental assistance, and assertions that new contractual duties were being imposed on owners that were not a part of the owners' existing agreements with the designated party. Landlords will be discouraged from participating, commenters claimed, and the rule will drive up their operating costs, without any certainty of additional compensation. Both rural housing authorities and agencies in the largest cities worried about tight rental markets

and the inability of participating families to locate lead-safe units.

Taking the more protective point of view, other commenters noted that the rule's requirements for tenant-based programs were less demanding than those set out for project-based programs and advocated applying the stricter standards uniformly. Some commenters urged that HUD impose the same protection that the Task Force on Lead-Based Paint Hazard Reduction and Financing recommended for all private units. A health department believed that because housing assistance programs were shifting toward tenant-based assistance, "the most stringent of requirements probably should be on this (type) of housing."

In considering how to respond to these comments, HUD took into account the recommendations of the Task Force. In their report, the Task Force recognized most of the concerns expressed by commenters on the proposed rule, not the least of which was the fear that expensive standards could reduce participation in the program by private landlords. It is noteworthy that the Task Force concluded that lead-based paint requirements for tenant-based assistance programs should be similar to the standards recommended by the Task Force for rental housing in general.

Under current regulations, HUD requires that designated parties administering tenant-based rental assistance programs visually inspect pre-1978 dwelling units that are to be occupied by children under the age of 6 to identify defective paint, and that owners correct any defective paint surfaces and clean up the worksite carefully. Except for the explicit cleanup requirement, which was issued in 1995, these requirements have been part of the Housing Quality Standards (HQS) for over ten years.

In the final rule, as in the proposed rule, HUD is retaining the requirement of a visual assessment to identify deteriorated paint to be performed usually by a housing quality inspector at initial and periodic inspections. (There is no effective difference between the meaning of "defective paint," the term used in the current regulations, and "deteriorated paint," which is the term used in Title X.) Also, the final rule retains the proposed rule requirement that such inspectors be trained to perform the activities required of them by this rule. The Department is developing a training course that will enable such inspectors to meet this requirement. The purpose of the course is to assure that persons performing the visual assessment understand why they

are doing it, what they should look for, and why deteriorated paint should be stabilized. The course was pilot tested in 1998 and will be available well before the effective date of this final rule.

The basic concept of treating defective paint is being retained, but the final rule modifies the details of the standard applying to that requirement. First, as explained above in Section III.D.4 of this preamble, the minimum area of defective paint that must be treated has been changed. The minimum that was promulgated in the Housing Quality Standards in 1995, and was included in the proposed rule, is being withdrawn at the request of many housing agencies, health departments and other commenters who found it complicated, difficult to administer, and contrary to the purpose of the regulations. As was the case before 1995, all deteriorated paint must be treated.

Second, the painted surfaces that are subject to the rule have changed.

Current requirements apply to all interior surfaces within the dwelling unit, the entrance and hallway serving the unit in a multi-unit building, and exterior surfaces up to five feet from the floor or ground that are readily accessible to children under 6 years of age, but excluding outbuildings. The proposed rule was the same as the current regulations, except for the addition of playground equipment and fences surrounding an exterior play area. The final rule sets no limits to the surfaces covered by the requirement, saying only that the designated party shall conduct a visual assessment of "all painted surfaces." It is HUD's intent that such surfaces shall include all surfaces within the dwelling unit, all surfaces on the exterior of the structure regardless of height from the ground, and all common areas servicing the dwelling unit. The definition of "common area" in the rule includes all areas on the property available for use by occupants of more than one unit, including outbuildings such as garages.

Third, in the final rule the details regarding the method of treatment are somewhat different than those in current regulations and in the proposed rule. Current regulations require removal of defective paint (using specified acceptable methods) and covering surfaces "with durable materials with joints and edges sealed and caulked as needed to prevent escape of dust." The proposed rule called for "paint repair", which was repainting with proper surface preparation using safe practices and including occupant protection and cleanup. The final rule requires "paint stabilization," which is the same as

paint repair except that it includes the additional requirement that any physical defect in the substrate that is causing deterioration be repaired. Such defects include dry-rot, rust, moisture, crumbling plaster, and missing siding or other components that are not securely fastened. As discussed above in Section III.D.9 of this preamble, HUD is uniformly requiring paint stabilization across this final rule, because otherwise the treatment of the deteriorated paint will be ineffective.

The fourth change to the standard for treating deteriorated paint is the requirement in the final rule that there be clearance of the dwelling unit if paint stabilization is conducted. As explained above, this is also a uniform requirement across this rule whenever hazard reduction is conducted. It does not exist in current regulations nor was it required for tenant-based rental assistance programs in the proposed rule. HUD believes unit-wide clearance is an essential factor in establishing that a dwelling unit is lead safe, and therefore is requiring that clearance tests be conducted by certified risk assessors or certified lead-based paint inspectors. The final rule eliminates the dust testing requirement for pre-1950 housing that was in the proposed rule and the distinction between pre-1950 and post-1949 housing. In the interest of regulatory streamlining, a single set of requirements applies to all pre-1978 housing.

All occupants shall be provided the lead hazard information pamphlet by the owner, except that a pamphlet does not have to be provided if it has already been provided by the owner or other designated party pursuant to the disclosure rule. Also, the owner must provide a notice to occupants describing the results of the clearance examination. Finally, the final rule requires that ongoing maintenance of painted surfaces and safe work practices be incorporated into regular building operations, where appropriate under HUD-administered programs.

HUD estimates in the Economic Analysis for this rule that the average cost of the new requirements imposed by this subpart will be approximately \$250 per unit in single family units and \$100 per unit in multifamily units during the first year after the effective date. In subsequent years, costs will doubtless be less. Net benefits are clearly positive. For single family units, the estimated average net benefit (benefits minus costs) is \$850 per unit using a discount rate of three percent for increased lifetime earnings and \$125 per unit using a seven percent rate. For multifamily units, the comparable net benefits are \$840 and \$150. For further

information on costs and benefits of the rule, see Section VI. of this preamble, below.

Another subject of public comment was the policy on responding to the existence of an environmental intervention blood lead level child in the home of a family receiving tenant-based rental assistance. Some commenters felt that the proposed policy of requiring a risk assessment and interim controls would reduce participation in the program by property owners. HUD believes that compliance with the basic policy of paint stabilization and unit clearance, combined with ongoing maintenance is so inexpensive and will so reduce the likelihood of environmental intervention blood lead level cases in these dwellings that landlords will not leave the program. To ensure that the designated party is aware of environmental intervention blood lead level cases in assisted families, the final rule clarifies the requirements of the proposed rule for exchanging information between public health departments and designated parties and matching environmental intervention blood lead level addresses with those of assisted families. (See further discussion in Section III.D.6 of this preamble, above.) Also, for purposes of clarity, the rule states that if a dwelling unit does not comply with the requirements of this rule, the unit does not meet Housing Quality Standards (HQS). If a family is occupying a unit that is out of compliance, the designated party may offer the family the right to move to another unit. If the family refuses to move, the designated party may curtail assistance.

14. Subparts N–Q reserved.

15. *Subpart R—Methods and Standards for Lead-Based Paint Hazard Evaluation and Reduction Activities.* This subpart replaces part 37 of the proposed rule. It is shorter than the proposed part 37 because it references methods and standards established by EPA-authorized State or tribal programs or by EPA itself for risk assessment, lead-based paint inspection and abatement. Revised, streamlined sections are provided on interim controls (including paint stabilization), occupant protection and worksite preparation, and ongoing lead-based paint maintenance and reevaluation (called “monitoring” in the proposed rule). New sections are provided on standard treatments and safe work practices, concepts recommended by the Task Force (see Section I.D.2 of this preamble, above).

a. *Standards.* Although HUD defers to a large extent to methods and standards set by States, Indian tribes or EPA for

lead-based paint inspections, risk assessments, lead-hazard screens and abatements, the Department is requiring that Federal standards for lead-based paint, dust-lead hazards and soil-lead hazards be used when conducting evaluations and hazard reductions in housing covered by this final rule unless a State, tribal or local government requirement is more protective.

As explained above in Section III.D.4 of this preamble, above, the standard for deteriorated paint in the proposed rule contained de minimis areas that are not included in the final rule. The definition of lead-based paint, however, is the same. HUD is including interim standards for dust-lead hazards and soil-lead hazards pending effective EPA standards pursuant to TSCA section 403. The interim standard for soil-lead hazards, and the concentration for abating bare soil, are unchanged from the proposed rule; but the interim dust-lead standards have changed. The proposed dust-lead standard for risk assessments and reevaluations was 100 µg/sq.ft (micrograms per square foot) for interior floors (both hard and carpeted) and 500 µg/sq.ft for interior window sills; there was no proposed standard for window troughs (sometimes called window wells); the standards for clearance were the same as for risk assessments; and there was no standard for lead hazard screens, which were not recognized in the proposed rule. In the final rule, the interim dust-lead standard for risk assessments and reevaluations is 40 µg/sq.ft for interior floors (both hard and carpeted) and 250 µg/sq.ft for interior window sills. Risk assessments and reevaluations do not have a standard for window troughs. Standards for clearance and lead hazard screens are also provided. Exterior floors, such as unenclosed porches, and patios, do not have a standard; the floor standard applies to enclosed porches. A complete discussion of dust-lead standards is provided below in Section III.E.15.b of this preamble, “Adequacy of Dust-Lead Standards.”

One commenter questioned the advisability of HUD specifying a dust standard in the proposed rule for carpets, arguing that there is no consensus about how to test for dust hazards in carpets or what level of lead is dangerous. HUD agrees with the commenter that research on this question is needed, and it initiated such studies in 1997. It is known, however, that carpeting can be a dust reservoir with significant amounts of lead (Battelle 1997). The Department believes that it would be wrong to do nothing to protect children in this situation. The

effect of failing to provide a standard for carpeted floors would mean that the children who happen to be living in homes that are covered by the rule and have wall-to-wall carpeting would remain unprotected from floor dust-lead hazards, and the children living with area rugs would be only partially protected. Preliminary data from the HUD Evaluation of the Lead-Based Paint Hazard Control Grant program indicate that about 25–30 percent of the bedrooms and living rooms in the study had carpeting, with the percentage much higher in certain areas.

HUD acknowledges that the proposed EPA rule implementing TSCA section 403 did not include a dust-lead standard for carpets because EPA felt that currently available data are insufficient for establishing a health-based standard and because it is not clear what hazard reduction methods are effective. EPA acknowledged that “the lack of a standard for carpeted floors is a significant limitation” and requested comment on the impact of not having a standard and on information that would be helpful in setting such a standard.

As explained below under “Adequacy of Dust-Lead Standards,” a study by the University of Rochester (Lanphear 1996) shows a significant correlation between dust lead in carpets and children’s blood lead. Furthermore, HUD provides in subpart R of the rule a method for dust-lead hazard control in carpets or rugs. This method relies on thorough vacuuming and is based on the HUD Guidelines and on recent data from the Evaluation of the HUD Lead-Based Paint Hazard Control Grant program. The feasibility of removing dust lead from carpets to achieve the interim standard is discussed below in Section III.E.15.b. of this preamble. Therefore, HUD is including in the final rule an interim standard for dust lead in carpeting using a wipe sampling method, pending the issuance by EPA of a health-based standard pursuant to TSCA section 433.

The HUD interim standard for clearance in the final rule is the same as for risk assessments on floors and interior window sills, but a clearance standard of 800 $\mu\text{g}/\text{sq. ft.}$ is added for window troughs. The Department’s intent in setting a clearance standard for window troughs is to encourage their cleaning. It is not unusual for window troughs to have very high loadings of lead in dust, perhaps because they are perceived as an exterior surface and are rarely cleaned, and perhaps because lead-based paint on window friction surfaces contributes to the dust lead loading in the trough. In the evaluation of HUD’s Lead-Based Paint Hazard Control Grant Program, the median pre-

intervention dust-lead loading on troughs for occupied dwelling units was over 11,500 $\mu\text{g}/\text{sq. ft.}$, and 10 percent of the units had loadings over 100,000 $\mu\text{g}/\text{sq. ft.}$ Comments were both for and against sampling troughs. A large city housing agency agreed with the policy on troughs in the proposed rule. A State agency disagreed, pointing out that, in the Rochester study of the relationship between dust lead and childhood blood lead, dust lead in troughs correlated well with blood lead.

In the final rule HUD has included an option to conduct a lead hazard screen, and, as in the HUD Guidelines, the dust-lead standard is set at approximately one-half the risk assessment standard: 25 $\mu\text{g}/\text{sq. ft.}$ for floors and 125 $\mu\text{g}/\text{sq. ft.}$ for interior window sills. The floor standard for the lead hazard screen was set at 25 $\mu\text{g}/\text{sq. ft.}$ instead of 20, reflecting practical laboratory detection limits.

Several commenters addressed aspects of the proposed rule’s treatment of soil-lead standards or soil treatments. EPA questioned HUD’s interpretation of the soil-lead levels in EPA’s guidance on lead in soil (60 FR 47248, September 11, 1995). In its guidance, EPA recommended that when lead levels in bare soil exceed 400 ppm at “areas expected or intended to be used by children,” interim controls be undertaken to change use patterns and/or create barriers between children and contaminated soil. “Where bare soil-lead levels are found to be 2,000 ppm or more, interim controls should be implemented even if the area is not frequented by children.” At 5,000 ppm or more, EPA recommended abatement of bare soil. In the proposed rule, HUD applied the 400 ppm standard to bare soil “in play areas;” the 2,000 ppm standard was applied to bare soil in “other areas.” EPA called this interpretation incorrect, indicating that permitting 2000 ppm levels anywhere near areas occupied by children “may present an unreasonable risk.” The Agency recommended that the 400 ppm standard apply to the entire yard. HUD believes that its interpretation of the guidance is reasonable and also that it reflects the guidance on this matter given in the HUD Guidelines, which is referenced in the EPA regulation. In the final rule, HUD has retained, therefore, the same interpretation as in the proposed rule. The standard for soil-lead hazards addresses bare soil in play areas frequented by children under 6 years of age. HUD intends that these play areas include those intended for these children’s routine use, as demonstrated by such evidence as the presence of play equipment or similar

attractions, collections of toys or other children’s possessions, or observations of children’s play patterns.

EPA questioned the basis for the proposed rule standard of no more than 200 $\mu\text{g}/\text{g}$ for material used to cover soil-lead hazards. While conclusive scientific data on which to base the standard are not available, HUD believes that a standard is needed and that making it one-half of the level considered to be a soil-lead hazard in children’s play areas is reasonable.

Throughout the rule, units of measurement are provided in metric forms as well as corresponding conventional unit values, in accordance with the Metric Conversion Act of 1975, as amended by Public Law 100–418, at 15 U.S.C. 205b; and Executive Order 12770, “Metric Usage in Federal Government Programs” (56 FR 35801, July 25, 1991). Persons covered by the rule should consistently apply the units they use routinely in their work. For example, lead-based paint professionals who use conventional units (such as feet) in their work should use the risk assessment standards of micrograms per square foot ($\mu\text{g}/\text{ft}^2$); professionals who use metric units (such as meters) in their work should use the fully metric standards of micrograms per square meter ($\mu\text{g}/\text{m}^2$).

HUD is aware of efforts by voluntary consensus standards bodies to develop private-sector standards in the lead-based paint hazard evaluation, management and control areas, and on related subjects. HUD has been supportive of, and participated in, some of these efforts. For example, over a dozen standards of the American Society for Testing and Materials (ASTM, West Conshohocken, PA 19428–2392) are cited in the HUD Guidelines. The Guidelines, in turn, are cited by subpart R itself and in the EPA rule on lead hazard control work practices (40 CFR 745.227(a)(3)), which is cited by subpart R. ASTM and other committees are continuing to develop standards in the lead-based paint hazard field (such as occupant notices with more detail). The Department will review these standards, when issued, for their applicability to and practicality for the programs covered by this rule.

b. Adequacy of Dust-Lead Standards. One commenter stated that the permissible levels of lead in dust referenced in the proposed rule would not be sufficiently protective of children and cited several recent scientific studies as evidence. Other commenters stated that HUD failed to require clearance testing in all programs to determine if housing units undergoing lead hazard reduction activities were

safe to reoccupy. The proposed rule contained standards for lead in dust of 100 $\mu\text{g}/\text{ft}^2$ on floors and 500 $\mu\text{g}/\text{ft}^2$ on window sills for both risk assessment and clearance purposes. The proposed rule eliminated an earlier standard of 800 $\mu\text{g}/\text{ft}^2$ for window troughs. In preparing the final rule, HUD considered the health benefits and feasibility of lead dust standards for both clearance and risk assessment purposes.

(1) *Health Benefits.* Clark and coworkers reported a study of 23 homes in Cincinnati where the floor dust-lead level required to prevent 95% of the children from exceeding a blood lead level of 10 $\mu\text{g}/\text{dL}$ was found to be almost an order of magnitude lower than the existing standard of 100 $\mu\text{g}/\text{ft}^2$ (Clark 1996). In a study of 205 children in Rochester, NY, Lanphear et al. found that approximately 20% of children exposed to a floor dust-lead level of 40 $\mu\text{g}/\text{ft}^2$ had blood lead levels greater than 10 $\mu\text{g}/\text{dL}$ (Lanphear 1996).

Earlier studies have demonstrated the importance of establishing adequate dust-lead standards. From data collected in 1990, Ashengrau reported an increase in blood lead level of 6.5 $\mu\text{g}/\text{dL}$ ($p=0.05$) in children who had baseline blood lead levels below 20 $\mu\text{g}/\text{dL}$ and whose houses were treated for lead-based paint hazards using a floor clearance standard of 200 $\mu\text{g}/\text{ft}^2$ (Ashengrau 1997). These houses were also treated mainly through extensive dry scraping, which under this rule is now a prohibited method of paint removal in federally-assisted or federally-owned housing.

In a study conducted between 1987 and 1990 where clearance testing may not have been conducted at all and where children had baseline blood lead levels less than 20 $\mu\text{g}/\text{dL}$, only 35% of the children had lower blood lead levels following hazard control work. The mean blood lead level increased significantly from 16.8 $\mu\text{g}/\text{dL}$ to 19.3 $\mu\text{g}/\text{dL}$ ($p<0.05$) (Swindell 1990).

These studies demonstrate that without clearance testing and without adequate dust-lead standards, children's blood lead levels may worsen as a result of lead-based paint hazard control work in housing. Therefore, HUD has provided for clearance testing when lead hazard control work is done in housing covered by this rule.

Although each of the studies cited above have limitations, it is clear that the weight of the scientific evidence suggests that children may not be adequately protected under the dust-lead standards in HUD's proposed rule. As a result of such studies, HUD has progressively lowered its dust-lead standard over the years. In 1990, HUD used a floor dust-lead standard of 200 $\mu\text{g}/\text{ft}^2$ in its Interim Guidelines, based primarily on a standard adopted by the State of Maryland and research conducted at Johns Hopkins University (Farfel 1990).

At that time, the Centers for Disease Control and Prevention (CDC) had established a blood lead level of concern of 25 $\mu\text{g}/\text{dL}$. In 1991, CDC adopted a new multi-tier blood lead level response system. That system indicated that blood lead levels of 10–14 $\mu\text{g}/\text{dL}$ in many children in a community should trigger community-wide childhood lead poisoning prevention activities. A blood lead level of 15–19 $\mu\text{g}/\text{dL}$ that persists in an individual child should result in an environmental investigation and intervention. Higher blood lead levels require more intensive medical evaluation and pharmacologic treatment. Because CDC lowered the blood lead level of concern, it is logical that dust-lead standards would also need to be reduced. Consequently, HUD reduced its floor dust-lead standard to 100 $\mu\text{g}/\text{ft}^2$ in its 1994 draft Guidelines, which was released in final form in 1995. EPA adopted the same guidance dust-lead level in 1994 and published it the next year (60 FR 47248, September 11, 1995).

Dust-lead standards in this rule will be used in risk assessments to determine whether hazard reduction should be conducted and in clearance examinations to determine whether dust in housing units, common areas and/or work sites has been properly cleaned and removed after hazard reduction activities. The goal of these activities is to protect children from exposure to lead at or above the CDC level of concern, 10 $\mu\text{g}/\text{dL}$. As explained below, HUD has considered both cost and feasibility in setting the interim standards.

To better understand the existing science, HUD conducted a study pooling the data from virtually all available epidemiological studies that examined the relationship between dust-lead and blood-lead levels, taking into account differences across the studies (Lanphear et al. 1998). After combining data sets from each study, a cohort of 1,861 children aged 6 to 36 months was created. This age group has been found to have the clearest relationship between dust lead and blood lead. The pooled analysis excluded children who had been individually selected for study on the basis of high blood lead, due to the bias this could introduce. Environmental lead measurements and other variables (season, presence of industrial sources of exposure, year of study, race, sex, socioeconomic status and measurement error) were standardized across all studies.

The pooled analysis of epidemiological studies estimated the expected prevalence rate of blood lead levels greater than or equal to 10 and 15 $\mu\text{g}/\text{dL}$ in young children using a number of different candidate dust-lead standards and holding all other environmental variables and other covariates at their national averages. Table 1 shows the results of this analysis.

TABLE 1.—FLOOR DUST LEAD AND CHILDREN'S BLOOD LEAD LEVELS

Floor dust-lead loading ($\mu\text{g}/\text{ft}^2$)	Percentage of children with blood lead levels greater than or Equal to 10 $\mu\text{g}/\text{dL}$ (95% confidence intervals)	Percentage of children with blood lead levels greater than or equal to 15 $\mu\text{g}/\text{dL}$ (95% confidence intervals)
1	1.0 (0.3–3.8)	0.1 (0.0–0.6)
5	4.4 (1.7–11.0)	0.7 (0.4–2.6)
10	7.4 (3.1–16.5)	1.4 (0.4–4.6)
20	12 (5–24)	2.7 (0.9–7.8)
25	14 (6–27)	3.2 (1–9)
40	18 (9–33)	4.7 (2–13)
70	24 (12–42)	7.2 (3–18)

TABLE 1.—FLOOR DUST LEAD AND CHILDREN'S BLOOD LEAD LEVELS—Continued

Floor dust-lead loading ($\mu\text{g}/\text{ft}^2$)	Percentage of children with blood lead levels greater than or equal to 10 $\mu\text{g}/\text{dL}$ (95% confidence intervals)	Percentage of children with blood lead levels greater than or equal to 15 $\mu\text{g}/\text{dL}$ (95% confidence intervals)
100	28 (14–48)	9.3 (4–23)

The pooled analysis indicates that, using the old standard (i.e., 100 $\mu\text{g}/\text{sq. ft.}$ on floors), 28 percent of young children may have a blood lead level greater than or equal to 10 $\mu\text{g}/\text{dL}$, and nearly 10 percent may have a blood lead level equal to or greater than 15 $\mu\text{g}/\text{dL}$. Using a floor dust-lead standard of 40 $\mu\text{g}/\text{sq. ft.}$, 18 percent of young children may have a blood level of 10 $\mu\text{g}/\text{dL}$ or greater, and less than 5 percent will be a 15 $\mu\text{g}/\text{dL}$ or greater. To achieve a prevalence of only 5 percent of young children with blood levels at 10 $\mu\text{g}/\text{dL}$ or greater, the analysis indicates that dust-lead loadings on floors would have to be at 5 $\mu\text{g}/\text{sq. ft.}$

For reasons of feasibility, HUD is setting an interim dust-lead standard for floors of 40 $\mu\text{g}/\text{sq. ft.}$ The feasibility issues are discussed in the following paragraphs. It is noteworthy that, based on Table 1, a standard of 40 $\mu\text{g}/\text{sq. ft.}$ is expected to protect more than 95 percent of young children against exposure to lead in blood equal to or greater than 15 $\mu\text{g}/\text{dL}$, which is the level recommended by CDC at which environmental intervention should be conducted. This is also the environmental intervention blood lead level used in this rule, as explained above in Section III.D.6 of this preamble.

With regard to carpeted floors, Lanphear *et al.* found a significant correlation between dust lead in carpets (using wipe sampling) and children's blood lead levels (Lanphear 1996). Furthermore, the study showed that about 19.8 percent of children would have blood lead levels at or above 10 $\mu\text{g}/\text{dL}$ with carpeted floors at 40 $\mu\text{g}/\text{sq. ft.}$, a percentage that is not significantly different from the 18 percent found with hard-floor dust lead at 40 $\mu\text{g}/\text{sq. ft.}$ Therefore HUD is setting an interim dust lead standard for carpeted floors that is the same as that for hard floors.

(2) *Feasibility.* There are two issues that affect the feasibility and cost of any given dust-lead standard: (1) The ability of cleaning techniques to meet a given level of cleanliness and the percentage of houses that can be expected to pass and maintain a given dust-lead

standard; and (2) the ability to measure dust-lead levels in the range of interest using readily available analytical techniques (and the increased cost of using more sensitive detection methods if needed).

The largest study of residential lead hazard control conducted to date is HUD's on-going evaluation of its first 14 grantees under the Lead-Based Paint Hazard Control Grant program. These grantees are State and local governments receiving grants to address lead-based paint hazards in low-income, privately owned dwelling units. Almost 3,000 dwelling units are enrolled in this evaluation. Using modern hazard control techniques, this study provides important insights into the degree of cleanliness that is feasible using current measurement, cleaning and hazard reduction technologies. The final report will not be issued until after the year 2000 due to on-going evaluation of the dwellings and the children who live in them.

Interim results show that, on average, initial floor dust-lead levels are below 20 $\mu\text{g}/\text{ft}^2$ (National Center 1998). Furthermore, the data show that dust-lead levels on floors do not reaccumulate continuously, as assumed in the Economic Analysis for the proposed rule, which was prepared before these reaccumulation data were available. The new data show that median dust-lead levels on floors continue to drop for at least the first year following the hazard control work, from 19 $\mu\text{g}/\text{ft}^2$ to 14 $\mu\text{g}/\text{ft}^2$ twelve months later. The average dwelling unit undergoing lead hazard control had a median floor dust-lead level of 17 $\mu\text{g}/\text{ft}^2$ immediately following hazard control work. That level declined to 14 $\mu\text{g}/\text{ft}^2$ six months later and remained at the same level one year following the work. Therefore, it is feasible to reach and maintain a floor dust-lead standard of 40 $\mu\text{g}/\text{ft}^2$.

The pooled epidemiological analysis also shows that a floor dust-lead standard of 5 $\mu\text{g}/\text{ft}^2$ would be required to ensure that 95 percent of children do not have a blood lead level greater than or equal to 10 $\mu\text{g}/\text{dL}$. However, modern

hazard reduction techniques do not appear to be capable of reaching a floor dust-lead level of 5 $\mu\text{g}/\text{ft}^2$ routinely, since the median level following hazard control work is three to four times greater (see also the discussion below about detection limits).

Importantly, many of the units treated under the HUD lead hazard control grant program are high-risk houses and often initially contain children with seriously elevated blood lead levels. In more typical dwelling units, it is likely that even lower dust-lead levels can be achieved. Indeed, HUD's 1990 National Survey of Lead-Based Paint Hazards in Private Housing found that the average dust-lead loading on floors (converted to wipe sampling) was estimated to be only 5 $\mu\text{g}/\text{ft}^2$. This survey did not include houses where lead hazard reduction had occurred.

The HUD Evaluation Study data show that 17.4 percent of these high risk houses have floor dust-lead levels above 100 $\mu\text{g}/\text{ft}^2$ (the existing standard). A dust-lead standard of 40 $\mu\text{g}/\text{ft}^2$ would increase the percentage of "high risk" houses above the standard to about 26 percent. This is fairly consistent with the blood lead levels found in this population, because 28.9% of the children enrolled had environmental intervention blood lead levels.

More typical houses that are served by other HUD programs are likely to have a far lower percentage failing the reduced dust-lead interim standard, because these programs do not target housing with lead-poisoned children. For example, data from HUD's National Survey show that the percentage of all U.S. housing exceeding a floor dust-lead level of 100 $\mu\text{g}/\text{ft}^2$ is 7.6 percent in "dry" rooms (i.e., rooms without plumbing fixtures). The percentage exceeding a floor dust-lead level of 40 $\mu\text{g}/\text{ft}^2$ is 10.2 percent in dry rooms. In short, the lower floor dust-lead interim standard of 40 $\mu\text{g}/\text{ft}^2$ will increase the percentage of houses requiring hazard control by a modest 2.6 percent.

With regard to carpeted floors, preliminary data from the HUD Evaluation indicate that only 15 percent of carpeted entry areas and 8 percent of

other carpeted rooms had dust-lead loadings equal to or greater than 40 $\mu\text{g}/\text{sq. ft.}$ based on wipe sampling. The Evaluation data also indicate that grantees were able to reduce dust-lead loadings in carpets, but the data are limited by the fact that grantees were working with a clearance standard of 100 $\mu\text{g}/\text{sq. ft.}$ instead of 40 $\mu\text{g}/\text{sq. ft.}$

(3) *Detection Limits.* Detection limits of dust wipe analysis also have an effect on the feasibility of lower dust-lead standards. A standard cannot be set at a level that cannot be measured reliably. Many analytical laboratories currently report method detection limits of 25 $\mu\text{g}/\text{wipe}$. For floors, this means a method detection limit of 25 $\mu\text{g}/\text{ft}^2$, since a one square foot area is typically sampled. A method detection limit at least 4 times lower than the regulatory standard is desirable to ensure reliable results.

For all laboratories in the HUD Evaluation Study, the average method detection limit is currently 11 $\mu\text{g}/\text{wipe}$. Therefore, HUD believes that laboratories will be able to report detection limits of 10 $\mu\text{g}/\text{wipe}$ without having to resort to more sensitive and more expensive types of analytical procedures. In short, no increase in analytical cost is expected in order to achieve a detection limit of 10 $\mu\text{g}/\text{wipe}$, which is one-fourth the new floor dust-lead standard of 40 $\mu\text{g}/\text{ft}^2$. This will ensure that reliable measures of dust-lead loading can be made.

A floor dust-lead standard of 5 $\mu\text{g}/\text{ft}^2$ is well below method detection limits reported by most laboratories and is therefore not feasible to implement.

(4) *Window Dust Standards.* For interior window sills and window troughs, epidemiological data are less available than for floors, because only a few studies have collected samples from these areas. For interior window sills, the final rule establishes a dust-lead standard of 250 $\mu\text{g}/\text{ft}^2$, which is based on a study in Rochester, NY (Lanphear 1996). This standard also should protect virtually all children from developing an environmental intervention blood lead level. In the high risk houses enrolled in the HUD Evaluation Study, 47.5 percent of the units had baseline window sill dust lead levels below 250 $\mu\text{g}/\text{ft}^2$, which is close to the percentage of children who had blood lead levels below 10 $\mu\text{g}/\text{dL}$ in the evaluation (54.3 percent). At clearance following lead hazard control work, the median dust-lead level on window sills was 44 $\mu\text{g}/\text{ft}^2$ at the time of clearance, 83 $\mu\text{g}/\text{ft}^2$ six months later, and 88 $\mu\text{g}/\text{ft}^2$ 12 months later. For more typical houses, the HUD National Survey found that the percentage of interior window sills failing a new dust-lead standard of 250

$\mu\text{g}/\text{ft}^2$ would increase by a modest 5.4 percent (compared to the current standard of 500 $\mu\text{g}/\text{ft}^2$).

In short, the window sill standard is both feasible and health-based. It is feasible because dust-lead levels at the new interim standard can be reached and maintained and because the increase in the percentage of houses failing the new standard is small. It is health-based because the percentage of houses failing the standard is about the same as the percentage of children with blood lead levels greater than 10 $\mu\text{g}/\text{dL}$ in the HUD Evaluation Study.

In the proposed rule, HUD did not include the window trough standard of 800 $\mu\text{g}/\text{ft}^2$ it had established in the HUD Guidelines and the 1990 Interim Guidelines. However, several commenters indicated that a window trough standard should be retained for clearance purposes, as a way of ensuring that window troughs are cleaned and/or treated during hazard reduction work. The HUD Evaluation Study shows that median dust-lead levels in window troughs immediately following hazard reduction work is 72 $\mu\text{g}/\text{ft}^2$, indicating that it is feasible to implement a window trough clearance standard of 800 $\mu\text{g}/\text{ft}^2$.

On the other hand, development of a feasible window trough risk assessment standard is more problematic, because nearly all pre-1978 dwellings have very high window trough dust-lead levels. For example, data from HUD's Evaluation Study indicate that the median window trough dust-lead level for occupied dwelling units prior to hazard control work is more than 11,500 $\mu\text{g}/\text{ft}^2$. Because HUD believes it is important to have a reliable way to determine whether or not window troughs were cleaned during hazard reduction work, and because window trough lead dust does appear to contribute to children's exposure, HUD has reestablished a window trough clearance standard of 800 $\mu\text{g}/\text{ft}^2$ in the final rule. Because most dwelling units have window trough levels above 800 $\mu\text{g}/\text{ft}^2$, HUD believes it is not feasible to establish a window trough dust-lead standard for risk assessment and reevaluation purposes at this time. Therefore, the window trough dust standard of 800 $\mu\text{g}/\text{ft}^2$ is used for clearance purposes only. To meet this clearance requirement, window troughs should be cleaned as a routine part of all lead hazard control work.

(5) *Lead Hazard Screen Standards.* The lead hazard screen levels for floor and interior window sill dust lead in this rule are 25 $\mu\text{g}/\text{ft}^2$ and 125 $\mu\text{g}/\text{ft}^2$, respectively. These are about half of the standards used for risk assessment

purposes. This ensures that the screen will be sufficiently sensitive to uncover those houses that should have a full risk assessment.

Lead hazard screens are a form of risk assessment applied to housing in good condition where lead-based paint hazards are unlikely to be present. The protocol for a lead hazard screen referenced in the HUD Guidelines involves (among other things) collection of two composite dust samples: one from floors and a second from window troughs. Each composite sample consists of 4 individual samples collected from a like surface. If a level found in the screen is more than one half of the applicable risk assessment dust-lead standard, then a full risk assessment is to be conducted to determine if lead-based paint hazards are actually present.

In this final regulation, HUD has modified slightly the lead hazard screen protocol of the HUD Guidelines regarding dust. In the final rule, interior window sills are sampled instead of window troughs for three reasons: (1) Interior window sills are easier to wipe-sample than troughs; (2) dust-lead loadings on troughs may reflect exterior sources not related to the residential structure itself; and (3) dust-wipe loadings on sills and troughs are highly correlated (the correlation coefficient of the logarithms of the loadings is 0.60, which is higher than that for any other pairs of paint- or dust-lead measurements (Lanphear 1995)). EPA made a similar judgment in deciding not to propose a window trough dust-lead hazard standard in the proposed regulations pursuant to TSCA section 403 (63 FR 30335-6, June 3, 1998). Future research or technological advances may result in different recommendations, which the Department will review.

Similarly, HUD is noting that single-wipe samples may be used instead of composite samples as part of the lead hazard screen. When two or more single-wipe samples are used for a single building component type (such as two or more interior window sills), the dust loadings for that component type are averaged to give the equivalent composite sample result. Users may wish to take single-wipe samples, rather than composite samples, as part of lead hazard screens for several reasons: the cost of laboratory analyses is low enough for many users that they may perceive little economic benefit to analyzing composite samples instead of single-wipe samples, and the EPA's National Lead Laboratory Accreditation Program (NLLAP) does not, at the time of issuance of this rule, have a formal

quality assurance program for composite dust samples. EPA is working on this latter issue, and will advise NLLAP participants and others if and when such a program becomes available. Potential users of composite dust wipe analyses may contact the National Lead Information Center Clearinghouse toll-free at 1-800-424-LEAD for information on this subject.

If less than 125 µg/ft² (half of 250 µg/ft²) of lead dust is detected on the composite interior window sill sample, and the composite floor sample shows that less than 25 µg/ft² is present, the screen shows that lead-based paint hazards are not present. In this case, a full risk assessment is not needed. Conversely, if a lead hazard screen

shows that dust-lead is present at a level equal to or greater than 125 µg/ft² on interior window sills or equal to or greater than 25 µg/ft² on floors, a lead-based paint hazard may be present and a full risk assessment should be conducted to confirm or reject the results of the screen.

HUD has also modified slightly the lead hazard screen protocol of the HUD Guidelines regarding soil. In the final rule, soil is to be sampled and analyzed, and the analyses evaluated, using the same protocol as for a risk assessment. With analytical costs having dropped since the publication of the HUD Guidelines, the cost of performing soil analyses as part of lead hazard screens for single family housing in good

condition undergoing rehabilitation above \$5,000 per unit (the cases where the lead hazard screens are likely to be used) has become insignificant; the additional time associated with the samples, for lead professionals already at the site, is also insignificant.

To summarize, the final rule establishes the dust-lead standards in Table 2. The dust-lead standards in this rule are interim standards until EPA promulgates and makes effective dust-lead hazard standards under TSCA section 403. When the TSCA 403 rule is effective, HUD will issue any technical amendments that are needed to make clear what standards are applicable to this rule at that time.

TABLE 2.—INTERIM DUST-LEAD STANDARDS

Evaluation method	Surface		
	Floors (µg/ft ²)	Interior Window Sills (µg/ft ²)	Window troughs (µg/ft ²)
Risk Assessment Screen	25	125	Not Applicable.
Risk Assessment	40	250	Not Applicable.
Reevaluation	40	250	Not Applicable.
Clearance	40	250	800.

Note: "Floors" includes carpeted and uncarpeted interior floors.

c. *Summary Notice Formats.* Subparts D, and F through M of the final rule require that occupants be notified of the results of evaluations and hazard reduction activities (including clearance examinations). Also, if lead-based paint or lead-based paint hazards are presumed to exist, notification must be made. The major elements of these notices are described in Subpart B.

Subpart B places responsibility for any required occupant notification on the designated party. HUD recognizes that many designated parties may not have the expertise from staff or consultants to extract the pertinent information from the inspection, risk assessment or clearance reports to prepare the notices. As a result, the Department, in subpart R, makes a strong recommendation that the lead-based paint professional who prepares such a report provide the designated party with the summary notice of the results suitable for posting or distribution to occupants.

Sample (i.e., non-mandatory) notice formats that can be used are provided in Appendix A for a lead-based paint inspection, Appendix B for a risk assessment, Appendix C for presumption of the presence of lead-based paint or lead-based paint hazards, and Appendix D for completion of hazard reduction activities (including

clearance). These formats include the information described in Subpart B and are based on: (1) The sample formats developed by HUD and EPA for the disclosure rule (see 61 FR 9074-5, March 6, 1998, in the preamble to the final rules implementing section 1018 of Title X, 24 CFR 35.80-98 and 40 CFR 745.100-119); and (2) formats developed by the California Department of Health Services (Emeryville, CA 94608-1939) for notices of abatement of lead hazards (DHS form 8551) and lead hazard evaluation (DHS form 8552).

Requirements for reports of evaluation or abatement clearance used to develop the corresponding notices to occupants are found in EPA's TSCA section 402/404 rule (40 CFR 745.227) and are cited by subpart R. Requirements for reports on hazard reduction activities other than abatement are in subpart R itself. Guidance on preparing these reports is found in the HUD Guidelines, chapters 5 (risk assessment), 7 (inspection), and 15 (clearance). There are currently no detailed standards for preparing these reports, and HUD-funded research on lead-based paint inspection reports has found considerable variability in them, in both format and measures of completeness and accuracy (HUD 1998). ASTM committee work developing detailed voluntary consensus standard protocols for report preparation is

beginning; HUD will evaluate any standards, when issued, for their applicability to, and practicality for, the programs covered by this rule.

d. *Interim Controls.* The section on interim controls in the final rule is similar to that of the proposed rule. As mentioned above in Section III.D.8 of this preamble, the proposed rule required that workers performing interim controls be supervised by a certified abatement supervisor, and this was met with criticism by several commenters. In response to these comments, in the final rule HUD is following the Task Force recommendation that such workers be trained in the basic requirements of safe lead-based paint hazard reduction, and several choices of acceptable training courses are mentioned. All such training is designed to meet OSHA requirements; several choices meet EPA requirements as well.

Another significant modification of the proposed-rule section on interim controls is the addition of explicit factors that must be present for interim controls to be required under this rule for friction, impact and chewable surfaces. HUD developed these factors in response to comments that greater specificity is needed to prevent unnecessary, ineffective and wasteful hazard reduction actions. Friction

surfaces are required to be treated only if: (1) Dust-lead levels on the nearest horizontal surface (i.e., the surface on which the dust settles that is nearest to the friction surface) are greater than the risk assessment dust-lead standards; (2) there is evidence that the surface is subject to abrasion; and (3) lead-based paint is known or presumed to be present on the surface. Impact surfaces are required to be treated only if: (1) Paint on the surface is damaged; (2) the damaged paint is caused by impact from a related building component (such as a door knob that knocks into a wall, or a door that knocks against its door frame); and (3) lead-based paint is known or presumed to be present on the surface. HUD intends that impact as a result of misuse by occupants is not necessarily an acceptable basis for requiring treatment. Chewable surfaces are required to be treated only if: (1) There is evidence that a child of less than 6 years of age has chewed on the surface; and (2) lead-based paint is known or presumed to be present on the surface.

As in the proposed rule, interim control methods, when required, must be selected from among those identified as acceptable in a current risk assessment report. (As noted in subpart B, abatement is also acceptable when interim controls are required.) When interim controls are required and no risk assessment has been done or no risk assessment that has been done is current, a new risk assessment must be conducted (except when only paint stabilization of deteriorated paint is required, because the response has been specified in the rule). Techniques for repairing physical defects in a substrate before performing paint stabilization are discussed in the HUD Guidelines, chapter 11.

The proposed rule required a minimum two-stage cleaning process for the control of dust-lead hazards on hard surfaces: first HEPA vacuuming, then wet cleaning. Also, HEPA vacuuming was required for surfaces covered by carpeting or rugs. One commenter noted that recent research has indicated that a variety of cleaning methods may achieve clearance levels, and that one of the critical variables affecting the difficulty of cleaning is the condition of the surface. To avoid rigidity, HUD has modified the dust-lead hazard control requirements in the interim controls section of subpart R of the final rule in three ways. First, the two-stage process is no longer required; second, if hard surfaces are rough and pitted, they must be made smooth and cleanable; and third, rather than requiring HEPA vacuuming, HUD is requiring the use of a "HEPA vacuum or other method of

equivalent efficacy." One of the main reasons for revision of required cleaning methods is that the final rule requires clearance after all hazard reduction activities, whereas the proposed rule omitted the clearance requirement for some housing programs. In the context of this rule, the goal of cleaning should be to achieve clearance, not to comply with prescriptive regulations on how to clean. Making surfaces smooth and cleanable is an important objective, because it makes it possible for occupants to maintain their dwellings safe from dust-lead hazards in the future. Revision of the HEPA filter requirement will facilitate the application of advances in technology resulting from ongoing research on cleaning lead-contaminated surfaces. Information on the status of this field of technology is provided in Section III.E.2.a of this preamble, in the discussion of HEPA vacuums.

A commenter recommended that clearance not be required after "basic interim controls," because many interim controls are like routine maintenance activities that will be performed frequently by in-house staff. In the final rule, the Department has retained the clearance requirement for initial interim controls, because clearance is the only method of determining whether a dwelling unit is free of lead-based paint hazards. HUD, however, is not requiring clearance after ongoing lead-based paint maintenance activities that are conducted after interim controls and that do not disturb painted surfaces of a total area greater than 20 square feet on exterior surfaces, 2 square feet in any one interior room or space, or 10 percent of the total surface area on an interior or exterior component with a small surface area such as window sills, baseboards and other trim.

e. *Standard Treatments.* As explained above in Section III.E.2.c of this preamble, standard treatments, when used, must include: (1) Stabilization of all deteriorated paint, interior and exterior; (2) the provision of smooth and cleanable horizontal hard surfaces; (3) the correction of dust-generating conditions (i.e., conditions causing rubbing, binding, or crushing of surfaces known or presumed to be coated with lead-based paint); and (4) treatment of bare soil to control known or presumed soil-lead hazards. Safe work practices and clearance are required. Individuals performing standard treatments must be trained in how to control lead-based paint hazards. The training requirement is identical to that for interim controls.

f. *Clearance.* Methods and standards for clearance in this rule refer to the EPA requirements for clearance after

abatement at 40 CFR 745.227(e) but also specify the dust-lead loading levels to be used for clearance. To pass clearance, dust-lead levels, using wipe sampling, must be less than 40 µg/ft² for interior floors, 250 µg/ft² for interior window sills, and 800 µg/ft² for window troughs. The rule also specifies the content of clearance reports that must be prepared for clearances after hazard reduction activities other than abatement. For clearance of the worksite only, which is required in subpart J after rehabilitation receiving no more than \$5,000 per unit and also in some ongoing maintenance activities, dust samples must be taken from the floor and windows (if available) that represent the area within the dust containment area of the worksite. Worksite clearance is not required if the rehabilitation or maintenance does not disturb painted surfaces totaling more than the safe work practices de minimis levels (see Section III.D.4 of this preamble, above). For a discussion of qualification requirements for persons performing clearance, see Section III.D.8 of this preamble, above.

While subpart R allows recleaning immediately after a clearance failure, owners, designated parties and contractors are urged to consider the cause of the failure, and to address the cause, if identified, before recleaning the affected area.

A commenter recommended that property owners (or other designated parties) be allowed to retain a certified inspector or risk assessor to perform the clearance examinations. In the final rule, HUD has allowed this, provided the clearance examiner is independent from any contractor used to perform the hazard reduction work. The property owners (or other designated parties) may, however, use in-house employees for both hazard reduction and clearance examination, provided that the same employee does not do hazard reduction and clearance.

After clearance, a report is to be prepared that documents the hazard reduction or maintenance activity as well as the results of the clearance examination. It is the responsibility of the designated party to ensure that this report is prepared, signed, and kept for at least three years. For an abatement activity, the report is an abatement report as described in EPA regulations at 40 CFR 745.227(e)(10). The abatement report includes the results of the clearance examination as well as a detailed written description of the abatement, and its preparation is the responsibility of the abatement supervisor. For another hazard reduction activity requiring a clearance

report (including interim controls, paint stabilization, standard treatments, lead-based paint maintenance, or rehabilitation), the EPA rule does not apply; so the final rule provides an outline of the required report that parallels the EPA abatement report outline. However, the designated party must make sure: (1) That a report describing the hazard reduction activity is prepared; and (2) that the clearance examiner provides a signed clearance report with the information required by the rule.

Designated parties should also bear in mind that HUD has requirements in subparts D, and F through M for occupant notification following hazard reduction activities. The major elements of this notice are described in Subpart B. A sample (i.e., non-mandatory) format that can be used for notification of the completion of hazard reduction activities, including clearance, is provided in Appendix D (see discussion, above, in Section III.E.15.c of this preamble).

g. Occupant Protection and Worksite Preparation. Requirements for occupant protection and worksite preparation in this final rule are similar to those in the proposed rule, which were based largely on the HUD Guidelines.

Many hazard reduction activities can be completed in one work shift. As a result, the Department has streamlined the requirements for occupant relocation for work that will be completed within one period of 8 daytime hours. For work lasting longer, the rule provides for either occupant relocation or, for work lasting up to five days, occupancy of parts of the dwelling unit outside the worksite. The five-day de minimis criterion is used in chapter 8 of the HUD Guidelines; the regulation closely parallels, but streamlines the guidance in tables 8.1, 8.2, and 8.3 of the Guidelines.

At rooms where hazard reduction activities are conducted when occupants are present; or buildings from which occupants have been relocated, a warning sign shall be posted at each entry. For exterior hazard reduction activities, the sign placement is based on the HUD Guidelines, chapter 8, but the rule is somewhat more flexible, in that the position of the sign for exterior work is not specified beyond the performance requirement of its being easily read at 20 feet (6 meters) from the edge of the worksite. The wording of the sign is that of the four-line warning sign in the OSHA lead in construction standard (29 CFR 1926.62(m)), "WARNING / LEAD WORK AREA / POISON / NO SMOKING OR EATING." The OSHA wording is used by HUD for

interagency regulatory consistency. Based on the approach used in subpart B for occupant notification, the warning sign is to be provided in the occupants' primary language or in the language of the occupants' lease or contract.

h. Safe Work Practices. A section on safe work practices has been added to this final rule to specify the practices to be observed during paint stabilization, ongoing lead-based paint maintenance, and rehabilitation receiving no more than \$5,000 per unit in Federal rehabilitation assistance. Safe work practices include occupant protection and worksite preparation, specialized cleanup, and the prohibition of certain methods of paint removal (see Section III.E.2.g of this preamble, above). Safe work practices are not required if the total area of paint surfaces being disturbed is no more than the de minimis exemption levels of 20 square feet on exterior surfaces, or 2 square feet in any one interior room or space, or 10 percent of the total surface area on an interior or exterior component with a small surface area (such as window sills, baseboards, and other trim).

i. Ongoing Lead-Based Paint Maintenance and Reevaluation. The proposed monitoring of housing after interim controls was the subject of several comments. Commenters expressed doubts about the efficacy of the proposed monitoring requirements, regarded them as expensive to maintain and enforce, and questioned the ability of designated parties to assure, into the future, that monitoring responsibilities assigned to owners would be carried out. Monitoring, as proposed, consisted of a visual survey by the owner at least annually, repair of any deteriorated paint, and a professional reevaluation by a risk assessor for the presence of lead-based paint on a schedule based on the hazards found and the action taken.

In the final rule, the monitoring requirement has been changed in several ways. The term, "monitoring," is no longer used in the rule; the visual assessment by the owner is now part of the ongoing maintenance requirement, which has been patterned after the "essential maintenance practices" recommended by the Task Force; and the reevaluation schedule has been simplified so that all reevaluations are on the same schedule. The new schedule calls for reevaluation at intervals of two years, plus or minus 60 days. If two consecutive reevaluations at two-year intervals find no lead-based paint hazards, no further reevaluation is required. Similarly, if the initial risk assessment found no lead-based paint hazards, no reevaluation is required.

Ongoing lead-based paint maintenance is required in specified situations in subparts F through M. This can involve such activities as visual assessment, stabilizing deteriorated paint, standard treatments, interim controls, repair of failed lead-based paint hazard controls, and notifications of evaluation and hazard reduction activities. (Sample formats and language requirements for notices are discussed above in Sections III.E.15.c and g of this preamble, respectively.)

Reevaluation is required for housing receiving project-based assistance greater than \$5,000 per unit per year and for public housing. The strategy for selecting portions of residential properties to reevaluate considers two factors: How many dwelling units and common areas are present, and at how many worksites hazard reduction activities were performed previously. The selection and reevaluation procedures for dwelling units and common areas are the same as for risk assessment, as provided in subpart R, and as detailed in the HUD Guidelines, chapter 5. Similar dwelling units are grouped, and the number to be reevaluated in each such group is determined from tables in the Guidelines.

For a targeted sample of units with the highest likelihood for finding lead-based paint hazards, there is a table in chapter 5; for a random sample of units, chapter 5 refers users to a table in chapter 7. Separately, the number of worksites of previous hazard reduction activities to be reevaluated is determined using the same procedure as for selecting the number of units. Specifically, worksites are grouped on the basis of similarities of their original lead-based paint hazards (e.g., similarities in the type of location, original condition and, as applicable, building component type, of the lead-based paint hazards), and types of hazard reduction activities performed on them. The number of such similar worksites to be reevaluated is determined using the tables in chapters 5 or 7, and worksites are selected. Reevaluations are not to be duplicated in locations selected by both processes (that is, selecting units and common areas, and selecting worksites).

When a risk assessor performing a reevaluation finds deteriorated paint or deteriorated or failed interim controls, encapsulations or enclosures, the designated party shall respond, selecting from among the acceptable options for controlling the hazard identified in the risk assessor's report of the reevaluation. When the risk assessor reports newly-identified lead-based

paint hazards, the designated party shall treat each dust-lead hazard by cleaning or hazard reduction measures, and each soil-lead hazard by hazard reduction measures.

IV. Deletions of Current Regulations

Most of the regulatory changes in parts of title 24 other than part 35 consist, as noted in Section III.A.7 of this preamble, above, of replacing explicit descriptions of lead-based paint requirements with references to part 35. Retaining mention of lead-based paint in each HUD program's part of title 24 maintains the visibility of the lead-based paint requirements, and promotes compliance with requirements under Title X and the Lead-Based Paint Poisoning Prevention Act. Consolidating references in affected program parts will help program managers, property owners and other users recognize that they can apply the same procedures to the same situations, even if they arise under different HUD programs. The consolidation also shortens these other parts of title 24.

To aid users, the relevant program-oriented subpart of part 35 is identified in the other parts of title 24, as is subpart A, the Disclosure Rule. Each program-oriented subpart in part 35 describes and cites applicable requirements elsewhere in that part.

References to Title X are added to the existing references to the Lead-Based Poisoning Prevention Act, as bases for the regulations in part 35. The terminology of Title X regarding evaluation and hazard reduction replaces previous wording regarding inspection and abatement, respectively, which were used in accordance with the earlier LPPPA.

For public housing, the regulations on liability insurance coverage found at § 965.215 fit better in their original location than they would in part 35, and their substantive text remains in place. The section has been modified, as described above for other sections, to reflect Title X terminology and requirements.

V. Additional Public Comment

As noted earlier in this preamble, the rule will not take effect for a period of one year. If in the review of this rule, there are questions, concerns or other comments, HUD welcomes these questions, concerns and comments. It is HUD's intention that the rule achieve the objectives of the statute in the least burdensome manner. If there are any serious inconsistencies or deficiencies in the rule, HUD will make every effort to correct these before the rule takes effect. Comments should be submitted

to the Office of Lead Hazard Control, Department of Housing and Urban Development, 451 Seventh Street, SW, Room P-3206, Washington, DC 20410-0500.

VI. Regulatory Assessment

A. Economic Analysis

An Economic Analysis (EA) has been prepared that examines the costs and benefits of this final rule. This document fulfills the requirements of Executive Order 12866, which requires HUD to prepare an EA for all significant rulemakings. A discussion of public comments on the EA of the proposed rule is provided below in Section VI.A.6 of this preamble.

1. *Summary and Methodology of Cost-Benefit Analysis.* HUD estimates the costs associated with this rule to be \$253.2 million for the first year, and the benefits to be \$1,143.3 million using a three percent discount rate for increased lifetime earnings and \$324.2 million using a seven percent discount rate (see discussion of discount rates below). The analysis in the EA reflects costs and benefits associated with the first year of hazard evaluation and reduction activities in housing units affected under the final rule. The estimated annual number of HUD-assisted and HUD-owned units affected reflect an annual flow of units under HUD programs (e.g., insurance and rehabilitation programs), except in the case of project-based assistance and public housing, for which the affected units are divided by the number of years allowed under the final rule for completion of required activities. The costs and benefits for each year's activities include the present value of future costs and benefits associated with first year hazard reduction activities. For example, the costs associated with first year activities include the present value of future reevaluation costs. Similarly, the benefits of first year activities include the present value of lifetime earnings benefits for children living in or visiting the affected unit during the first year, and for children living in or visiting that unit during the second and subsequent years after hazard reduction activities.

After the first year, the number of units for which initial hazard evaluation and reduction must be done will decline significantly because some large housing assistance programs, such as public housing and project-based assistance, have a relatively stable stock and do not experience a large annual inflow of new units. In these programs, owners will need only to engage in ongoing maintenance and reevaluation

after initial hazard evaluation and reduction is completed. There is a two-year phase-in of requirements in the public housing program and a four-year phase-in for housing with project-based assistance of more than \$5,000 per unit per year. HUD estimates that the total number of dwelling units newly covered by the rule will be approximately 1,289,000 in the first year, 513,000 in the second year, 341,000 in years three and four, and 314,000 per year after the fourth year. The estimated present value of costs associated with the first five years of the rule is \$564.2 million. Using a seven percent discount rate for increased lifetime earnings, HUD estimates the present value of total benefits associated with the first five years to be \$715.6 million, with net benefits for the same period at \$151.4 million. Using a three percent discount rate, total benefits over five years are \$2.65 billion, and net benefits are \$2.08 billion.

The primary monetized benefit of childhood lead poisoning prevention is increased lifetime earnings associated with the higher cognitive abilities of persons not lead poisoned as children. The present value of lifetime earnings benefits is particularly sensitive to discount rate assumptions in the analysis, because these benefits reflect lifetime earnings many decades into the future. The EA presents estimated benefits using two different discount rates for lifetime earnings—three percent and seven percent. For all other benefit and cost estimates, the EA uses only a seven percent rate. The analysis assumes that preventing a one µg/dL increase in a one-year old child's blood lead level saves \$2,367 in lifetime earnings discounted at three percent, and \$544 at seven percent.

While the Office of Management and Budget (OMB) specifies seven percent as the appropriate discount rate for most regulatory analyses, a special social rate of time preference is appropriate when conducting intergenerational analysis. HUD believes that an intergenerational discount rate is applicable to the final rule because the costs will be borne by adult taxpayers, and lifetime earnings benefits will be realized by the children and grandchildren of these adult taxpayers. The analysis of this issue by the Environmental Protection Agency, in the 1996 EA for the regulations implementing sections 402(a) and 404 of the Toxic Substances Control Act, concluded that a three percent discount rate best reflects the social rate of time preference for annualized, non-capital costs and benefits.

An intermediate approach, not quantified in the EA, could have used

a real discount rate based on the long-term borrowing costs of the Federal government. The seven percent rate used in most regulatory analyses is intended to reflect OMB's estimate of the opportunity cost of capital, based on the average real rates of return on private investments. This rate is appropriate for most regulatory analyses because most regulations impose costs on the private sector. The final rule, however, imposes costs on federally assisted housing. Most of these costs will be funded directly or indirectly by Federal expenditures. If these expenditures increase the national debt, then the real cost of that debt to future generations will compound at the real long-term Federal rate. The Internal Revenue Service's Applicable Federal Rate (AFR) measures the nominal cost of government borrowing over obligations with different maturities. The long-term AFR adjusted for the implicit price deflator results in real AFRs of approximately four to five percent over recent years. Therefore, benefits could be discounted at this real AFR rate (i.e., 4 to 5 percent).

By presenting results using both three and seven percent, HUD is providing the broadest view of costs and benefits. Additional information on the methodology and results of the cost-benefit analysis is provided below.

The methodology used in this analysis to estimate annual costs and benefits for the final rule is based on the following simple formulas:

Regulatory Costs = (dwelling unit cost) \times (unit cost frequency) \times (number of affected units); and

Regulatory Benefits = (dwelling unit benefit) \times (unit benefit frequency) \times (number of affected units).

The unit cost estimates reflect the average costs associated with specific hazard evaluation and reduction activities in a single housing unit.

The unit benefit estimates are the benefits achieved by conducting hazard reduction activities in a single housing unit. Unit cost frequencies reflect the extent of required hazard evaluation activities under the final rule, and the occurrence frequencies of different lead-based paint hazards that trigger hazard reduction requirements. Unit benefit frequencies are also determined by the occurrence frequencies of lead-based paint hazards, because benefits are realized by hazard reduction activities. Frequencies are estimated by three periods of construction: Pre-1940, 1940-1959, and 1960-1977. The affected units, for regulatory costs and benefits, are federally assisted and federally owned units affected by the final rule.

2. Regulatory Costs. The cost estimates used in the EA reflect the estimated average cost per unit for LBP hazard evaluation and reduction activities in single and multifamily units affected by the final rule. In the case of rehabilitation programs, the regulatory cost estimates for paint stabilization and LBP hazard abatement activities reflect only the incremental costs of the final rule. For example, the unit cost of stabilizing paint that would not otherwise have been repaired is significantly greater than the incremental cost of safe work practices and cleanup to reduce lead-based paint hazards in the course of scheduled repainting. The full cost of lead-based paint hazard abatement includes a variety of activities that are also associated with housing rehabilitation activities. Therefore, housing rehabilitation programs affected by the final rule incur only incremental costs for paint stabilization and abatement.

Under non-rehabilitation programs, the full costs of paint stabilization are recognized as regulatory costs, but these costs are substantially offset by the market value of housing-related benefits for paint stabilization. The EA assumes that the full market value of paint stabilization is realized whenever paint stabilization is required under the final rule. Therefore, the incremental costs of paint stabilization (e.g., safe work practices) are the only costs of these activities that are not offset by market value benefits.

Although the final rule only requires hazard abatement in rehabilitation units receiving more than \$25,000 of Federal assistance, the EA anticipates that some units subject to interim control requirements will find it economical to treat friction impact surfaces in part by replacing old windows with new energy efficient (low-e) windows. In such cases, the EA recognizes the market value of new windows based on the present value of estimated fuel savings (discounted at seven percent). It is possible, however, that the market value estimates for painting and window replacement may overstate the market benefits of the final rule. For example, the market value of paint stabilization required for HUD-owned housing may not be fully recovered when these repainted units are sold by HUD. Therefore, the cost-benefit analysis for non-rehabilitation programs explicitly separates the estimated market value benefits of the final rule from the monetized health benefits of LBP hazard reduction to facilitate recalculations of net benefits under alternative market value assumptions. The EA details the basis for unit cost estimates and

associated market values and explains the available data on occurrence frequencies and the number of housing units affected by the final rule.

3. Monetized Benefits. Although many benefits of lead-based paint hazard reduction cannot be quantified or monetized, the EA does provide monetized estimates of the benefits of preventing children from developing elevated blood lead levels (EBLs). Such benefits include avoiding the costs of special education and medical treatment for EBL children, as well as increasing lifetime earnings associated with higher IQs for children with lower blood lead levels. The monetized benefit of increased lifetime earnings due to lower blood lead levels accounts for 99 percent of all monetized health benefits of the rule.

The benefits quantified in this analysis reflect the benefits of preventing EBLs in children rather than the benefits of lowering the blood lead levels of children already affected by lead poisoning. As shown in the analysis, the benefits associated with avoiding childhood lead poisoning substantially exceed the benefits of reducing hazards for children already affected by lead poisoning. The EA details the basis for the health benefit estimates.

4. Monetized Net Benefits. The analysis of net benefits in the EA reflects costs and benefits associated with the first year of hazard evaluation and reduction activities under the final rule. These costs and benefits, however, include the present value of future costs and benefits associated with first year hazard reduction activities.

Tables 3a and 3b present net benefits or costs by housing program at three percent and seven percent discount rates respectively for increased lifetime earnings. All programs have a net benefit at three percent. The following programs have a net cost at seven percent: HUD-owned single family and multifamily housing, housing with project-based assistance, single family housing receiving rehabilitation assistance of more than \$5,000 per unit, and housing receiving assistance for acquisition, leasing, support services or operation. The specificity of statutory requirements limits the Department's ability to devise policies with net benefits for these programs at a seven percent discount rate.

Table 3c presents a summary of the costs, benefits, and net benefits of the first year activities under the final rule, using a three percent and seven percent discount rate for lifetime earnings. The total cost of first year hazard evaluation and reduction activities is \$253.2

million. The total benefit of first year activities is \$1.14 billion using a three percent discount rate, and \$324 million using a seven percent discount rate. Net benefits of first year activities are therefore either \$890 million or \$71 million, depending on the discount rate used. The EA details the costs and benefits of the final rule by subpart of the rule and by period of construction.

The individual rows of Table 3c detail the components of hazard evaluation and reduction costs and monetized hazard reduction benefits. Although the components of hazard reduction costs and monetized benefits are often identified by the same brief descriptors (e.g., paint stabilization, soil cover, dust

cleanup) the cost components are not directly comparable to the benefit components. For example, dust-cleanup costs reflect only the costs of cleanup. Cleanup benefits, however, reflect the assumption that low dust-lead levels have a benefit duration of five years with paint stabilization and ten years with lead-based paint hazard abatement.

The duration of dust removal benefits reflects the anticipated benefits over five or ten years to a new population of young children, associated with births and unit turnover. This estimated duration of benefits could not be realized without the hazard reduction activities of paint stabilization or abatement, friction/impact work, and

soil cover, to the extent required by the rule. The monetized benefits in the table for paint stabilization and abatement reflect only the health benefits of avoided paint chip ingestion. The cost of paint stabilization includes the incremental cost for rehabilitation programs, and the full cost for non-rehab programs. Paint stabilization market value benefits reflect the estimated market value for non-rehabilitation programs. Subtracting paint stabilization market value benefits from paint stabilization costs yields the incremental cost of all paint stabilization required under the rule.

TABLE 3a.—NET BENEFIT (COST) BY PROGRAM FOR FIRST YEAR ACTIVITIES

[Three percent discount rate for lifetime earnings]

Subparts	Pre-1940	1940–1959	1960–1977	Total for subpart
Single Family Insured Housing (E)	\$0	\$0	\$0	\$0
HUD-Owned Single Family Housing (F)	804,349	(104,790)	(267,451)	432,108
Multifamily Insured Housing (G)	3,712,523	2,981,836	0	6,694,360
Multifamily Housing With Project-Based Assistance > 5K (Hm1) ...	7,858,982	6,284,595	4,395,518	18,539,094
Multifamily Housing With Project-Based Assistance > 5K (Hm2) ...	22,150,600	7,055,126	4,798,460	34,004,186
Single Family Housing With Project-Based Assistance (Hs)	5,359,054	1,570,456	848,160	7,777,670
HUD-Owned and Mortgage-in-Possession Multifamily Housing (I)	221,666	551,460	316,903	1,090,029
Single Family Rehab <5K (J1s)	26,705,720	19,813,315	3,103,588	49,622,624
Single Family Rehab 5K–25K (J2s)	40,365,551	29,115,276	4,186,525	73,667,352
Single Family Rehab 25K (J3s)	3,192,504	8,466,423	421,773	12,080,700
Multifamily Rehab <5K (J1m)	3,103,001	2,488,518	491,894	6,083,413
Multifamily Rehab 5K–25K (J2m)	12,303,357	9,541,269	3,316,929	25,161,554
Multifamily Rehab >25K (J3m)	8,536,151	6,932,896	1,504,944	16,973,991
Single Family Acquisition, Leasing, Operating, and Support (Ks) ..	318,545	124,334	20,862	463,741
Multifamily Acquisition, Leasing, Operating, and Support (Km)	608,761	146,925	47,221	802,907
Multifamily Public Housing (Lm)	58,623,013	188,764,843	34,665,629	282,053,485
Single Family Public Housing (Ls)	13,930,634	44,625,006	7,001,718	65,557,359
Single Family Tenant-Based Rental Assistance (Ms)	68,354,171	31,214,436	15,578,130	115,146,737
Multifamily Tenant-Based Rental Assistance (Mm)	102,509,490	46,573,257	24,862,934	173,945,681
Total Net Benefit	378,658,072	406,145,182	105,293,738	890,096,991

TABLE 3b.NET BENEFIT (COST) BY PROGRAM FOR FIRST YEAR ACTIVITIES

[Seven percent discount rate for lifetime earnings]

Subparts	Pre-1940	1940–1959	1960–1977	Total for Subpart
Single Family Insured Housing (E)	\$0	\$0	\$0	\$0
HUD-Owned Single Family Housing (F)	(1,927,841)	(689,268)	(539,603)	(3,156,712)
Multifamily Insured Housing (G)	246,690	176,627	0	423,317
Multifamily Housing With Project-Based Assistance > 5K (Hm1) ...	391,267	240,304	(3,053,108)	(2,421,537)
Multifamily Housing With Project-Based Assistance < 5K (Hm2) ...	(2,093,138)	(2,104,432)	(5,644,938)	(9,842,508)
Single Family Housing With Project-Based Assistance (Hs)	(1,667,495)	(1,102,037)	(3,184,370)	(5,953,901)
HUD-Owned and Mortgage-in-Possession Multifamily Housing (I)	(15,690)	(40,308)	(368,895)	(424,892)
Single Family Rehab <5K (J1s)	3,659,065	2,291,784	(2,361,222)	3,589,628
Single Family Rehab 5K–25K (J2s)	332,951	(564,095)	(4,419,314)	(4,650,458)
Single Family Rehab >25K (J3s)	(202,701)	(259,968)	(467,775)	(930,445)
Multifamily Rehab <5K (J1m)	506,967	370,441	(153,853)	723,554
Multifamily Rehab 5K–25K (J2m)	1,820,172	1,315,448	(76,463)	3,059,158
Multifamily Rehab >25K (J3m)	1,191,958	963,529	(42,968)	2,112,520
Single Family Acquisition, Leasing, Operating, and Support (Ks) ..	(99,117)	(87,249)	(78,325)	(264,691)
Multifamily Acquisition, Leasing, Operating, and Support (Km)	(57,525)	(43,825)	(55,551)	(156,902)
Multifamily Public Housing (Lm)	8,942,287	27,902,848	(1,523,858)	35,321,277
Single Family Public Housing (Ls)	1,380,411	4,213,020	(2,151,524)	3,441,908
Single Family Tenant-Based Rental Assistance (Ms)	11,717,061	4,619,772	1,484,946	17,821,779
Multifamily Tenant-Based Rental Assistance (Mm)	19,667,574	7,933,157	4,751,523	32,352,254

TABLE 3b.NET BENEFIT (COST) BY PROGRAM FOR FIRST YEAR ACTIVITIES—Continued

[Seven percent discount rate for lifetime earnings]

Subparts	Pre-1940	1940–1959	1960–1977	Total for Subpart
Total Net Benefit	43,792,895	45,135,748	(17,885,295)	71,043,348

TABLE 3C.—COST-BENEFIT SUMMARY FOR FIRST YEAR ACTIVITIES USING A THREE PERCENT AND A SEVEN PERCENT DISCOUNT RATE FOR LIFETIME EARNINGS

[\$ millions]

	Three percent	Seven percent
Hazard Evaluation Costs	\$ 99.5	\$ 99.5
Hazard Reduction Costs:		
Paint Stabilization	75.7	75.7
Window Replacement	4.6	4.6
Friction/Impact Work	8.5	8.5
Soil Cover	2.3	2.3
Paint Hazard Abatement	2.0	2.0
Dust Cleanup	60.5	60.5
Total First Year Costs	253.2	253.2
Monetized Benefits:		
Paint Stabilization	71.2	20.3
Paint Hazard Abatement	1.1	0.3
Soil Cover	88.0	20.2
Dust Cleanup	908.6	209.0
Paint Stabilization Market Value	70.2	70.2
Window Replacement	4.2	4.2
Total First Year Benefits	1,143.3	324.2
Total First Year Net Benefits	890.1	71.0

5. *Data Sources.* The following data sources are referenced extensively in the EA:

- The HUD national survey of lead-based paint in housing, conducted in 1989 and 1990.
- “Comprehensive and Workable Plan for the Abatement of Lead-Based Paint in Privately Owned Housing: a Report to Congress,” prepared by HUD, December 7, 1990.
- “TSCA Title IV, Sections 402(a) and 404: Target Housing and Child-Occupied Facilities Final Rule

Regulatory Impact Analysis,” prepared by Abt Associates for EPA, August 1996.

- The Evaluation of the HUD Lead-Based Paint Hazard Control Grant program—interim data collected through March 1998.

- National Academy of Sciences, National Research Council Committee on Measuring Lead in Critical Populations, “Measuring Lead Exposure in Infants, Children, and Other Sensitive Populations,” October 1993.

- Third National Health and Nutrition Examination Survey, as reported in “Blood Lead Levels in the U.S. Population” and “The Decline in Blood Lead Levels in the United States,” Journal of the American Medical Association, July 27, 1994; and “Update Blood Lead Levels—United States, 1991–1994,” MMWR, February 21, 1997; and additional detail obtained from NHANES III data on CD-ROM.

6. *Public Comments.* An industry group criticized the EA for the proposed rule on several grounds. The group stated that population blood lead levels may have declined further since the NHANES III Phase 1 data were released. For the final rule, HUD has used the most current data available, which is the NHANES III, Phase 2 data covering the years 1992–1994.

The group also suggested that HUD’s conclusion that declining dust lead levels will reduce blood lead levels in children is not supportable because it is based on a single study. In fact, there are at least 18 epidemiological studies which have estimated the blood lead/dust lead relationship; HUD has not relied on a single study in developing the final EA, but has conducted an extensive pooled analysis of virtually all available epidemiological data (Lanphear 1998).

The group stated that HUD’s EA relied on a 1991 CDC finding that 10 µg/dL represents a threshold level, below which there are no adverse effects, and that therefore the EA should not have calculated benefits below 10 µg/dL. This is an incorrect interpretation of CDC’s position. In fact, the 1991 CDC guidance document indicated that there was evidence of adverse health effects below 10 µg/dL. Neither HUD nor CDC have stated that 10 µg/dL is a “threshold.” The conclusion that it is reasonable to assume cognitive benefits to reducing childhood blood lead levels, including

below 10 µg/dL, has been approved by EPA, the EPA external peer review process, CDC, the HHS internal peer review process and the National Academy of Sciences. It is clear that HUD’s analysis is consistent with the consensus of the scientific community.

The group also stated that the EA cited the correlation between blood lead and low IQ, but erred in suggesting that correlation could be used to establish causality and that the available scientific studies failed to control for a variety of confounding variables. HUD agrees that correlation alone cannot establish causality. The idea that lead exposure causes a reduction in IQ is supported by not only correlation, but also by time precedence, biological plausibility, dose-effect relationship, and animal studies. When taken together, HUD believes that all these factors establish conclusively that lead exposure does in fact cause reductions in IQ. Time precedence has been established by those studies that measure blood lead level at birth, showing that the cause exists before the consequence. Biological plausibility has been established by the studies showing anatomical, physiological, and biochemical changes in the brain due to lead exposure. Dose-response has also been clearly established in the literature. Finally, all modern lead studies have in fact controlled for confounding variables, such as socioeconomic status, parent’s education and race.

The group also suggested that the lead studies upon which the EA relied used imprecise or incomplete methods of measuring IQ. However, if IQ was in fact measured inappropriately, one would expect to see the studies equally distributed between those showing no effect and those that did. In fact, virtually all of the studies on lead show the same IQ effect. While the size of the effect and degree of statistical significance may vary from one study to another, the basic conclusion remains the same: increased lead exposure is related to reduced IQ.

Another industry group suggested that HUD’s EA for the proposed rule had overestimated the benefits, because children living in HUD-assisted housing will grow up to earn less than the average income, and thus the calculated loss in lifetime earnings was too great.

First, HUD does not believe it is appropriate to declare that the value of damage to children in one socioeconomic group is less than the value of damage to children in another socioeconomic group. Furthermore, there is evidence that earnings may have in fact been underestimated, because per capita productivity has increased in recent years, which often results in increased wages. HUD used data covering the past 20 years to estimate growth in real wages, which has been low. If in fact the country returns to the growth rate over the past century, HUD's EA would underestimate the size of the lost lifetime earnings. HUD has used an updated estimate of the size of the lost lifetime earnings benefit (Salkever 1995) in the EA for this final rule to respond to this criticism. Salkever updated the analysis of labor force participation and other pathways by which lead can reduce expected future earnings. Finally, HUD's EA assumed that there would be no benefit to reducing lead exposure in adults, even though a number of studies have demonstrated that lead can increase blood pressure and cause a decline in both kidney function and cognition in adults. In short, HUD's EA is likely to underestimate the total benefit involved, not overestimate it.

An industry group suggested that HUD should use the lower confidence bound of the scientific studies, which would reduce the benefits of the proposed rule. HUD agrees that this would reduce the benefits, but notes that if it chose to use the upper bound as a health protective measure, the benefit would increase. On balance, HUD believes that measures of central tendency appear to be best when faced with the need to make public policy in the face of scientific uncertainty, which is always present to some extent. HUD encourages public comment on the EA and the final rule and will make revisions to both documents as new evidence comes to light.

B. Paperwork Reduction Act Statement

The information collection requirements contained in this final rule have been approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 2501–3520), and have been assigned OMB control number 2539–0009. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

C. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

When the proposed rule was published on June 7 1996, HUD certified that the proposed regulatory requirements would not have a significant economic impact on a substantial number of small entities. On October 9, 1998 (63 FR 54422), HUD published a Notice in the **Federal Register** containing additional information about its determination that the proposed rule would not have a significant impact on a substantial number of small entities. HUD has concluded, upon further consideration, that its certification that the rule will not have a significant economic impact on a substantial number of small entities could reasonably be questioned. Although the Department continues to believe that the certification was reasonable and justified, the degree of uncertainty as to what constitutes a “significant” impact and a “substantial” number of small entities in the housing industry has led to the decision not to make such a certification at this time. HUD is seeking to comply fully with the intent of the Regulatory Flexibility Act and is publishing this Final Regulatory Flexibility Analysis to describe the likely impact. This analysis expands on the analysis published on October 9, 1998 and summarizes and responds to public comments. HUD requests written public comment on this analysis of the impact of the rule on small entities. The final rule does not take effect until one year after publication, so there is time for the Department to arrange for responses to economic impacts that it believes would significantly diminish the effectiveness of its housing assistance programs in providing affordable housing to families of low and moderate income.

Comments on this notice must be received on or before November 1, 1999. Interested persons are invited to submit comments to the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–0500. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address. Facsimile (FAX) comments are *not* acceptable. For further information, contact: Steve Weitz, Office of Lead Hazard Control, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–0500. Telephone: (202) 755–1785, ext. 106

(this is not a toll-free number). E-Mail: stevenson_p_weitz@hud.gov. Hearing or speech-impaired persons may access the above telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

1. *Need For and Objectives of the Final Rule.* The Lead-Based Paint Poisoning Prevention Act of 1971, as amended, directs the U.S. Department of Housing and Urban Development (HUD) to establish procedures to eliminate to the extent practicable lead-based paint hazards in federally associated housing. HUD issued implementing regulations in 1976 and made Department-wide revisions in 1986, 1987, and 1988. In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act, which was Title X of the Housing and Community Development Act of 1992 (Title X). Sections 1012 and 1013 of Title X amend the Lead-Based Paint Poisoning Prevention Act to require specific new procedures for lead-based paint notification, evaluation, and hazard reduction activities in housing receiving Federal assistance (section 1012) and federally owned housing at the time of sale (section 1013).

In enacting Title X, the Congress found that low-level lead poisoning is widespread among American children, with minority and low-income communities disproportionately affected. The Congress also found that, at low levels, lead poisoning in children causes IQ deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems. In addition the Congress found that the health and development of children living in as many as 3.8 million homes is endangered by chipping or peeling lead paint or excessive amounts of lead-contaminated dust in their homes.

Among the stated purposes of Title X are to implement, on a priority basis, a broad program to evaluate and reduce lead-based paint hazards in the Nation's housing stock; to ensure that the existence of lead-based paint hazards is taken into account in the development of Government housing policies and in the sale, rental, and renovation of homes and apartments; and to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government.

The final rule sets forth new requirements for lead-based paint hazard notification, evaluation, and reduction for federally owned residential property and housing receiving Federal assistance. The rule takes into consideration the substantial advancement of lead-based paint remediation technologies and the

improved understanding of the causes of childhood lead poisoning by the scientific and medical communities. Perhaps the most important results of research on this subject during the last 10–12 years have been: (1) The finding that lead in house dust is the most common pathway of childhood lead exposure; and (2) the measurement of the statistical relationship between levels of lead in house dust and lead in the blood of young children. The final rule updates the existing HUD regulations to reflect this knowledge, giving importance to procedures that identify and remove dust-lead hazards as well as chipping, peeling or flaking lead-based paint.

The rule also offers a consolidated, uniform approach to addressing lead-based paint hazards. Currently, each individual HUD program has a separate set of lead-based paint requirements incorporated into its program regulations. The final regulation consolidates the HUD lead-based paint regulations and groups requirements by type of housing assistance, rather than by individual program. For example, the rule contains subparts that address multifamily mortgage insurance; project-based assistance; rehabilitation assistance; assistance for acquisition, leasing, support services and operation; public housing; and tenant-based assistance. Moreover, the final rule uses a clear and consistent set of terms to specify notification, evaluation, and hazard reduction requirements. Organizing the requirements by the type of housing assistance and using new terminology will avoid subjecting properties receiving assistance from more than one program to inconsistent or redundant HUD lead-based paint requirements. These changes will also ease the burden on HUD clients in locating and understanding the applicable requirements and help ensure that lead hazards are identified and safely reduced.

2. *Public Comments.* The Notice published in the **Federal Register** on October 9, 1998 outlined the impact of the proposed rule on small entities. Eight comments were received. Following is a summary of the significant issues raised by the comments and a description of the Department's assessment of and response to such issues.

a. *Information Not Adequate.* Two commenters requested additional information. One commenter said they were unable to assess the impact of the proposed regulations with the information provided in the published Notice and requested that the Department extend the comment period

on the Notice until supporting materials are available for public review. Another requested that HUD prepare a more detailed analysis and submit it for comment before publishing a final rule.

In response, HUD is providing more detailed information in this analysis and welcomes further comment. However, HUD is not delaying further the publication of this important regulation, which is expected to significantly reduce lead poisoning among children living in Federally owned housing that is sold and in housing that receives Federal assistance.

b. *Capital vs. Operating Costs.* One commenter stated that the analysis was "confusing," because it compared the cost of lead-based paint hazard reduction to current rent revenue. According to this commenter, lead-based paint activities are major capital improvement costs that would be financed from reserves or through a loan.

HUD agrees that some property managers may budget the required work out of reserves, some may have to finance it through a loan, while others will be able to handle it as an operating expense. Regardless of how the work is budgeted and financed, HUD believes that comparison to annual rent revenues is a reasonable method of gaining a general understanding of the significance of the costs. However, Section 3 of this Notice includes additional financial statistics for HUD-insured multifamily housing with project-based rental assistance; these statistics are net annual cash flow per unit before income taxes, total reserves per unit, and backlog of physical needs per unit.

c. *Costs Will Be Higher Than HUD Assumes.* Three commenters thought HUD underestimated the cost of complying with the requirements. All of these commenters were concerned primarily with rehabilitation programs. One commenter stated that the cost would be between \$2,000 and \$4,000 per unit, while the others claimed that rehabilitation costs are 35–50 percent more when lead-based paint is involved.

While it is possible that the costs in some jurisdictions may exceed those estimated for this analysis, HUD believes it has estimated the national average costs of the requirements in the rule as accurately as possible, given available data. It is important to remember that average costs may be much lower than costs one may have heard reported for heavily contaminated housing. Even in older housing, some structures have a great deal of lead-based paint while others have only a small amount, and the condition of the

paint varies as well. Also, the anecdotal costs reported in some jurisdictions may not be for the same activities as those required in this rule. Furthermore, the costs used in the analysis for rehabilitation are incremental costs. For example, if it is estimated that rehabilitation will replace windows for other reasons, that cost is not charged to lead-based paint hazard reduction. Finally, HUD believes that the cost of lead-based paint hazard evaluation and reduction will decline as program managers learn how to administer the requirements efficiently and as staff and contractors become experienced in the work.

HUD has estimated unit costs for lead-based paint hazard evaluation and reduction based on interviews with contractors and data from the ongoing Evaluation of HUD's Lead-Based Paint Hazard Control Grant Program (National Center 1998). It has estimated the frequencies of hazard occurrence based on both the Evaluation and the 1990 National Survey of Lead-Based Paint in Housing (EPA 1995). Also, it used American Housing Survey data to estimate the frequency with which rehabilitation involves activities like repainting or window replacement that overlap the requirements of lead-based paint hazard reduction. These estimates are explained in the HUD EA for the final rule (HUD 1999).

d. *There Will Be a Significant Impact.* Many commenters stated or implied that HUD was incorrect in its determination that the rule will not have a significant economic impact on a substantial number of small entities. While the Department has chosen not to make such a determination for this final rule, it continues to think that the cost of compliance, and therefore the impact, will not be as significant as many commenters believe.

As explained below, in section 4 of this Analysis, HUD has written provisions into the rule, consistent with Title X, designed to alleviate the impact of the lead-based paint evaluation and reduction requirements on entities receiving limited Federal assistance. For example, for most housing affected by this regulation, all that is required is stabilization of deteriorated paint, if any is present, followed by cleanup and clearance.

In multifamily housing, HUD estimates that compliance with this requirement costs only about \$100 per unit more than routine repainting, and less if only a small amount of deteriorated paint is present. This requirement pertains to housing that receives tenant-based rental assistance and is occupied by children of less than

six years of age, and it applies to housing receiving project-based rental assistance averaging less than \$5,000 per unit per year (which includes most housing that is affected by this rule and is receiving project-based assistance). The requirements are greater for multifamily housing receiving project-based assistance of more than \$5,000 per unit per year; but that is a relatively small percentage of the assisted stock that was built before 1978, and most of it is professionally managed, in relatively good physical and financial condition, and not expected to have a high prevalence of lead-based paint hazards. For housing receiving Federal rehabilitation assistance of \$5,000 per unit or less (which is almost one-half of the housing receiving such assistance), the rule requires only that the rehabilitation be done in a lead-safe manner so that it causes no contamination.

For these reasons and because there currently exist lead-based paint regulations for virtually all HUD programs prescribing notice, evaluation and treatment procedures, HUD continues to believe that the economic impact of the rule will be much less than many of the commenters believe.

e. *Owners Whose Entire Portfolio Is Affected May Be Impacted Especially Hard.* One organization stated that "small property owners whose portfolio may only contain target properties and will have to bear this additional expense throughout their portfolio, may well be forced out of business by such extreme financial requirements."

HUD agrees that the impact on an owner may depend to some extent on the percentage of his or her portfolio that is affected by the rule. However, many if not most housing owned by small entities will be only partially affected by the rule. A dwelling unit is not covered if it was built after 1977, or designated exclusively for the elderly or persons with disabilities (unless a child of less than 6 years of age resides or is expected to reside), or is a zero bedroom dwelling (e.g., efficiency, studio, or single-room occupancy unit), or is found to be free of lead-based paint, or all lead-based paint has been removed. Many residential properties, especially those built after 1960, have little or no lead-based paint hazards. If a unit has no deteriorated paint or no lead-based paint hazards (depending on the

housing program), no hazard reduction is required. Thus, owners can minimize the cost effect of the rule through good maintenance of paint surfaces and careful cleanup at turnover. In the case of units with tenant-based assistance, the rule applies only to units occupied by families with children of less than six years of age. Many properties with project-based assistance have only part of their units under housing assistance payments contracts. For all of these reasons, the total annual rental revenue for affected small entities may substantially exceed the total annual rental revenue associated with just those units subject to the rule.

3. *Impact on Small Entities.* a. *Number of Small Entities Affected by the Rule.* For this analysis, HUD defines a small entity as one with less than \$5 million in total revenues per year. This standard is based on the report, "Small Business Administration Standard Industrial Code (SIC) Size Standards," dated January 1998.

Table 4 provides, for each program group, an estimate of the number of small entities that will be affected by the first effective year of the rule. Although some additional housing units and ownership entities will become subject to the rule after the first effective year, focusing on the first year facilitates analysis of impact on an annual basis. Estimates are given for the same program groups used in the EA for the rule, and the number of housing units for each program is taken from the EA. For all program groups, it is estimated that approximately 203,000 small entities will be affected in the first year of the rule. Of these, about 122,000, or 60 percent, are owners of single-family housing being rehabilitated with HUD rehabilitation assistance.

The vast majority of these owners are expected to be individuals who are rehabilitating their own residences. They are not businesses, organizations or units of local government, which are the entities of concern under the Regulatory Flexibility Act. Nevertheless data are provided for these owners for completeness of analysis. Of the remaining 81,000 small entities, the great majority will be owners of rental housing; and, of those, about 56,000 will be owners of housing with tenant-based rental assistance, 17,000 will be owners of housing with project-based rental assistance, 1,500 will own multifamily

housing receiving rehabilitation assistance, and about 1,400 will be local public housing authorities. HUD believes that the great majority of local public housing authorities are not covered by the Regulatory Flexibility Act, because they are not agencies of local governments with populations of less than 50,000. Nevertheless, public housing data are included in this analysis for completeness.

(1) *Housing With Multifamily Mortgage Insurance and/or Project-Based Rental Assistance.* The first and second rows of Table 4 pertain to multifamily housing that has HUD mortgage insurance but not HUD subsidies. For this program group, the rule will apply only to properties built before 1978 that are covered by a new application for mortgage insurance. These properties tend to be relatively large, with an average of 160 units per property. Twenty-one percent of the properties have more than 200 units (Abt Associates 1999). Average annual total revenues for unassisted HUD-insured multifamily properties are assumed for purposes of this analysis to be \$8,000 per unit. (This assumption is based on Abt Associates 1999, Exhibit 3-1, which reports a mean average annual total revenue for all unassisted insured properties of \$7,978.) To earn \$5 million per year in total revenues, a property with per unit annual revenue of \$8,000 would have to have 625 housing units. Few projects are of this size. However, it is well known that many of these projects are part of multiproperty portfolios. Of all rental housing in properties with 50 or more units, 25 percent of the properties and 50 percent of the units are owned by limited partnerships, general partnerships, real estate corporations or other corporations, or joint ventures (HUD 1996). Therefore it is assumed for this analysis that 25 percent of the unassisted multifamily properties with HUD mortgage insurance are owned by large entities and 75 percent are owned by small entities. It is also assumed that none of the properties owned by small entities are part of a multiproperty portfolio. This assumption may overstate the number of small entities somewhat. Based on this analysis, it is estimated that each year 70 applicants for unassisted multifamily mortgage insurance will be small entities.

TABLE 4.—NUMBER OF SMALL ENTITIES AFFECTED BY THE FIRST YEAR OF THE HUD LEAD-BASED PAINT REGULATIONS, FINAL RULE

Program group	Number of units	Units per property	Number of properties	Small owner entities as percent of number of properties	Number of small ownership entities
Pre-1960 Housing w/Multifamily (MF) Mortgage Insurance	3,750	160	23	75	17
Post-1959 Housing w/ MF Mortgage Insurance	11,250	160	70	75	53
MF Housing w/ Project-Based Assistance, >\$5K/Unit	35,750	115	311	75	233
MF Housing w/ Project-Based Assistance, <\$5K/Unit	408,690	115	3,554	85	3,021
Single Family (SF) Housing w/ Project-Based Assistance	134,280	2	67,140	20	13,428
MF Housing w/ Tenant-Based Assistance	207,050	7	29,579	99	29,283
SF Housing w/ Tenant-Based Assistance	134,500	1	134,500	20	26,900
Public Housing	164,000	N/A	1,500	96	1,440
SF Housing w/ Rehab Assistance, <\$5K/Unit	66,836	1	66,836	100	66,836
MF Housing w/ Rehab Assistance, <\$5K/Unit	7,834	20	392	99	388
SF Housing w/ Rehab Assistance, \$5K–\$25K	48,998	1	48,998	100	48,998
MF Housing w/ Rehab Assistance, \$5K–\$25K	15,877	20	794	98	778
SF Housing w/ Rehab Assistance, >\$25K	5,817	1	5,817	100	5,817
MF Housing w/ Rehab Assistance, >\$25K	7,306	20	365	98	358
SF Housing w/ Acquisition, Leasing, etc. Assistance	5,093	1	5,093	100	5,093
MF Housing w/ Acquisition, Leasing, etc. Assistance	6,103	20	305	99	302
Total	1,263,134	365,277	202,945

The third and fourth rows of Table 4 present estimates for multifamily housing with project-based rental assistance. These are somewhat smaller properties, with an average of 115 units per project; only 13 percent have more than 200 units (Abt Associates 1999). For this analysis it is assumed that average annual total revenues are \$10,000 per unit for properties receiving an average of more than \$5,000 in rental assistance per unit per year and \$6,000 for those with less than \$5,000. (The Abt Associates 1999 report estimates that mean annual total revenues were \$5,868 in 1995 for all “older assisted” multifamily properties and \$10,057 for “newer assisted” properties. Older assisted properties receive either mortgage interest subsidies (under section 236 or 221(d)(3) Below Market Interest Rate insurance programs) or rental assistance under the Section 8 Loan Management Set Aside, Rent Supplement, Rental Assistance Payment, Section 8 Property Disposition, or Preservation programs. Newer assisted properties receive rental assistance under one of the following Section 8 programs: New Construction, Substantial Rehabilitation, or Moderate Rehabilitation. Older assisted properties had mean assistance payments of \$2,576 per unit per year, with a median of \$2,310. Newer assisted properties had mean assistance payments of \$7,448, with a median of \$7,106. Thus HUD assumes for purposes of this Regulatory Flexibility Analysis that virtually all of the housing receiving more than \$5,000 per unit per year in project-based assistance are in the newer assisted

properties and that virtually all of the housing receiving less than \$5,000 are in the older assisted category.) A project with \$10,000 in annual revenue per unit would have to have 500 units to earn \$5 million in total revenue. A project with \$6,000 in annual revenue per unit would need 834 units. It is assumed that 75 per cent of the owners of properties receiving more than \$5,000 per unit in assistance will be small entities—the same as for unassisted insured properties. However, recognizing the sharp difference in average revenues between properties receiving more than and less than \$5,000 per unit per year, it is assumed that 85 percent of the less-than-\$5,000 group will be small entities. Based on this analysis, it is estimated that 3,254 small entities will own multifamily properties with project-based assistance that will be affected by the rule in its first year. All of these should complete initial work in the first year, with only ongoing maintenance and some reevaluation required after that. In each of the second, third and fourth years, it is expected that 233 additional small entities will be affected.

The fifth row in Table 4 presents estimates for all *single family* housing receiving project-based assistance. HUD assumes for the purposes of this analysis of ownership that there is an average of two units per property in this inventory. This assumption derives from American Housing Survey data which indicates that there are a large number of three- and four-unit properties with project-based assistance as well as single unit properties. (The

HUD-FHA definition of “single family property” is one-to-four units.) It is further assumed that owners of single-family housing with project-based assistance own an average of five properties. This assumption recognizes that it requires a certain additional amount of managerial knowledge to participate in project-based assistance programs compared to owning an unassisted rental unit, and that such owners tend to try to maximize the benefits of such knowledge by owning several homes. HUD also assumes, however, that 100 percent of the owners of such housing are small entities. It is estimated that 13,428 small entities will own single family housing with project-based assistance that is affected by the first year of the rule. After that, only ongoing maintenance is required. No additional entities are expected to be affected in later years.

(2) *Tenant-Based Rental Assistance.* Families assisted by tenant-based rental assistance programs are living in housing that is similar in size and age to the nation’s entire non-luxury rental housing stock. Therefore HUD assumes that the average number of units per multifamily property is 20, which is much smaller than the projects with mortgage insurance and project-based assistance. However, in the tenant-based assistance programs, HUD lead-based paint regulations apply only to housing occupied by children of less than 6 years of age. Therefore, based on occupancy data from a subsample of the American Housing Survey, it is assumed that 35 percent of the 20 units (or seven) are occupied by such children. Because

of the small average property size, HUD assumes that only one percent of the owners of multifamily housing assisted under tenant-based programs are large entities.

For single-family housing with tenant-based assistance, it is assumed that an average of one unit per property will house families with children of less than six years of age, that owners will own an average of five properties, and that 100 percent of the properties are owned by small entities.

Counting owners of both multifamily and single family housing, it is estimated that 56,183 small entities will own housing with tenant-based assistance affected by the first year of the rule. In future years, because of housing turnover in these programs, it is expected that about 20,000 small entities will become newly affected each year.

(3) *Public Housing.* HUD estimates that approximately 1,500 public housing agencies will be affected by the rule. Although HUD believes that the Regulatory Flexibility Act does not apply to the vast majority of public housing authorities, data are presented here for completeness. Many public housing agencies own both multifamily and single family units, so no attempt is made in Table 1 to distinguish between agencies owning one or the other. Although rents paid by tenants of public housing are relatively low, HUD estimates that subsidies boosted public housing agency revenues to an average of approximately \$7,400 per unit per year in 1995. A public housing agency with average revenues per unit would have to have 676 units to have revenues of \$5 million. Only about 2 percent of public housing agencies have that many units. However, many housing agencies have revenues from sources other than the public housing program, including the project-based and tenant-based rental assistance programs. Therefore HUD assumes for this analysis that 4 percent of the public housing agencies are large entities and that 96 percent, or 1,440, are small entities.

(4) *Rehabilitation Assistance.* There are at least three types of entities that will be affected by the lead-based paint requirements for housing receiving rehabilitation assistance. They are: (1) The State and local governmental agencies and tribal agencies that are the grantees and participating jurisdictions that receive funding from HUD; (2) nonprofit organizations that are subrecipients or funded directly by HUD and that operate housing development and rehabilitation programs; and (3) private owners of housing being rehabilitated. Of these

three, the greatest concern of those commenting on the proposed rule was with the potential economic impact on private owners. Therefore this analysis focuses on that group.

The number of small-owner entities participating in the rehabilitation programs is estimated to be large, because many local programs concentrate on the rehabilitation of single family, owner-occupied homes. HUD assumes for purposes of this analysis that in any given year all single family units assisted by rehabilitation programs are individually owned, i.e., that the number of owners equals the number of units. While this may produce an overestimate of the actual number of owners, the error is expected to be small. For multifamily units, the same average number of 20 units per property is used as was used in the tenant-based assistance programs; and 98 to 99 percent of the owners are assumed to be small entities. In total, it is estimated that 125,028 small-owner entities will be affected by the rehabilitation assistance programs each year.

(5) *Acquisition, Leasing, Support Services, or Operation.* Assumptions for the Acquisition, Leasing, Support Services or Operation group are the same as for Rehabilitation. The number of small entities affected is estimated to be 5,395.

b. *Economic Impact.* This section examines, for each program group, the financial impact of the rule on small entities.

(1) *Housing With Multifamily Mortgage Insurance, Project-Based Rental Assistance, Tenant-Based Rental Assistance, or Public Housing.* Table 5 provides a comparison of the incremental cost of compliance with total revenues for most of the rental housing programs affected by the rule. Table 6 provides the following additional financial statistics that are available from a study of the insured multifamily inventory: annual net cash flow, total reserves, and backlog of physical needs—all per unit (Abt Associates 1999, exhibits 2–2, 3–3, and 3–7). Annual net cash flow equals revenues less expenses before income taxes. Expenses include deposits to reserve accounts and debt service as well as operating expenses. Total reserves include replacement reserves and, for some properties, residual receipts accounts. The physical needs backlog is the estimated cost of repairs and replacements beyond ordinary maintenance required to restore a property to its original condition. The financial statistics in Table 6 are available only for the multifamily HUD-

insured stock that is unassisted or assisted with project-based subsidies; they are not available for housing receiving tenant-based assistance or for public housing.

Two sets of compliance cost estimates are provided for each program group in Table 5. The first column is the mean incremental cost per unit for all properties. Incremental costs are new costs incurred in compliance with this rule over and above the costs of compliance with existing regulations. There is a great deal of variation around this mean that is associated with the age, size and condition of the housing. Many properties will have no cost at all. Therefore, the second column of Table 5 provides the estimated incremental cost per unit for “high-cost properties.” This is an approximation of the average cost that may be incurred by properties that have all the hazards for which the rule requires remediation for a given program. The frequency of such high-cost cases is not known but is expected to be between one and eight percent of all properties, depending on the program group. All compliance cost estimates are incremental, i.e., over and above the costs of current HUD lead-based paint regulations. The cost estimates are derived from the EA, which in turn is based on data collected from discussions with lead-based paint inspectors and hazard reduction contractors in 1995 and the evaluation of the HUD Lead-Based Paint Hazard Control Grant Program (data collected 1994–1997). No cost estimates are shown for post-1959 unassisted housing with HUD multifamily mortgage insurance because the rule requires only that sponsors agree to conduct ongoing lead-based paint maintenance.

Estimates of mean annual total revenues per unit are based on a 1995 survey of HUD-insured multifamily rental housing (Abt Associates 1999, exhibit 3–1) and estimates by HUD staff. As with Table 4, all estimates pertain to housing affected by the first year of the rule.

In comparing compliance costs with revenue or with other financial data, it is important to remember that the compliance costs are not continuing annual costs. Rather they are one-time costs of hazard evaluation and control, after which the owner must simply maintain the paint surfaces and conduct maintenance and repair activities in a lead-safe manner. For some program groups, owners will have to conduct at least two reevaluations in two-year intervals after the initial hazard reduction activity to assure that lead-based paint hazards have not reoccurred. Also, many owners have

properties that are not covered by the rule as well as those that are affected. The financial impact on such owners will be less than on those whose portfolios consist solely of pre-1978 HUD-associated housing.

Table 5 indicates that, in the first effective year of the rule, the mean incremental cost of compliance is expected to vary from 1.0 to 6.9 percent of total annual revenues for the insured multifamily stock and housing receiving project-based rental assistance. Public housing and unassisted insured multifamily housing built before 1960 have the highest average costs and the highest percentage of revenue, because of the stringency of the requirements and the age of the stock. High-cost properties have ratios of cost to revenue of 9.0 to 28 percent; but these percentages should be used only as rough indicators, because the universe of the revenue estimate (all properties) does not correspond to that of the high-cost properties.

Table 6 provides additional financial statistics from the Abt Associates report on the multifamily insured stock. Data from the Abt study for unassisted properties are not included in this table, because they are not necessarily representative of properties that will apply for mortgage insurance when the rule becomes effective. For newer assisted properties (defined as properties receiving Section 8 New Construction, Substantial Rehabilitation, or Moderate Rehabilitation), the average (mean) cash flow was a substantial \$1,105 per unit. This compares to lead-based paint regulatory compliance costs of \$255 (average for all properties) and \$1,120 (high-cost properties) for housing with project-based assistance of more than \$5,000 per unit. While reserves also appeared respectable for most of these newer assisted properties, the mean backlog of physical needs was \$3,214 compared to a median of \$1,324, indicating that a few properties had very

high backlog needs. Also, 13 percent of the newer assisted properties had negative cash flow, again indicating that some properties are in financial distress.

For the older assisted properties, which correspond to housing with project-based assistance of less than \$5,000 per unit, mean annual net cash flow per unit was \$283, compared with compliance costs of \$60–\$82 per unit (average for all properties) and \$570–\$870 (high-cost properties). The Abt study found that 33 percent of the older assisted properties had a negative cash flow and that another 42 percent had a cash flow of \$0–\$500 per unit. Further, the study found \$3,929 in average (mean) backlog of physical needs per unit, with a median of \$2,096, indicating that some properties have very high deferred needs. Thus it appears that a certain percentage of this older stock is in financial distress, even more than with the newer assisted properties.

TABLE 5.—INCREMENTAL COST OF COMPLIANCE AS A PERCENTAGE OF ANNUAL REVENUE, BY PROGRAM GROUP:
NONFEDERAL RENTAL HOUSING AFFECTED BY THE FIRST YEAR OF THE RULE

[Not including housing receiving assistance for rehabilitation or acquisition, leasing, support services or operation. Cost and revenue data as of 1995–1996]

Program group	Average incremental compliance cost per unit, all properties	Average incremental compliance cost per unit, high-cost properties	Average annual total revenue per unit, all properties	Average incremental compliance cost as a percent of revenue, all properties	Average incremental compliance cost as a percent of revenue, high-cost properties
Pre-1960 Housing w/Multifamily (MF) Mortgage Insurance	\$414	\$1,120	\$8,000	5.2	14
Post-1959 Housing w/MF Mortgage Ins.	0	0	8,000	0	0
MF Housing w/Project-Based Assistance, >\$5K/Unit	255	1,120	10,000	2.6	11
MF Housing w/Project-Based Assistance, <\$5K/Unit	60	570	6,000	1.0	9.5
SF Housing w/Project-Based Assistance	82	870	6,500	1.3	13
MF Housing w/Tenant-Based Rental Assistance	59	560	6,200	1.0	9.0
SF Housing w/Tenant-Based Rental Assistance	103	870	6,200	1.7	14
MF Public Housing	311	1,120	7,400	4.2	15
SF Public Housing	511	2,095	7,400	6.9	28

TABLE 6.—FINANCIAL STATISTICS FOR MULTIFAMILY PROPERTIES WITH HUD-INSURED MORTGAGES 1995

[In 1995 dollars per 2-bedroom equivalent unit]

	Newer assisted properties	Older assisted properties
Annual Net Cash Flow Per Unit:		
Mean	\$1,105	\$283
Median	\$742	\$162
Percentage of Properties With Negative Cash Flow	13%	33%
Percentage of Properties With Cash Flow of \$0–\$500	22%	42%
Total Reserves Per Unit:		
Mean	\$1,924	\$1,766
Median	\$1,163	\$1,240
Backlog of Physical Needs Per Unit:		
Mean	\$3,214	\$3,929
Median	\$1,324	\$2,096

It is apparent from these statistics that some properties will not be able to fund lead-based paint compliance out of current income. HUD estimates that no more than half of the housing with project-based assistance will be able to obtain an adjustment in assistance levels to finance the cost of the lead-based paint requirements. For projects that do not qualify for a rent adjustment and do not have sufficient income to cover the cost of compliance with the rule, HUD will work with owners to find funds from other sources. Depending on the property, this process may include the financial restructuring known as Mark to Market. Mark-to-Market processing will address lead-

based paint requirements in the restructuring commitment. Other possible sources of funds include replacement reserves, grants, and Community Development Block Grant funds.

(2) *Housing Receiving Rehabilitation Assistance.* For housing receiving rehabilitation assistance, Table 7 compares the cost of compliance to an assumed average total cost of rehabilitation. Assumed average total rehabilitation costs are \$4,000 for projects receiving \$5,000 or less in rehabilitation assistance, \$15,000 for those receiving between \$5,000 and \$25,000 in assistance, and \$30,000 for those receiving more than \$25,000 in assistance. Average compliance costs

vary from 1.1 to 4.2 percent of these total project costs. Costs for high-compliance-cost projects vary from 3.3 to 9.3 percent of total rehabilitation cost. Single family properties tend to have a higher cost impact than multifamily, because they are larger units on average and usually require more exterior work.

Virtually all HUD rehabilitation assistance is administered by State, local and tribal agencies, and many, if not most, of these programs are operated as low-interest loans. If property owners are unable to finance loans for the incremental cost of lead hazard control, the administering agencies have the option to finance such costs with a grant out of program funds.

TABLE 7.—INCREMENTAL COST OF COMPLIANCE AS A PERCENTAGE OF AVERAGE REHABILITATION COST, BY PROGRAM GROUP HOUSING RECEIVING FEDERAL REHABILITATION ASSISTANCE
(Cost data as of 1995–1996)

Program group	Average incremental compliance cost per unit, all properties	Average incremental compliance cost per unit, high-cost properties	Average cost of rehabilitation, all properties	Average incremental compliance cost as a percentage of average rehab cost, all properties	Average incremental compliance cost as a percentage of average rehab cost, high-cost properties
Single Family (SF) Housing w/ Rehab Assistance, <\$5K/Unit	\$153	\$170	\$4,000	3.8	4.3
Multifamily (MF) Housing w/ Rehab Assistance, <\$5K/Unit	113	130	4,000	2.8	3.3
SF Housing w/ Rehab Assistance, \$5K–\$25K	627	1,275	15,000	4.2	8.5
MF Housing w/ Rehab Assistance, \$5K–\$25K	265	720	15,000	1.8	4.8
SF Housing w/ Rehab Assistance, >\$25K/Unit	891	2,775	30,000	3.0	9.3
MF Housing w/ Rehab Assistance, >\$25K/Unit	342	1,140	30,000	1.1	3.8

(3) *Acquisition, Leasing, Support Services, and Operation.* This program group does not appear on Table 5, because HUD has no aggregate financial information for the housing affected by this subpart of the rule. For single family properties, the average cost of compliance is estimated at \$251 per unit for all properties; the high cost is \$870. For multifamily properties, the average cost per unit is \$122 for all properties and \$460 for high-cost properties. These costs are similar to those of housing with tenant-based assistance, and the financial impact is likely to be similar also.

4. *Final Rule Requirements.* The final rule establishes the following types of lead-based paint requirements: (1) Distribution of a lead hazard information pamphlet; (2) notice to occupants of evaluation and hazard reduction activities; (3) evaluation of lead-based paint hazards; (4) reduction of lead-based paint hazards; (5) ongoing monitoring and reevaluation; (6) response to a child with an elevated blood lead level; and (7) record keeping.

a. *Lead Hazard Information Pamphlet.*

The rule, in accordance with the statute, requires the distribution of the EPA pamphlet entitled, "Protect Your Family From Lead in Your Home" to all existing tenants or owner-occupants who have not already received it in compliance with the lead-based paint disclosure rule (24 CFR part 35, subpart H) or the EPA rule implementing TSCA section 406(b) (40 CFR part 745, subpart E). Since the disclosure rule was effective in the Fall of 1996, HUD expects that most tenants will have already received the pamphlet when the rule becomes effective in year 2000 (see discussion of effective date below). Current HUD regulations require provision of information similar to that in the EPA pamphlet, so this is not a totally new requirement.

b. *Resident Notice.* The rule, in accordance with Title X, requires that occupants of rental housing receiving Federal assistance be provided written notice of risk assessments, paint inspections, or hazard reduction activities required by this regulation and

undertaken at the property. This is a new requirement in HUD regulations. The required notice following risk assessment or inspection provides information to occupants about the nature, scope, and results of the evaluation and a name and phone number to contact for more information or for access to the actual evaluation reports. Notices to tenants regarding hazard reduction activities must contain information about the treatments performed and the location of any remaining lead-based paint. HUD is providing a sample format for resident notices in the final rule.

c. *Evaluation.* The rule establishes four types of evaluation procedures: (1) A lead-based paint inspection, which is a surface-by-surface investigation to determine the presence of lead-based paint on painted surfaces of a dwelling, typically through the use of a portable X-ray fluorescence (XRF) analyzer; (2) paint testing, which is a limited form of lead-based paint inspection aimed at determining the lead content of deteriorated paint or paint to be

disturbed by rehabilitation; (3) a risk assessment, which is an on-site investigation to determine and report the existence, nature, severity, and location of lead-based paint hazards, which, in accordance with Title X, include dust-lead and soil-lead hazards as well as deteriorated lead-based paint, as well as lead-based paint on friction, impact and chewable surfaces; and (4) clearance, which is an examination conducted after hazard reduction, rehabilitation, or maintenance activities (a) to visually determine that deteriorated surfaces that are known or presumed to be lead-based paint have been controlled or abated and that visible dust, debris, paint chips, or other residue have been cleaned up; and (b) to collect samples of settled dust and test them for lead content to determine that no dust-lead hazards remain. A risk assessment includes limited dust wipe sampling or other environmental sampling techniques, identification of hazard reduction options, and a report explaining the results of the investigation. In some housing programs, the rule calls for a visual assessment instead of a lead-based paint inspection or risk assessment. A visual assessment does not require environmental sampling but requires the visual examination of interior and exterior painted surfaces for signs of deterioration. The rule requires different types of evaluation for different types of housing assistance programs and different ages of housing. The differences in the requirements largely reflect the extent of Federal involvement in the property or the availability of funding.

Existing HUD lead-based paint regulations require a visual inspection for defective paint surfaces and, in some cases, testing of and abatement of any lead-based paint on chewable paint surfaces. These methods are similar in kind to the visual assessment and paint testing requirements under the proposed rule.

d. *Hazard Reduction Activities.* Three types of hazard reduction activities are required in the rule: (1) Abatement, which is a set of measures designed to permanently eliminate lead-based paint or lead-based paint hazards through removal, permanent enclosure or encapsulation, replacement of components, or removal or covering of lead-contaminated soil; (2) interim controls, which are designed to reduce temporarily human exposure to lead-based paint hazards through repairs, maintenance, painting, temporary containment, specialized cleaning, and ongoing monitoring; and (3) paint stabilization, which is the removal of

deteriorated paint, repair of any physical defect in the substrate that may be causing paint deterioration, and repainting. Specialized cleanup and clearance are required after all these activities.

As with the requirements for evaluation, the final rule requires different types of hazard reduction activities for different types of housing assistance programs and different periods of construction. In the case of public housing, abatement of lead-based paint and lead-based paint hazards is required during the course of modernization under the current regulation. Under the final rule, the public housing requirements would remain essentially the same, with the additional requirement of interim controls to reduce identified lead-based hazards before scheduled abatement can occur.

e. *Ongoing Lead-Based Paint Maintenance and Reevaluation.* If temporary hazard reduction measures are used and there is a continuing financial relationship between HUD and the residential property, the final rule requires that owners conduct an annual check to identify any new deteriorated paint and to ensure that prior hazard reduction treatments are still intact. If there is new deteriorated paint, it is to be repaired; if old treatments are failing, they are to be fixed. For some housing programs, the rule requires that a certified risk assessor conduct a reevaluation of the property at specified intervals to identify any reaccumulation of lead-contaminated dust and any failure of prior hazard reductions.

f. *Response To a Child With an Elevated Blood Lead Level.* In some HUD programs, existing regulations use the presence of a child under age seven with an elevated blood lead level (EBL) as a trigger to initiate testing for and abatement of lead-based paint on chewable surfaces. The final rule changes the cutoff age from seven to six, to conform to guidance from the Centers for Disease Control and Prevention (CDC). The rule also changes the response requirement to a risk assessment and interim controls of any identified lead-based paint hazards, and changes the definition of an elevated blood lead level for the purposes of this rule from equal to or exceeding 25 micrograms per deciliter ($\mu\text{g}/\text{dL}$) to 20 $\mu\text{g}/\text{dL}$ for a single venous test or of 15–19 $\mu\text{g}/\text{dL}$ in two tests taken at least 3 months apart. This definitional change was made in consultation with CDC to conform to their existing medical guidelines.

g. *Record Keeping.* Grantees, owners, public housing authorities, and other

designated parties are responsible for keeping a copy of each notice, evaluation, clearance or hazard reduction report for at least three years. If ongoing lead-based paint maintenance and/or reevaluation is required, such records must be kept and made available for HUD review until at least three years after such ongoing activities are no longer required.

5. *Description of Alternatives and Minimization of Economic Impact.* The specificity of the statute left HUD with no alternative to issuing an implementing regulation. However, in developing the final rule, HUD considered several alternative policies related to minimizing the burden of the rule on grantees, property owners and other parties responsible for complying with its requirements. Other alternatives were suggested by commenters on the proposed rule. In many cases, the public comments on the proposed rule articulated the issues discussed within the Department and at meetings with interested parties.

a. *Effective Date.* One consideration pertained to the effective date of the rule. On the one hand, an early effective date (such as 30 or 60 days after publication) seemed appropriate because the health of young children was at stake and the rule was delayed relative to the statutory schedule. On the other hand, HUD was aware that property owners, State and local agencies and other responsible parties needed time to prepare for compliance. The Department has concluded that such preparation is essential for safe, effective compliance and therefore is setting the effective date as one year after publication.

Commenters also urged HUD to make it clear that projects for which financing had been committed prior to the effective date should not have to be redesigned or refinanced in midstream. In response, HUD is including in the rule provisions that clarify exactly when projects in the pipeline are affected by the new requirements.

In addition to the phase-in period of one year, the final rule, in accordance with the statute, provides a more extended phase-in period for multifamily housing receiving project-based assistance of more than \$5,000 per unit per year and was constructed after 1959. For some housing, this phase-in could last for 4 years after publication of the final rule.

b. *Stringency of Requirements in Relation to Amount of Federal Assistance and Nature of Program.* The Department recognizes that the statute and the legislative history indicates a desire on the part of Congress to make

the stringency of requirements reasonable in relation to the amount of Federal assistance, the type and size of property, and the nature of the program. HUD considered various ways to achieve this goal and concluded with three important policies: (1) Multifamily properties receiving no more than \$5,000 per unit per year in project-based assistance and all single family properties receiving project-based assistance have less stringent requirements than multifamily properties receiving more than \$5,000 in project-based assistance; (2) housing receiving no more than \$5,000 per unit in Federal rehabilitation assistance have much less stringent requirements than those receiving more than \$5,000; and (3) the requirements for housing occupied by families with tenant-based rental assistance apply only to units occupied by families with children of less than 6 years of age. By applying the rule narrowly to tenant-based rental assistance programs, HUD has mitigated some of the cost and burden on small businesses, while still realizing significant benefits by targeting units that house families with young children.

c. De Minimis Area of Deteriorated Paint. In the proposed rule, in an attempt to make the requirements of the rule as cost-effective as possible, the Department proposed a certain area of deteriorated paint that had to be present before treatment was required under the rule. This "de minimis" was drawn from the HUD Guidelines, where it was established as a way to focus resources on the highest priority hazards while maintaining effectiveness in hazard reduction. The de minimis areas were as follows: More than 10 square feet on an exterior wall; more than two square feet on a component with a large surface area other than an exterior wall (such as interior walls, ceilings, floors and doors); or more than 10 percent of the total surface area on an interior or exterior component with a small surface area including, but not limited to window sills, baseboards, and trim. Comments on this proposal were mixed. Some commenters found it difficult to understand and put in practice, indicating that people would spend too much time measuring the exact areas of deteriorated paint instead of focusing on making housing lead safe. Others welcomed the proposal as a reasonable way to target hazard reduction resources. In preparing the final rule, HUD has removed the de minimis provision with regard to deteriorated paint, after concluding that experience in the tenant-based assistance programs (where the de minimis provision was

made effective in 1995) indicates that it is a cause of confusion.

d. Qualifications. Another subject of concern to HUD and to commenters on the proposed rule was the qualifications of individuals performing the hazard evaluation and reduction activities required by the rule. The proposed rule allowed dust and soil testing by persons employed by local housing agencies that are trained but not certified. Two commenters felt that it would be a mistake to allow uncertified individuals to take dust and soil tests, indicating that this appeared to be an avoidance of the certification law established by EPA regulations. EPA agreed with this point of view. HUD concluded that, because of the importance of dust and soil testing to the effectiveness of the regulation, there must be an established set of qualifications for those doing such testing. At this time, the only such program is that administered by EPA under authority of sections 402 and 404 of the Toxic Substances Control Act. Therefore HUD requires in the final rule that all dust and soil testing, as well as lead-based paint inspections, risk assessments, clearances and abatements, be performed or approved by people certified in accordance with EPA regulations or a State or tribal program authorized by EPA. To increase the availability of persons qualified to perform clearance examinations, HUD allows certified clearance technicians to perform clearances; and HUD also allows uncertified but trained technicians to perform clearances, provided the clearance report is signed by a certified lead-based paint inspector or risk assessor.

The proposed rule also required workers performing interim controls to be supervised by a person who is certified under EPA procedures as an abatement supervisor. Some commenters felt that it was unnecessary to require that interim controls workers be supervised by a certified abatement supervisor, suggesting that such workers could simply be trained in safe work practices. HUD agrees and requires in the final rule that workers performing lead-based paint maintenance and interim controls, including paint stabilization, only be trained in safe work practices. A series of optional acceptable training programs is listed.

e. Options to Provide Greater Flexibility. Several commenters on the proposed rule urged that HUD allow greater flexibility in ways to meet the goals of the rule. In particular, it was suggested that options be provided, such as the standard treatments recommended by the Task Force on Lead-Based Hazard Reduction and

Financing as an option to conducting a risk assessment and interim controls. Such options would allow owners to select the procedure that is most cost-effective for them to achieve the goal of lead-based paint hazard control. The standard treatments option has been incorporated into today's final rule.

In the proposed rule, HUD included a provision requiring owners of multifamily housing with project-based rental assistance to prepare a lead hazard reduction plan. The hazard reduction plan was a suggestion of the Task Force on Lead-Based Paint Hazard Reduction and Financing. Its purpose was to give owners flexibility in prioritizing hazard reduction work. Several commenters, however, noted that it would be a paperwork "nightmare," not only for the owners but for HUD as well. Therefore the final rule requires simply that the hazard reduction work be completed within 90 days after completion of the risk assessment report in units occupied by children of less than six years of age and within 12 months in all other units. HUD believes this change provides flexibility without unnecessary paperwork.

HUD recognizes that some States, tribes, or local governments may have established procedures for lead-based paint evaluation and hazard reduction that may be somewhat different than but as protective as those in this rule. Therefore the rule provides that HUD may waive or modify certain requirements if the Department determines that such local provisions are as protective as those of the HUD rule.

f. Avoidance of Duplication. The final rule was written with careful consideration of existing regulations developed by other Federal agencies, States, Indian tribes and localities. To minimize duplication and avoid confusion, HUD has explicitly stated that this rulemaking does not preclude States, Indian tribes or localities from conducting a more protective procedure than the minimum requirements set out in the proposed rule. Similarly, if more than one requirement covers a condition or activity, the most protective method shall apply. HUD has worked and continues to work closely with the EPA and CDC to ensure that regulations from two or more Federal agencies are consistent and not duplicative. Wherever possible, HUD has referenced relevant requirements established by EPA.

VII. Findings and Certifications

A. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This final rule does not impose any Federal mandates on any State, local, or tribal governments or the private sector within the meaning of Unfunded Mandates Reform Act of 1995.

B. Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The Finding of No Significant Impact is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC.

C. Executive Order 12866, Regulatory Planning and Review

This rule was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866 on Regulatory Planning and Review, issued by the President on September 30, 1993. OMB determined that this rule is an economically significant regulatory action, as defined in section 3(f)(1) of the Order. As described in section VI of this preamble, an Economic Analysis (EA) has been prepared that examines the economic costs and benefits of the final rule. The EA is available for inspection and copying in the office of the Departments' Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410. Any changes made to the final rule subsequent to its submission to OMB are identified in the docket file, which is also available for public inspection in the office of the Rules Docket Clerk.

D. Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this rule will not have federalism implications concerning the division of local, State, and Federal responsibilities. The purpose of this rule is to ensure that housing receiving Federal assistance and federally owned housing that is to be sold does not pose

lead-based paint hazards to young children. It implements Title X of the Housing and Community Development Act of 1992. No programmatic or policy change will result from this rule that will affect the relationship between the Federal government and State and local governments.

E. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

This rule will not pose an environmental health risk or safety risk for children.

F. Congressional Review of Major Final Rules

This final rule is a "major rule" as defined in the Congressional Review Act (5 U.S.C. Chapter 8).

VIII. References

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17. National Academy of Sciences 1993. *Measuring Lead Exposure in Infants, Children and Other Sensitive Populations*. Committee on Measuring Lead in Critical Populations, Board on Environmental Studies and Toxicology, Commission on Life Sciences, National Academy of Sciences, 1993.
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List of Subjects

24 CFR Part 35

Grant programs—housing and community development, Lead poisoning, Mortgage insurance, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low and moderate income housing, Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Grant programs—housing and community development, Grant programs—Indians, Indians, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Incorporation by reference, Lead poisoning, Loan programs—housing and community development, Minimum property standards, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 203

Hawaiian Natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 206

Aged, Condominiums, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 280

Community development, Grant programs—housing and community development, Loan programs—housing and community development, Low and moderate income housing, Nonprofit organizations, Reporting and recordkeeping requirements.

24 CFR Part 291

Community facilities, Conflict of interests, Homeless, Lead poisoning, Low and moderate income housing, Mortgages, Reporting and recordkeeping requirements, Surplus government property.

24 CFR Part 511

Administrative practice and procedure, Grant programs—housing and community development, Lead poisoning, Low and moderate income

housing, Reporting and recordkeeping requirements, Technical assistance.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Lead poisoning, Loan programs—housing and community development, Low and moderate income housing, New communities, Northern Mariana Islands, Pacific Islands Trust Territory, Pockets of poverty, Puerto Rico, Reporting and recordkeeping requirements, Small cities, Student aid, Virgin Islands.

24 CFR Part 572

Condominiums, Cooperatives, Fair housing, Government property, Grant programs—housing and community development, Low and moderate income housing, Nonprofit organizations, Reporting and recordkeeping requirements.

24 CFR Part 573

Condominiums, Fair housing, Government property, Grant programs—housing and community development, Low and moderate income housing, Nonprofit organizations, Reporting and recordkeeping requirements.

24 CFR Part 574

AIDS, Community facilities, Disabled, Emergency shelter, Grant programs—health programs, Grant programs—housing and community development, Grant programs—social programs, Homeless, Housing, Low and moderate income housing, Nonprofit organizations, Rent subsidies, Reporting and recordkeeping requirements, Technical assistance.

24 CFR Part 576

Community facilities, Emergency shelter grants, Grant programs—housing and community development, Grant programs—social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 582

Homeless, Rent subsidies, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

24 CFR Part 583

Homeless, Rent subsidies, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

24 CFR Part 585

Grant programs—housing and community development, Homeless, Low and very low-income families, Reporting and recordkeeping requirements.

24 CFR Part 761

Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 881

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 882

Grant programs—housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 883

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 886

Grant programs—housing and community development, Lead poisoning, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 891

Aged, Capital advance programs, Civil rights, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Low- and moderate-income housing, Mental health programs, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 901

Administrative practice and procedure, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 906

Grant programs—housing and community development, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 941

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 965

Energy conservation, Government procurement, Grant programs—housing and community development, Lead poisoning, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements, Utilities.

24 CFR Part 968

Grant programs—housing and community development, Indians, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 970

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs—housing and community development, Housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 1000

Aged, Community development block grants, Grant programs—housing and community development, Grant programs—Indians, Indians, Individuals with disabilities, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 1003

Alaska, Community development block grants, Grant programs—housing and community development, Indians, Reporting and recordkeeping requirements.

24 CFR Part 1005

Indians, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD is amending title 24 of the Code of Federal Regulations as follows:

PART 35—LEAD-BASED PAINT POISONING PREVENTION IN CERTAIN RESIDENTIAL STRUCTURES

1. The authority citation for 24 CFR part 35 is revised to read as follows:

Authority: 42 U.S.C. 3535(d), 4821, and 4851.

2. Remove Subpart A and redesignate subpart H, consisting of §§ 35.80

through 35.98, as subpart A, consisting of §§ 35.1 through 35.19. The table of contents to redesignated subpart A is revised to read as follows:

Subpart A—Disclosure of Known Lead-Based Paint Hazards Upon Sale or Lease of Residential Property

Sec.

- 35.1 Purpose.
- 35.3 Scope and applicability.
- 35.5 Effective dates.
- 35.7 Definitions.
- 35.9 Disclosure requirements for sellers and lessors.
- 35.11 Opportunity to conduct an evaluation.
- 35.13 Certification and acknowledgement of disclosure.
- 35.15 Agent responsibilities.
- 35.17 Enforcement.
- 35.19 Impact on State and local requirements.

3. Revise subparts B through G and add subparts H through R to read as follows:

Subpart B—General Lead-Based Paint Requirements and Definitions for All Programs

- 35.100 Purpose and applicability.
- 35.105 Effective dates.
- 35.106 Information collection requirements.
- 35.110 Definitions.
- 35.115 Exemptions.
- 35.120 Options.
- 35.125 Notice of evaluation and hazard reduction activities.
- 35.130 Lead hazard information pamphlet.
- 35.135 Use of paint containing lead.
- 35.140 Prohibited methods of paint removal.
- 35.145 Compliance with Federal laws and authorities.
- 35.150 Compliance with other State, tribal, and local laws.
- 35.155 Minimum requirements.
- 35.160 Waivers.
- 35.165 Prior evaluation or hazard reduction.
- 35.170 Noncompliance with the requirements of subparts B through R.
- 35.175 Records

Subpart C—Disposition of Residential Property Owned by a Federal Agency Other Than HUD

- 35.200 Purpose and applicability.
- 35.205 Definitions and other general requirements.
- 35.210 Disposition of residential property constructed before 1960.
- 35.215 Disposition of residential property constructed after 1959 and before 1978.

Subpart D—Project-Based Assistance Provided by a Federal Agency Other Than HUD

- 35.300 Purpose and applicability.
- 35.305 Definitions and other general requirements.
- 35.310 Notices and pamphlet.
- 35.315 Risk assessments.
- 35.320 Hazard reduction.
- 35.325 Child with an environmental intervention blood lead level.

Subpart E [Reserved]

Subpart F—HUD-Owned Single Family Property

- 35.500 Purpose and applicability.
- 35.505 Definitions and other general requirements.
- 35.510 Required procedures.

Subpart G—Multifamily Mortgage Insurance

- 35.600 Purpose and applicability.
- 35.605 Definitions and other general requirements.
- 35.610 Exemption.
- 35.615 Notices and pamphlet.
- 35.620 Multifamily insured property constructed before 1960.
- 35.625 Multifamily Insured Property constructed after 1959 and before 1978.
- 35.630 Conversions and Major Rehabilitations

Subpart H—Project-Based Rental Assistance

- 35.700 Purpose and applicability.
- 35.705 Definitions and other general requirements.
- 35.710 Notices and pamphlet.
- 35.715 Multifamily properties receiving more than \$5,000 per unit.
- 35.720 Multifamily properties receiving up to \$5,000 per unit, and single-family properties.
- 35.725 Section 8 rent adjustments.
- 35.730 Child with an environmental intervention blood lead level.

Subpart I—HUD-Owned and Mortgagee-in-Possession Multifamily Property.

- 35.800 Purpose and applicability.
- 35.805 Definitions and other general requirements.
- 35.810 Notices and pamphlet.
- 35.815 Evaluation.
- 35.820 Interim controls.
- 35.825 Ongoing lead-based paint maintenance and reevaluation.
- 35.830 Child with an environmental intervention blood lead level.

Subpart J—Rehabilitation

- 35.900 Purpose and applicability.
- 35.905 Definitions and other general requirements.
- 35.910 Notices and pamphlet.
- 35.915 Calculating rehabilitation costs, except for the CILP program.
- 35.920 Calculating rehabilitation costs for the Flexible-Subsidy—CILP Program.
- 35.925 Examples of determining applicable requirements.
- 35.930 Evaluation and hazard reduction requirements.
- 35.935 Ongoing lead-based paint maintenance activities.
- 35.940 Special requirements for insular areas.

Subpart K—Acquisition, Leasing, Support Services, or Operation.

- 35.1000 Purpose and applicability.
- 35.1005 Definitions and other general requirements.
- 35.1010 Notices and pamphlet.
- 35.1015 Visual assessment, paint stabilization, and maintenance.

35.1020 Funding for evaluation and hazard reduction.

Subpart L—Public Housing Programs

- 35.1100 Purpose and applicability.
- 35.1105 Definitions and other general requirements.
- 35.1110 Notices and pamphlet.
- 35.1115 Evaluation.
- 35.1120 Hazard reduction.
- 35.1125 Evaluation and hazard reduction before acquisition and development.
- 35.1130 Child with an environmental intervention blood lead level.
- 35.1135 Eligible costs.
- 35.1140 Insurance coverage

Subpart M—Tenant-Based Rental Assistance

- 35.1200 Purpose and applicability.
- 35.1205 Definitions and other general requirements.
- 35.1210 Notices and pamphlet.
- 35.1215 Activities at initial and periodic inspections.
- 35.1220 Ongoing lead-based paint maintenance activities
- 35.1225 Child with an environmental intervention blood lead level.

Subparts N–Q [Reserved]

Subpart R—Methods and Standards for Lead-Based Paint Hazard Evaluation and Hazard Reduction Activities.

- 35.1300 Purpose and applicability
- 35.1305 Definitions and other general requirements.
- 35.1310 References.
- 35.1315 Collection and laboratory analysis of samples.
- 35.1320 Lead-based paint inspections and risk assessments.
- 35.1325 Abatement.
- 35.1330 Interim controls.
- 35.1335 Standard treatments.
- 35.1340 Clearance.
- 35.1345 Occupant protection and worksite preparation
- 35.1350 Safe work practices.
- 35.1355 Ongoing lead-based paint maintenance and reevaluation activities.

Subpart B—General Lead-Based Paint Requirements and Definitions for All Programs.

§ 35.100 Purpose and applicability.

(a) *Purpose.* The requirements of subparts B through R of this part are

promulgated to implement the Lead-Based Paint Poisoning Prevention Act, as amended (42 U.S.C. 4821 *et seq.*), and the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851 *et seq.*).

(b) *Applicability.*—(1) *This subpart.*

This subpart applies to all target housing that is federally owned and target housing receiving Federal assistance to which subparts C, D, F through M, and R of this part apply, except where indicated.

(2) *Other subparts.*—(i) *General.*

Subparts C, D, and F through M of this part each set forth requirements for a specific type of Federal housing activity or assistance, such as multifamily mortgage insurance, project-based rental assistance, rehabilitation, or tenant-based rental assistance. Subpart R of this part provides standards and methods for activities required in subparts B, C, D, and F through M of this part.

(ii) *Application to programs.* Most HUD housing programs are covered by only one subpart of this part, but some programs can be used for more than one type of assistance and therefore are covered by more than one subpart of this part. A current list of programs covered by each subpart of this part is available on the internet at www.hud.gov, or by mail from the National Lead Information Center at 1–800–424–LEAD. Examples of flexible programs that can provide more than one type of assistance are the HOME Investment Partnerships program, the Community Development Block Grant program, and the Indian Housing Block Grant Program. Grantees, participating jurisdictions, Indian tribes and other entities administering such flexible programs must decide which subpart applies to the type of assistance being provided to a particular dwelling unit or residential property.

(iii) *Application to dwelling units.* In some cases, more than one type of assistance may be provided to the same dwelling unit. In such cases, the subpart

or section with the most protective initial hazard reduction requirements applies. Paragraph (c) of this section provides a table that lists the subparts and sections of this part in order from the most protective to the least protective. (This list is based only on the requirements for initial hazard reduction. The summary of requirements on this list is not a complete list of requirements. It is necessary to refer to the applicable subparts and sections to determine all applicable requirements.)

(iv) *Example.* A multifamily building has 100 dwelling units and was built in 1965. The property is financed with HUD multifamily mortgage insurance. This building is covered by subpart G of this part (see § 35.625—Multifamily mortgage insurance for properties constructed after 1959), which is at protectiveness level 5 in the table set forth in paragraph (c) of this section. In the same building, however, 50 of the 100 dwelling units are receiving project-based assistance, and the average annual assistance per assisted unit is \$5,500. Those 50 units, and common areas servicing those units, are covered by the requirements of subpart H of this part (see § 35.715—Project-based assistance for multifamily properties receiving more than \$5,000 per unit), which are at protectiveness level 3. Therefore, because level 3 is a higher level of protectiveness than level 5, the units receiving project-based assistance, and common areas servicing those units, must comply at level 3, while the rest of the building can be operated at level 5. The owner may choose to operate the entire building at level 3 for simplicity.

(c) *Table One.* The following table lists the subparts and sections of this part applying to HUD programs in order from most protective to least protective hazard reduction requirements. The summary of hazard reduction requirements in this table is not complete. Readers must refer to relevant subpart for complete requirements.

Level of protection	Subpart, section, and type of assistance	Hazard reduction requirements
1	Subpart L, Public housing. Subpart G, § 35.630, Multifamily mortgage insurance for conversions and major rehabilitations.	Full abatement of lead-based paint.
2	Subpart J, § 35.930(d), Properties receiving more than \$25,000 per unit in rehabilitation assistance.	Abatement of lead-based paint hazards.
3	Subpart G, § 35.620, Multifamily mortgage insurance for properties constructed before 1960, other than conversions and major rehabilitations. Subpart H, § 35.715, Project-based assistance for multifamily properties receiving more than \$5,000 per unit. Subpart I, HUD-owned multifamily property. Subpart J, § 35.930(c), Properties receiving more than \$5,000 and up to \$25,000 per unit in rehabilitation assistance.	Interim controls.
4	Subpart F, HUD-owned single family properties. Subpart H, § 35.720, Project-based rental assistance for multifamily properties receiving up to \$5,000 per unit and single family properties. Subpart K, Acquisition, leasing, support services, or operation. Subpart M, Tenant-based rental assistance.	Paint stabilization.

Level of protection	Subpart, section, and type of assistance	Hazard reduction requirements
5	Subpart G, § 35.625, Multifamily mortgage insurance for properties constructed after 1959	Ongoing lead-based paint maintenance.
6	Subpart J, § 35.930(b), Properties receiving up to and including \$5,000 in rehabilitation assistance	Safe work practices during rehabilitation.

§ 35.105 Effective dates.

The effective date for subparts B through R of this part is September 15, 2000, except that the effective date for prohibited methods of paint removal, described in § 35.140, is November 15, 1999. Subparts F through M of this part provide further information on the application of the effective date to specific programs. Before September 15, 2000, a designated party has the option of following the procedures in subparts B through R of this part, or complying with current HUD lead-based paint regulations.

§ 35.106 Information collection requirements.

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 2501–3520), and have been assigned OMB control number 2539–0009. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

§ 35.110 Definitions.

Abatement means any set of measures designed to permanently eliminate lead-based paint or lead-based paint hazards (see definition of “permanent”).

Abatement includes:

(1) The removal of lead-based paint and dust-lead hazards, the permanent enclosure or encapsulation of lead-based paint, the replacement of components or fixtures painted with lead-based paint, and the removal or permanent covering of soil-lead hazards; and

(2) All preparation, cleanup, disposal, and post abatement clearance testing activities associated with such measures.

Act means the Lead-Based Paint Poisoning Prevention Act, as amended, 42 U.S.C. 4822 *et seq.*

Bare soil means soil or sand not covered by grass, sod, other live ground covers, wood chips, gravel, artificial turf, or similar covering.

Certified means licensed or certified to perform such activities as risk assessment, lead-based paint inspection,

or abatement supervision, either by a State or Indian tribe with a lead-based paint certification program authorized by the Environmental Protection Agency (EPA), or by the EPA, in accordance with 40 CFR part 745, subparts L or Q.

Chewable surface means an interior or exterior surface painted with lead-based paint that a young child can mouth or chew. A chewable surface is the same as an “accessible surface” as defined in 42 U.S.C. 4851b(2)). Hard metal substrates and other materials that cannot be dentured by the bite of a young child are not considered chewable.

Clearance examination means an activity conducted following lead-based paint hazard reduction activities to determine that the hazard reduction activities are complete and that no soil-lead hazards or settled dust-lead hazards, as defined in this part, exist in the dwelling unit or worksite. The clearance process includes a visual assessment and collection and analysis of environmental samples. Dust-lead standards for clearance are found at § 35.1320.

CILP recipient means an owner of a multifamily property which is undergoing rehabilitation funded by the Flexible Subsidy-Capital Improvement Loan Program (CILP).

Common area means a portion of a residential property that is available for use by occupants of more than one dwelling unit. Such an area may include, but is not limited to, hallways, stairways, laundry and recreational rooms, playgrounds, community centers, on-site day care facilities, garages and boundary fences.

Component means an architectural element of a dwelling unit or common area identified by type and location, such as a bedroom wall, an exterior window sill, a baseboard in a living room, a kitchen floor, an interior window sill in a bathroom, a porch floor, stair treads in a common stairwell, or an exterior wall.

Composite sample means a collection of more than one sample of the same medium (e.g., dust, soil or paint) from the same type of surface (e.g., floor, interior window sill, or window trough), such that multiple samples can be analyzed as a single sample.

Containment means the physical measures taken to ensure that dust and

debris created or released during lead-based paint hazard reduction are not spread, blown or tracked from inside to outside of the worksite.

Designated party means a Federal agency, grantee, subrecipient, participating jurisdiction, housing agency, CILP recipient, Indian tribe, tribally designated housing entity (TDHE), sponsor or property owner responsible for complying with applicable requirements.

Deteriorated paint means any interior or exterior paint or other coating that is peeling, chipping, chalking or cracking, or any paint or coating located on an interior or exterior surface or fixture that is otherwise damaged or separated from the substrate.

Dry sanding means sanding without moisture and includes both hand and machine sanding.

Dust-lead hazard means surface dust that contains a dust-lead loading (area concentration of lead) at or exceeding the levels promulgated by the EPA pursuant to section 403 of the Toxic Substances Control Act or, if such levels are not in effect, the standards in § 35.1320.

Dwelling unit means a:

(1) Single-family dwelling, including attached structures such as porches and stoops; or

(2) Housing unit in a structure that contains more than 1 separate housing unit, and in which each such unit is used or occupied, or intended to be used or occupied, in whole or in part, as the home or separate living quarters of 1 or more persons.

Encapsulation means the application of a covering or coating that acts as a barrier between the lead-based paint and the environment and that relies for its durability on adhesion between the encapsulant and the painted surface, and on the integrity of the existing bonds between paint layers and between the paint and the substrate.

Encapsulation may be used as a method of abatement if it is designed and performed so as to be permanent (see definition of “permanent”).

Enclosure means the use of rigid, durable construction materials that are mechanically fastened to the substrate in order to act as a barrier between lead-based paint and the environment. Enclosure may be used as a method of

abatement if it is designed to be permanent (see definition of "permanent").

Environmental intervention blood lead level means a confirmed concentration of lead in whole blood equal to or greater than 20 µg/dL (micrograms of lead per deciliter) for a single test or 15–19 µg/dL in two tests taken at least 3 months apart.

Evaluation means a risk assessment, a lead hazard screen, a lead-based paint inspection, paint testing, or a combination of these to determine the presence of lead-based paint hazards or lead-based paint.

Expected to reside means there is actual knowledge that a child will reside in a dwelling unit reserved for the elderly or designated exclusively for persons with disabilities. If a resident woman is known to be pregnant, there is actual knowledge that a child will reside in the dwelling unit.

Federal agency means the United States or any executive department, independent establishment, administrative agency and instrumentality of the United States, including a corporation in which all or a substantial amount of the stock is beneficially owned by the United States or by any of these entities. The term "Federal agency" includes, but is not limited to, Rural Housing Service (formerly Rural Housing and Community Development Service that was formerly Farmer's Home Administration), Resolution Trust Corporation, General Services Administration, Department of Defense, Department of Veterans Affairs, Department of the Interior, and Department of Transportation.

Federally owned property means residential property owned or managed by a Federal agency, or for which a Federal agency is a trustee or conservator.

Firm commitment means a valid commitment issued by HUD or the Federal Housing Commissioner setting forth the terms and conditions upon which a mortgage will be insured or guaranteed.

Friction surface means an interior or exterior surface that is subject to abrasion or friction, including, but not limited to, certain window, floor, and stair surfaces.

g means gram, *mg* means milligram (thousandth of a gram), and *µg* means microgram (millionth of a gram).

Grantee means any State or local government, Indian tribe, IHBG recipient, insular area or nonprofit organization that has been designated by HUD to administer Federal housing assistance under a program covered by

subparts J and K of this part, except the HOME program or the Flexible Subsidy-Capital Improvement Loan Program (CILP).

Hard costs of rehabilitation means:

- (1) Costs to correct substandard conditions or to meet applicable local rehabilitation standards;
- (2) Costs to make essential improvements, including energy-related repairs, and those necessary to permit use by persons with disabilities; and costs to repair or replace major housing systems in danger of failure; and
- (3) Costs of non-essential improvements, including additions and alterations to an existing structure; but
- (4) Hard costs do not include administrative costs (e.g., overhead for administering a rehabilitation program, processing fees, etc.).

Hazard reduction means measures designed to reduce or eliminate human exposure to lead-based paint hazards through methods including interim controls or abatement or a combination of the two.

HEPA vacuum means a vacuum cleaner device with an included high-efficiency particulate air (HEPA) filter through which the contaminated air flows, operated in accordance with the instructions of its manufacturer. A HEPA filter is one that captures at least 99.97 percent of airborne particles of at least 0.3 micrometers in diameter.

Housing for the elderly means retirement communities or similar types of housing reserved for households composed of one or more persons 62 years of age or more, or other age if recognized as elderly by a specific Federal housing assistance program.

Housing receiving Federal assistance means housing which is covered by an application for HUD mortgage insurance, receives housing assistance payments under a program administered by HUD, or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program administered by an agency other than HUD.

HUD means the United States Department of Housing and Urban Development.

HUD-owned property means residential property owned or managed by HUD, or for which HUD is a trustee or conservator.

Impact surface means an interior or exterior surface that is subject to damage by repeated sudden force, such as certain parts of door frames.

Indian Housing Block Grant (IHBG) recipient means a tribe or a tribally designated housing entity (TDHE) receiving IHBG funds.

Indian tribe means a tribe as defined in the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*)

Inspection (See Lead-based paint inspection).

Insular areas means Guam, the Northern Mariana Islands, the United States Virgin Islands and American Samoa.

Interim controls means a set of measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards. Interim controls include, but are not limited to, repairs, painting, temporary containment, specialized cleaning, clearance, ongoing lead-based paint maintenance activities, and the establishment and operation of management and resident education programs.

Interior window sill means the portion of the horizontal window ledge that protrudes into the interior of the room, adjacent to the window sash when the window is closed. The interior window sill is sometimes referred to as the window stool.

Lead-based paint means paint or other surface coatings that contain lead equal to or exceeding 1.0 milligram per square centimeter or 0.5 percent by weight or 5,000 parts per million (ppm) by weight.

Lead-based paint hazard means any condition that causes exposure to lead from dust-lead hazards, soil-lead hazards, or lead-based paint that is deteriorated or present in chewable surfaces, friction surfaces, or impact surfaces, and that would result in adverse human health effects.

Lead-based paint inspection means a surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation.

Lead hazard screen means a limited risk assessment activity that involves paint testing and dust sampling and analysis as described in 40 CFR 745.227(c) and soil sampling and analysis as described in 40 CFR 745.227(d).

Mortgagee means a lender of a mortgage loan.

Mortgagor means a borrower of a mortgage loan.

Multifamily property means a residential property containing five or more dwelling units.

Occupant means a person who inhabits a dwelling unit.

Owner means a person, firm, corporation, nonprofit organization, partnership, government, guardian, conservator, receiver, trustee, executor,

or other judicial officer, or other entity which, alone or with others, owns, holds, or controls the freehold or leasehold title or part of the title to property, with or without actually possessing it. The definition includes a vendee who possesses the title, but does not include a mortgagee or an owner of a reversionary interest under a ground rent lease.

Paint stabilization means repairing any physical defect in the substrate of a painted surface that is causing paint deterioration, removing loose paint and other material from the surface to be treated, and applying a new protective coating or paint.

Paint testing means the process of determining, by a certified lead-based paint inspector or risk assessor, the presence or the absence of lead-based paint on deteriorated paint surfaces or painted surfaces to be disturbed or replaced.

Paint removal means a method of abatement that permanently eliminates lead-based paint from surfaces.

Painted surface to be disturbed means a paint surface that is to be scraped, sanded, cut, penetrated or otherwise affected by rehabilitation work in a manner that could potentially create a lead-based paint hazard by generating dust, fumes, or paint chips.

Participating jurisdiction means any State or local government that has been designated by HUD to administer a HOME program grant.

Permanent means an expected design life of at least 20 years.

Play area means an area of frequent soil contact by children of less than 6 years of age, as indicated by the presence of play equipment (e.g. sandboxes, swing sets, sliding boards, etc.) or toys or other children's possessions, observations of play patterns, or information provided by parents, residents or property owners.

Project-based rental assistance means Federal rental assistance that is tied to a residential property with a specific location and remains with that particular location throughout the term of the assistance.

Public health department means a State, tribal, county or municipal public health department or the Indian Health Service.

Public housing development means a residential property assisted under the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*), but not including housing assisted under section 8 of the 1937 Act.

Reevaluation means a visual assessment of painted surfaces and limited dust and soil sampling conducted periodically following lead-

based paint hazard reduction where lead-based paint is still present.

Rehabilitation means the improvement of an existing structure through alterations, incidental additions or enhancements. Rehabilitation includes repairs necessary to correct the results of deferred maintenance, the replacement of principal fixtures and components, improvements to increase the efficient use of energy, and installation of security devices.

Replacement means a strategy of abatement that entails the removal of building components that have surfaces coated with lead-based paint and the installation of new components free of lead-based paint.

Residential property means a dwelling unit, common areas, building exterior surfaces, and any surrounding land, including outbuildings, fences and play equipment affixed to the land, belonging to an owner and available for use by residents, but not including land used for agricultural, commercial, industrial or other non-residential purposes, and not including paint on the pavement of parking lots, garages, or roadways.

Risk assessment means:

(1) An on-site investigation to determine the existence, nature, severity, and location of lead-based paint hazards; and

(2) The provision of a report by the individual or firm conducting the risk assessment explaining the results of the investigation and options for reducing lead-based paint hazards.

Single family property means a residential property containing one through four dwelling units.

Single room occupancy (SRO) housing means housing consisting of zero-bedroom dwelling units that may contain food preparation or sanitary facilities or both (see Zero-bedroom dwelling).

Soil-lead hazard means bare soil on residential property that contains lead equal to or exceeding levels promulgated by the U.S. Environmental Protection Agency pursuant to section 403 of the Toxic Substances Control Act or, if such levels are not in effect, the following levels: 400 µg/g in play areas; and 2000 µg/g in other areas with bare soil that total more than 9 square feet (0.8 square meters) per residential property.

Sponsor means mortgagor (borrower).

Subrecipient means any nonprofit organization selected by the grantee or participating jurisdiction to administer all or a portion of the Federal rehabilitation assistance or other non-rehabilitation assistance, or any such organization selected by a subrecipient of the grantee or participating

jurisdiction. An owner or developer receiving Federal rehabilitation assistance or other assistance for a residential property is not considered a subrecipient for the purposes of carrying out that project.

Standard treatments means a series of hazard reduction measures designed to reduce all lead-based paint hazards in a dwelling unit without the benefit of a risk assessment or other evaluation.

Substrate means the material directly beneath the painted surface out of which the components are constructed, including wood, drywall, plaster, concrete, brick or metal.

Target housing means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless a child of less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any zero-bedroom dwelling. In the case of jurisdictions which banned the sale or use of lead-based paint prior to 1978, HUD may designate an earlier date.

Tenant means the individual named as the lessee in a lease, rental agreement or occupancy agreement for a dwelling unit.

Visual assessment means looking for, as applicable:

- (1) Deteriorated paint;
- (2) Visible surface dust, debris and residue as part of a risk assessment or clearance examination; or
- (3) The completion or failure of a hazard reduction measure.

Wet sanding or wet scraping means a process of removing loose paint in which the painted surface to be sanded or scraped is kept wet to minimize the dispersal of paint chips and airborne dust.

Window trough means the area between the interior window sill (stool) and the storm window frame. If there is no storm window, the window trough is the area that receives both the upper and lower window sashes when they are both lowered.

Worksite means an interior or exterior area where lead-based paint hazard reduction activity takes place. There may be more than one worksite in a dwelling unit or at a residential property.

Zero-bedroom dwelling means any residential dwelling in which the living areas are not separated from the sleeping area. The term includes efficiencies, studio apartments, dormitory or single room occupancy housing, military barracks, and rentals of individual rooms in residential dwellings (see Single room occupancy (SRO)).

§ 35.115 Exemptions.

(a) Subparts B through R of this part do not apply to the following:

(1) A residential property for which construction was completed on or after January 1, 1978, or, in the case of jurisdictions which banned the sale or residential use of lead-containing paint prior to 1978, an earlier date as HUD may designate (see § 35.160).

(2) A zero-bedroom dwelling unit, including a single room occupancy (SRO) dwelling unit.

(3) Housing for the elderly, or a residential property designated exclusively for persons with disabilities; except this exemption shall not apply if a child less than age 6 resides or is expected to reside in the dwelling unit (see definitions of "housing for the elderly" and "expected to reside" in § 35.110).

(4) Residential property found not to have lead-based paint by a lead-based paint inspection conducted in accordance with § 35.1320(a) (for more information regarding inspection procedures consult the 1997 edition of Chapter 7 of the HUD Guidelines). Results of additional test(s) by a certified lead-based paint inspector may be used to confirm or refute a prior finding.

(5) Residential property in which all lead-based paint has been identified, removed, and clearance has been achieved in accordance with 40 CFR 745.227(b)(e) before September 15, 2000, or in accordance with §§ 35.1320, 35.1325 and 35.1340 on or after September 15, 2000. This exemption does not apply to residential property where enclosure or encapsulation has been used as a method of abatement.

(6) An unoccupied dwelling unit or residential property that is to be demolished, provided the dwelling unit or property will remain unoccupied until demolition.

(7) A property or part of a property that is not used and will not be used for human residential habitation, except that spaces such as entryways, hallways, corridors, passageways or stairways serving both residential and nonresidential uses in a mixed-use property shall not be exempt.

(8) Any rehabilitation that does not disturb a painted surface.

(9) For emergency actions immediately necessary to safeguard against imminent danger to human life, health or safety, or to protect property from further structural damage (such as when a property has been damaged by a natural disaster, fire, or structural collapse), occupants shall be protected from exposure to lead in dust and debris generated by such emergency actions to

the extent practicable, and the requirements of subparts B through R of this part shall not apply. This exemption applies only to repairs necessary to respond to the emergency. The requirements of subparts B through R of this part shall apply to any work undertaken subsequent to, or above and beyond, such emergency actions.

(10) If a Federal law enforcement agency has seized a residential property and owns the property for less than 270 days, §§ 35.210 and 35.215 shall not apply to the property.

(11) The requirements of subpart K of this part do not apply if the assistance being provided is emergency rental assistance or foreclosure prevention assistance, provided that this exemption shall expire for a dwelling unit no later than 100 days after the initial payment or assistance.

(12) Performance of an evaluation or lead-based paint hazard reduction or lead-based paint abatement on an exterior painted surface as required under this part may be delayed for a reasonable time during a period when weather conditions are unsuitable for conventional construction activities.

(13) Where abatement of lead-based paint hazards or lead-based paint is required by this part and the property is listed or has been determined to be eligible for listing in the National Register of Historic Places or contributing to a National Register Historic District, the designated party may, if requested by the State Historic Preservation Office, conduct interim controls in accordance with § 35.1330 instead of abatement. If interim controls are conducted, ongoing lead-based paint maintenance and reevaluation shall be conducted as required by the applicable subpart of this part in accordance with § 35.1355.

(b) For the purposes of subpart C of this part, each Federal agency other than HUD will determine whether appropriations are sufficient to implement this rule. If appropriations are not sufficient, subpart C of this part shall not apply to that Federal agency. If appropriations are sufficient, subpart C of this part shall apply.

§ 35.120 Options.

(a) *Standard treatments.* Where interim controls are required by this part, the designated party has the option to presume that lead-based paint or lead-based paint hazards or both are present throughout the residential property. In such a case, evaluation is not required. Standard treatments shall then be conducted in accordance with § 35.1335 on all applicable surfaces, including soil. Standard treatments are

completed only when clearance is achieved in accordance with § 35.1340.

(b) *Abatement.* Where abatement is required by this part, the designated party may presume that lead-based paint or lead-based paint hazards or both are present throughout the residential property. In such a case, evaluation is not required. Abatement shall then be conducted on all applicable surfaces, including soil, in accordance with § 35.1325, and completed when clearance is achieved in accordance with § 35.1340. This option is not available in public housing, where inspection is required.

(c) *Lead hazard screen.* Where a risk assessment is required, the designated party may choose first to conduct a lead hazard screen in accordance with § 35.1320(b). If the results of the lead hazard screen indicate the need for a full risk assessment (e.g., if the environmental measurements exceed levels established for lead hazard screens in § 35.1320(b)(2)), a complete risk assessment shall be conducted. Environmental samples collected for the lead hazard screen may be used in the risk assessment. If the results of the lead hazard screen do not indicate the need for a follow-up risk assessment, a risk assessment is not required.

(d) *Paint testing.* Where paint stabilization or interim controls of deteriorated paint surfaces are required by this rule, the designated party has the option to conduct paint testing of all surfaces with non-intact paint. If paint testing indicates the absence of lead-based paint on a specific surface, paint stabilization or interim controls are not required on that surface.

§ 35.125 Notice of evaluation and hazard reduction activities.

The following activities shall be conducted if notice is required by subparts D and F through M of this part.

(a) *Notice of evaluation or presumption.* When evaluation is undertaken and lead-based paint or lead-based paint hazards are found to be present, or if a presumption is made that lead-based paint or lead-based paint hazards are present in accordance with the options described in § 35.120, the designated party shall provide a notice to occupants within 15 calendar days of the date when the designated party receives the report or makes the presumption.

(1) The notice of the evaluation shall include:

(i) A summary of the nature, scope and results of the evaluation;

(ii) A contact name, address and telephone number for more information,

and to obtain access to the actual evaluation report; and

(iii) The date of the notice.

(2) The notice of presumption shall include:

(i) The nature and scope of the presumption;

(ii) A contact name, address and telephone number for more information; and

(iii) The date of the notice.

(b) *Notice of hazard reduction activity.* When hazard reduction activities are undertaken, each designated party shall:

(1) Provide a notice to occupants no more than 15 calendar days after the hazard reduction activities have been completed. Notice of hazard reduction shall include, but not be limited to:

(i) A summary of the nature, scope and results (including clearance), of the hazard reduction activities.

(ii) A contact name, address and telephone number for more information; and

(iii) Available information on the location of any remaining lead-based paint in the rooms, spaces or areas where hazard reduction activities were conducted, on a surface-by-surface basis;

(2) Update the notice, based on reevaluation of the residential property and as any additional hazard reduction work is conducted.

(c) *Availability of notices of evaluation, presumption, and hazard reduction activities.* (1) The notices of evaluation, presumption, and hazard reduction shall be of a size and type that is easily read by occupants.

(2) To the extent practicable, each notice shall be made available, upon request, in a format accessible to persons with disabilities (e.g., Braille, large type, computer disk, audio tape).

(3) Each notice shall be provided in the occupants' primary language or in the language of the occupants' contract or lease.

(4) The designated party shall provide each notice to the occupants by:

(i) Posting and maintaining it in centrally located common areas and distributing it to any dwelling unit if necessary because the head of household is a person with a known disability; or

(ii) Distributing it to each occupied dwelling unit affected by the evaluation, presumption, or hazard reduction activity or serviced by common areas in which an evaluation, presumption or hazard reduction has taken place.

§ 35.130 Lead hazard information pamphlet.

If provision of a lead hazard information pamphlet is required in

subparts D and F through M of this part, the designated party shall provide to each occupied dwelling unit to which subparts D and F through M of this part apply, the lead hazard information pamphlet developed by EPA, HUD and the Consumer Product Safety Commission pursuant to section 406 of the Toxic Substances Control Act (15 U.S.C. 2686), or an EPA-approved alternative; except that the designated party need not provide a lead hazard information pamphlet if the designated party can demonstrate that the pamphlet has already been provided in accordance with the lead-based paint notification and disclosure requirements at § 35.88(a)(1), or 40 CFR 745.107(a)(1) or in accordance with the requirements for hazard education before renovation at 40 CFR part 745, subpart E.

§ 35.135 Use of paint containing lead.

(a) *New use prohibition.* The use of paint containing more than 0.06 percent dry weight of lead on any interior or exterior surface in federally owned housing or housing receiving Federal assistance is prohibited. As appropriate, each Federal agency shall include the prohibition in contracts, grants, cooperative agreements, insurance agreements, guaranty agreements, trust agreements, or other similar documents.

(b) *Pre-1978 prohibition.* In the case of a jurisdiction which banned the sale or residential use of lead-containing paint before 1978, HUD may designate an earlier date for certain provisions of subparts D and F through M of this part.

§ 35.140 Prohibited methods of paint removal.

The following methods shall not be used to remove paint that is, or may be, lead-based paint:

(a) Open flame burning or torching.

(b) Machine sanding or grinding without a high-efficiency particulate air (HEPA) local exhaust control.

(c) Abrasive blasting or sandblasting without HEPA local exhaust control.

(d) Heat guns operating above 1100 degrees Fahrenheit or charring the paint.

(e) Dry sanding or dry scraping, except dry scraping in conjunction with heat guns or within 1.0 ft. (0.30 m.) of electrical outlets, or when treating defective paint spots totaling no more than 2 sq. ft. (0.2 sq. m.) in any one interior room or space, or totaling no more than 20 sq. ft. (2.0 sq. m.) on exterior surfaces.

(f) Paint stripping in a poorly ventilated space using a volatile stripper that is a hazardous substance in accordance with regulations of the Consumer Product Safety Commission

at 16 CFR 1500.3, and/or a hazardous chemical in accordance with the Occupational Safety and Health Administration regulations at 29 CFR 1910.1200 or 1926.59, as applicable to the work.

§ 35.145 Compliance with Federal laws and authorities.

All lead-based paint activities, including waste disposal, performed under this part shall be performed in accordance with applicable Federal laws and authorities. For example, such activities are subject to the applicable environmental review requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the Toxic Substances Control Act, Title IV (15 U.S.C. 2860 *et seq.*), and other environmental laws and authorities (see, e.g., laws and authorities listed in § 50.4 of this title).

§ 35.150 Compliance with other State, tribal, and local laws.

(a) *HUD responsibility.* If HUD determines that a State, tribal or local law, ordinance, code or regulation provides for evaluation or hazard reduction in a manner that provides a comparable level of protection from the hazards of lead-based paint poisoning to that provided by the requirements of subparts B, C, D, F through M and R of this part and that adherence to the requirements of subparts B, C, D, F through M, and R of this part, would be duplicative or otherwise cause inefficiencies, HUD may modify or waive some or all of the requirements of the subparts in a manner that will promote efficiency while ensuring a comparable level of protection.

(b) *Participant responsibility.* Nothing in this part is intended to relieve any participant in a program covered by this subpart of any responsibility for compliance with State, tribal or local laws, ordinances, codes or regulations governing evaluation and hazard reduction. If a State, tribal or local law, ordinance, code or regulation defines lead-based paint differently than the Federal definition, the more protective definition (i.e., the lower level) shall be followed in that State, tribal or local jurisdiction.

§ 35.155 Minimum requirements.

(a) Nothing in subparts B, C, D, F through M, and R of this part is intended to preclude a designated party or occupant from conducting additional evaluation or hazard reduction measures beyond the minimum requirements established for each program in this regulation. For example, if the applicable subpart requires visual

assessment, the designated party may choose to perform a risk assessment in accordance with § 35.1320. Similarly, if the applicable subpart requires interim controls, a designated party or occupant may choose to implement abatement in accordance with § 35.1325.

(b) To the extent that assistance from any of the programs covered by subparts B, C, D, and F through M of this part is used in conjunction with other HUD program assistance, the most protective requirements prevail.

§ 35.160 Waivers.

In accordance with § 5.110 of this title, on a case-by-case basis and upon determination of good cause, HUD may, subject to statutory limitations, waive any provision of subparts B, C, D, F through M, and R of this part.

§ 35.165 Prior evaluation or hazard reduction.

If an evaluation or hazard reduction was conducted at a residential property or dwelling unit before the property or dwelling unit became subject to the requirements of subparts B, C, D, F through M, and R of this part, such an evaluation, hazard reduction or abatement meets the requirements of subparts B, C, D, F through M, and R of this part and need not be repeated under the following conditions:

(a) *Lead-based paint inspection.* (1) A lead-based paint inspection conducted before August 30, 1999, meets the requirements of this rule if:

(i) At the time of the inspection the lead-based paint inspector was approved by a State or Indian tribe to perform lead-based paint inspections. It is not necessary that the State or tribal approval program had EPA authorization at the time of the inspection.

(ii) Notwithstanding paragraph (a)(1)(i) of this section, the inspection was conducted and accepted as valid by a housing agency in fulfillment of the lead-based paint inspection requirement of the public and Indian housing program.

(2) A lead-based paint inspection conducted after August 29, 1999 must have been conducted by a certified lead-based paint inspector.

(b) *Risk assessment.* (1) A risk assessment must be no more than 12 months old to be considered current.

(2) A risk assessment conducted before August 30, 1999 meets the requirements of this part if at the time of the risk assessment the risk assessor was approved by a State or Indian tribe to perform risk assessments. It is not necessary that the State or tribal approval program had EPA

authorization at the time of the risk assessment.

(3) A risk assessment conducted after August 29, 1999 must have been conducted by a certified risk assessor.

(4) Paragraph (b) of this section does not apply in a case where a risk assessment is required in response to the identification of a child with an environmental intervention blood lead level. In such a case, the requirements in the applicable subpart for responding to a child with an environmental intervention blood lead level shall apply.

(c) *Interim controls.* If a residential property is under a program of interim controls and ongoing lead-based paint maintenance and reevaluation activities established pursuant to a risk assessment conducted in accordance with paragraph (b) of this section, the interim controls that have been conducted meet the requirements of this part if clearance was achieved after such controls were implemented. In such a case, the program of interim controls and ongoing activities shall be continued in accordance with the requirements of this part.

(d) *Abatement.* (1) An abatement conducted before August 30, 1999 meets the requirements of this part if:

(i) At the time of the abatement the abatement supervisor was approved by a State or Indian tribe to perform lead-based paint abatement. It is not necessary that the State or tribal approval program had EPA authorization at the time of the abatement.

(ii) Notwithstanding paragraph (d)(1)(i) of this section, it was conducted and accepted by a housing agency in fulfillment of the lead-based paint abatement requirement of the public housing program or by an Indian housing authority (as formerly defined under the U.S. Housing Act of 1937) in fulfillment of the lead-based paint requirement of the Indian housing program formerly funded under the U.S. Housing Act of 1937.

(2) An abatement conducted after August 29, 1999 must have been conducted under the supervision of a certified lead-based paint abatement supervisor.

§ 35.170 Noncompliance with the requirements of subparts B through R of this part.

(a) *Monitoring and enforcement.* A designated party who fails to comply with any requirement of subparts B, C, D, F through M, and R of this part shall be subject to the sanctions available under the relevant Federal housing assistance or ownership program and

may be subject to other penalties authorized by law.

(b) A property owner who informs a potential purchaser or occupant of lead-based paint or possible lead-based paint hazards in a residential property or dwelling unit, in accordance with subpart A of this part, is not relieved of the requirements to evaluate and reduce lead-based paint hazards in accordance with subparts B through R of this part as applicable.

§ 35.175 Records.

The designated party, as specified in subparts C, D, and F through M of this part, shall keep a copy of each notice, evaluation, and clearance or abatement report required by subparts C, D, and F through M of this part for at least three years. Those records applicable to a portion of a residential property for which ongoing lead-based paint maintenance and/or reevaluation activities are required shall be kept and made available for the Department's review, until at least three years after such activities are no longer required.

Subpart C—Disposition of Residential Property Owned by a Federal Agency Other Than HUD

§ 35.200 Purpose and applicability.

The purpose of this subpart C is to establish procedures to eliminate as far as practicable lead-based paint hazards prior to the sale of a residential property that is owned by a Federal agency other than HUD. The requirements of this subpart apply to any residential property offered for sale on or after September 15, 2000.

§ 35.205 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.210 Disposition of residential property constructed before 1960.

(a) *Evaluation.* The Federal agency shall conduct a risk assessment and a lead-based paint inspection in accordance with 40 CFR 745.227 before the closing of the sale.

(b) *Abatement of lead-based paint hazards.* The risk assessment used for the identification of hazards to be abated shall have been performed no more than 12 months before the beginning of the abatement. The Federal agency shall abate all identified lead-based paint hazards in accordance with 40 CFR 745.227. Abatement is completed when clearance is achieved in accordance with 40 CFR 745.227. Where abatement of lead-based paint hazards is not completed before the

closing of the sale, the Federal agency shall be responsible for assuring that abatement is carried out by the purchaser before occupancy of the property as target housing and in accordance with 40 CFR 745.227.

§ 35.215 Disposition of residential property constructed after 1959 and before 1978.

The Federal agency shall conduct a risk assessment and a lead-based paint inspection in accordance with 40 CFR 745.227. Evaluation shall be completed before closing of the sale according to a schedule determined by the Federal agency. The results of the risk assessment and lead-based paint inspection shall be made available to prospective purchasers as required in subpart A of this part.

Subpart D—Project-Based Assistance Provided by a Federal Agency Other Than HUD

§ 35.300 Purpose and applicability.

The purpose of this subpart D is to establish procedures to eliminate as far as practicable lead-based paint hazards in a residential property that receives more than \$5,000 annually per project in project-based assistance on or after September 15, 2000, under a program administered by a Federal agency other than HUD.

§ 35.305 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.310 Notices and pamphlet.

(a) *Notice.* A notice of evaluation or hazard reduction shall be provided to the occupants in accordance with § 35.125.

(b) *Lead hazard information pamphlet.* The owner shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.315 Risk assessment.

Each owner shall complete a risk assessment in accordance with 40 CFR 745.227(d). Each risk assessment shall be completed in accordance with the schedule established by the Federal agency.

§ 35.320 Hazard reduction.

Each owner shall conduct interim controls consistent with the findings of the risk assessment report. Hazard reduction shall be conducted in accordance with subpart R of this part.

§ 35.325 Child with an environmental intervention blood lead level.

If a child less than 6 years of age living in a federally assisted dwelling unit has an environmental intervention blood lead level, the owner shall immediately conduct a risk assessment in accordance with 40 CFR 745.227(d). Interim controls of identified lead-based paint hazards shall be conducted in accordance with § 35.1330. Interim controls are complete when clearance is achieved in accordance with § 35.1340. The Federal agency shall establish a timetable for completing risk assessments and hazard reduction when an environmental intervention blood lead level child is identified.

Subpart E [Reserved]

Subpart F—HUD-Owned Single Family Property

§ 35.500 Purpose and applicability.

The purpose of this subpart F is to establish procedures to eliminate as far as practicable lead-based paint hazards in HUD-owned single family properties that have been built before 1978 and are sold with mortgages insured under a program administered by HUD. The requirements of this subpart apply to any such residential properties offered for sale on or after September 15, 2000.

§ 35.505 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.510 Required procedures.

(a) The following activities shall be conducted for all properties to which this subpart is applicable:

(1) A visual assessment of all painted surfaces in order to identify deteriorated paint;

(2) Paint stabilization of all deteriorated paint in accordance with § 35.1330(a) and (b); and

(3) Clearance in accordance with § 35.1340.

(b) Occupancy shall not be permitted until all required paint stabilization is complete and clearance is achieved.

(c) If paint stabilization and clearance are not completed before the closing of the sale, the Department shall assure that paint stabilization and clearance are carried out pursuant to subpart R of this part by the purchaser before occupancy.

Subpart G—Multifamily Mortgage Insurance

§ 35.600 Purpose and applicability.

The purpose of this subpart G is to establish procedures to eliminate as far

as practicable lead-based paint hazards in a multifamily residential property for which HUD is the owner of the mortgage or the owner receives mortgage insurance, under a program administered by HUD.

§ 35.605 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.610 Exemption.

An application for insurance in connection with a refinancing transaction where an appraisal is not required under the applicable procedures established by HUD is excluded from the coverage of this subpart.

§ 35.615 Notices and pamphlet.

(a) *Notice.* If evaluation or hazard reduction is undertaken, the sponsor shall provide a notice to occupants in accordance with § 35.125.

(b) *Lead hazard information pamphlet.* The sponsor shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.620 Multifamily insured property constructed before 1960.

Except as provided in § 35.630, the following requirements apply to multifamily insured property constructed before 1960:

(a) *Risk assessment.* Before the issuance of a firm commitment the sponsor shall conduct a risk assessment in accordance with § 35.1320(b).

(b) *Interim controls.* (1) The sponsor shall conduct interim controls in accordance with § 35.1330 to treat the lead-based paint hazards identified in the risk assessment. Interim controls are considered completed when clearance is achieved in accordance with § 35.1340.

(2) The sponsor shall complete interim controls before the issuance of the firm commitment or interim controls may be made a condition of the Federal Housing Administration (FHA) firm commitment, with sufficient repair or rehabilitation funds escrowed at initial endorsement of the FHA insured loan.

(c) *Ongoing lead-based paint maintenance activities.* Before the issuance of the firm commitment, the sponsor shall agree to incorporate ongoing lead-based paint maintenance into regular building operations and maintenance activities in accordance with § 35.1355(a).

§ 35.625 Multifamily insured property constructed after 1959 and before 1978.

Except as provided in § 35.630, before the issuance of the firm commitment,

the sponsor shall agree to incorporate ongoing lead-based paint maintenance practices into regular building operations, in accordance with § 35.1355(a).

§ 35.630 Conversions and major rehabilitations.

The procedures and requirements of this section apply when a nonresidential property constructed before 1978 is to be converted to residential use, or a residential property constructed before 1978 is to undergo rehabilitation that is estimated to cost more than 50 percent of the estimated replacement cost after rehabilitation.

(a) *Lead-based paint inspection.* Before issuance of a firm FHA commitment, the sponsor shall conduct a lead-based paint inspection in accordance with § 35.1320(a).

(b) *Abatement.* Prior to occupancy, the sponsor shall conduct abatement of all lead-based paint on the property in accordance with § 35.1325. Whenever practicable, abatement shall be achieved through the methods of paint removal or component replacement. If paint removal or component replacement are not practicable, that is if such methods would damage substrate material considered architecturally significant, permanent encapsulation or enclosure may be used as methods of abatement. Abatement is considered complete when clearance is achieved in accordance with § 35.1340. If encapsulation or enclosure is used, the sponsor shall incorporate ongoing lead-based paint maintenance into regular building operations maintenance activities in accordance with § 35.1355.

(c) *Historic properties.* Section 35.115(a)(13) applies to this section.

Subpart H—Project-Based Rental Assistance

§ 35.700 Purpose and applicability.

(a) This subpart H establishes procedures to eliminate as far as practicable lead-based paint hazards in residential properties receiving project-based assistance under a HUD program. The requirements of this subpart apply only to the assisted dwelling units in a covered property and any common areas servicing those dwelling units. This subpart does not apply to housing receiving rehabilitation assistance or to public housing, which are covered by subparts J and M of this part, respectively.

(b) For the purposes of competitively awarded grants under the Housing Opportunities for Persons with AIDS Program (HOPWA), the Supportive Housing Program (42 U.S.C. 11381–

11389) and the Shelter Plus Care Program project-based rental assistance and sponsor-based rental assistance components (42 U.S.C. 11402–11407), the requirements of this subpart shall apply to grants awarded pursuant to Notices of Funding Availability published on or after October 1, 1999. For the purposes of formula grants awarded under the Housing Opportunities for Persons with AIDS Program (HOPWA) (42 U.S.C. 12901 *et seq.*), the requirements of this subpart shall apply to activities for which program funds are first obligated on or after September 15, 2000.

§ 35.705 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.710 Notices and pamphlet.

(a) *Notice.* If evaluation or hazard reduction is undertaken, each owner shall provide a notice to occupants in accordance with § 35.125.

(b) *Lead hazard information pamphlet.* The owner shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.715 Multifamily properties receiving more than \$5,000 per unit.

The requirements of this section shall apply to a multifamily residential property that is receiving an average of more than \$5,000 per assisted dwelling unit annually in project-based assistance.

(a) *Risk assessment.* Each owner shall complete a risk assessment in accordance with § 35.1320(b). A risk assessment is considered complete when the owner receives the risk assessment report. Until the owner conducts a risk assessment as required by this section, the requirements of paragraph (d) of this section shall apply. After the risk assessment has been conducted the requirements of paragraphs (b) and (c) of this section shall apply. Each risk assessment shall be completed no later than the following schedule or a schedule otherwise determined by HUD:

(1) Risk assessments shall be completed on or before September 17, 2001, in a multifamily residential property constructed before 1960.

(2) Risk assessments shall be completed on or before September 15, 2003, in a multifamily residential property constructed after 1959 and before 1978.

(b) *Interim controls.* Each owner shall conduct interim controls in accordance with § 35.1330 to treat the lead-based

paint hazards identified in the risk assessment. Interim controls are considered completed when clearance is achieved in accordance with § 35.1340. Interim controls shall be completed no later than the following schedule:

(1) In units occupied by families with children of less than 6 years of age and in common areas servicing those units, interim controls shall be completed no later than 90 days after the completion of the risk assessment. In units in which a child of less than 6 years of age moves in after the completion of the risk assessment, interim controls shall be completed no later than 90 days after the move-in.

(2) In all other dwelling units, common areas, and the remaining portions of the residential property, interim controls shall be completed no later than 12 months after completion of the risk assessment for those units.

(c) *Ongoing lead-based paint maintenance and reevaluation activities.* Effective immediately after completion of the risk assessment required in § 35.715(a), the owner shall incorporate ongoing lead-based paint maintenance and reevaluation into the regular building operations in accordance with § 35.1355, unless all lead-based paint has been removed. If the reevaluation identifies new lead-based paint hazards, the owner shall conduct interim controls in accordance with § 35.1330.

(d) *Transitional requirements—(1) Effective date.* The requirements of this paragraph shall apply effective September 15, 2000, and continuing until the applicable date specified in § 35.715(a) (1) or (2) or until the owner conducts a risk assessment, whichever is first.

(2) Definitions and other general requirements that apply to this paragraph are found in subpart B of this part.

(3) *Ongoing lead-based paint maintenance.* The owner shall incorporate ongoing lead-based paint maintenance activities into regular building operations, in accordance with § 35.1355(a), except that clearance is not required.

(4) *Child with an environmental intervention blood lead level.* If a child of less than 6 years of age living in a dwelling unit covered by this paragraph has an environmental intervention blood lead level, the owner shall comply with the requirements of § 35.730.

§ 35.720 Multifamily properties receiving up to \$5,000 per unit, and single family properties.

Effective September 15, 2000, the requirements of this section shall apply to a multifamily residential property that is receiving an average of up to and including \$5,000 per assisted dwelling unit annually in project-based assistance and to a single family residential property that is receiving project-based assistance through the Section 8 Moderate Rehabilitation program, the Project-Based Certificate program, or any other HUD program providing project-based assistance.

(a) *Activities at initial and periodic inspection.*—(1) *Visual assessment.* During the initial and periodic inspections, an inspector trained in visual assessment for deteriorated paint surfaces in accordance with procedures established by HUD shall conduct a visual assessment of all painted surfaces in order to identify any deteriorated paint.

(2) *Paint stabilization.* The owner shall stabilize each deteriorated paint surface in accordance with § 35.1330(a) and § 35.1330(b) before occupancy of a vacant dwelling unit or, where a unit is occupied, within 30 days of notification of the results of the visual assessment. Paint stabilization is considered complete when clearance is achieved in accordance with § 35.1340.

(3) *Notice.* The owner shall provide a notice to occupants in accordance with §§ 35.125(b) (1) and (c) describing the results of the clearance examination.

(b) *Ongoing lead-based paint maintenance activities.* The owner shall incorporate ongoing lead-based paint maintenance activities into regular building operations in accordance with § 35.1355(a), unless all lead-based paint has been removed.

(c) *Child with an environmental intervention blood lead level.* If a child of less than 6 years of age living in a dwelling unit covered by this section has an environmental intervention blood lead level, the owner shall comply with the requirements of § 35.730.

§ 35.725 Section 8 Rent adjustments.

HUD may, subject to the availability of appropriations for Section 8 contract amendments, on a project by project basis for projects receiving Section 8 project-based assistance, provide adjustments to the maximum monthly rents to cover the costs of evaluation for and reduction of lead-based paint hazards, as defined in section 1004 of the Residential Lead-Based Paint Hazard Reduction Act of 1992.

§ 35.730 Child with an environmental intervention blood lead level.

(a) *Risk assessment.* Within 15 days after being notified by a public health department or other medical health care provider that a child of less than 6 years of age living in a dwelling unit to which this subpart applies has been identified as having an environmental intervention blood lead level, the owner shall complete a risk assessment of the dwelling unit in which the child lived at the time the blood was last sampled and of common areas servicing the dwelling unit. The risk assessment shall be conducted in accordance with § 35.1320(b) and is considered complete when the owner receives the risk assessment report. The requirements of this paragraph apply regardless of whether the child is or is not still living in the unit when the owner receives the notification of the environmental intervention blood lead level. The requirements of this paragraph (a) shall not apply if the owner conducted a risk assessment of the unit and common areas servicing the unit between the date the child's blood was last sampled and the date when the owner received the notification of the environmental intervention blood lead level. If a public health department has already conducted an evaluation of the dwelling unit, the requirements of this paragraph shall not apply.

(b) *Verification.* After receiving information from a person who is not a medical health care provider that a child of less than 6 years of age living in a dwelling unit covered by this subpart may have an environmental intervention blood lead level, the owner shall immediately verify the information with the public health department or other medical health care provider. If that department or provider verifies that the child has an environmental intervention blood lead level, such verification shall constitute notification, and the owner shall take the action required in paragraphs (a) and (c) of this section.

(c) *Hazard reduction.* Within 30 days after receiving the report of the risk assessment conducted pursuant to paragraph (a) of this section or the evaluation from the public health department, the owner shall complete the reduction of identified lead-based paint hazards in accordance with § 35.1325 or § 35.1330. Hazard reduction is considered complete when clearance is achieved in accordance with § 35.1340 and the clearance report states that all lead-based paint hazards identified in the risk assessment have been treated with interim controls or abatement or the public health

department certifies that the lead-based paint hazard reduction is complete. The requirements of this paragraph do not apply if the owner, between the date the child's blood was last sampled and the date the owner received the notification of the environmental intervention blood lead level, already conducted a risk assessment of the unit and common areas servicing the unit and completed reduction of identified lead-based paint hazards.

(d) *Notice.* If evaluation or hazard reduction is undertaken, each owner shall provide a notice to occupants in accordance with § 35.125.

(e) *Reporting requirement.* The owner shall report the name and address of a child identified as having an environmental intervention blood lead level to the public health department within 5 working days of being so notified by any other medical health care professional.

Subpart I—HUD-Owned and Mortgagee-in-Possession Multifamily Property**§ 35.800 Purpose and applicability.**

The purpose of this subpart I is to establish procedures to eliminate as far as practicable lead-based paint hazards in a HUD-owned multifamily residential property or a multifamily residential property for which HUD is identified as mortgagee-in-possession. The requirements of this subpart apply to any such property that is offered for sale or held or managed on or after September 15, 2000.

§ 35.805 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.810 Notices and pamphlet.

(a) *Notices.* When evaluation or hazard reduction is undertaken, the Department shall provide a notice to occupants in accordance with § 35.125.

(b) *Lead hazard information pamphlet.* HUD shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.815 Evaluation.

HUD shall conduct a risk assessment and a lead-based paint inspection in accordance with § 35.1320(a) and (b). For properties to which this subpart applies on September 15, 2000, the lead-based paint inspection and risk assessment shall be conducted no later than December 15, 2000, or before publicly advertising the property for sale, whichever is sooner. For properties to which this subpart becomes

applicable after September 15, 2000, the lead-based paint inspection and risk assessment shall be conducted no later than 90 days after this subpart becomes applicable or before publicly advertising the property for sale, whichever is sooner.

§ 35.820 Interim controls.

HUD shall conduct interim controls in accordance with § 35.1330 to treat the lead-based paint hazards identified in the evaluation conducted in accordance with § 35.815. Interim controls are considered completed when clearance is achieved in accordance with § 35.1340. Interim controls of all lead-based paint hazards shall be completed no later than the following schedule:

(a) In units occupied by families with children of less than 6 years of age and in common areas servicing those units, interim controls shall be completed no later than 90 days after the completion of the risk assessment. In units in which a child of less than 6 years of age moves in after the completion of the risk assessment, interim controls shall be completed no later than 90 days after the move-in.

(b) In all other dwelling units, common areas, and the remaining portions of the residential property, interim controls shall be completed no later than 12 months after completion of the risk assessment for those units.

(c) If conveyance of the title by HUD at a sale of a HUD-owned property or a foreclosure sale caused by HUD when HUD is mortgagee-in-possession occurs before the schedule in paragraphs (a) and (b) of this section, HUD shall complete interim controls before conveyance or foreclosure, or HUD shall be responsible for assuring that interim controls are carried out by the purchaser. If interim controls are made a condition of sale, such controls shall be completed according to the following schedule:

(1) In units occupied by families with children of less than 6 years of age and in common areas servicing those units, interim controls shall be completed no later than 90 days after the date of the closing of the sale. In units in which a child of less than 6 years of age moves in after the closing of the sale, interim controls shall be completed no later than 90 days after the move-in.

(2) In all other dwelling units, in common areas servicing those units, and in the remaining portions of the residential property, interim controls shall be completed no later than 180 days after the closing of the sale.

§ 35.825 Ongoing lead-based paint maintenance and reevaluation.

HUD shall incorporate ongoing lead-based paint maintenance and reevaluation, in accordance with § 35.1355, into regular building operations if HUD retains ownership of the residential property for more than 12 months.

§ 35.830 Child with an environmental intervention blood lead level.

(a) *Risk assessment.* Within 15 days after being notified by a public health department or other medical health care provider that a child of less than 6 years of age living in a multifamily dwelling unit owned by HUD (or where HUD is mortgagee-in-possession) has been identified as having an environmental intervention blood lead level, HUD shall complete a risk assessment of the dwelling unit in which the child lived at the time the blood was last sampled and of common areas servicing the dwelling unit. The risk assessment shall be conducted in accordance with § 35.1320(b) and is considered complete when HUD receives the risk assessment report. The requirements of this paragraph apply regardless of whether the child is or is not still living in the unit when HUD receives the notification of the environmental intervention blood lead level. The requirements of this paragraph do not apply if HUD conducted a risk assessment of the unit and common areas servicing the unit between the date the child's blood was last sampled and the date when HUD received the notification of the environmental intervention blood lead level. If a public health department has already conducted an evaluation of the dwelling unit, the requirements of this paragraph shall not apply.

(b) *Verification.* After receiving information from a person who is not a medical health care provider that a child of less than 6 years of age living in a multifamily dwelling unit owned by HUD (or where HUD is mortgagee-in-possession) may have an environmental intervention blood lead level, HUD shall immediately verify the information with the public health department or other medical health care provider. If that department or provider verifies that the child has an environmental intervention blood lead level, such verification shall constitute notification, and HUD shall take the action required in paragraphs (a) and (c) of this section.

(c) *Hazard reduction.* Within 30 days after receiving the report of the risk assessment conducted pursuant to paragraph (a) of this section or the evaluation from the public health department, HUD shall complete the

reduction of lead-based paint hazards identified in the risk assessment in accordance with § 35.1325 or § 35.1330. Hazard reduction is considered complete when clearance is achieved in accordance with § 35.1340 and the clearance report states that all lead-based paint hazards identified in the risk assessment have been treated with interim controls or abatement or the public health department certifies that the lead-based paint hazard reduction is complete. The requirements of this paragraph do not apply if HUD, between the date the child's blood was last sampled and the date HUD received the notification of the environmental intervention blood lead level, conducted a risk assessment of the unit and common areas servicing the unit and completed reduction of identified lead-based paint hazards.

(d) *Reporting requirement.* HUD shall report the name and address of a child identified as having an environmental intervention blood lead level to the public health department within 5 working days of being so notified by any other health professional.

(e) *Closing.* If the closing of a sale is scheduled during the period when HUD is responding to a case of a child with an environmental intervention blood lead level, HUD may arrange for the completion of the procedures required by § 35.830(a)–(d) by the purchaser within a reasonable period of time.

(f) *Extensions.* The Assistant Secretary for Housing-Federal Housing Commissioner or designee may consider and approve a request for an extension of deadlines established by this section for a lead-based paint inspection, risk assessment, hazard reduction, and reporting. Such a request may be considered, however, only during the first six months during which HUD is owner or mortgagee-in-possession of a multifamily property.

Subpart J—Rehabilitation

§ 35.900 Purpose and applicability.

(a) *Purpose and applicability.* (1) The purpose of this subpart J is to establish procedures to eliminate as far as practicable lead-based paint hazards in a residential property that receives Federal rehabilitation assistance under a program administered by HUD. Rehabilitation assistance does not include project-based rental assistance, rehabilitation mortgage insurance or assistance to public housing.

(2) The requirements of this subpart shall not apply to HOME funds which are committed to a specific project in accordance with § 92.2 of this title before September 15, 2000. Such

projects shall be subject to the requirements of § 92.355 of this title that were in effect at the time of project commitment or the requirements of this subpart.

(3) For the purposes of the Indian Housing Block Grant program and the CDBG Entitlement program, the requirements of this subpart shall apply to all residential rehabilitation activities (except those otherwise exempted) for which funds are first obligated on or after September 15, 2000. For the purposes of the State, HUD-Administered Small Cities, and Insular Areas CDBG programs, the requirements of this subpart shall apply to all covered activities (except those otherwise exempted) for which grant funding is awarded to the unit of local government by the State or HUD, as applicable, on or after September 15, 2000. For the purposes of the Emergency Shelter Grant Program (42 U.S.C. 11371–11378) and the formula grants awarded under the Housing Opportunities for Persons with AIDS Program (HOPWA) (42 U.S.C. 12901 et. seq.), the requirements of this subpart shall apply to activities for which program funds are first obligated on or after September 15, 2000.

(4) For the purposes of competitively awarded grants under the HOPWA Program and the Supportive Housing Program (42 U.S.C. 11481–11389), the requirements of this subpart shall apply to grants awarded under Notices of Funding Availability published on or after September 15, 2000.

(5) For the purposes of the Indian CDBG program (§ 1003.607 of this title), the requirements of this subpart shall not apply to funds whose notice of funding availability is announced or funding letter is sent before September 15, 2000. Such project grantees shall be subject to the regulations in effect at the time of announcement or funding letter.

(b) The grantee or participating jurisdiction may assign to a subrecipient or other entity the responsibilities set forth in this subpart.

§ 35.905 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.910 Notices and pamphlet.

(a) *Notices.* In cases where evaluation or hazard reduction or both are undertaken as part of federally funded rehabilitation, the grantee, participating jurisdiction, or CILP recipient, shall provide a notice to occupants in accordance with § 35.125.

(b) *Lead hazard information pamphlet.* The grantee, participating jurisdiction, or CILP recipient, shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.915 Calculating rehabilitation costs, except for the CILP Program.

(a) *Applicability.* This section applies to recipients of Federal rehabilitation assistance, except for CILP recipients, for which § 35.920 applies.

(b) *Rehabilitation assistance.* (1) Lead-based paint requirements for rehabilitation fall into three categories which depend on the amount of rehabilitation assistance provided. The three categories are:

- (i) Assistance of up to and including \$5,000 per unit;
- (ii) Assistance of more than \$5,000 per unit up to and including \$25,000 per unit; and
- (iii) Assistance of more than \$25,000 per unit.

(2) For purposes of implementing §§ 35.930–35.935, the amount of rehabilitation assistance is the average per unit amount of Federal funds for the hard costs of rehabilitation, excluding lead-based paint hazard evaluation and hazard reduction activities. Costs of site preparation, occupant protection, relocation, interim controls, abatement, clearance and waste handling attributable to lead-based paint hazard reduction are not to be included in the hard costs of rehabilitation.

(c) *Calculating rehabilitation assistance.* For a residential property that includes both federally assisted and non-assisted units, the rehabilitation costs of non-assisted units are not included in the calculation.

(1) The average cost of rehabilitation for the assisted units is calculated as follows:

Per Unit Rehabilitation \$ = (a/c) + (b/d)
Where:

- a= Federal Rehabilitation Assistance for all assisted units
- b= Federal Rehabilitation Assistance for common areas and exterior painted surfaces
- c= Number of federally assisted units
- d= Total number of units

(2) Eight out of 10 dwelling units in a residential property receive Federal rehabilitation assistance. The total amount of Federal rehabilitation assistance for the dwelling units is \$90,000, and the total amount of Federal rehabilitation assistance for the common areas and exterior surfaces is \$10,000. Based on the formula above, the average per unit amount of Federal rehabilitation assistance is \$12,250. This is illustrated as follows: \$12,250 = (\$90,000/8) + (\$10,000/10).

§ 35.920 Calculating rehabilitation costs for the Flexible Subsidy-CILP program.

All dwelling units and common areas in a residential property are considered to be assisted under the CILP program. The cost of rehabilitation is calculated as follows:

Per Unit Rehab \$ = Federal Rehab Assistance / Total Number of Units.

§ 35.925 Examples of determining applicable requirements.

The following examples illustrate how to determine whether the requirements of §§ 35.930(b), (c), or (d) apply to a dwelling unit receiving Federal rehabilitation assistance (dollar amounts are on a per unit basis):

(a) If the total amount of Federal assistance for a dwelling is \$2,000, and the hard costs of rehabilitation are \$10,000, the lead-based paint requirements would be those described in § 35.930(b), because Federal rehabilitation assistance is up to and including \$5,000.

(b) If the total amount of Federal assistance for a dwelling unit is \$6,000, and the hard costs of rehabilitation are \$2,000, the lead-based paint requirements would be those described in § 35.930(b). Although the total amount of Federal dollars is more than \$5,000, only the \$2,000 of that total can be applied to rehabilitation. Therefore, the Federal rehabilitation assistance is \$2,000 which is not more than \$5,000.

(c) If the total amount of Federal assistance for a unit is \$6,000, and the hard costs of rehabilitation are \$6,000, the lead-based paint requirements are those described in § 35.930(c), because the amount of Federal rehabilitation assistance is more than \$5,000 but not more than \$25,000.

§ 35.930 Evaluation and hazard reduction requirements.

(a) *Paint testing.* The grantee, participating jurisdiction, or CILP recipient shall either perform paint testing on the painted surfaces to be disturbed or replaced during rehabilitation activities, or presume that all these painted surfaces are coated with lead-based paint.

(b) *Residential property receiving an average of up to and including \$5,000 per unit in Federal rehabilitation assistance.* Each grantee, participating jurisdiction, or CILP recipient shall:

(1) Conduct paint testing or presume the presence of lead-based paint, in accordance with paragraph (a) of this section. If paint testing indicates that the painted surfaces are not coated with lead-based paint, safe work practices and clearance are not required.

(2) Implement safe work practices during rehabilitation work in accordance with § 35.1350 and repair any paint that is disturbed.

(3) After completion of any rehabilitation disturbing painted surfaces, perform a clearance examination of the worksite(s) in accordance with § 35.1340. Clearance is not required if rehabilitation did not disturb painted surfaces of a total area more than that set forth in § 35.1350(b).

(c) *Residential property receiving an average of more than \$5,000 and up to and including \$25,000 per unit in Federal rehabilitation assistance.* Each grantee, participating jurisdiction, or CILP recipient shall:

(1) Conduct paint testing or presume the presence of lead-based paint, in accordance with paragraph (a) of this section.

(2) Perform a risk assessment in the dwelling units receiving Federal assistance, in common areas servicing those units, and exterior painted surfaces, in accordance with § 35.1320(b), before rehabilitation begins.

(3) Perform interim controls in accordance with § 35.1330 of all lead-based paint hazards identified pursuant to paragraphs (c)(1) and (c)(2) of this section and any lead-based paint hazards created as a result of the rehabilitation work.

(d) *Residential property receiving an average of more than \$25,000 per unit in Federal rehabilitation assistance.* Each grantee, participating jurisdiction, or CILP recipient shall:

(1) Conduct paint testing or presume the presence of lead-based paint in accordance with paragraph (a) of this section.

(2) Perform a risk assessment in the dwelling units receiving Federal assistance and in associated common areas and exterior painted surfaces in accordance with § 35.1320(b) before rehabilitation begins.

(3) Abate all lead-based paint hazards identified by the paint testing or risk assessment conducted pursuant to paragraphs (d)(1) and (d)(2) of this section, and any lead-based paint hazards created as a result of the rehabilitation work, in accordance with § 35.1325, except that interim controls are acceptable on exterior surfaces that are not disturbed by rehabilitation.

§ 35.935 Ongoing lead-based paint maintenance activities.

In the case of a rental property receiving Federal rehabilitation assistance under the HOME program or the Flexible Subsidy-CILP program, the grantee, participating jurisdiction or

CILP recipient shall require the property owner to incorporate ongoing lead-based paint maintenance activities into regular building operations, in accordance with § 35.1355(a).

§ 35.940 Special requirements for insular areas.

If a dwelling unit receiving Federal assistance under a program covered by this subpart is located in an insular area, the requirements of this section shall apply and the requirements of § 35.930 shall not apply. All other sections of this subpart J shall apply. The insular area shall conduct the following activities for the dwelling unit, common areas servicing the dwelling unit, and the exterior surfaces of the building in which the dwelling unit is located:

(a) *Residential property receiving an average of up to and including \$5,000 per unit in Federal rehabilitation assistance.* (1) Implement safe work practices during rehabilitation work in accordance with § 35.1350 and repair any paint that is disturbed by rehabilitation.

(2) After completion of any rehabilitation disturbing painted surfaces, perform a clearance examination of the worksite(s) in accordance with § 35.1340. Clearance shall be achieved before residents are allowed to occupy the worksite(s). Clearance is not required if rehabilitation did not disturb painted surfaces of a total area more than that set forth in § 35.1350(b).

(b) *Residential property receiving an average of more than \$5,000 per unit in Federal rehabilitation assistance.* (1) Before beginning rehabilitation, perform a visual assessment of all painted surfaces in order to identify deteriorated paint.

(2) Perform paint stabilization of each deteriorated paint surface and each painted surface being disturbed by rehabilitation, in accordance with §§ 35.1330(a) and (b).

(3) After completion of all paint stabilization, perform a clearance examination of the affected dwelling units and common areas in accordance with § 35.1340. Clearance shall be achieved before residents are allowed to occupy rooms or spaces in which paint stabilization has been performed.

Subpart K—Acquisition, Leasing, Support Services, or Operation.

§ 35.1000 Purpose and applicability.

(a) The purpose of this subpart K is to establish procedures to eliminate as far as practicable lead-based paint hazards in a residential property that receives Federal assistance under certain HUD

programs for acquisition, leasing, support services, or operation. Acquisition, leasing, support services, and operation do not include mortgage insurance, sale of federally-owned housing, project-based or tenant-based rental assistance, rehabilitation assistance, or assistance to public housing. For requirements pertaining to those activities or types of assistance, see the applicable subpart of this part.

(b) The grantee or participating jurisdiction may assign to a subrecipient or other entity the responsibilities set forth in this subpart.

(c)(1) The requirements of this subpart shall not apply to HOME funds which are committed to a specific project in accordance with § 92.2 of this title before September 15, 2000. Such projects shall be subject to the requirements of § 92.355 of this title that were in effect at the time of project commitment, or the requirements of this subpart.

(2) For the purposes of the CDBG Entitlement program and the Indian Housing Block Grant program, the requirements of this subpart shall apply to all residential rehabilitation activities (except those otherwise exempted) for which funds are first obligated on or after September 15, 2000. For the purposes of the State, HUD-Administered Small Cities, and Insular Areas CDBG programs, the requirements of this subpart shall apply to all covered activities (except those otherwise exempted) for which grant funding is awarded to the unit of local government by the State or HUD, as applicable, on or after September 15, 2000. For the purposes of the Emergency Shelter Grant Program (42 U.S.C. 11371–11378) and the formula grants awarded under the Housing Opportunities for Persons with AIDS Program (HOPWA) (42 U.S.C. 12901 et. seq.), the requirements of this subpart shall apply to activities for which program funds are first obligated on or after September 15, 2000.

(3) For the purposes of competitively awarded grants under the HOPWA Program and the Supportive Housing Program (42 U.S.C. 11481–11489), the requirements of this subpart shall apply to grants awarded under Notices of Funding Availability published on or after September 15, 2000.

(4) For the purposes of the Indian CDBG program (§ 1003.607 of this title), the requirements of this subpart shall not apply to funds whose notice of funding availability is announced or funding letter is sent before September 15, 2000. Such project grantees shall be subject to the regulations in effect at the time of announcement or funding letter.

§ 35.1005 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.1010 Notices and pamphlet

(a) *Notice.* In cases where evaluation or hazard reduction, including paint stabilization, is undertaken, each grantee or participating jurisdiction shall provide a notice to residents in accordance with § 35.125. A visual assessment is not considered an evaluation for purposes of this part.

(b) *Lead hazard information pamphlet.* The grantee or participating jurisdiction shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.1015 Visual assessment, paint stabilization, and maintenance.

If a dwelling unit receives Federal assistance under a program covered by this subpart, each grantee or participating jurisdiction shall conduct the following activities for the dwelling unit, common areas servicing the dwelling unit, and the exterior surfaces of the building in which the dwelling unit is located:

(a) A visual assessment of all painted surfaces in order to identify deteriorated paint;

(b) Paint stabilization of each deteriorated paint surface, and clearance, in accordance with §§ 35.1330(a) and (b), before occupancy of a vacant dwelling unit or, where a unit is occupied, immediately after receipt of Federal assistance; and

(c) The grantee or participating jurisdiction shall incorporate ongoing lead-based paint maintenance activities into regular building operations, in accordance with § 35.1355(a).

(d) The grantee or participating jurisdiction shall provide a notice to occupants in accordance with §§ 35.125(b)(1) and (c), describing the results of the clearance examination.

§ 35.1020 Funding for evaluation and hazard reduction.

The grantee or participating jurisdiction shall determine whether the cost of evaluation and hazard reduction is to be borne by the owner/developer, the grantee or a combination of the owner/developer and the grantee, based on program requirements and local program design.

Subpart L—Public Housing Programs**§ 35.1100 Purpose and applicability.**

The purpose of this subpart L is to establish procedures to eliminate as far as practicable lead-based paint hazards

in residential property assisted under the U.S. Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) but not including housing assisted under section 8 of the 1937 Act.

§ 35.1105 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.1110 Notices and pamphlet.

(a) *Notice.* In cases where evaluation or hazard reduction is undertaken, each public housing agency (PHA) shall provide a notice to residents in accordance with § 35.125.

(b) *Lead hazard information pamphlet.* The PHA shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.1115 Evaluation.

(a) A lead-based paint inspection shall be conducted in all public housing unless a lead-based paint inspection that meets the conditions of § 35.165(a) has already been completed. If a lead-based paint inspection was conducted by a lead-based paint inspector who was not certified, the PHA shall review the quality of the inspection, in accordance with quality control procedures established by HUD, to determine whether the lead-based paint inspection has been properly performed and the results are reliable. Lead-based paint inspections of all housing to which this subpart applies shall be completed no later than September 15, 2000. Revisions or augmentations of prior inspections found to be of insufficient quality shall be completed no later than September 17, 2001.

(b) If a lead-based paint inspection has found the presence of lead-based paint, or if no lead-based paint inspection has been conducted, the PHA shall conduct a risk assessment according to the following schedule, unless a risk assessment that meets the conditions of § 35.165(b) has already been completed:

(1) Risk assessments shall be completed on or before March 15, 2001, in a multifamily residential property constructed before 1960.

(2) Risk assessments shall be completed on or before March 15, 2002, in a multifamily residential property constructed after 1959 and before 1978.

(c) A PHA that advertises a construction contract (including architecture/engineering contracts) for bid or award or plans to start force account work shall not execute such contract until a lead-based paint inspection and, if required, a risk assessment, has taken place and any

necessary abatement is included in the modernization budget, except for contracts solely for emergency work in accordance with § 35.115(a)(9).

(d) The five-year funding request plan for CIAP and CGP shall be amended to include the schedule and funding for lead-based paint activities.

§ 35.1120 Hazard reduction.

(a) Each PHA shall, in accordance with § 35.1325, abate all lead-based paint and lead-based paint hazards identified in the evaluations conducted pursuant to § 35.1115. The PHA shall abate lead-based paint and lead-based paint hazards in accordance with § 35.1325 during the course of physical improvements conducted under the modernization.

(b) In all housing where abatement of all lead-based paint and lead-based paint hazards required in paragraph (a) of this section has not yet occurred, each PHA shall conduct interim controls, in accordance with § 35.1330, of the lead-based paint hazards identified in the most recent risk assessment.

(1) Interim controls of dwelling units in which any child who is less than 6 years of age resides and common areas servicing those dwelling units shall be completed within 90 days of the evaluation under § 35.1330. If a unit becomes newly occupied by a family with a child of less than 6 years of age or such child moves into a unit, interim controls shall be completed within 90 days after the new occupancy or move-in if they have not already been completed.

(2) Interim controls in dwelling units not occupied by families with one or more children of less than 6 years of age, common areas servicing those units, and the remaining portions of the residential property shall be completed no later than 12 months after completion of the evaluation conducted under § 35.1115.

(c) The PHA shall incorporate ongoing lead-based paint maintenance and reevaluation activities into regular building operations in accordance with § 35.1355. In accordance with § 35.115(a) (6) and (7), this requirement does not apply to a development or part thereof if it is to be demolished or disposed of in accordance with disposition requirements in part 970 of this title, provided the dwelling unit will remain unoccupied until demolition, or if it is not used and will not be used for human habitation.

§ 35.1125 Evaluation and hazard reduction before acquisition and development.

(a) For each residential property constructed before 1978 and proposed to be acquired for a family project (whether or not it will need rehabilitation) a lead-based paint inspection and risk assessment for lead-based paint hazards shall be conducted in accordance with § 35.1320.

(b) If lead-based paint is found in a residential property to be acquired, the cost of evaluation and abatement shall be considered when making the cost comparison to justify new construction, as well as when meeting maximum total development cost limitations.

(c) If lead-based paint is found, compliance with this subpart is required, and abatement of lead-based paint and lead-based paint hazards shall be completed in accordance with § 35.1325 before occupancy.

§ 35.1130 Child with an environmental intervention blood lead level.

(a) *Risk assessment.* Within 15 days after being notified by a public health department or other medical health care provider that a child of less than 6 years of age living in a public housing development has been identified as having an environmental intervention blood lead level, the PHA shall complete a risk assessment of the dwelling unit in which the child lived at the time the blood was last sampled and of common areas servicing the dwelling unit, the provisions of § 35.1115(b) notwithstanding. The risk assessment shall be conducted in accordance with § 35.1320(b) and is considered complete when the PHA receives the risk assessment report. The requirements of this paragraph apply regardless of whether the child is or is not still living in the unit when the PHA receives the notification of the environmental intervention blood lead level. The requirements of this paragraph shall not apply if the PHA conducted a risk assessment of the unit and common areas servicing the unit between the date the child's blood was last sampled and the date when the PHA received the notification of the environmental intervention blood lead level. If the public health department has already conducted an evaluation of the dwelling unit, the requirements of this paragraph shall not apply.

(b) *Verification.* After receiving information from a person who is not a medical health care provider that a child of less than 6 years of age living in a public housing development may have an environmental intervention blood lead level, the PHA shall immediately verify the information with

the public health department or other medical health care provider. If that department or provider verifies that the child has an environmental intervention blood lead level, such verification shall constitute notification, and the housing agency shall take the action required in paragraphs (a) and (c) of this section.

(c) *Hazard reduction.* Within 30 days after receiving the report of the risk assessment conducted pursuant to paragraph (a) of this section or the evaluation from the public health department, the PHA shall complete the reduction of lead-based paint hazards identified in the risk assessment in accordance with § 35.1325 or § 35.1330. Hazard reduction is considered complete when clearance is achieved in accordance with § 35.1340 and the clearance report states that all lead-based paint hazards identified in the risk assessment have been treated with interim controls or abatement or the local or State health department certifies that lead-based paint hazard reduction is complete. The requirements of this paragraph do not apply if the PHA, between the date the child's blood was last sampled and the date the owner received the notification of the environmental intervention blood lead level, already conducted a risk assessment of the unit and common areas servicing the unit and completed reduction of identified lead-based paint hazards.

(d) *Notice of evaluation and hazard reduction.* The PHA shall notify building residents of any evaluation or hazard reduction activities in accordance with § 35.125.

(e) *Reporting requirement.* The PHA shall report the name and address of a child identified as having an environmental intervention blood lead level to the public health department within 5 working days of being so notified by any other medical health care professional. The PHA shall also report each known case of a child with an environmental intervention blood lead level to the HUD field office.

(f) *Other units in building.* If the risk assessment conducted pursuant to paragraph (a) of this section identifies lead-based paint hazards and previous evaluations of the building conducted pursuant to § 35.1320 did not identify lead-based paint or lead-based paint hazards, the PHA shall conduct a risk assessment of other units of the building in accordance with § 35.1320(b) and shall conduct interim controls of identified hazards in accordance with the schedule provided in § 35.1120(c).

§ 35.1135 Eligible costs.

A PHA may use financial assistance received under the modernization program (CIAP or CGP) for the notice, evaluation and reduction of lead-based paint hazards in accordance with § 968.112 of this title. Eligible costs include:

(a) *Evaluation and insurance costs.* Evaluation and hazard reduction activities, and costs for insurance coverage associated with these activities.

(b) *Planning costs.* Planning costs are costs that are incurred before HUD approval of the CGP or CIAP application and that are related to developing the CIAP application or carrying out eligible modernization planning, such as planning for abatement, detailed design work, preparation of solicitations, and evaluation. Planning costs may be funded as a single work item. Planning costs shall not exceed 5 percent of the CIAP funds available to a HUD Field Office in a particular fiscal year.

(c) *Architectural/engineering and consultant fees.* Eligible costs include fees for planning, identification of needs, detailed design work, preparation of construction and bid documents and other required documents, evaluation, planning and design for abatement, and inspection of work in progress.

(d) *Environmental intervention blood lead level response costs.* The PHA may use its operating reserves and, when necessary, may request reimbursement from the current fiscal year CIAP funds, or request the reprogramming of previously approved CIAP funds to cover the costs of evaluation and hazard reduction.

§ 35.1140 Insurance coverage.

For the requirements concerning the obligation of a PHA to obtain reasonable insurance coverage with respect to the hazards associated with evaluation and hazard reduction activities, see § 965.215 of this title.

Subpart M—Tenant-Based Rental Assistance**§ 35.1200 Purpose and applicability.**

(a) *Purpose.* The purpose of this subpart M is to establish procedures to eliminate as far as practicable lead-based paint hazards in housing occupied by families receiving tenant-based rental assistance. Such assistance includes tenant-based rental assistance under the Section 8 certificate program, the Section 8 voucher program, the HOME program, the Shelter Plus Care program, the Housing Opportunities for Persons With AIDS (HOPWA) program,

and the Indian Housing Block Grant program. *Tenant-based rental assistance* means rental assistance that is not attached to the structure.

(b) *Applicability.* (1) This subpart applies only to dwelling units occupied or to be occupied by families or households that have one or more children of less than 6 years of age, common areas servicing such dwelling units, and exterior painted surfaces associated with such dwelling units or common areas. Common areas servicing a dwelling unit include those areas through which residents pass to gain access to the unit and other areas frequented by resident children of less than 6 years of age, including on-site play areas and child care facilities.

(2) For the purposes of the Section 8 tenant-based certificate program and the Section 8 voucher program:

(i) The requirements of this subpart are applicable where an initial or periodic inspection occurs on or after September 15, 2000; and

(ii) The PHA shall be the designated party.

(3) For the purposes of formula grants awarded under the Housing Opportunities for Persons with AIDS Program (HOPWA) (42 U.S.C. 12901 *et seq.*):

(i) The requirements of this subpart shall apply to activities for which program funds are first obligated on or after September 15, 2000; and

(ii) The grantee shall be the designated party.

(4) For the purposes of competitively awarded grants under the HOPWA Program and the Shelter Plus Care program (42 U.S.C. 11402–11407) tenant-based rental assistance component:

(i) The requirements of this subpart shall apply to grants awarded pursuant to Notices of Funding Availability published on or after October 1, 1999; and

(ii) The grantee shall be the designated party.

(5) For the purposes of the HOME program:

(i) The requirements of this subpart shall not apply to funds which are committed in accordance with § 92.2 of this title before September 15, 2000; and

(ii) The participating jurisdiction shall be the designated party.

(6) For the purposes of the Indian Housing Block Grant program:

(i) The requirements of this subpart shall apply to activities for which funds are first obligated on or after September 15, 2000; and

(ii) The IHBG recipient shall be the designated party.

(7) The housing agency, grantee, participating jurisdiction, or IHBG

recipient may assign to a subrecipient or other entity the responsibilities of the designated party in this subpart.

§ 35.1205 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.1210 Notices and pamphlet.

(a) *Notice.* In cases where evaluation or paint stabilization is undertaken, the owner shall provide a notice to residents in accordance with § 35.125. A visual assessment is not an evaluation.

(b) *Lead hazard information pamphlet.* The owner shall provide the lead hazard information pamphlet in accordance with § 35.130.

§ 35.1215 Activities at initial and periodic inspection.

(a) (1) During the initial and periodic inspections, an inspector acting on behalf of the designated party and trained in visual assessment for deteriorated paint surfaces in accordance with procedures established by HUD shall conduct a visual assessment of all painted surfaces in order to identify any deteriorated paint.

(2) For tenant-based rental assistance provided under the HOME program, visual assessment shall be conducted as part of the initial and periodic inspections required under § 92.209(i) of this title.

(b) The owner shall stabilize each deteriorated paint surface in accordance with § 35.1330(a) and (b) before commencement of assisted occupancy. If assisted occupancy has commenced prior to a periodic inspection, such paint stabilization must be completed within 30 days of notification of the owner of the results of the visual assessment. Paint stabilization is considered complete when clearance is achieved in accordance with § 35.1340.

(c) The owner shall provide a notice to occupants in accordance with § 35.125(b)(1) and (c) describing the results of the clearance examination.

§ 35.1220 Ongoing lead-based paint maintenance activities.

The owner shall incorporate ongoing lead-based paint maintenance activities into regular building operations in accordance with § 35.1355(a).

§ 35.1225 Child with an environmental intervention blood lead level.

(a) Within 15 days after being notified by a public health department or other medical health care provider that a child of less than 6 years of age living in an assisted dwelling unit has been identified as having an environmental

intervention blood lead level, the designated party shall complete a risk assessment of the dwelling unit in which the child lived at the time the blood was last sampled and of the common areas servicing the dwelling unit. The risk assessment shall be conducted in accordance with § 35.1320(b). When the risk assessment is complete, the designated party shall immediately provide the report of the risk assessment to the owner of the dwelling unit. If the child identified as having an environmental intervention blood lead level is no longer living in the unit when the designated party receives notification from the public health department or other medical health care provider, but another household receiving tenant-based rental assistance is living in the unit or is planning to live there, the requirements of this section apply just as they do if the child still lives in the unit. If a public health department has already conducted an evaluation of the dwelling unit, or the designated party conducted a risk assessment of the unit and common areas servicing the unit between the date the child's blood was last sampled and the date when the designated party received the notification of the environmental intervention blood lead level, the requirements of this paragraph shall not apply.

(b) *Verification.* After receiving information from a source other than a public health department or other medical health care provider that a child of less than 6 years of age living in an assisted dwelling unit may have an environmental intervention blood lead level, the designated party shall immediately verify the information with a public health department or other medical health care provider. If that department or provider verifies that the child has an environmental intervention blood lead level, such verification shall constitute notification to the designated party as provided in paragraph (a) of this section, and the designated party shall take the action required in paragraphs (a) and (c) of this section.

(c) *Hazard reduction.* Within 30 days after receiving the risk assessment report from the designated party or the evaluation from the public health department, the owner shall complete the reduction of identified lead-based paint hazards in accordance with § 35.1325 or § 35.1330. Hazard reduction is considered complete when clearance is achieved in accordance with § 35.1340 and the clearance report states that all lead-based paint hazards identified in the risk assessment have been treated with interim controls or

abatement or when the public health department certifies that the lead-based paint hazard reduction is complete. If the owner does not complete the hazard reduction required by this section, the dwelling unit is in violation of Housing Quality Standards (HQS).

(d) *Notice of evaluation and hazard reduction.* The owner shall notify building residents of any evaluation or hazard reduction activities in accordance with § 35.125.

(e) *Reporting requirement.* The designated party shall report the name and address of a child identified as having an environmental intervention blood lead level to the public health department within 5 working days of being so notified by any other medical health care professional.

(f) *Data collection and record keeping responsibilities.* At least quarterly, the designated party shall attempt to obtain from the public health department(s) with area(s) of jurisdiction similar to that of the designated party the names and/or addresses of children of less than 6 years of age with an identified environmental intervention blood lead level. At least quarterly, the designated party shall also report an updated list of the addresses of units receiving assistance under a tenant-based rental assistance program to the same public health department(s), except that the report(s) to the public health department(s) is not required if the health department states that it does not wish to receive such report. If it obtains names and addresses of environmental intervention blood lead level children from the public health department(s), the designated party shall match information on cases of environmental intervention blood lead levels with the

names and addresses of families receiving tenant-based rental assistance, unless the public health department performs such a matching procedure. If a match occurs, the designated party shall carry out the requirements of this section.

Subparts N–Q—[Reserved]

Subpart R—Methods and Standards for Lead-Paint Hazard Evaluation and Hazard Reduction Activities

§ 35.1300 Purpose and applicability.

The purpose of this subpart R is to provide standards and methods for evaluation and hazard reduction activities required in subparts B, C, D, and F through M of this part.

§ 35.1305 Definitions and other general requirements.

Definitions and other general requirements that apply to this subpart are found in subpart B of this part.

§ 35.1310 References.

Further guidance information regarding evaluation and hazard reduction activities described in this subpart is found in the following:

(a) The HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (Guidelines);

(b) The EPA Guidance on Residential Lead-Based Paint, Lead-Contaminated Dust, and Lead Contaminated Soil;

(c) Guidance, methods or protocols issued by States and Indian tribes that have been authorized by EPA under 40 CFR 745.324 to administer and enforce lead-based paint programs.

§ 35.1315 Collection and laboratory analysis of samples.

All paint chip, dust, or soil samples shall be collected and analyzed in accordance with standards established either by a State or Indian tribe under a program authorized by EPA in accordance with 40 CFR part 745, subpart Q, or by the EPA in accordance with 40 CFR 745.227, and as further provided in this subpart.

§ 35.1320 Lead-based paint inspections and risk assessments.

(a) *Lead-based paint inspections.* Lead-based paint inspections shall be performed in accordance with methods and standards established either by a State or Indian tribe under a program authorized by EPA, or by EPA at 40 CFR 745.227(b), except that the definition of lead-based paint shall not include a loading (area concentration) or mass concentration greater than that in the definition at § 35.110 of this part.

(b) *Risk assessments.* (1) Risk assessments shall be performed in accordance with methods and standards established either by a State or Indian tribe under a program authorized by EPA, or by EPA at 40 CFR 745.227(d), and paragraph (b)(2) of this section.

(2) Risk assessors shall use levels defining dust-lead hazards and soil-lead hazards that are no greater than those promulgated by EPA pursuant to section 403 of the Toxic Substances Control Act (15 U.S.C. 2683), or, if such levels are not in effect, the following for dust or soil:

(i) *Dust.* A dust-lead hazard shall be a dust-lead level equal to or greater than the applicable loading (area concentration), based on wipe samples, in the following table:

INTERIM DUST LEAD STANDARDS

Evaluation method	Surface	Interior window sills, µg/ft ² (mg/m ²)	Window troughs, µg/ft ² (mg/m ²)
	Floors, µg/ft ² (mg/m ²)		
Lead Hazard Screen	25 (0.27)	125 (1.4)	Not Applicable.
Risk Assessment	40 (0.43)	250 (2.7)	Not Applicable.
Reevaluation	40 (0.43)	250 (2.7)	Not Applicable.
Clearance	40 (0.43)	250 (2.7)	800 (8.6).

Note: "Floors" includes carpeted and uncarpeted interior floors.

(ii) *Soil.* (A) A soil-lead hazard for play areas frequented by children under 6 years of age shall be bare soil with lead equal to or exceeding 400 micrograms per gram.

(B) For other areas, soil-lead hazards shall be bare soil that totals more than 9 square feet (0.8 square meters) per

property with lead equal to or exceeding 2,000 micrograms per gram.

(3) Lead hazard screens shall be performed in accordance with the methods and standards established either by a State or Indian tribe under a program authorized by EPA, or by EPA at 40 CFR 745.227(c), and paragraph (b)(2) of this section. If the lead hazard

screen indicates the need for a follow-up risk assessment (e.g., if dust-lead measurements exceed the levels established for lead hazard screens in this section), a risk assessment shall be conducted in accordance with paragraphs (b)(1) and (b)(2) of this section. Dust, soil, and paint samples collected for the lead hazard screen may

be used in the risk assessment. If the lead hazard screen does not indicate the need for a follow-up risk assessment, no further risk-assessment is required.

(c) It is strongly recommended, but not required, that lead-based paint inspectors and risk assessors provide a summary of the results suitable for posting or distribution to occupants in compliance with § 35.125.

§ 35.1325 Abatement.

Abatement shall be performed in accordance with methods and standards established either by a State or Indian tribe under a program authorized by EPA, or by EPA at 40 CFR 745.227(e), and shall be completed by achieving clearance in accordance with § 35.1340. If encapsulation or enclosure is used as a method of abatement, ongoing lead-based paint maintenance activities shall be performed as required by the applicable subpart of this part in accordance with § 35.1355. Abatement of an intact, factory-applied prime coating on metal surfaces is not required unless the surface is a friction surface.

§ 35.1330 Interim controls.

Interim controls of lead-based paint hazards identified in a risk assessment shall be conducted in accordance with the provisions of this section. Interim control measures include paint stabilization of deteriorated paint, treatments for friction and impact surfaces where levels of lead dust are above the levels specified in § 35.1320, dust control, and lead-contaminated soil control. As provided by § 35.155, interim controls may be performed in combination with, or be replaced by, abatement methods.

(a) *General requirements.* (1) Only those interim control methods identified as acceptable methods in a current risk assessment report shall be used to control identified hazards, except that, if only paint stabilization is required in accordance with subparts F, H, K or M of this part, it shall not be necessary to have conducted a risk assessment.

(2) Occupants of dwelling units where interim controls are being performed shall be protected during the course of the work in accordance with § 35.1345.

(3) Clearance testing shall be performed at the conclusion of interim control activities in accordance with § 35.1340.

(4) A person performing interim controls must be trained in accordance with 29 CFR 1926.59 and either be supervised by an individual certified as a lead-based paint abatement supervisor or have successfully completed one of the following courses:

(i) A lead-based paint abatement supervisor course accredited in accordance with 40 CFR 745.225;

(ii) A lead-based paint abatement worker course accredited in accordance with 40 CFR 745.225;

(iii) The Lead-Based Paint Maintenance Training Program, "Work Smart, Work Wet, and Work Clean to Work Lead Safe," prepared by the National Environmental Training Association for EPA and HUD;

(iv) "The Remodeler's and Renovator's Lead-Based Paint Training Program," prepared by HUD and the National Association of the Remodeling Industry; or

(v) Another course approved by HUD for this purpose after consultation with EPA.

(b) *Paint stabilization.* (1) Interim control treatments used to stabilize deteriorated lead-based paint shall be performed in accordance with the requirements of this section. Interim control treatments of intact, factory applied prime coatings on metal surfaces are not required. Finish coatings on such surfaces shall be treated by interim controls if those coatings contain lead-based paint.

(2) Any physical defect in the substrate of a painted surface or component that is causing deterioration of the surface or component shall be repaired before treating the surface or component. Examples of defective substrate conditions include dry-rot, rust, moisture-related defects, crumbling plaster, and missing siding or other components that are not securely fastened.

(3) Before applying new paint, all loose paint and other loose material shall be removed from the surface to be treated. Acceptable methods for preparing the surface to be treated include wet scraping, wet sanding, and power sanding performed in conjunction with a HEPA filtered local exhaust attachment operated according to the manufacturer's instructions.

(4) Dry sanding or dry scraping is permitted only in accordance with § 35.140(e) (i.e., for electrical safety reasons or for specified minor amounts of work).

(5) Paint stabilization shall include the application of a new protective coating or paint. The surface substrate shall be dry and protected from future moisture damage before applying a new protective coating or paint. All protective coatings and paints shall be applied in accordance with the manufacturer's recommendations.

(6) Paint stabilization shall incorporate the use of safe work practices in accordance with § 35.1350.

(c) *Friction and impact surfaces.* (1) Friction surfaces are required to be treated only if:

(i) Lead dust levels on the nearest horizontal surface underneath the friction surface (e.g., the window sill, window trough, or floor) are equal to or greater than the standards specified in 35.1320(b);

(ii) There is evidence that the paint surface is subject to abrasion; and

(iii) Lead-based paint is known or presumed to be present on the friction surface.

(2) Impact surfaces are required to be treated only if:

(i) Paint on an impact surface is damaged or otherwise deteriorated;

(ii) The damaged paint is caused by impact from a related building component (such as a door knob that knocks into a wall, or a door that knocks against its door frame); and

(iii) Lead-based paint is known or presumed to be present on the impact surface.

(3) Examples of building components that may contain friction or impact surfaces include the following:

(i) Window systems;

(ii) Doors;

(iii) Stair treads and risers;

(iv) Baseboards;

(v) Drawers and cabinets; and

(vi) Porches, decks, interior floors, and any other painted surfaces that are abraded, rubbed, or impacted.

(4) Interim control treatments for friction surfaces shall eliminate friction points or treat the friction surface so that paint is not subject to abrasion. Examples of acceptable treatments include rehanging and/or planing doors so that the door does not rub against the door frame, and installing window channel guides that reduce or eliminate abrasion of painted surfaces. Paint on stair treads and floors shall be protected with a durable cover or coating that will prevent abrasion of the painted surfaces. Examples of acceptable materials include carpeting, tile, and sheet flooring.

(5) Interim control treatments for impact surfaces shall protect the paint from impact. Examples of acceptable treatments include treatments that eliminate impact with the paint surface, such as a door stop to prevent a door from striking a wall or baseboard.

(6) Interim control for impact or friction surfaces does not include covering such a surface with a coating or other treatment, such as painting over the surface, that does not protect lead-based paint from impact or abrasion.

(d) *Chewable surfaces.* (1) Chewable surfaces are required to be treated only if there is evidence that a child of less than 6 years of age has chewed on the painted surface, and lead-based paint is known or presumed to be present on the surface.

(2) Interim control treatments for chewable surfaces shall make the lead-based paint inaccessible for chewing by children of less than 6 years of age. Examples include enclosures or coatings that cannot be penetrated by the teeth of such children.

(e) *Dust-lead hazard control.* (1) Interim control treatments used to control dust-lead hazards shall be performed in accordance with the requirements of this section. Additional information on dust removal is found in the HUD Guidelines, particularly Chapter 11 (see § 35.1310).

(2) Dust control shall involve a thorough cleaning of all horizontal surfaces, such as interior window sills, window troughs, floors, and stairs, but excluding ceilings. All horizontal surfaces, such as floors, stairs, window sills and window troughs, that are rough, pitted, or porous shall be covered with a smooth, cleanable covering or coating, such as metal coil stock, plastic, polyurethane, or linoleum.

(3) Surfaces covered by a rug or carpeting shall be cleaned as follows:

(i) The floor surface under a rug or carpeting shall be cleaned where feasible, including upon removal of the rug or carpeting, with a HEPA vacuum or other method of equivalent efficacy.

(ii) An unattached rug or an attached carpet that is to be removed, and padding associated with such rug or carpet, located in an area of the dwelling unit with dust-lead hazards on the floor, shall be thoroughly vacuumed with a HEPA vacuum or other method of equivalent efficacy. Protective measures shall be used to prevent the spread of dust during removal of a rug, carpet or padding from the dwelling. For example, it shall be misted to reduce dust generation during removal. The item(s) being removed shall be wrapped or otherwise sealed before removal from the worksite.

(iii) An attached carpet located in an area of the dwelling unit with dust-lead hazards on the floor shall be thoroughly vacuumed with a HEPA vacuum or other method of equivalent efficacy if it is not to be removed.

(f) *Soil-lead hazards.* (1) Interim control treatments used to control soil-lead hazards shall be performed in accordance with this section.

(2) Soil with a lead concentration equal to or greater than 5,000 µg/g of

lead shall be abated in accordance with 40 CFR 745.227(e).

(3) Acceptable interim control methods for soil lead are impermanent surface coverings and land use controls.

(i) Impermanent surface coverings may be used to treat lead-contaminated soil if applied in accordance with the following requirements. Examples of acceptable impermanent coverings include gravel, bark, sod, and artificial turf.

(A) Impermanent surface coverings selected shall be designed to withstand the reasonably-expected traffic. For example, if the area to be treated is heavily traveled, neither grass or sod shall be used.

(B) When loose impermanent surface coverings such as bark or gravel are used, they shall be applied in a thickness not less than six inches deep.

(C) The impermanent surface covering material shall not contain more than 200 µg/g of lead.

(D) Adequate controls to prevent erosion shall be used in conjunction with impermanent surface coverings.

(ii) Land use controls may be used to reduce exposure to soil-lead hazards only if they effectively control access to areas with soil-lead hazards. Examples of land use controls include: fencing, warning signs, and landscaping.

(A) Land use controls shall be implemented only if residents have reasonable alternatives to using the area to be controlled.

(B) If land use controls are used for a soil area that is subject to erosion, measures shall be taken to contain the soil and control dispersion of lead.

§ 35.1335 Standard treatments.

Standard treatments shall be conducted in accordance with this section.

(a) *Paint stabilization.* All deteriorated paint on exterior and interior surfaces located on the residential property shall be stabilized in accordance with § 35.1330(a)(b), or abated in accordance with § 35.1325.

(b) *Smooth and cleanable horizontal surfaces.* All horizontal surfaces, such as uncarpeted floors, stairs, interior window sills and window troughs, that are rough, pitted, or porous, shall be covered with a smooth, cleanable covering or coating, such as metal coil stock, plastic, polyurethane, or linoleum.

(c) *Correcting dust-generating conditions.* Conditions causing friction or impact of painted surfaces shall be corrected in accordance with § 35.1330(c)(4)–(6).

(d) *Bare residential soil.* Bare soil shall be treated in accordance with the

requirements of § 35.1330, unless it is found not to be a soil-lead hazard in accordance with § 35.1320(b).

(e) *Safe work practices.* All standard treatments described in paragraphs (a) through (d) of this section shall incorporate the use of safe work practices in accordance with § 35.1350.

(f) *Clearance.* A clearance examination shall be performed in accordance with § 35.1340 at the conclusion of any lead hazard reduction activities.

(g) *Qualifications.* An individual performing standard treatments must meet the training and/or supervision requirements of § 35.1330(a)(4).

§ 35.1340 Clearance.

Clearance examinations required under subparts B, C, D, F through M, and R, of this part shall be performed in accordance with the provisions of this section.

(a) *Clearance following abatement.* Clearance examinations performed following abatement of lead-based paint or lead-based paint hazards shall be performed in accordance with 40 CFR 745.227(e) and paragraphs (c)–(f) of this section. Such clearances shall be performed by a person certified to perform risk assessments or lead-based paint inspections.

(b) *Clearance following activities other than abatement.* Clearance examinations performed following interim controls, paint stabilization, standard treatments, ongoing lead-based paint maintenance, or rehabilitation shall be performed in accordance with the requirements of this paragraph (b) and paragraphs (c)–(g) of this section.

(1) *Qualified personnel.* Clearance examinations shall be performed by:

- (i) A certified risk assessor;
- (ii) A certified lead-based paint inspector;

(iii) A person who has successfully completed a training course for clearance technicians (or a discipline of similar purpose and title) that is developed or accepted by EPA or a State or tribal program authorized by EPA pursuant to 40 CFR part 745, subpart Q, and that is given by a training provider accredited by EPA or a State or Indian tribe for training in lead-based paint inspection or risk assessment, *provided* a certified risk assessor or a certified lead-based paint inspector approves the work of the clearance technician and signs the report of the clearance examination; or

(iv) A technician licensed or certified by EPA or a State or Indian tribe to perform clearance examinations without the approval of a certified risk assessor or certified lead-based paint inspector,

provided that a clearance examination by such a licensed or certified technician shall be performed only for a single-family property or individual dwelling units and associated common areas in a multi-unit property, and provided further that a clearance examination by a such a licensed or certified clearance technician shall not be performed using random sampling of dwelling units or common areas in multifamily properties, except that a clearance examination performed by such a licensed or certified clearance technician is acceptable for any residential property if the clearance examination is approved and the report signed by a certified risk assessor or a certified lead-based paint inspector.

(2) *Required activities.* (i) Clearance examinations shall include a visual assessment, dust sampling, submission of samples for analysis for lead, interpretation of sampling results, and preparation of a report. Clearance examinations shall be performed in dwelling units, common areas and exterior areas in accordance with this section and the steps set forth at 40 CFR 745.227(e)(8). If clearance is being performed for more than 10 dwelling units of similar construction and maintenance, as in a multifamily property, random sampling for the purposes of clearance may be conducted in accordance with 40 CFR 745.227(e)(9).

(ii) The visual assessment shall be performed to determine if deteriorated paint surfaces and/or visible amounts of dust, debris, paint chips or other residue are still present. Both exterior and interior painted surfaces shall be examined for the presence of deteriorated paint. If deteriorated paint or visible dust, debris or residue are present in areas subject to dust sampling, they must be eliminated prior to the continuation of the clearance examination, except elimination of deteriorated paint is not required if it has been determined, through paint testing or a lead-based paint inspection, that the deteriorated paint is not lead-based paint. If exterior painted surfaces have been disturbed by the hazard reduction, maintenance or rehabilitation activity, the visual assessment shall include an assessment of the ground and any outdoor living areas close to the affected exterior painted surfaces. Visible dust or debris in living areas shall be cleaned up and visible paint chips on the ground shall be removed.

(iii) Dust samples shall be wipe samples and shall be taken on floors and, where practicable, interior window sills and window troughs. Dust samples

shall be collected and analyzed in accordance with § 35.1315 of this part.

(iv) Clearance reports shall be prepared in accordance with paragraph (c) of this section.

(c) *Clearance report.* When clearance is required, the designated party shall ensure that a clearance report is prepared that provides documentation of the hazard reduction or maintenance activity as well as the clearance examination. When abatement is performed, the report shall be an abatement report in accordance with 40 CFR 745.227(e)(10). When another hazard reduction or maintenance activity requiring a clearance report is performed, the report shall include the following information:

(1) The address of the residential property and, if only part of a multifamily property is affected, the specific dwelling units and common areas affected.

(2) The following information on the clearance examination:

(i) The date(s) of the clearance examination;

(ii) The name, address, and signature of each person performing the clearance examination, including certification number;

(iii) The results of the visual assessment for the presence of deteriorated paint and visible dust, debris, residue or paint chips;

(iv) The results of the analysis of dust samples, in $\mu\text{g}/\text{sq. ft.}$, by location of sample; and

(v) The name and address of each laboratory that conducted the analysis of the dust samples, including the identification number for each such laboratory recognized by EPA under section 405(b) of the Toxic Substances Control Act (15 U.S.C. 2685(b)).

(3) The following information on the hazard reduction or maintenance activity for which clearance was performed:

(i) The start and completion dates of the hazard reduction or maintenance activity;

(ii) The name and address of each firm or organization conducting the hazard reduction or maintenance activity and the name of each supervisor assigned;

(iii) A detailed written description of the hazard reduction or maintenance activity, including the methods used, locations of exterior surfaces, interior rooms, common areas, and/or components where the hazard reduction activity occurred, and any suggested monitoring of encapsulants or enclosures; and

(iv) If soil hazards were reduced, a detailed description of the location(s) of

the hazard reduction activity and the method(s) used.

(d) *Standards.* The clearance standards in § 35.1320(b)(2) shall apply. If test results equal or exceed the standards, the dwelling unit, worksite, or common area represented by the sample fails the clearance examination.

(e) *Clearance failure.* All surfaces represented by a failed clearance sample shall be recleaned or treated by hazard reduction, and retested, until the applicable clearance level in § 35.1320(b)(2) is met.

(f) *Independence.* Clearance examinations shall be performed by persons or entities independent of those performing hazard reduction or maintenance activities, unless the designated party uses qualified in-house employees to conduct clearance. An in-house employee shall not conduct both a hazard reduction or maintenance activity and its clearance examination.

(g) *Worksite clearance.* When clearance is of an interior worksite, not an entire dwelling unit or residential property, dust samples taken for paragraph (b) of this section shall be taken from the floor and window (if available) to represent the area within the dust containment area. Clearance is not required if maintenance or hazard reduction activities in the worksite do not disturb painted surfaces of a total area more than that set forth in § 35.1350(d).

§ 35.1345 Occupant protection and worksite preparation.

This section establishes procedures for protecting dwelling unit occupants and the environment from contamination from lead-contaminated or lead-containing materials during hazard reduction activities.

(a) *Occupant protection.* (1) Occupants shall not be permitted to enter the worksite during hazard reduction activities (unless they are employed in the conduct of these activities at the worksite), until after hazard reduction work has been completed and clearance, if required, has been achieved.

(2) Occupants shall be temporarily relocated before and during hazard reduction activities to a suitable, decent, safe, and similarly accessible dwelling unit that does not have lead-based paint hazards, except if:

(i) Treatment will not disturb lead-based paint, dust-lead hazards or soil-lead hazards;

(ii) Only the exterior of the dwelling unit is treated, and windows, doors, ventilation intakes and other openings in or near the worksite are sealed during hazard control work and cleaned

afterward, and entry free of dust-lead hazards, soil-lead hazards, and debris is provided;

(iii) Treatment of the interior will be completed within one period of 8-daytime hours, the worksite is contained so as to prevent the release of leaded dust and debris into other areas, and treatment does not create other safety, health or environmental hazards (e.g., exposed live electrical wiring, release of toxic fumes, or on-site disposal of hazardous waste); or

(iv) Treatment of the interior will be completed within 5 calendar days, the worksite is contained so as to prevent the release of leaded dust and debris into other areas, treatment does not create other safety, health or environmental hazards; and, at the end of work on each day, the worksite and the area within at least 10 feet (3 meters) of the containment area is cleaned to remove any visible dust or debris, and occupants have safe access to sleeping areas, and bathroom and kitchen facilities.

(3) The dwelling unit and the worksite shall be secured against unauthorized entry, and occupants' belongings protected from contamination by dust-lead hazards and debris during hazard reduction activities. Occupants' belongings in the containment area shall be relocated to a safe and secure area outside the containment area, or covered with an impermeable covering with all seams and edges taped or otherwise sealed.

(b) *Worksite preparation.* (1) The worksite shall be prepared to prevent the release of leaded dust, and contain lead-based paint chips and other debris from hazard reduction activities within the worksite until they can be safely removed. Practices that minimize the spread of leaded dust, paint chips, soil and debris shall be used during worksite preparation.

(2) A warning sign shall be posted at each entry to a room where hazard reduction activities are conducted when occupants are present; or at each main and secondary entryway to a building from which occupants have been relocated; or, for an exterior hazard reduction activity, where it is easily read 20 feet (6 meters) from the edge of the hazard reduction activity worksite. Each warning sign shall be as described in 29 CFR 1926.62(m), except that it shall be posted irrespective of employees' lead exposure and, to the extent practicable, provided in the occupants' primary language.

§ 35.1350 Safe work practices.

(a) *Prohibited methods.* Methods of paint removal listed in § 35.140 shall not be used.

(b) *Occupant protection and worksite preparation.* Occupants and their belongings shall be protected, and the worksite prepared, in accordance with § 35.1345.

(c) *Specialized cleaning.* After hazard reduction activities have been completed, the worksite shall be cleaned using cleaning methods, products, and devices that are successful in cleaning up dust-lead hazards, such as a HEPA vacuum or other method of equivalent efficacy, and lead-specific detergents or equivalent.

(d) *De minimis levels.* Safe work practices are not required when maintenance or hazard reduction activities do not disturb painted surfaces that total more than:

(1) 20 square feet (2 square meters) on exterior surfaces;

(2) 2 square feet (0.2 square meters) in any one interior room or space; or

(3) 10 percent of the total surface area on an interior or exterior type of component with a small surface area. Examples include window sills, baseboards, and trim.

§ 35.1355 Ongoing lead-based paint maintenance and reevaluation activities.

(a) *Maintenance.* Maintenance activities shall be conducted in accordance with paragraphs (a)(2)–(6) of this section, except as provided in paragraph (a)(1) of this section.

(1) Maintenance activities need not be conducted in accordance with this section if both of the following conditions are met, as applicable:

(i) Either a lead-based paint inspection indicates that no lead-based paint is present in the dwelling units, common areas, and on exterior surfaces, or a clearance report prepared in accordance with § 35.1340(a) indicates that all lead-based paint has been removed; and

(ii) If a risk assessment is required by the applicable subpart of this part, a current risk assessment indicates that no soil-lead hazards and no dust-lead hazards are present.

(2) A visual assessment for deteriorated paint, bare soil, and the failure of any hazard reduction measures shall be performed at unit turnover and every twelve months.

(3) (i) *Deteriorated paint.* All deteriorated paint on interior and exterior surfaces located on the residential property shall be stabilized in accordance with § 35.1330(a)(b), except for any paint that an evaluation has found is not lead-based paint.

(ii) *Bare soil.* All bare soil shall be treated with standard treatments in accordance with § 35.1335(d) through (g), or interim controls in accordance with § 35.1330(a) and (f); except for any bare soil that a current evaluation has found is not a soil-lead hazard.

(4) Safe work practices, in accordance with sec. 35.1350, shall be used when performing any maintenance or renovation work that disturbs paint that may be lead-based paint.

(5) Any encapsulation or enclosure of lead-based paint or lead-based paint hazards which has failed to maintain its effectiveness shall be repaired, or abatement or interim controls shall be performed in accordance with §§ 35.1325 or 35.1330, respectively.

(6) Clearance testing of the worksite shall be performed at the conclusion of repair, abatement or interim controls in accordance with § 35.1340.

(7) Each dwelling unit shall be provided with written notice asking occupants to report deteriorated paint and, if applicable, failure of encapsulation or enclosure, along with the name, address and telephone number of the person whom occupants should contact. The language of the notice shall be in accordance with § 35.125(c)(3). The designated party shall respond to such report and stabilize the deteriorated paint or repair the encapsulation or enclosure within 30 days.

(b) *Reevaluation.* Reevaluation shall be conducted in accordance with this paragraph (b), and the designated party shall conduct interim controls of lead-based paint hazards found in the reevaluation.

(1) Reevaluation shall be conducted if hazard reduction has been conducted to reduce lead-based paint hazards found in a risk assessment or if standard treatments have been conducted, except that reevaluation is not required if any of the following cases are met:

(i) An initial risk assessment found no lead-based paint hazards;

(ii) A lead-based paint inspection found no lead-based paint; or

(iii) All lead-based paint was abated in accordance with § 35.1325, provided that no failures of encapsulations or enclosures have been found during visual assessments conducted in accordance with § 35.1355(a)(2) or during other observations by maintenance and repair workers in accordance with § 35.1355(a)(5) since the encapsulations or enclosures were performed.

(2) Reevaluation shall be conducted to identify:

(i) Deteriorated paint surfaces with known or suspected lead-based paint;

(ii) Deteriorated or failed interim controls of lead-based paint hazards or encapsulation or enclosure treatments;

(iii) Dust-lead hazards; and

(iv) Soil that is newly bare with lead levels equal to or above the standards in § 35.1320(b)(2).

(3) Each reevaluation shall be performed by a certified risk assessor.

(4) Each reevaluation shall be conducted in accordance with the following schedule if a risk assessment or other evaluation has found deteriorated lead-based paint in the residential property, a soil-lead hazard, or a dust-lead hazard on a floor or interior window sill. (Window troughs are not sampled during reevaluation). The first reevaluation shall be conducted no later than two years from completion of hazard reduction. Subsequent reevaluation shall be conducted at intervals of two years, plus or minus 60 days. To be exempt from additional reevaluation, at least two consecutive reevaluations conducted at such two-year intervals must be conducted without finding lead-based paint hazards or a failure of an encapsulation or enclosure. If, however, a reevaluation finds lead-based paint hazards or a failure, at least two more consecutive reevaluations conducted at such two year intervals must be conducted without finding lead-based paint hazards or a failure.

(5) Each reevaluation shall be performed as follows:

(i) Dwelling units and common areas shall be selected and reevaluated in accordance with § 35.1320(b).

(ii) The worksites of previous hazard reduction activities that are similar on the basis of their original lead-based paint hazard and type of treatment shall be grouped. Worksites within such groups shall be selected and reevaluated in accordance with § 35.1320(b).

(6) Each reevaluation shall include reviewing available information, conducting selected visual assessment, recommending responses to hazard reduction omissions or failures, performing selected evaluation of paint, soil and dust, and recommending response to newly-found lead-based paint hazards.

(i) *Review of available information.* The risk assessor shall review any available past evaluation, hazard reduction and clearance reports, and any other available information describing hazard reduction measures, ongoing maintenance activities, and relevant building operations.

(ii) *Visual assessment.* The risk assessor shall:

(A) Visually evaluate all lead-based paint hazard reduction treatments, any

known or suspected lead-based paint, any deteriorated paint, and each exterior site, and shall identify any new areas of bare soil;

(B) Determine acceptable options for controlling the hazard; and

(C) Await the correction of any hazard reduction omission or failure and the reduction of any lead-based paint hazard before sampling any dust or soil the risk assessor determines may reasonably be associated with such hazard.

(iii) *Reaction to hazard reduction omission or failure.* If any hazard reduction control has not been implemented or is failing (e.g., an encapsulant is peeling away from the wall, a paint-stabilized surface is no longer intact, or gravel covering an area of bare soil has worn away), or deteriorated lead-based paint is present, the risk assessor shall:

(A) Determine acceptable options for controlling the hazard; and

(B) Await the correction of any hazard reduction omission or failure and the reduction of any lead-based paint hazard before sampling any dust or soil the risk assessor determines may reasonably be associated with such hazard.

(iv) *Selected paint, soil and dust evaluation.* (A) The risk assessor shall sample deteriorated paint surfaces identified during the visual assessment and have the samples analyzed, in accordance with 40 CFR 745.227(b)(3)(4), but only if reliable information about lead content is unavailable.

(B) The risk assessor shall evaluate new areas of bare soil identified during the visual assessment. Soil samples shall be collected and analyzed in accordance with 40 CFR 745.227(d)(8)–(11), but only if the soil lead levels have not been previously measured.

(C) The risk assessor shall take selected dust samples and have them analyzed. Dust samples shall be collected and analyzed in accordance with § 35.1320(b). At least two composite samples, one from floors and the other from interior window sills, shall be taken in each dwelling unit and common area selected. Each composite sample shall consist of four individual samples, each collected from a different room or area. If the dwelling unit contains both carpeted and uncarpeted living areas, separate floor samples are required from the carpeted and uncarpeted areas. Equivalent single-surface sampling may be used instead of composite sampling.

(7) The risk assessor shall provide the designated party with a written report documenting the presence or absence of

lead-based paint hazards, the current status of any hazard reduction and standard treatment measures used previously and any newly-conducted evaluation and hazard reduction activities. The report shall include the information in 40 CFR 745.227(d)(11), and shall:

(i) Identify any lead-based paint hazards previously detected and discuss the effectiveness of any hazard reduction or standard treatment measures used, and list those for which no measures have been used.

(ii) Describe any new hazards found and present the owner with acceptable control options and their accompanying reevaluation schedules.

(iii) Identify when the next reevaluation, if any, must occur, in accordance with the requirements of paragraph (b)(4) of this section.

(c) *Response to the reevaluation.* (1) *Hazard reduction omission or failure found by a reevaluation.* The designated party shall respond in accordance with paragraph (b)(6)(iii)(A) of this section to a report by the risk assessor of a hazard reduction control that has not been implemented or is failing, or that deteriorated lead-based paint is present.

(2) *Newly-identified lead-based paint hazard found by a reevaluation.* The designated party shall treat each:

(i) Dust-lead hazard or paint lead hazard by cleaning or hazard reduction measures, which are considered completed when clearance is achieved in accordance with § 35.1340.

(ii) Soil-lead hazard by hazard reduction measures, which are considered completed when clearance is achieved in accordance with § 35.1340.

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

4. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, 12901–12912.

5. Revise § 91.2(b)(15) to read as follows:

§ 91.2 Applicability.

* * * * *

(b) * * *

(15) The “Lead-Based Paint Hazard Reduction Program (see 42 U.S.C. 4852(o));”

* * * * *

6. In § 91.5, revise the definition of “Lead-based paint hazards” to read as follows:

§ 91.5 Definitions.

* * * * *

Lead-based paint hazards means lead-based paint hazards as defined in part 35, subpart B of this title.

7. Revise § 91.225(b)(7) to read as follows:

§ 91.225 Certifications.

* * * * *

(b) * * *

(7) *Compliance with lead-based paint procedures.* The jurisdiction must submit a certification that its activities concerning lead-based paint will comply with the requirements of part 35, subparts A, B, J, K, and R of this title.

* * * * *

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

8. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

9. Revise § 92.206(a)(2)(ii) to read as follows:

§ 92.206 Eligible project costs.

* * * * *

(a) * * *

(2) * * *

(ii) To make essential improvements, including energy-related repairs or improvements, improvements necessary to permit use by persons with disabilities, and lead-based paint activities, as required by part 35 of this title.

* * * * *

10. Revise § 92.355 to read as follows:

§ 92.355 Lead-based paint.

Housing assisted with HOME funds is subject to the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K, M and R of this title.

11. Revise § 92.504(c)(3)(iv) to read as follows:

§ 92.504 Participating jurisdiction responsibilities; written agreements; on-site inspection.

* * * * *

(c) * * *

(3) * * *

(iv) *Property standards.* The agreement must require the housing to meet the property standards in § 92.251 and the lead-based paint requirements in part 35, subparts A, B, J, K, M and R of this title, upon project completion. The agreement must also require owners of rental housing assisted with HOME

funds to maintain the housing compliance with § 92.251 for the duration of the affordability period.

* * * * *

12. Revise § 92.508(a)(7)(vi) to read as follows:

§ 92.508 Recordkeeping.

* * * * *

(a) * * *

(7) * * *

(vi) Records demonstrating compliance with the lead-based paint requirements of part 35, subparts A, B, J, K, M and R of this title.

* * * * *

PART 200—INTRODUCTION TO FHA PROGRAMS

13. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1701–1715z–18; 42 U.S.C. 3535(d).

14. Revise subpart O to read as follows:

Subpart O—Lead-Based Paint Poisoning Prevention

Sec.

200.800 Lead-based paint.

200.805 Definitions.

200.810 Single family insurance and coinsurance.

Subpart O—Lead-Based Paint Prevention

§ 200.800 Lead-based paint.

The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, F, G, I, and R of this title, apply to activities under these programs, except for single family mortgage insurance and guarantee programs. Sections 200.805 and 200.810 apply to single family mortgage insurance and guarantee programs administered by HUD.

§ 200.805 Definitions.

Applicable surface. All intact and nonintact interior and exterior painted surfaces of a residential structure.

Defective paint surface. Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

Lead-based paint surface. A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 mg/cm².

§ 200.810 Single family insurance and coinsurance.

(a) *General.* (1) The requirements of this section apply to any one-to four-family dwelling which was constructed

before 1978 and is the subject of an application for mortgage insurance under section 203(b) or other sections of the National Housing Act relating to the insurance or coinsurance of mortgages on one-to-four-family dwellings. Such other sections include:

(i) Section 244 (coinsurance);

(ii) Section 213 (cooperative housing insurance);

(iii) Section 220 (rehabilitation and neighborhood conservation housing insurance);

(iv) Section 221 (housing for moderate income and displaced families);

(v) Section 222 (mortgagor insurance for servicemen);

(vi) Section 809 (armed services housing for civilian employees);

(vii) Section 810 (armed services housing in impacted areas);

(viii) Section 234 (mortgage insurance for condominiums);

(ix) Section 235 (mortgage assistance payments for home ownership and project rehabilitation);

(x) Section 237 (special mortgage insurance for low and moderate income families); and

(xi) Section 240 (mortgage insurance on loans for purchase of fee simple title from lessors).

(2) This section is also applicable to single family mortgage insurance on Indian reservations (12 U.S.C. 1715z–13) and loan guarantees for Indian housing (25 U.S.C. 4191).

(3) Applications for insurance in connection with a refinancing transaction where an appraisal is not required under the applicable procedures established by the Commissioner are excluded from the coverage of this section. Any housing assisted under the programs set out in this section for which no new activity is applied for or required is not covered by this section.

(b) *Appraisal.* The appraiser shall, when appraising a dwelling constructed prior to 1978, inspect the dwelling for defective paint surfaces.

(c) *Treatment of defective paint surfaces.* For defective paint surfaces, treatment shall be provided to defective areas. Treatment of hazards shall consist of covering or removing defective paint surfaces. Covering may be accomplished by such means as adding a layer of wallboard to the wall surface.

Depending on the wall condition, wallcoverings which are permanently attached may be used. Covering or replacing trim surfaces is also permitted. Paint removal may be accomplished by such methods as scraping, heat treatment (infra-red or coil type heat guns) or chemicals. Machine sanding and use of propane or

gasoline torches (open-flame methods) are not permitted. Washing and repainting without thorough removal or covering does not constitute adequate treatment. In the case of defective paint spots, scraping and repainting the defective area is considered adequate treatment. Treatment of a defective paint surface is not required if such a surface is found to not be a lead-based paint surface by a lead-based paint inspector certified pursuant to procedures of the U.S. Environmental Protection Agency at 40 CFR part 745.

(d) *Home equity conversion mortgage insurance.* The requirements of this section, as modified by the following sentence, apply to a dwelling which is the subject of an application for mortgage insurance under section 255 of the National Housing Act (home equity conversion insurance) unless the mortgagor provides the certification described in § 206.45(d) of this title. The defective paint surface may be treated after the mortgage is endorsed for insurance, provided that the defective paint surface is treated as expeditiously as possible in accordance with the repair work provisions contained in § 206.47 of this title

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

15. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, and 1715u; 42 U.S.C. 3535(d).

16. In § 203.673, revise paragraphs (a) and (c) to read as follows:

§ 203.673 Habitability.

(a) For purposes of § 203.670, a property is habitable if it meets the requirements of this section in its present condition, or will meet these requirements with the expenditure of not more than five percent of the fair market value of the property. The cost of hazard reduction or abatement of lead-based paint hazards in the property, as required by the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), and the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations in part 35 of this title, is excluded from these repair cost limitations.

* * * * *

(c) If repairs, including lead-based paint hazard reduction or abatement, are to be made while the property is occupied, the occupant must hold the Secretary and the Department harmless against any personal injury or property damage that may occur during the process of making repairs. If temporary

relocation of the occupant is necessary during repairs, no reimbursement for relocation expenses will be provided to the occupant.

PART 280—NEHEMIAH HOUSING OPPORTUNITY GRANTS PROGRAM

17. The authority citation for part 280 continues to read as follows:

Authority: 12 U.S.C. 1715l note; 42 U.S.C. 3535(d).

18. Revise § 280.25(e) to read as follows:

§ 280.25 Other Federal requirements.

* * * * *

(e) *Lead-based paint.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, K, and R, of this title apply to the program.

* * * * *

PART 291—DISPOSITION OF HUD-ACQUIRED SINGLE FAMILY PROPERTY

19. The authority citation for part 291 continues to read as follows:

Authority: 12 U.S.C. 1701 *et seq.*; 42 U.S.C. 1441, 1441a, and 3535(d).

20. Revise § 291.100(g) to read as follows:

§ 291.100 General policy.

* * * * *

(g) *Lead-based paint poisoning prevention.* Properties constructed before 1978 are subject to the requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, F, and R, of this title.

* * * * *

21. Revise § 291.430 to read as follows:

§ 291.430 Elimination of lead-based paint hazards.

The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, F, and R of this title, apply activities covered by this subpart.

PART 511—RENTAL REHABILITATION GRANT PROGRAM

22. The authority citation for 24 CFR part 511 continues to read as follows:

Authority: 42 U.S.C. 1437o and 3535(d).

23. Revise § 511.10(f)(1)(ii) to read as follows:

§ 511.10 General requirements.

* * * * *

(f) * * *

(1) * * *

(ii) Make essential improvements, as reasonably defined by the grantee or State recipient in its rehabilitation standards adopted under § 511.10(e), including energy-related repairs, improvements necessary to permit the use of rehabilitated projects by handicapped persons, and activities of lead based paint hazards, as required by part 35 of this title;

* * * * *

24. Revise § 511.15 to read as follows:

§ 511.15 Lead-based paint.

The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K, and R of this title apply to activities under these programs.

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

25. The authority citation for part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5300–5320.

26. Revise § 570.202(f) to read as follows:

§ 570.202 Eligible rehabilitation and preservation activities.

* * * * *

(f) *Lead-based paint activities.* Lead-based paint activities as set forth in part 35 of this title.

27. Revise § 570.461 to read as follows:

§ 570.461 Post-preliminary approval requirements; lead-based paint.

The recipient may receive preliminary approval prior to the accomplishment of lead-based paint activities conducted pursuant to part 35, subparts A, B, J, K, and R of this title, but no funds will be released until such actions are complete and evidence of compliance is submitted to HUD.

28. Revise § 570.487(c) to read as follows:

§ 570.487 Other applicable laws and related program requirements.

* * * * *

(c) *Lead-Based Paint Poisoning Prevention Act.* States shall devise, adopt and carry out procedures with

respect to CDBG assistance that fulfill the objectives and requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K, and R of this title.

* * * * *

29. Revise § 570.608 to read as follows:

§ 570.608 Lead-based paint.

The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K, and R of this part apply to activities under this program.

PART 572—HOPE FOR HOMEOWNERSHIP OF SINGLE FAMILY HOMES PROGRAM (HOPE 3)

30. The authority citation for part 572 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12891.

31. Revise § 572.100(d)(1) to read as follows:

§ 572.100 Acquisition and rehabilitation of eligible properties; rehabilitation standards.

* * * * *

(d) * * *

(1) The recipient is responsible to assure that rehabilitation of eligible property meets local codes applicable to rehabilitation of work in the jurisdiction (but not less than the housing quality standards established under the Section 8 rental voucher program, described in § 982.401 of this title). Rehabilitation must also include work necessary to meet applicable federal requirements, including lead-based paint requirements set forth at part 35, subparts A, B, J, K, and R of this title.

* * * * *

32. Revise § 572.215(e) to read as follows:

§ 572.215 Implementation grants-eligible activities.

* * * * *

(e) *Architectural and engineering work.* Architectural and engineering work, and related professional services required to prepare architectural plans or drawings, write-ups, specifications or inspections, including lead-based paint evaluation.

* * * * *

33. Revise § 572.420(h) to read as follows:

§ 572.420 Miscellaneous requirements.

* * * * *

(h) *Lead-based paint activities.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K and R of this title apply to activities under these programs.

PART 573—LOAN GUARANTEE RECOVERY FUND

34. The authority citation for part 573 continues to read as follows:

Authority: Pub. L. 104–155, 110 Stat. 1392, 18 U.S.C. 241 note; 42 U.S.C. 3535(d).

35. Revise § 573.9(c) to read as follows:

§ 573.9 Other requirements.

* * * * *

(c) *Lead-based paint.* Housing assisted under this part is subject to the lead-based paint requirements described in part 35, subparts A, B, E, G, and R of this title.

* * * * *

PART 574—HOUSING OPPORTUNITIES FOR PEOPLE WITH AIDS

36. The authority citation for part 574 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12901–12912.

37. Revise § 574.635 to read as follows:

§ 574.635 Lead-based paint.

The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, J, K, M, and R of this part apply to activities under this program.

PART 576—EMERGENCY SHELTER GRANTS PROGRAM: STEWART B. MCKINNEY HOMELESS ASSISTANCE ACT

38. The authority citation for part 576 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11376.

39. Revise § 576.57(c) to read as follows:

§ 576.57 Other Federal Requirements.

* * * * *

(c) The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–

4856), and implementing regulations at part 35, subparts A, B, J, K, and R of this title apply to activities under this program.

* * * * *

PART 582—SHELTER PLUS CARE

40. The authority citation for part 582 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11403–11407b.

41. Revise the first sentence of § 582.305(a) to read as follows:

§ 582.305 Housing quality standards; rent reasonableness.

(a) *Housing quality standards.* Housing assisted under this part must meet the applicable housing quality standards (HQS) under § 982.401 of this title—except that § 982.401(j) of this title does not apply and instead part 35, subparts A, B, K and R of this title apply—and, for SRO under § 882.803(b) of this title. * * *

* * * * *

PART 583—SUPPORTIVE HOUSING PROGRAM

42. The authority citation for part 583 continues to read as follows:

Authority: 42 U.S.C. 11389 and 3535(d).

43. Revise § 583.330(d) to read as follows:

§ 583.330 Applicability of other Federal requirements.

* * * * *

(d) *Lead-based paint.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K, and R of this title apply to activities under this program.

* * * * *

PART 585—YOUTHBUILD PROGRAM

44. The authority citation for part 585 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 8011.

45. Revise § 585.305(d) to read as follows:

§ 585.305 Eligible activities.

* * * * *

(d) Rehabilitation of housing and related facilities to be used for the purposes of providing homeownership, residential rental housing, or transitional housing for the homeless and low- and very low-income persons and families, including lead-based paint

activities; in accordance with part 35 of this title;

* * * * *

46. Revise § 585.502(h) to read as follows:

§ 585.502 Certifications.

* * * * *

(h) *Lead-based paint.* A certification that the applicant will comply with the requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, J, K, and R of this title.

* * * * *

PART 761—DRUG ELIMINATION PROGRAMS

47. The authority citation for part 761 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11901 *et seq.*

48. Revise § 761.40(c) to read as follows:

§ 761.40 Other Federal requirements.

* * * * *

(c) *Lead-based paint.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title.

* * * * *

PART 881—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR SUBSTANTIAL REHABILITATION

49. The authority citation for part 881 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

50. Revise § 881.207(e) to read as follows:

§ 881.207 Property standards.

* * * * *

(e) The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title; and

* * * * *

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

51. The authority citation for part 882 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

52. Revise § 882.404(d) to read as follows:

§ 882.404 Physical condition standards; physical inspection requirements.

* * * * *

(d) *Lead-based paint.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title apply to the Section 8 moderate rehabilitation program.

53. Revise § 882.507(b)(2)(iv) to read as follows:

§ 882.507 Completion of rehabilitation.

* * * * *

(b) * * *

(2) * * *

(iv) The unit(s) are in compliance with part 35, subparts A, B, H, and R of this title.

* * * * *

54. Revise § 882.514(d)(1)(vi) to read as follows:

§ 882.514 Family participation.

* * * * *

(d) * * *

(1) * * *

(vi) The advisability and availability of blood lead level screening for children under 6 years of age and HUD's lead-based paint requirements in part 35, subparts A, B, H, and R of this title.

* * * * *

55. Revise § 882.803(b)(1) to read as follows:

§ 882.803 Project eligibility and other requirements.

* * * * *

(b)(1) *Physical condition standards.* Section 882.404 applies to this program.

* * * * *

PART 883—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—STATE HOUSING AGENCIES

56. The authority citation for part 883 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

57. Revise § 883.310(b)(5) to read as follows:

§ 883.310 Property standards.

* * * * *

(b) * * *

(5) The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at

part 35, subparts A, B, H, and R of this title.

* * * * *

PART 886—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—SPECIAL ALLOCATIONS

58. The authority citation for part 886 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f and 3535(d) and 13611–13619.

59. Revise § 886.113(i) to read as follows:

§ 886.113 Physical condition standard; physical inspection requirements.

* * * * *

(i) *Lead based paint.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title apply to activities under this program.

* * * * *

60. Revise § 886.307(i) to read as follows:

§ 886.307 Physical condition standards; physical inspection requirement.

* * * * *

(i) *Lead-based paint.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title apply to activities under this program.

* * * * *

61. Revise § 886.333(b)(2)(iv) to read as follows:

§ 886.333 Completion of rehabilitation.

* * * * *

(b) * * *

(2) * * *

(iv) The project was in compliance with applicable HUD lead-based paint regulations at part 35, subparts A, B, H, and R of this title.

* * * * *

PART 891—SECTION 8—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

62. The authority citation for part 891 continues to read as follows:

Authority: 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d) and 8013.

63. Revise § 891.155(g) to read as follows:

§ 891.155 Other Federal requirements.

* * * * *

(g) *Lead-based paint.* The requirements of the Lead-Based Paint

Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title apply to these programs.

64. Revise § 891.325 to read as follows:

§ 891.325 Lead-based paint requirements.

The requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title apply to the Section 811 program and to projects funded under §§ 891.655 through 891.790.

PART 901—PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM

65. The authority citation for part 901 continues to read as follows:

Authority: 42 U.S.C. 1437d(j); 42 U.S.C. 3535(d).

66. In § 901.5, revise the definition of “HQS” to read as follows:

§ 901.5 Definitions.

* * * * *

HQS means Housing Quality Standards as set forth at § 982.401 of this title, except that § 982.401(j) of this title does not apply and instead part 35, subparts A, B, L, and R of this title apply.

* * * * *

PART 906—SECTION 5(h) HOMEOWNERSHIP PROGRAM

67. The authority citation for part 906 continues to read as follows:

Authority: 42 U.S.C. 1437c, 1437d and 3535(d).

68. Revise the first sentence of § 906.6(b) to read as follows:

§ 906.6 Property that may be sold.

* * * * *

(b) *Physical condition of property.* The property must meet local code requirements (or, if no local code exists, the housing quality standards established by HUD for the Section 8 Housing Assistance Payments Program for Existing Housing, under part 882 of this title) and the relevant requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations

part 35, subparts A, B, L, and R of this title. * * *

PART 941—PUBLIC HOUSING DEVELOPMENT

69. The authority citation for part 941 continues to read as follows:

Authority: 42 U.S.C. 1437b, 1437c, 1437g and 3535(d).

70. Revise § 941.208(b) to read as follows:

§ 941.208 Other Federal requirements.

* * * * *

(b) *Lead-based paint.* The relevant requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, L, and R of this title apply to the program.

71. Revise the second sentence of § 941.606(m) to read as follows:

§ 941.606 Proposal.

* * * * *

(m) *New construction.* * * * This may be accomplished by the PHA’s submission of a comparison of the cost of new construction in the neighborhood where the housing is proposed to be constructed and the cost of acquisition of existing housing (with or without rehabilitation) in the same neighborhood (including estimated costs of lead-based paint activities).

* * *

* * * * *

PART 965—PHA-OWNED OR LEASED PROJECTS—GENERAL PROVISIONS

72. The authority citation for part 965 continues to read as follows:

Authority: 42 U.S.C. 1437, 1437a, 1437d, 1437g, and 3535(d). Subpart H is also issued under 42 U.S.C. 4821–4846.

73. Amend § 965.215 as follows:

- a. Revise paragraph (a);
- b. Revise the introductory text of paragraph (b); and
- c. Revise paragraphs (b)(1), (c), and (d).

§ 965.215 Lead-based paint liability insurance coverage.

(a) *General.* The purpose of this section is to specify what HUD deems reasonable insurance coverage with respect to the hazards associated with lead-based paint activities that the PHA undertakes, in accordance with the PHA’s ACC with HUD. The insurance coverage does not relieve the PHA of its responsibility for assuring that lead-based paint activities are conducted in a responsible manner.

(b) *Insurance coverage requirements.* When the PHA undertakes lead-based paint activities, it must assure that it has reasonable insurance coverage for itself for potential personal injury liability associated with those activities. If the work is being done by PHA employees, the PHA must obtain a liability insurance policy directly to protect the PHA. If the work is being done by a contractor, the PHA must obtain, from the insurer of the contractor performing this type of work in accordance with a contract, a certificate of insurance providing evidence of such insurance and naming the PHA as an additional insured; or obtain such insurance directly. Insurance must remain in effect during the entire period of lead-based paint activity and must comply with the following requirements:

(1) *Named insured.* If purchased by the PHA, the policy shall name the PHA as insured. If purchased by an independent contractor, the policy shall name the contractor as insured and the PHA as an additional insured, in connection with performing work under the PHA’s contract pertaining to lead-based paint activities. If the PHA has executed a contract with a Resident Management Corporation (RMC) to manage a building/project on behalf of the PHA, the RMC shall be an additional insured under the policy in connection with the PHA’s contract related to lead-based paint activities. (The duties of the RMC are similar to those of a real estate management firm.)

* * * * *

(c) *Exception to requirements.* Insurance already purchased by the PHA or contractor and enforced on the day this section is effective which provides coverage for lead-based paint activities shall be considered as meeting the requirements of this section until the expiration of the policy. This section is not applicable to architects, engineers or consultants who do not physically perform lead-based paint activities.

(d) *Insurance for the existence of lead-based paint hazards.* A PHA may also purchase special liability insurance against the existence of lead-based paint hazards, although it is not a required coverage. A PHA may purchase this coverage if, in the opinion of the PHA, the policy meets the PHA’s requirements, the premium is reasonable and the policy is obtained in accordance with applicable procurement standards. (See part 85 of this title and § 965.205 of this title.) If this coverage is purchased, the premium must be paid from funds available under the Performance Funding System or from reserves.

74. Revise subpart H, consisting of § 965.701, to read as follows:

Subpart H—Lead-based Paint Poisoning Prevention

§ 965.701 Lead-based paint poisoning prevention.

The requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, L, and R of this title apply to this program.

PART 968—PUBLIC HOUSING MODERNIZATION

75. The authority citation for part 968 continues to read as follows:

Authority: 42 U.S.C. 1437d, 1437l, and 3535(d).

76. Revise the first sentence of § 968.102(c) to read as follows:

§ 968.102 Special requirements for Turnkey III developments.

(c) *Other.* The homebuyer family must be in compliance with its financial obligations under its homebuyer agreement in order to be eligible for non-emergency physical improvements, with the exception of work necessary to meet statutory and regulatory requirements, (e.g., accessibility for persons with disabilities and lead-based paint activities) and the correction of development deficiencies. * * *

77. Revise § 968.110(k) to read as follows:

§ 968.110 Other program requirements.

(k) *Lead-based paint poisoning prevention.* The PHA shall comply with the relevant requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, L, and R of this title. * * *

78. Revise § 968.112(i) to read as follows:

§ 968.112 Eligible costs.

(i) *Lead-based paint costs.* Eligible costs include lead-based paint activities, such as insurance coverage and cleanup and disposal, in accordance with part 35 of this title. * * *

79. In § 968.205, revise the definition of the term “*Other modernization*” to read as follows:

§ 968.205 Definitions.

* * * * *

Other Modernization (modernization other than emergency). A type of modernization program for a development that includes one or more physical work items, where HUD determines that the physical improvements are necessary and sufficient to extend substantially the useful life of the development, and/or one or more development specific or PHA-wide management work items (including planning costs), and/or lead-based paint activities. * * * * *

80. Revise § 968.210(e)(2)(ii) to read as follows:

§ 968.210 Procedures for obtaining approval of a modernization program.

* * * * *

(e) * * *

(2) * * *

(ii) *Lead-based paint inspection compliance.* Where a PHA has not complied with the statutory requirement to complete lead-based paint inspection of all pre-1978 family units, the PHA is eligible for processing only for Emergency Modernization or work needed to complete the lead-based paint inspection. * * * * *

81. Revise the first sentence of § 968.315(e)(2)(i) to read as follows:

§ 968.315 Comprehensive Plan (including five-year action plan).

* * * * *

(e) * * *

(2) * * *

(i) *Requirements.* The physical needs assessment identifies all of the work that a PHA would need to undertake to bring each of its developments up to the modernization and energy conservation standards, as required by the Act, to comply with the lead-based paint requirements in part 35, subparts A, B, L, and R of this title, and to comply with other program requirements under § 968.110. * * * * *

82. Revise § 968.435(b) to read as follows:

§ 968.435 Other program requirements.

* * * * *

(b) Certify that activities undertaken within vacant units will bring the affected units into compliance with the Housing Quality Standards, as set forth in § 982.401 of this title, except that § 982.401(j) of this title shall not apply; the applicable lead-based paint requirements in part 35 subparts A, B, L and R, of this title shall apply. * * * * *

PART 970—PUBLIC HOUSING PROGRAM—DEMOLITION OR DISPOSITION OF PUBLIC HOUSING PROJECTS

83. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 1437p and 3535(d).

84. Revise § 970.13(d)(1)(i) to read as follows:

§ 970.13 Resident organization opportunity to purchase.

* * * * *

(d) * * *

(1) * * *

(i) An identification of the development, or portion of the development, in the proposed demolition or disposition, including the development number and location, the number of units and bedroom configuration, the amount of space and use for non-dwelling space, the current physical condition (e.g., fire damaged, friable asbestos, lead-based paint evaluation results), and occupancy status (e.g., percent occupancy). * * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

85. The authority citation for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

86. Revise § 982.158(f)(5) to read as follows:

§ 982.158 Program accounts and records.

* * * * *

(f) * * *

(5) Lead-based paint records as required by part 35, subpart B of this title. * * * * *

§ 982.301 [Amended]

87. In § 982.301, remove paragraph (b)(10) and redesignate paragraphs (b)(11) through (b)(16) as paragraphs (b)(10) through (b)(15), respectively.

88. Revise § 982.305(b)(3) to read as follows:

§ 982.305 PHA approval of assisted tenancy.

* * * * *

(b) * * *

(3) The lease is approvable and includes the lease addendum and the lead-based paint disclosure information as required in § 35.92(b) of this title. * * * * *

89. Revise § 982.401(j) to read as follows:

§ 982.401 Housing quality standards (HQS).

* * * * *

(j) *Lead-based paint performance requirement.* The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, M, and R of this title apply to units assisted under this part.

* * * * *

PART 983—SECTION 8 PROJECT-BASED CERTIFICATE PROGRAM

90. The authority citation for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

91. Revise § 983.1(b)(2)(vii) to read as follows:

§ 983.1 Purpose and applicability.

* * * * *

(b) * * *

(2) * * *

(vii) In subpart I of this part, § 982.401(j), § 982.402(a)(3), § 982.402(c) and (d) (effect of family unit size—subsidy and size of unit); and § 982.403 (termination of HAP contract when unit is too big or too small);

* * * * *

92. Revise § 983.5(c) to read as follows:

§ 983.5 Physical condition standards; physical inspection requirements.

* * * * *

(c) The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title apply to units assisted under this part.

93. Revise § 983.104(b)(2)(iv) to read as follows:

§ 983.104 New construction or rehabilitation completion.

* * * * *

(b) * * *

(2) * * *

(iv) Units are in compliance with the lead-based paint requirements in part 35, subparts A, B, H, and R of this title; and

* * * * *

94. In § 983.203(d), revise the first sentence of the introductory paragraph to read as follows:

§ 983.203 Family participation.

* * * * *

(d) *Briefing of families.* When a family is selected to occupy a project-based

unit, the PHA must provide the family with information concerning the tenant rent and any applicable utility allowance and a copy of the lead hazard information pamphlet, as required by part 35, subpart A of this title. * * *

* * * * *

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

95. The authority citation for part 1000 continues to read as follows:

Authority: 12 U.S.C. 1715z–13a and 3535(d).

96. Revise § 1000.40 to read as follows:

§ 1000.40 Do lead-based paint poisoning prevention requirements apply to affordable housing activities under NAHASDA?

Yes, lead-based paint requirements apply to housing activities assisted under NAHASDA. The applicable requirements for NAHASDA are HUD's regulations at part 35, subparts A, B, E, G, H, K, M and R of this title, which implement the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4822–4846) and the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856).

PART 1003—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKAN NATIVE VILLAGES

97. The authority citation for part 1003 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301 *et seq.*

98. Revise § 1003.202(b)(7)(iv) to read as follows:

§ 1003.202 Eligible rehabilitation and preservation activities.

* * * * *

(b) * * *

(7) * * *

(iv) Lead-based paint activities in part 35 of this title.

* * * * *

99. Revise § 1003.607 to read as follows:

§ 1003.607 Lead-based paint.

The requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations part 35, subparts A, B, J, K, and R of this title apply to activities conducted under this program.

PART 1005—LOAN GUARANTEES FOR INDIAN HOUSING

100. The authority citation for part 1005 continues to read as follows:

Authority: 12 U.S.C. 1715z–13a and 3535(d).

101. In § 1005.111, redesignate the existing text as paragraph (a) and add paragraph (b) to read as follows:

§ 1005.111 What safety and quality standards apply?

* * * * *

(b) The relevant requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, J, K, M, and R of this title apply to this part.

Dated: August 26, 1999.

Andrew Cuomo,
Secretary.

Appendix A—Sample Summary Inspection Notice Format

Note: The following appendix will not appear in the Code of Federal Regulations Summary Notice of Lead-Based Paint Inspection

Address/location of property or structure(s) this summary notice applies to:

Lead-based paint inspection description:

Date(s) of inspection: _____

Summary of inspection results (check all that apply):

(a) ☐ No lead-based paint was found.

(b) ☐ Lead-based paint was found.

(c) ☐ A brief summary of the findings of the inspection is provided below (required if lead-based paint found).

Summary of where lead-based paint was found. List at least the housing unit numbers and common areas (for multifamily housing), and building components (including type of room or space, and the material underneath the paint):

Contact person for more information about the inspection:

Printed name: _____

Organization: _____

Street and city: _____

Building Native Communities: Financial Skills for Families

developed in partnership
by:

The Fannie Mae
Foundation and First
Nations Development
Institute

The purpose of today's training

- We're here today to:
 - introduce you to this financial skills curriculum
 - review the content and key points covered in each session
 - provide you with an opportunity to practice using the material
 - share our experience as adult educators

Native people have little experience managing their financial assets

- Consequences include:
 - limited ability to manage financial resources
 - victimization by predatory lenders
 - failure to qualify for home mortgages
 - financial insecurity
 - high unemployment and poverty
 - inability to manage community assets

Self reliance starts with personal financial skills

- Need the information and experience necessary to:
 - manage family budgets
 - operate businesses
 - achieve savings goals
 - use credit wisely
 - get approved for home mortgages
 - grow community assets

Partnership develops Native financial skills curriculum

- First Nations Development Institute and the Fannie Mae Foundation partner to develop financial skills materials that capitalize on Native values.

Building Native Communities: Financial Skills for Families

- The purpose of the curriculum is to:
 - enable community members to realize their traditional values by learning financial skills that will help each person make informed financial decisions for themselves, their family, and their community

Specialists in Native education and financial literacy develop curriculum

- Representatives from the following organizations participated in the process:
 - Adult Literacy Resource Institute
 - HUD
 - Federal Reserve Bank of Minneapolis
 - Fond du Lac Tribal College
 - Lakota Fund
 - New Mexico Community Development Loan Fund

Financial skills must be taught in a Native environment and context

- Non-Native efforts fail
- Effective learning builds on what you already know
 - builds self confidence
 - reinforces traditional values and practices

Native resource management and financial management use similar skills

- These skills include:
 - awareness of resources
 - saving
 - budgeting resources
 - using tools to maximize resources

Each session builds on traditional practices to teach new skills

- Each session provides:
 - opportunity to discuss community's traditional practices
 - connection between Native resource management and financial management
 - introduction to financial skills
 - interactive discussion questions
 - skill reinforcement exercises

Six sessions cover personal financial skills for families

- The topic areas include:
 - building a healthy economy
 - developing a spending plan
 - working with checking and saving accounts
 - understanding credit and your credit report
 - accessing credit

Building a healthy economy

- This session provides an opportunity for participants to:
 - discuss the traditional resource management practices in their community
 - evaluate the economic dynamics of their community
 - identify actions to build a healthier local economy (e.g. strengthening their personal financial skills)

Developing a spending plan

- This session provides an opportunity for participants to:
 - connect Native resource management skills with financial budgeting skills
 - identify savings goals
 - be aware of the flow of money through their household
 - take control of the flow of money through their household

Understanding credit and your credit report

- This session provides an opportunity for participants to:
 - discuss the transition from a subsistence economy to a market economy
 - understand the concept of credit
 - learn how to read and work with their credit report

Accessing credit, part I

- This session provides an opportunity for participants to:
 - recognize the Native strength in adopting new ideas to benefit the community(e.g. horses, credit)
 - learn about the lending process

Accessing credit, part II

- This session provides an opportunity for participants to:
 - identify pre-European Native economic systems
 - discuss types of financial institutions
 - learn to evaluate loan rates, terms and fees
 - understand how to avoid predatory lenders
 - recognize the importance of insurance

Evaluating a loan application exercise

- The five C's of credit are:
 - character: credit history
 - capacity: repayment sources, debt-to-income ratio
 - capital: personal investment, alternative repayment sources
 - collateral: personal valuables to guarantee repayment
 - conditions: situations that affect repayment

Effective workshops engage the participants

- Create a comfortable learning environment by:
 - selecting a site location where participants are at ease and open to learning
 - opening with a traditional prayer
 - coming prepared and using the community's history and stories as illustrations
 - encouraging group respect, questions and discussion
 - providing food (e.g. potluck meal)
 - including local financial experts

Facilitating successful training sessions takes preparation and practice

- A good trainer puts time and energy into:
 - Session marketing
 - Session preparation
 - Presentation
 - length
 - style
 - content
 - Incorporating participant feedback

For assistance, please call:
First Nations Development
Institute
540.371.5615

***BUILDING NATIVE COMMUNITIES: FINANCIAL SKILLS FOR FAMILIES
TRAINING-OF-TRAINERS SESSION***

TOOLKIT FOR TRAINERS

Thank you for participating in this training-of-trainers workshop. This toolkit provides useful information to help you teach consumer financial literacy to your community members. Trainers who have already used this curriculum compiled the toolkit. We hope you also will provide your input and comments to add to this toolkit to benefit future trainers. Included is a list of supplies and materials you will need, tips for preparation and specific tips on presentation of each session.

Supplies:

- Flip chart
- Markers (for yourself and at least one per person)
- Pencils
- Calculators
- Paper (8 ½ in. x 11 in. cut in half to equal 2 – 8 1/2 in. x 5 ½ in.)
- Colored paper
- Name tents
- Toys/ FUN, BRIGHT environment
- Masking tape (to hang magic wall and flipchart papers)
- Magic Wall (3 yds x 60 in. of nylon fabric sprayed with adhesive)
- Spray mount adhesive (3M Artist's Mount)
- Props for 'ice breaker,' such as a roll of toilet paper
- Overhead projector
- Markers for overhead
- Snacks, drinks (depending upon potluck)

Prepared materials could include:

- Overheads
- Games (puzzles, jeopardy)
- "Magic wall" information sheets, such as questions, diagrams, etc. (can be color coded)
- Extra copies of budget worksheets for participants to take home
- Handouts regarding contact information for financial institutions in/surrounding the community
- Copy of a credit report

Useful web sites

- www.mapnp.org (for ice breaker examples)
- cccs.w.org (how credit reports originated)

Size of participant group: Recommended 8 to 10 people for one trainer. You want the group to feel comfortable. A smaller group is better depending upon the setting. Ex: if a

college class, you could have 20 participants. Also, if you do co-training, you could have more participants and divide them into groups.

Time required for training: There are six units/18 hours. The sessions could be done in two hours, but it really depends upon the sessions. Some sessions require more discussion or more worksheets. The heart of the curriculum is in the discussion.

TIPS FOR PREPARATION:

- The most important thing is PREPARATION!!! And the most important preparation is to have a thorough knowledge of both manuals.
- Use personal experiences. At the very least, use the case studies in the book.
- If you are not from the community identify a key contact person to help you with culture, logistics and coordination.
- Keep your relationship going with your key contact person throughout the set-up and the training. They may be able to do a lot of the outreach and information gathering for you. They will continually be an important source.
- At the first participant meeting, get the contact information for all the participants, including address, phone number and email. Utilize email if the community has it!
- Potlucks allow for a more personal level. Try to have a potluck after the session as it helps to bond the group and facilitate continued discussion after the session. Assign each person in the group a dish to bring. Send them a note in the mail to remind them what to bring about a week and a half before the meeting. Also ask your key contact to remind them to bring the food!
- Trainers need to target their audience. There may be substantial differences in rural audiences vs. urban audiences. Trainers will need to recognize different approaches.
- Know the traditions of the community. Utilize your key person for this. For example, prayer will probably be an essential part of the meeting. Prayer will often come before introductions. Find out what the proper way to do this will be. It will probably be appropriate for a community member to do this, not the trainer.
- Be careful about eye contact. You may need to avoid it in some situations. "Feel out" the group before making too much eye contact. You may look to the side, at a table setting, or towards the ceiling. Do not put anyone 'on the spot' or in an uncomfortable position. You cannot generalize this – it varies community to community.
- Don't assume that everyone can read, write, or speak English. Find out everyone's first language. You need to know beforehand if there needs to be a translator, if you can do it yourself, or if you need a co-trainer. Find out if any of the participants have special needs.
- If you don't know an answer, call the person the next day. (Good reason for a co-trainer).
- Be CONSISTENT – have the meetings in the same place at the same time.
- The seating is important – preferably a U-shape. It is preferable for the participants to face each other.

- If at all possible, try NOT to cancel your first meeting. This is usually the hardest one to schedule. Canceling may be viewed as a lack of commitment and it may be difficult to reschedule.
- The time of day for the training depends on your audience (staff, students, etc.)
- BE PATIENT.
- For definition questions, you might have to lead the discussion so the participants can think of ideas.
- Visuals are extremely important. Be creative.
- When reading, always substitute words. Reiterate what you have read from the book in a simpler fashion if you think it is necessary.
- Walk around when participants are doing activities, such as worksheets, and ask one-on-one if they have questions. More than likely, they will not bring attention to themselves if they have a question.
- It is good to have the participants read, BUT if you do this, prepare the participants who will be reading. Send them their “assignment” in the mail at least a week before the meeting. Make sure you have asked if they would be willing to read it beforehand. Again, you do not want them to feel uncomfortable.
- Trainers need to emphasize that this training is a TOOL. It is up to the participants if they want to use it or not. You do not want them to feel pressured.
- Set rules at the beginning of the first meeting, such as raising hands or no talking while another person is speaking. Write the rules on the flip chart.
- Research the community, including financial institutions in the area and the traditions/stories. Bring in stories that are relevant to the community.
- Get the participants to evaluate EVERY session.
- Trainers may get calls during and after the sessions for help/suggestions.

Questions to ask trainers:

1. What are characteristics of adult learners?
(comprehend ‘slower’ – more cautious, more time conscious – they ‘turn off’ if they don’t see the relevance for themselves, more involved with sharing/personal)
2. What are some creative techniques that you have experienced/shared for training?
(puzzle/jeopardy)
3. How can we get participants to become more involved?
(games)

Ice Breakers:

- Pass around a roll of toilet paper. Ask each person to take ‘what they need’ from the roll. This creates a fun atmosphere and gets people laughing. Each person must then tell one thing about him/herself for each square of toilet paper that they took.

- Three truths and a lie – The trainer will tell three true things about him/herself and one lie. The participants then have to guess which is the lie. The participants can also do this.
- Use the magic wall – place the following questions/statements on the wall and have each participant answer:
 - What is your name?
 - Who are you named after?
 - What would you like to be called?
 - I am here because....
 - What I expect to learn....

Session One: Building a Healthy Economy

*Explain the role of the trainer and the participants. Read (from an overhead) the purpose of the training. For each session, have someone new read the purpose.

- Circle of life – Oral history will be a big part of the discussion. The younger generation will be exposed to more detailed stories about their ancestors.
- The trainer may need to do some research on the particular tribe or community's traditional management of resources and the current local economy to trigger discussion.
- The participants might have a hard time thinking of community owned businesses.
- It is important to show participants how to keep the money in the community. You will find out the community issues, such as "the tribe doesn't support starting this business...."

*At the end of each session, let the participants know what you're doing the next time. Recommend that they look at the next section in the book before the next meeting.

Session Two: Developing a Spending Plan

- It is helpful to start each session with a repeat of the purpose of the curriculum.
- Go slow during this session – there are a lot of worksheets. Highlight what is important – this session will reflect back to the first session. Some participants will not see 'saving' as important. Tie in how the ancestors used to save. If saving was done traditionally, it will bring more validity and relevance to the participants. (savings=resources). Reinforce the connection of the traditional manner of saving.
- Make cards for the magic wall (track, assess, save, take action) using the paper halves. Can be done ahead of time and printed. Use these to let the participants know 'where' they are at throughout the session.
- Money tracking – use personal experience. You will find out who takes care of the finances in the households. Let the participants know that their spouse/partner will need to be involved in the money tracking.

- Know what is on the worksheets and be able to explain them. The trainers might want to fill them out beforehand to show an example of what one's expenses could be. (Important to walk around and see if anyone is having trouble/questions). The importance of these worksheets is to get them to go through the process.
- Be prepared to provide calculators and pencils for this session.
- When assessing the worksheets, use the worksheets to explain what you are now doing. ("Remember when we did this on the worksheet...")
- The spending plan can be confusing for a lot of people. Prepare and use your own examples from your worksheets.
- The time required for this session depends on the TYPES of participants, not the number.

Session Three: Working with Checking and Savings Accounts

- Use the game in the book if everyone has a savings/checking account. Use the magic wall. Some groups will prefer to do things as a group instead of in pairs. Do what is most comfortable for the group.
- If anyone has their checkbook, have them compare a check to the example in the book.
- Reiterate the part about voiding checks.
- All account statements are different. Let participants know that an account statement is a tool that they should use (use for reconciliation).
- Invite someone from the banking community to speak to the group. You may want to prepare questions with the group for them to ask the speaker.

Session Four: Understanding Credit and Your Credit Report

- You will see a change in the participants from this point on. There will be a lot of discussion.
- If no one in the group has seen their credit report, it is an eye-opening session.
- Leave room for discussion in the beginning (how the community was impacted with the formation of reservations).
- Using credit – a lot of tribal politics came up. Lots of discussion.
- Advantages/Disadvantages of credit – use flip chart
- Participants like the discussion of defining 'wants vs. needs.'
- The trainer might have to prompt the group a lot in parts of this session. ("I'll let you think about that for a while.")
- Using credit exercise – let the participants know that it is okay to disagree.
- Types of credit – the participants knew the types of credit, but not the formal names for them. (20-25 minutes)
- Preferred the term 'collateral' vs. 'secured.'

- There is typically a lot of discussion on the credit report. You may want to do extra research on how the credit report came about, cccsa.org (web site).
- Look in the community/border town for other credit bureaus (fee differences, contact information, how to get the information yourself, etc.) Put this on the flipchart.
- THOROUGHLY go through credit report. Each reporting and preference can be different. Let participants know that if they have been denied something (ex: credit card) because of their credit, they can use the denial letter to receive a free copy of their credit report.
- Let them know why it is important to look at their credit report. They can find out who is looking at it with out their permission. A lot of people become upset when they found out how easily people can access their credit report.
- Participants are appreciative of the sample letters in the book.
- TELL THEM NOT TO GIVE UP. It is a tedious process, but it will help them in the end. Reinforce this.

Session Five: Accessing Credit, Part I

- The participants' favorite part of this session is to act as the lender.
- You may want to invite someone to talk to the group about credit.
- At first, a lot of the participants did not engage in the discussion of what they would do if they had access to a small amount of money. To bring about a discussion, bring back session one (community businesses). Ask what they wish was in their community or what they do not have to drive 50 miles to get to. It is important how you pose this question.
- The participants enjoy the discussion about credit systems. Let people know that they have the ability to make things change. Reinforce that the community plays an important role.
- The question of bank accountability is not really addressed in the curriculum. You may want to have a speaker come to a different meeting to discuss this if the participants are really interested, but keep the time frame in mind. You may also want to have handouts available with information regarding bank accountability.
- Evaluating a loan – Go over the first case study as a group. Then divide the participants up into groups – one case study per group. (Done this way because of short time span). After everyone is finished with their activity, the whole group can discuss the case studies.
- Applying for a loan – Use magic wall. Sometimes the group may decide that they should start their own credit union or other financial institution. They may express a desire to have a banking service in the community instead of driving to town – a matter of convenience.

Session Six: Accessing Credit, Part II

- Again, the storytelling at the beginning of the session is important.
- Typically the participants initially think that all financial institutions are the same.
- The trainer may want to define a non-profit and for-profit.

- The trainer will want to research where banks are in the community/border towns. Let the participants add to the list. The participants may share stories about the banks (who likes/dislikes which bank and why).
- The trainer should be prepared for situations in extremely remote areas such as Alaska. If there are few choices, you need to make this more relevant to the community. You can look at how the community might create a financial institution or ACCESS. (ex: What services do certain financial institutions have available?)
- Prepare puzzles for the participants to put together (ex: stating the missions of financial institutions). You can put the participants in groups and then have one person from each group read their puzzle.
- There is usually a lot of discussion on interest rates and the payment table factor. (How long will it take to get rid of bills)
- The trainer will want to have calculators accessible.
- Always do the first example with the group.
- The trainer will have to do a lot of redefining and reiterating in this session. It is important to tell the participants that it is important for them to know the terms used because the financial institutions will use them. Let the participants know that they should not be afraid to ask the staff (at financial institutions) questions (ex: what certain words mean).
- Predatory lending – Expect a long discussion. The participants were not only thinking about themselves, but how their relatives are effected.
- Insurance – slightly hesitant to talk about this. Asked the participants how they felt about talking about insurance. They decided that they wanted to talk about it. This brought about a discussion based on family deaths and community issues.
MAKE SURE YOU ASK IF THEY WANT TO TALK ABOUT THIS.

For more information and/or to provide comments on the curriculum or toolkit, contact First Nations Development Institute at 540/371-5615 or email to information@firstnations.org.

Tribal Labor Ordinance Technical Assistance Tool

July 2001

BACKGROUND

In order for Indian tribes to develop and implement effective housing and community development programs, tribes must first adopt comprehensive tribal codes that address a broad range of housing and community development issues. The tribal code development process, however, is a difficult, expensive, and time-consuming process.

Consequently, tribal governments are in need of substantial technical assistance concerning the development of the legal infrastructure necessary to facilitate housing and community development in Indian country. Technical assistance should incorporate both general information concerning the tribal code development process and information concerning specific tribal codes that are critical for tribal housing and community development.

In 1995-1996, the Office of Native American Programs (ONAP) contracted for the design and development of a comprehensive Tribal Housing Code (including eviction and foreclosure procedures). The Tribal Housing Code was intended to provide tribal governments with an outline and an illustrative guide for drafting their specific tribal codes and to greatly reduce the cost of designing individual tribal housing codes.

In 1999, the Tribal Law and Policy Institute contracted with ONAP to substantially update and revise the Tribal Housing Code as part of a comprehensive Tribal Legal Code Project (see <http://www.tribal-institute.org/codes/overview.htm>). Under this comprehensive Tribal Legal Code Project, the Tribal Law and Policy Institute surveyed existing tribal codes and identified best practices. This Tribal Legal Code Project included a broad range of tribal codes that are critical for tribal housing and community development – such as zoning, land use and planning, building, commercial, corporations, environmental review, and probate codes. However, the Tribal Legal Code Project did not include tribal labor codes.

ONAP has now identified the need for Tribal Labor Code technical assistance tools based on the Davis Bacon exemption language included in the December 27, 2000 amendment (Public Laws 106-568 and 106-569) to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). In order for a Tribe to qualify for an exemption under the law, a Tribal Labor Ordinance must be in place. To assist the Tribes, ONAP has identified the need to provide sample ordinances and resources – similar to the Tribal Housing Code and Tribal Legal Code technical assistance products developed in previous years.

ONAP has indicated that this project will create a framework for the development of a full-fledged technical assistance tool and should utilize a somewhat similar approach to that used for the Tribal Housing Code, including:

- Identification, analysis, and annotation of existing tribal codes (identifying best practices),

- Circulation of an outline of components of a model code, and
- Presentation of the draft model code at a HUD-sponsored conference so that there is review and comment (or consultation).

Although there are some existing tribal labor codes, it is very important to note that no existing tribal labor code is based on the Davis Bacon exemption language included in the December 27, 2000 amendment (Public Laws 106-568 and 106-569) to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Furthermore, (1) no existing tribal labor code addresses the full range of issues that could be included in a comprehensive tribal labor code and (2) no existing tribal labor code has been developed since the recent Supreme Court decisions of Atkinson Trading Co. Inc. v. Shirley and Nevada v. Hicks that have established a new foundation for tribal labor legislation (thus requiring tribes to revisit their existing labor laws).

It would be possible to develop a tribal labor code that simply allows for a tribe to take advantage of the Davis Bacon exemption language. However, it would be much more in keeping with the development and implementation of effective housing and community development programs to develop a comprehensive tribal labor code that attempts to address a much broader range of tribal labor issues and the challenges presented by recent U.S. Supreme Court decisions.

TRIBAL LABOR ORDINANCE TECHNICAL ASSISTANCE TOOL COMPONENT PARTS

This Tribal Labor Ordinance Technical Assistance Tool was developed for review and comment (consultation) at the 8th Homeownership Summit in St. Paul, Minnesota in July 2001. It consists of the following four component parts (please note that part #3 and part #4 are included in a separate attachment):

Part #1: Background Report/Commentary Concerning Tribal Labor Codes

This component part addresses three specific issues. First, legal analysis on a broad range of issues that must be addressed prior to the development of a “model” tribal labor code. Second, commentary on the need for a “model” tribal labor code and issues that the code should address. Third, an identification of the best practices in labor legislation as reflected in the reviewed tribal labor codes. (Please note that copies of the syllabi and court opinions in two recent U.S. Supreme Court cases - Atkinson Trading Co. Inc. v. Shirley and Nevada v. Hicks – have also been included in the resource packet).

Part #2: Outline of “Model” Tribal Labor Code

Part #2 is an outline of a “model” tribal labor code based on the review of existing tribal labor codes (see component part #3 and #4 below) and the background report/commentary concerning tribal labor codes (see component part #1).

Part #3: Existing Tribal Labor Codes – Summary and Analysis of Best Practices

Part #3 is an extensive database of summary and analysis of selected tribal labor codes. It includes a review and analysis of 15 selected existing tribal labor codes. Moreover, it identifies best practices among these existing tribal labor codes.

Part #4: Existing Tribal Labor Codes – Examples of 5 Codes Representing Best Practices

Part #4 is the identification and provision of 5 existing tribal labor codes representing best practices. The five selected codes are as follows:

1. Confederated Tribes of the Colville Reservation (Washington) – this code is the most comprehensive example of the Tribal Employment Rights (or TERO) codes.
2. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Montana) – this code represents an innovative effort to address specific reservation conditions.
3. Hoopa Valley Tribe (California) – another innovative code.
4. The Navajo Nation (Arizona-New Mexico-Utah) – the most comprehensive code.
5. Stockbridge-Munsee Community of Mohican Indians (Wisconsin) – a short, but very innovative code.

Please note however that no existing tribal labor code is based on the Davis Bacon exemption language included in the December 27, 2000 amendment (Public Laws 106-568 and 106-569) to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Furthermore, (1) no existing tribal labor code addresses the full range of issues that could be included in a comprehensive tribal labor code and (2) no existing tribal labor code has been developed since the recent Supreme Court decisions of Atkinson Trading Co. Inc. v. Shirley and Nevada v. Hicks that have established a new foundation for tribal labor legislation (thus requiring tribes to revisit their existing labor laws).

Development of TRIBAL LABOR ORDINANCE TECHNICAL ASSISTANCE TOOL

The staff and consultants of the Tribal Law and Policy Institute developed this Tribal Labor Ordinance Technical Assistance Tool. The following were the key personnel:

Project Director: Jerry Gardner

Jerry Gardner is the Executive Director of the Tribal Law and Policy Institute, an Indian owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the improvement of justice in Indian Country and the health, well-being, and culture of Native peoples. He serves as the Institute's Executive Director and as the Project Director of the Institute's Indian Housing Projects including (1) a model *Tribal Housing Code* (revised 1999 version); (2) the *Tribal Legal Code Project* that provided comprehensive legal resources for tribal governments – extensive resources for the development of other tribal codes needed to develop and implement effective housing and community development programs, including zoning, land use and planning, building, commercial, corporations, environmental review, and probate codes; and (3) an Indian Housing resource page on the Tribal Court Clearinghouse (www.tribal-institute.org). He has also served as an adjunct lecturer at the University of California, Berkeley, School of Law (Boalt Hall), consultant with UCLA's American Indian Studies Center, and Administrator for the National American Indian Court Judges Association

(NAICJA). Mr. Gardner has more than 20 years experience working with Indian tribes, Indian housing authorities, and Indian tribal court systems. He served as the Senior Staff Attorney with the National Indian Justice Center (NIJC) from NIJC's establishment in 1983 until January 1997. As NIJC Senior Staff Attorney, his responsibilities included (1) the design and development of more than 30 NIJC training manuals, including Indian Housing Law training manuals; (2) conducting more than 200 conferences, regional training sessions, and on-site training sessions, including Indian Housing Law sessions, and serving as lead instructor at most of these sessions; (3) the editor and contributing author for the *Indian Housing Law Quarterly*; (4) the director of NIJC's code drafting projects, including the Tribal Housing Code developed for ONAP. Mr. Gardner has also worked for the U.S. Senate Committee on Indian Affairs, the national office of the Legal Services Corporation, and the American Indian Lawyer Training Program.

Primary Author: James W. Zion

James Zion served as the Solicitor for the Navajo Nation Supreme Court from 1991-2001. His position as Solicitor required work in planning court operations, preparing court rules and policies, drafting court and advisory opinions, training and advising judges, assisting in court related litigation, and assuming other responsibilities to improve and maintain the court system. He served as the General Counsel for the Navajo Housing Authority from 1988-1990 and he was named a Certified Housing Manager by the National Center for Housing Management. He also served as the Assistant Attorney General of the State of Montana for the Department of Labor and Industry and the Human Rights Commission. Mr. Zion has served as a legal advisor for various tribal and state agencies. He has also served as an adjunct lecturer for various educational institutions. He has written extensively on Indian law issues, especially issues concerning peacemaking, mediation, and other dispute resolution and problem solving mechanisms. He served as co-author for most of the National Indian Justice Center (NIJC) training manuals concerning Indian Housing Law and served as a trainer at numerous NIJC training sessions. He also served as one of the primary authors of the Tribal Legal Code Project that provided comprehensive legal resources for tribal governments – extensive resources for the development of Indian Housing Codes and other tribal codes needed to develop and implement effective housing and community development programs, including zoning, land use and planning, building, commercial, corporations, environmental review, and probate codes.

Research Assistance:

Tribal Law and Policy Institute staff and consultants, including Pat Sekaquaptewa, Elton Naswood, and Angela Mooney-D'Arcy, provided research assistance.

This Technical Assistance Tool was developed under a contract between the Office of Native American Programs (ONAP) of the U. S. Department of Housing and Urban Development (HUD) and ICF Consulting (Contract C-OPC-21172, Task Order No. 3, Sub-Task L). Points of view or opinion stated in this document are those of the authors and do not necessarily represent positions or policies of the U. S. Department of Housing and Urban Development.

Part #1: **BACKGROUND REPORT AND COMMENTARY**
ON TRIBAL LABOR CODES

July 2001

INTRODUCTION

This report is a survey and commentary on fifteen Indian nation labor codes¹ to identify the best practices in existing Indian Country legislation.² This report addresses three specific issues: First, a legal analysis on a broad range of issues which must be addressed prior to developing a model tribal labor code; Second, commentary on the need for such a code and issues one should address; Third, an identification of the best practices in labor legislation as reflected in the codes which were reviewed.

This is a difficult task for several reasons: First, there is not a great deal of literature on labor law in Indian Country as such. There are almost none on general labor issues. Second, most of the labor codes which were reviewed were limited to Indian preference in employment on or a near an

¹ The fifteen labor codes selected for review were from the laws of the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation of California, the Cherokee Nation of Oklahoma, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Montana), the Gila River Indian Community of the Gila River Indian Reservation (Arizona), the Hoopa Valley Tribe of California, the Lummi Tribe of the Lummi Reservation (Washington), the Navajo Nation (Arizona, New Mexico and Utah), the Oglala Sioux Tribe of the Pine Ridge Reservation (South Dakota), the Stockbridge-Munsee Community of Mohican Indians (Wisconsin), the Tlingit & Haida Indian Tribes of Alaska, the Turtle Mountain Band of Chippewa Indians (North Dakota), the Confederated Tribes of the Umatilla Reservation (Washington), and the White Mountain Apache Tribe of the Fort Apache Reservation (Arizona). These Indian nations are officially recognized by the Government of the United States as such using the indicated names. Bureau of Indian Affairs, Department of the Interior, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 65(49) Fed. Reg. 13298 (2000).

² Two model codes were also reviewed, namely a ATitle 7: Tribal Business Operations code, and the ATribal Employment Rights Ordinance of the Band of Indians, in NATIONAL INDIAN JUSTICE CENTER, EMPLOYMENT LAW IN INDIAN COUNTRY 271 (1995).

Indian reservation. Third, most of the litigation in federal, state or Indian nation courts has been over Indian preference or tribal jurisdiction over employers and not conventional labor issues.

Fourth, as this report was being researched and written, the Indian law community was waiting for two important United States Supreme Court decisions on jurisdiction to be handed down, because the rulings in the two cases will impact any future regulatory or adjudicatory legislation in Indian Country.

The two decisions are Atkinson Trading Co. Inc. v. Shirley,³ and Nevada v. Hicks.⁴ Those two decisions establish a new foundation for Indian labor legislation, which will require all Indian nations to revisit their existing labor law. Fifth, and finally, any consideration of a future model tribal labor code must address a broad range of issues, including development policy and even economic and moral questions.⁵

The subjects identified above will be addressed as follows: First, the report will discuss general findings from the review of the fifteen labor codes, identifying some of the legislation, which illustrates the best practices in legislation. Second, there will be an analysis of the Atkinson Trading Post and Nevada v. Hicks decisions with a discussion of their implications for future labor legislation.

Third, there will be discussion of legislative approaches to future labor codes which will also address contemporary economic development and policy issues. That discussion will include a review of a recent change in federal Indian housing law which permits Indian tribes to adopt statutes

³ No. 00-454, 532 U.S. ____ (May 29, 2001).

⁴ No. 99-1994, 533 U.S. ____ (June 25, 2001).

⁵ Martha C. Knack & Alice Littlefield, Native American Labor: Retrieving History, Rethinking Theory, in NATIVE AMERICANS AND WAGE LABOR 3, 41 (Alice Littlefield & Martha C. Knack, eds. 1996). Labor as the working of a living humanity should be studied within a larger social and cultural context. Id. For a general history of Indians and wage labor, see, Patricia C. Albers, From Legend to Land to Labor: Changing Perspectives on Native American Work, in Id., at 245.

and regulations on prevailing wages as a platform for general labor law reform for Indian Country.

GENERAL FINDINGS FROM CODE REVIEW

Most of the codes implement federal Indian legislation which permits a preference to hire individual Indians or contract with Indian-owned businesses on or near an Indian reservation.

While the federal policy of according a hiring preference to Indians in federal employment dates from at least 1834,⁶ it was not until the 1974 decision in Morton v. Mancari⁷ that there was confidence in the constitutional validity of Indian preferences. The legislation reviewed by the Court was Section 16 of the Indian Reorganization Act,⁸ which provides that the Indian Office (the Bureau of Indian Affairs and Indian Health Services today⁹) must give a preference to qualified Indians for appointment to any vacancy in positions. The Court also noted the provisions Title VII of the Civil Rights Act of 1964 which exempt the preferential employment of Indians by Indian tribes or by “industries located on or near Indian reservations.”¹⁰ The Court also reviewed other Indian preference legislation and policies.¹¹ Following that review, the Court ruled that Indian preferences in employment are not “racial discrimination,” or even a “racial preference.”¹² Instead, the Court explained, reviewing the history of federal Indian policy, it is a political

⁶ Morton v. Mancari, 417 U.S. 535 at 541 (1974).

⁷ Id.

⁸ 25 U.S.C. Sec. 472.

⁹ 417 U.S. at 537 n. 1.

¹⁰ Id., at 546, citing 42 U.S.C. Secs. 2000e(b) and 2000e-2.

¹¹ Id., at 548-549

¹² Id., at 553.

preference which is permissible.¹³

The timing of the decision in 1974 was important, because when the Indian Self-Determination and Education Assistance Act became law the next year,¹⁴ congress addressed Indian preference in the context of the delegation of authority to Indian nations to provide federal services to Indians. The Act states that any “contract, grant, or sub grant” under the Act, the Indian Reorganization Act of 1934, or “any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians,” must provide, “to the greatest extent feasible,” “preferences and opportunities for training and employment in connection with the administration of such contracts and grants to Indians,” and “preference in the award of subcontracts and sub grants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.”¹⁵

Given the approval of Indian preference hiring, and the requirement of Indian preferences in grants and contracts in the Indian Self-Determination and Education Assistance Act, Indian nations took advantage of federal preference legislation by enacting statutes and codes which require Indian preference in some or all employment on or near a reservation.

There was a new movement to enact a “tribal employment rights ordinance” and create a “tribal employment rights office” to enforce that law, popularly known as a “TERO.” There are significant problems in passing such legislation. The first is the territorial scope of the law. If a

¹³ Id. 553-554, 553 n. 24.

¹⁴ Pub. L. No. 96-638, 88 Stat. 2203 (codified at 25 U.S.C. Secs. 450-450n, 455-458e) (the Public Law citation gives the Act its popular nickname, A638”).

¹⁵ 25 U.S.C. Sec. 450e(b).

given tribe sought to regulate employment “near” a reservation (since Title VII of the Civil Rights Act of 1964 does not define “near”), what area would that be? Some legislation defines “near” as being within daily commuting distance, other legislation defines it as counties which are within or adjacent to the reservation, and some laws use the land reserved by treaty as the frame of reference. Many TERO laws indicate that the employment and contracting preference applies within the “external boundaries” of the given reservation, while others restrict its application to trust lands within the reservation.¹⁶ Some TERO laws seem confident that there can be jurisdiction over employers and businesses (and particularly non-Indian entities) based upon the “on or near” language of Title VII, while others appear to recognize the problem of limited civil jurisdiction over non-Indians.¹⁷

There is difficulty in defining what activities are covered by the TERO law, and most of the codes have lengthy (and sometimes turgid and confusing) definitions which attempt to define business activities by organizational form (i.e. corporations, partnerships, business trusts, etc.) and identified activities. Some codes attempt to regulate only “significant” business activities, defined by the number of employees a business has or the dollar amount of its reservation-based earnings. Some codes require that the tribe itself must give preference in employment and contracting, while others exempt the tribe from coverage. Several of the codes exempt federal and state (including municipalities, counties, and other “local governments”) jurisdictions from the application of the law, while others specifically include them. Several codes exempt charitable and non-profit

¹⁶ Not all the legislation is clear about what it means by Atrust lands.” There are two general kinds of Indian trust land: Land where the United States holds title for a given Indian tribe or group, and allotted lands, where the United States holds title for individual Indians. Both are within the definition of AIndian country” at 18 U.S.C. Sec. 1151.

¹⁷ See, Montana v. United States, 450 U.S. 544 (1981) (Indian tribes do not have civil regulatory

organizations, but others cover them.

There is a division about who is an “Indian” for purposes of the Indian preference. Some codes limit coverage to members of tribes which are officially recognized by the United States, while others make reference to individuals the United States treats as “Indian” for purposes of carrying out its trust responsibility to Indians. The problem is that there are at least thirteen different definitions of “Indian,” and an individual may or may not qualify, depending upon the given federal program.¹⁸ The Navajo Nation Supreme Court adopted the “Cohen” definition that an “Indian” is a person who meets two qualifications, “(a) that some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an ‘Indian’ by the community in which he lives.”¹⁹ All of the employment codes referenced federal definitions of the term, and none established their own definition.

There are also difficulties identifying an “Indian-owned” business, enterprise, or entity in definitions. Most of the codes simply stated that any business which is “owned” by Indians in the sense of having 51% of the ownership or control is an Indian-owned business. One code requires a 60% ownership interest. Several of the codes provide great detail in definitions or application for certification requirements about the nature of the business, the exercise of ownership and control, the receipt of profits, and the actual nature of the business in its operations. One of the problems with Indian contracting preference has been non-Indian businesses forming false Indian

jurisdiction over non-Indian activities on fee land except in limited circumstances).

¹⁸ See, Testimony of the Little Shell Tribe of Indians of Montana, AIndian Definition Study” (U.S. Department of Education hearing, Crow Agency, Montana, January 14, 1980). See also, Schmasow v. Native American Center, 1999 MT 49 (Mont. 1999) (application of Indian preference to a member of an unrecognized tribe in an off-reservation health program).

¹⁹ Navajo Nation v. Hunter, No. SC-CR-07-95, slip op. at 5-6, 2 Nav. A.R. 411, at 413 (Nav. Sup. Ct. 1996) (citing a republished version of the original 1942 edition of FELIX S. COHEN’S

ownership “fronts,” partnerships or joint ventures with Indians simply to take advantage of preference contracting. There is a lot of money to be made in Indian housing, and many of the complaints about the quality of housing in Indian Country stem from abuses by some irresponsible contractors.

There is a great deal of difference in the regulatory and enforcement structure in the codes. Most establish a “TERO” or Tribal Employment Rights Office, with a director and staff. The director usually has the power to make regulations and rules to implement the code, along with the power to do inspections, receive complaints, carry out investigations, and sanction violators. Many establish a board or commission to set policy in rules, regulations and orders and determine whether there have been violations of the law in contested hearings. A few of the codes provide for judicial review of the orders and decisions of directors or commissions, primarily by the trial level of the tribal court. Some provide for direct review by a court of appeals or appellate review after trial court action. The standard of review varies, with the court being able to address errors of fact (or not) or errors of law. Some use the general administrative law standard that review is limited to the “arbitrary, capricious, and contrary to law” test. In jurisdictions where there is both a TERO director and a board or commission, few codes clearly separate the rule-making, agency investigation and adjudication functions. That is, rule making is an administrative, quasi-legislative, function. It is logical that if there are to be two bodies, one would set policies in regulations and rules, and the other would enforce them. There is a mixed adjudication function, with several of the TERO directors being able to hold hearings and make a quasi-judicial determination that an employer or other party has violated the TERO law, subject to review in a commission hearing. Most codes provide that a sanctioned employer or dissatisfied employee can

appeal to the board or commission. Some codes are not careful about separating the functions of the two organizations as to communications about alleged violations of the law and a later adjudicative hearing, while the Navajo Nation code and others prohibit communications between the investigative arm and the hearing arms. A few of the codes permit the board or commission to investigate a complaint and later hear it as a contested matter. Some commissions have elected tribal council members as members.

There are several problems with mixed structures. First, there should be a clear separation of investigative functions and quasi-judicial adjudication. It is proper for an agency head to investigate, hold his or her own hearings and make a determination which is subject to a contested case hearing. However, due process of law requires a “fair hearing” before a disinterested and impartial hearing body, and permitting the quasi-judicial body to learn facts before a hearing or discuss a proposed order with an official who performs a prosecutorial function²⁰ destroys the impartiality of the hearing body. Given that all the codes provide for civil penalties, which are a form of punishment,²¹ it is doubtful that any elected official should sit on a labor board or commission, because of the prohibition against bills of attainder in the Indian Civil Rights Act of 1968.²²

²⁰ Most TERO directors do perform a prosecutorial function, because the codes uniformly provide for civil sanctions for violations.

²¹ Although civil penalties for willful violations of a TERO code are in fact a form of punishment,” the fact that non-Indians may receive punishment in the form of a civil penalty (sometimes called a fine) does not divest a tribal court or agency of jurisdiction. See, Halwood v. Cowboy Auto Sales, Inc., 124 N.M. 77, 946 P.2d 1088 (Ct. App. 1977) (enforcing a Navajo Nation civil judgment with punitive damages against a non-Indian business).

²² 25 U.S.C. Sec. 1302(9). A bill of attainder” is the action of a legislature or legislative body inflicting punishment,” including statutes which take away vested rights. In the case of Dodge v.

The obvious model for most of the TERO codes is the procedural arrangement for handling discrimination cases under Title VII of the Civil Rights Act of 1964, namely there is an executive body which investigates, determines probable cause for violations of the statute, and attempts to conciliate the case. In the federal system, the Equal Employment Opportunity Commission (EEOC) performs that function, and if it cannot conciliate or investigate the case in time, it issues a “right to sue letter” and the complainant then files an original complaint in federal court. Many states have state anti-discrimination agencies and commissions which combine the investigation and adjudication functions in separate divisions of the agency. The problem lies in accusations of partiality or bias in structure or in fact. Great care must be taken in separating functions and assuring fairness in structure and procedure, because there is already doubt and skepticism about the fairness of Indian nation courts,²³ and the same holds true of quasi-judicial adjudication.

Only one tribal jurisdiction addressed the problem of a general law to establish administrative regulation, investigation, sanctioning, and adjudication. That is, many states and the Government of the United States have an administrative procedures act, which regulates rule

Nakai, 298 F. Supp. 26 (D. Ariz. 1969) the court ruled that there was a bill of attainder when the Navajo Nation Advisory Committee excluded a lawyer from the Navajo Nation. Query whether the presence of some legislative members on a board or commission could constitute a bill of attainder if a punitive action, such as a civil penalty, is considered to be a “political” act. While this is an old Indian Civil Rights Act case, it is likely that exclusion could be challenged in a federal habeas corpus action if the enforcement of a punitive civil penalty caused a severe actual or potential restraint on liberty (e.g. as with seizing property to enforce the fine, as several codes provide). See, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2nd Cir. 1996), cert. den., 117 S. Ct. 610 (1996) (stripping tribal member of citizenship and banishment).

²³ See, e.g. the concurring opinion of Justice Souter in Nevada v. Hicks, supra n. 4, at 10-12, which recites the litany of popular suspicions about the partiality and integrity of Indian nation courts, from the fact that the U.S. Bill of Rights does not apply to them, to the use of traditional Indian law, political control of Indian judges, and a lack of judicial review as “unwarranted intrusions on ... personal liberty.”

making, enforcement activity, and administrative adjudication. Most of the tribal codes attempt to address such matters, but often, the same issues are addressed in several codes, and that makes them lengthy and repetitive. There are times when code provisions conflict. Most federal and state labor legislation establishes bodies to administer and enforce employment standards, with varying modes of administrative review in adjudication and a separation of investigative and adjudicatory functions. It makes sense for Indian nations to adopt comprehensive administrative law standards in a separate piece of legislation so that they can take a full look at their administrative law scheme. There have been many changes in administrative law over the years, and drafters of such legislation have many models in the form of model or uniform legislation or attempts at a thorough restatement of administrative law.

Almost all the tribal codes make reference to federal anti-discrimination agencies, such as the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance (OFCCP), and most require the TERO director or commission to work with them to combat discrimination against Indians or enter into cooperative agreements with them. No code has a provision for cooperation with state anti-discrimination agencies. A few codes recognize the fact that Title VII provides for “deferral agencies,” whereby a state anti-discrimination agency can investigate, hear, and decide discrimination cases, and provide for tribal negotiation with the EEOC to attain that status.²⁴ Unfortunately, most TERO codes incorporate federal civil rights agency regulations, rulings, and case interpretations into tribal law by reference. That is not a good practice, because one jurisdiction should rarely automatically incorporate another’s law because there is no control over that law. That is, if another jurisdiction’s law is adopted by

²⁴ Research failed to disclose the result of such efforts.

reference, that will include later amendments to it or unfavorable judicial interpretations. Many TERO ordinances were passed when the civil rights climate of the United States was different, and Indian nations may wish to consider contemporary interpretations of civil rights law and enforcement policies when it comes to the desire to aggressively deal with anti-Indian discrimination. A fresh approach and new cooperative ventures are needed to refocus on a problem which still exists.

Some TERO codes recognize jurisdiction problems, or anticipate them, and require “voluntary” Indian preference compliance. A few codes ask for it on a voluntary basis for “near” reservation business operations, and one code distinguishes between a “consensual” relationship with the tribe for the application of the code and asks for voluntary compliance and cooperation where there is not such a consensual relationship. That code provision most likely recognizes the Montana Rule²⁵ that Indian nations do not have civil jurisdiction over non-Indians unless there is consent in business arrangements or a vital tribal interest. While the consent and business relationships issue will be discussed below, consent and voluntary cooperation and the means to achieve them are important. There is an emerging theory of law having to do with “social norms theory” which recognizes that in most instances, Americans do not “go to the law,” and they behave toward each other on the basis of shared values.²⁶ The theory is that there are ways problems can be approached without using coercion or resorting to “legal” mechanisms,²⁷ and

²⁵ Montana v. United States, supra n. 17

²⁶ See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

²⁷ See, e.g., Arti Kaur Rai, Regulating Scientific Research: Intellectual Property Rights and the Norms of Science, 94(1) NORTHWESTERN U.L.REV. 77, 95-100 (1999) (the academic community moderating the ability to obtain patents on genetic materials) and Jeffrey J. Rachlinski, The Limits of Social Norms, 74 CHICAGO KENT L. REV. 1537 (2000) (general review of the

there are non-punitive and consensual ways of dealing with problems.²⁸ There is an assumption, rooted in the history of past commercial dealings with Indians and their nations that non-Indians tend to disrespect or exploit Indians. There is a great deal of language to that effect in the various resolution preambles and purposes sections of the codes reviewed here. However, there are new initiatives in Indian Country, often prompted by federal officials, which seek to establish a business climate where respectable and responsible businesses will come to Indian Country and where Indian business people will have new opportunities. That kind of climate is perfect for an effective use of social norms theory, because businesses that agree with Indian advancement and a healthy business climate will voluntarily obey civil rights norms, rules of business ethics, and the goals Indian nations establish.

RECENT DEVELOPMENTS IN JURISDICTION

The beginning point for today's jurisdictional limitations for Indian labor codes is the case of Montana v. United States, where the United States Supreme Court ruled that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers of the tribe which are conducted on fee land, with two exceptions: first, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements;" and second, a "tribe may ... exercise civil authority over the conduct of non-Indians on fee lands

theory).

²⁸ See, e.g., Dan M. Kahan, Privatizing Punishment: Strategies for Private Norm Enforcement in the Inner-City, 46 UCLA L. REV. 3 (2000) and Darlene R. Wong, Stigma: A More Efficient Alternative to Fines in Deterring Corporate Misconduct, 3 CAL. CRIM. L. REV. 3 (2000) (Stigma" punishments are effective, but praising those who follow the law is even more effective).

within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁹ A political scientist who reads those two limitations would conclude that an individual’s “consent” could come from actual dealings and practices, and that formal, written, consent would not be necessary. For example, the law recognizes mutual consent in common law marriage, and there is liability for informal business partnerships where partners hold themselves out as such. One would think that an Indian nation could make its own determination of what political integrity, economic security or health and welfare” happen to be, and base legislation upon findings that a given kind of activity affects the tribe’s political integrity, economic security, and public health and welfare. That is essentially the definition of “police power,” which is the power to enact laws for the “good and welfare of the commonwealth” and to secure “comfort, health, and prosperity.”³⁰ That is, of course, why it has been important for Indian nation legislatures to make specific and detailed findings of the purposes of a given law in the preamble to a resolution or in legislative findings and statements of purpose. The usual canon in reviewing federal and state legislation is that legislative findings are important to see whether a given statute was within the legislature’s power, and those findings are usually recognized. However, several questions linger after Montana: What form must the consent take, and how specific must it be? What kinds of activities have a “direct effect” on political integrity, economic security and tribal health or welfare? Does it matter, for jurisdiction, whether the non-Indian’s conduct took place on fee land or on Indian trust land?

The Montana decision was said to be the test of the limit of tribal regulatory authority, when, and under what circumstances, an Indian nation could regulate the activities of non-Indians

²⁹ 450 U.S. at 565, 566.

on fee land within a reservation. Many practitioners of Indian affairs law assumed that Indian courts could adjudicate any case that arose within the exterior boundaries of their reservations without limitation. The case of Strate v. A-1 Contractors³¹ addressed some of those questions. It ruled that where a non-Indian woman was injured by a truck driver for a non-Indian construction company, (1) the non-Indian driver and his company did not have a “consensual” relationship with the tribe or its members (although it was working on a construction project on the reservation), and (2) since the tribe had given up its power to exercise a landowner’s rights by granting a right-of-way for the highway where the incident occurred, the tribal court did not have jurisdiction. That was a ruling on tribal authority for the adjudication process. Even after *Strate*, there was an assumption that where a non-Indian conducted activities which impacted or implicated government, there was consent, and the place of an occurrence answered the question of jurisdiction.

Those lingering questions have been answered, somewhat. The case of Atkinson Trading Company, Inc. v. Shirley,³² addressed the validity of a Navajo Nation hotel occupancy tax on a non-Indian business. In 1916, Hubert Richardson wanted to trade with wealthy Navajo cattlemen, so he built the Cameron Trading Post near the Little Colorado River and Cameron, Arizona.³³ At the time, it was outside the Navajo Nation. In 1934, the United States Congress expanded the Navajo Nation Reservation eight miles south so that the trading post fell within reservation

³⁰ BLACK’S LAW DICTIONARY 1317 (4th ed. 1968).

³¹ 520 U.S. 438 (1997).

³² *Supra*, n. 3.

³³ *Slip op. Id.*, at 1 (The opinion of the Court, delivered by Chief Justice Rehnquist).

boundaries.³⁴ That did not alter the status of Richardson's property, which continued to be fee land.³⁵ Richardson's small trading post evolved into a business complex which includes a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and a recreational vehicle facility.³⁶ The current owner, Atkinson Trading Company, benefits from the fact that the "trading post" is located near the intersection of a highway that goes into the Grand Canyon and a highway that connects Flagstaff, Arizona with the Glen Canyon Dam so it benefits from the tourist trade.³⁷

In 1992, the Navajo Nation enacted a hotel occupancy tax of 8% of the room rate. The tax is on hotel guests, but the hotel is required to collect it and give it to the Navajo Nation Tax Commission.³⁸ Cameron Trading Post paid approximately \$84,000 in room taxes each year.³⁹ Atkinson (the trading post owner) challenged the validity of the tax, and the issue was whether or not it "consented" to Navajo Nation taxation of operations on fee land.

Chief Justice Rehnquist began with the general proposition that tribal jurisdiction is limited: Unless power is given in a treaty or a federal statute, Indian tribes "must rely upon retained or inherent sovereignty."⁴⁰ "Retained" and "inherent" sovereignty can be explained this way: When Indian nations entered into treaties with the United States, they "retained" all powers

³⁴ Id.

³⁵ Id., at 2.

³⁶ Id.

³⁷ Id. The opinion does not mention the fact that U.S. Highway 89 is a major route for "Snow birds" from the north who winter in Arizona, and that sales of crafts by Navajo vendors along the highway has an important impact on the local Navajo economy.

³⁸ Id.

³⁹ Id.

⁴⁰ Id., at 3.

they did not specifically surrender. That is where we get the term “reservation” (which usually refers to “retained” lands under a treaty), and the same doctrine applies to non-treaty tribes. They all reserve certain powers to address public health, welfare and safety, and those are “inherent” powers. They are what is needed to get the job done. Despite that, Chief Justice Rehnquist went on to explain that in the Montana case, the Court found that “Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.”⁴¹ He reviewed the Montana and Strate rulings, above, and then went on to address prior taxation precedent. In the Merrion decision,⁴² the Court upheld an oil and gas severance tax based upon the tribe’s powers to exclude nonmembers from tribal land,⁴³ control economic activity within the reservation, and give certain benefits to nonmembers, including police protection, other governmental services, and “the advantages of a civilized society.”⁴⁴ The Chief Justice then said that such factors did not apply, because the tax approved in Merrion dealt with transactions on Indian trust lands, and “An Indian tribe’s sovereign power to tax, whatever its derivation, reaches no further than tribal land.”⁴⁵

Going then to the consent foundation for civil jurisdiction, the Navajo Nation asserted that

⁴¹ Id., at 3-4.

⁴² Merrion v. Jicarilla Apache Tribe, 544 U.S. 130 (1982).

⁴³ Note that the opinion uses the term “tribal land” rather than “reservation.” This language could be a signal that in the future, and particularly on checkerboarded reservations, Indian nations will not have the power to exclude persons from the reservation. Cameron Trading Post made that argument in one of its cases before the Navajo Nation Supreme Court.

⁴⁴ Atkinson, *supra* n. 3, at 6.

⁴⁵ Id., at 7. In footnote 5 on this page, the Court answered another question that puzzled Indian law practitioners doesn’t 18 U.S.C. Sec. 1151, the federal “Indian country” definition mean what it says that Indian country includes fee land and rights-of-way? The footnote simply says that the statute does not confer jurisdiction.

there was a consensual relationship because of “numerous services provided by the Navajo Nation.”⁴⁶ The Navajo Nation police patrol the highways near the trading post, the Navajo Nation emergency medical services department will respond to an emergency call from the trading post, and the Navajo Nation’s fire department will provide fire protection.⁴⁷ The opinion states that while Indian nations can charge an “appropriate fee” for services rendered, “the generalized availability of tribal services [is] patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land.”⁴⁸

Going to the problem of when there is a consensual relationship, the opinion says that “The consensual relationship must stem from ‘commercial dealing, contracts, leases, or other arrangements,’“ and “a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.”⁴⁹ The Court reiterated its position that the provision of tribal services to nonmembers does not constitute consent, while giving no further guidance on what actually does constitute consent.

The Court then examined the effects of the trading post on the Navajo Nation.⁵⁰ It argued that Cameron’s status as a federally-licensed Indian trader, the employment of almost 100 Navajos, the fact that the trading post derives its business from tourists visiting the reservation, large amounts of tribal land around the property and the “overwhelming Indian character” of the

⁴⁶ Id., at 8-9.

⁴⁷ Id., at 9. Footnote 7, Id., indicates that the fire department has responded to Aa fire at the trading post.”

⁴⁸ Id., at 9.

⁴⁹ Id.

⁵⁰ Id., at 11.

Cameron Chapter are relevant factors to show that under the circumstances, Cameron’s operations had an impact on the Navajo Nation.⁵¹ While acknowledging that, the opinion says that “we fail to see how petitioner’s operation of a hotel on non-Indian fee land” threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”⁵²

The Court concluded by noting that while Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory,” “their dependent status generally precludes extension of tribal civil authority beyond these limits.”⁵³ The Court found the Navajo Nation tax was “presumptively invalid” under that principle.⁵⁴ That means that there is a general presumption against any civil jurisdiction over non-Indians.

The decision in Nevada v. Hicks addressed the question of “whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.”⁵⁵ Hicks is one of about 900 members of the Fallon Paiute-Shoshone Tribes of western Nevada.⁵⁶ In 1990, he came under suspicion of having illegally killed a California

⁵¹ Id.

⁵² Id., at 11-12 (citing Montana). The Court also explained, in footnote 12, Id., that the second Montana exception is not a “Necessity” test for civil authority to support jurisdiction, but a test based only on “nonmember conduct that threatens the Indian tribe.” Id. (Italics in the original).

⁵³ Id., at 13 (Citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

⁵⁴ Id.

⁵⁵ Supra, n. 4, at 1 (Opinion of Justice Scalia for the Court).

⁵⁶ Id.

bighorn sheep off the reservation, and a state game warden got a search warrant.⁵⁷ The issuing judge required the approval of the Fallon Tribal Court because he felt he had no jurisdiction on the reservation.⁵⁸ The warden then got a tribal court search warrant and searched Hick's yard, accompanied by a tribal police officer. He found the head of a Rocky Mountain bighorn sheep, a species of sheep other than the one Hicks was suspected of killing.⁵⁹

About a year later, a tribal police officer told the warden about seeing two mounted bighorn sheep heads in Hick's home, and the warden again got both state and tribal search warrants.⁶⁰ This time, three wardens and tribal officers searched Hick's home, but the search was unsuccessful.⁶¹

Hicks claimed that his sheep heads were damaged and that the search was beyond the bounds of the warrant, so he brought suit against the tribal judge who issued the warrant, the tribal officers, and the state wardens in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes.⁶² He sued for trespass to land and chattels (personal property), abuse of process, and the violation of his civil rights (the denial of equal protection and due process and an unreasonable search and seizure) under 42 U.S.C. Sec. 1983.⁶³ The Tribal Court, the Tribal Appeals Court, and the Ninth

⁵⁷ Id.

⁵⁸ Id., at 1-2.

⁵⁹ Id., at 2. Hicks was suspected of having killed a California bighorn sheep, which was apparently a protected species.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id. 42 U.S.C. Sec. 1983 is the Civil Rights Act of 1871, which provides for suits against

Circuit Court of Appeals all agreed that the tribal court had jurisdiction, given the fact that Hick's home is on tribal land within a reservation.⁶⁴

The first question was whether the tribal court had jurisdiction to adjudicate tortious conduct by state wardens executing a search warrant for evidence of an off-reservation crime.⁶⁵ Justice Scalia's opinion began with the principle that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction when it comes to nonmembers.⁶⁶ The unanswered question is whether adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction.⁶⁷ To answer that, the first question was whether the Fallon Paiute-Shoshone Tribes could regulate state game wardens executing a search warrant for evidence of an off-reservation crime as an exercise of either inherent sovereignty or under a grant of federal authority.⁶⁸

Under the prior precedents, a tribe could not regulate nonmember activities on land over which the tribe could not "assert a landowner's right to occupy and exclude."⁶⁹ In this case, the land was tribally owned within a reservation.⁷⁰ Justice Scalia pointed out that the prior decisions did not make distinctions based upon the status of the land, and "The ownership status of land ... is

persons Acting under color of state law" who violate the U.S. Constitution or federal laws.

⁶⁴ Id., at 3.

⁶⁵ Id.

⁶⁶ Id. (Citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)).

⁶⁷ Id., at 4 (*Italics in the original*).

⁶⁸ Id.

⁶⁹ Id., at 5 (citing *Montana*).

⁷⁰ Id.

only one factor to consider in determining whether regulation of the activities of non-members is necessary to protect tribal self-government or to control internal relations.’’⁷¹ While the Court used land status in several of its decisions, “the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.”⁷² The Court then went on to discuss whether regulatory jurisdiction over state officers is “necessary to protect tribal self-government or control internal relations,” “and if not, whether Congress has conferred that jurisdiction.”⁷³

The opinion next examined the kind of power Indian nations have: They have the authority to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and the right to make their own laws and be ruled by them.⁷⁴ In this instance, “Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.”⁷⁵

Continuing, Justice Scalia said that “Our cases make clear that the Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at the reservation’s border.”⁷⁶ The exercise of state authority within a reservation is limited by the principle that Indians have the right to make their own laws and be governed by them, but the rule requires an accommodation of the interests of the

⁷¹ Id., at 6.

⁷² Id.

⁷³ Id.

⁷⁴ Id., at 7.

⁷⁵ Id.

⁷⁶ Id. At this point, Justice Scalia observed that while tribes “are often referred to as >sovereign entities,’ an Indian reservation is part of the state. Id., at 7-8.

Tribes, the Federal Government and the State.⁷⁷ While state law is generally inapplicable to on-reservation conduct involving only Indians, when “state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.”⁷⁸ In this particular situation, the question was whether the authority to exercise state jurisdiction within a reservation gives the “corollary right to enter a reservation (including Indian-fee lands),” and “several of our opinions point in that direction.”⁷⁹ After reviewing other precedents, the opinion summed up:

We conclude today ... that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations to “the right to make laws and be ruled by them.” The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.⁸⁰

The Court then proceeded to another question, state authority in Indian Country, noting that “The States’ inherent jurisdiction can of course be stripped by Congress.”⁸¹ However, that has not been done, there is no federal authority for tribes to hear cases under federal statutes, and the Court concluded that states have the right to serve process in Indian Country, so state officers can enter a

⁷⁷ Id., at 8.

⁷⁸ Id.

⁷⁹ Id., at 9. The opinion uses a new term, “Indian-fee lands,” in several places without defining it. It is likely that “Indian” means lands held in trust for a tribe or individual Indians (allotments), and “fee” refers to lands held in fee and other non-Indian land.

⁸⁰ Id., 10-11. The Court adopted the Black’s Law Dictionary definition of “process” as “any means used by a court to acquire or exercise its jurisdiction over a person or over specific property.” Id., at 10. That would cover a wide range of civil and criminal process.

⁸¹ Id., at 11.

reservation to investigate or prosecute violations of state law occurring off reservation.⁸²

The opinion then addressed the specific issue of whether a tribal court, as a court of general jurisdiction, has the authority to entertain claims under 42 U.S.C. Sec. 1983.⁸³ While it is true, the opinion explains, that state courts can adjudicate cases invoking federal statutes because they are courts of “general jurisdiction,” that does not apply to Indian nation courts.⁸⁴ Saying that it is wrong to assert that tribal courts are courts of “general jurisdiction,” “A state court’s jurisdiction is general, in that it ‘lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.’ Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”⁸⁵ While some statutes “proclaim” tribal court jurisdiction over some questions of federal law, no provision in federal law provides for tribal court jurisdiction over Section 1983 actions.⁸⁶

This decision was issued at the end of the Supreme Court’s year 2000 term, and the last

⁸² Id., at 12.

⁸³ Id.

⁸⁴ Id., at 13.

⁸⁵ Id.

⁸⁶ Id., at 14. The Court overlooked the fact that most Indian nation judicial codes have language from the 1935 Bureau of Indian Affairs ALaw and Order Code” which permits the court to apply Aapplicable” federal law. Many of those codes were approved by a secretarial order which arguably makes such approval a federal Aregulation” in administrative law. See, 25 U.S.C. Secs. 1 and 9 (presidential and Commissioner of Indian Affairs authority to make rules and regulations in Indian affairs).

Monday of the term is when the most contentious decisions are issued. While Justice Scalia's opinion was the opinion of the Court, and the other justices concurred with the result, Justice Souter gave a concurring opinion (joined by Justices Kennedy and Thomas), Justice Ginsburg wrote a separate opinion (for herself alone), Justice O'Connor rendered a concurring opinion (joined by Justices Stevens and Bryer), and Justice Stevens did a separate concurrence (joined by Justice Bryer).⁸⁷ This is not the place to review the separate concurring opinions, and Justice Scalia (and some of the press) called Justice O'Connor's concurrence with the Court's opinion a "dissent." Generally, while the Court was unanimous in agreeing that Indian courts do not have adjudicatory jurisdiction over state officials, the disagreement was over whether Justice Scalia went too far in his announcement of what the proper Indian law principles happen to be. The issue of when there is consent by implication stemming from a non-Indian's activities is still unclear, and some of the disagreement between Justices Scalia and O'Connor was based upon O'Connor's complaint that the consent issue is still not clear.

At end, these two new decisions on Indian nation civil regulatory and adjudication jurisdiction tell us that consent usually cannot be obtained through normal business dealings without a specific agreement (a question still somewhat up in the air in the Nevada v. Hicks decision); non-Indian impacts on the integrity of tribal government and public welfare must be direct and significant; there is no Indian nation jurisdiction (at least over nonmembers) on non-trust land; there is no Indian nation jurisdiction outside the reservation (as in the "on or near" provisions of the tribal labor codes); there is no jurisdiction over state, county or municipal officials (as with labor code provisions covering states and state officials); and there is a general presumption that there is no tribal civil jurisdiction over non-Indians that must be overcome. It

⁸⁷ Note that Stevens and Bryer joined O'Connor's concurring opinion while having their own.

may well be, given the language in these opinions, that civil jurisdiction over nonmember Indians is also subject to challenge. While some may disagree and find these to be overly restrictive conclusions, if law (as some legal philosophers say) is about predicting what courts will do in the future, then these conclusions may well be accurate, given today's Indian law climate.

LEGISLATIVE APPROACHES TO FUTURE LABOR CODES

Some of the legal issues to be addressed in future labor codes include: (1) The applicability of federal legislation to Indian tribes as "laws of general application," (2) the preemption of tribal law by federal law, (3) the nature of the Indian preference, and (4) the devolution or sharing of power with the federal government and state governments. There are also a few miscellaneous issues. Aside from legal issues, future labor codes must take policy factors into account, including how and why Indian nations exercise sovereignty for economic development.

The first problem is this: When Congress enacts a federal labor law, to what extent does it apply to Indian nations as a "law of general application"? These questions initially arose when Congress enacted the Occupational Safety and Health Act. When Congress passes a law, doesn't it apply to everyone? The usual rule is that when a federal statute of general applicability is silent on the issue of including Indian tribes, it will not apply if (1) the law affects "exclusive rights of self-governance in purely intramural matters,"⁸⁸ (2) application of the law "would abrogate rights guaranteed by Indian treaties," or (3) there is proof "by legislative history or some other means that Congress intended [a statute] not to apply to Indians on their reservations."⁸⁹ That rule has been applied in different ways. In one case, the Occupational Safety and Health Act did not apply

⁸⁸ This means matters involving the tribe and its members only.

to the Navajo Nation because of a treaty provision which limited the kinds of federal employees who could enter the Reservation, and OSHA inspectors were not among them.⁹⁰ However, in a case where the treaty spoke to the tribe's "exclusive use" of the reservation, that language was held not to oust the application of OSHA.⁹¹ Similarly, the Employment Retirement Income Security Act (ERISA), a federal retirement law, was held to apply to tribes.⁹² A problem which is related to the exceptions above, but is trickier, is the extent to which a federal devolution or grant of authority to the states would impact tribes and thus not permit a full exercise of state jurisdiction.⁹³

When drafting Indian Country labor legislation, great care must be taken to examine federal labor law to assure that the tribal law complies with federal requirements. There is a great deal of movement in this area, and the latest developments will need to be examined to see if there has been any new law on point, or whether there is pending litigation that calls into question the application of a given federal employment statute to an Indian nation.

⁸⁹ Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

⁹⁰ Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

⁹¹ U.S. Department of Labor v. Occupational Safety & Health Review Common, 935 F.2d 182 (9th Cir. 1991).

⁹² Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1991), cf. Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989). For general reviews of the problem and related employment issues, see, Vicki J. Limas, *Application of Federal and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L. J. 681 (1994); William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995); and Kristen E. Burge, *Comment: ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291 (2000).

⁹³ See, Washington, Dept. Of Ecology v. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

The next area, federal preemption, is a related but slightly different area. To what extent does federal legislation preempt or oust Indian nations from enacting legislation on a given subject by taking exclusive control over a legal subject.⁹⁴ One example is a ruling of the Navajo Nation Supreme Court that despite federal legislation which gives the states authority to regulate worker's compensation for employment within Indian Country, a separate cause of action could be maintained against an employer for an occupational injury.⁹⁵

State labor and employment laws (with the special exception of worker's compensation law) generally do not apply in Indian Country,⁹⁶ but the Nevada v. Hicks ruling may cause a great deal of litigation on that issue in the future, depending upon the state's interest in protecting non-Indian employees under state law. It is one thing when tribes regulate their own employees, but there may be problems if a tribe attempts to regulate all employment and all employees within its reservation boundaries.⁹⁷ To what extent does going beyond the regulation of a tribe's own employees (by statute or tribal personnel policies) implicate a state interest or give an opening for federal law?

⁹⁴ See, Daniel W. Long, Employment Law on Indian Land, <<http://www.modrall.com/articles/article_33.html>> (October 1, 1999) (Visited on June 26, 2001).

⁹⁵ Id., citing Nez v. Peabody Western Coal Co., Inc., No. SC-CV-28-97 (September 22, 1999). The issue is in litigation in federal court now, with certified questions from the U.S. District Court for the District of Arizona pending before the Navajo Nation Supreme Court. The problem is that there is a federal statute which permits the states to extend worker's compensation law coverage to Indian Country, and we do not know if it preempts or prevents Indian nations from exercising jurisdiction over employees other than tribal employees.

⁹⁶ Id., citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

⁹⁷ See, Helen M. Kemp, Fallen Timber: A Proposal for the National Labor Relations Board to Assert Jurisdiction over Indian-Owned and Controlled Businesses on Tribal Reservations, 17 W. N. ENG. L. REV. 1 (1995) (discussing Atribal employee only" versus general regulatory exercises of tribal jurisdiction).

There has been a great deal of discussion about the exemption of Indian tribes from Title VII of the Civil Rights Act of 1964 and its implications.⁹⁸ The most recent and most important decision on Indian preference hiring is the case of Dawavendewa v. Salt River Project.⁹⁹ The tribal code review showed that several tribal labor codes assumed that tribal member preference is permitted under the thinking that if Indian preference in employment is supported as being political and not racial, then it makes sense that political affiliation with the tribe where the job is located would be permitted. Other codes assume that some sort of “local” preference by residence with the reservation is permissible. In Dawavendewa,¹⁰⁰ the court ruled that federal law and regulations preempt tribal member preference and only a general preference for “Indians” is permitted under federal law. It is likely that federal courts would take the same approach for “local” preferences as another means of achieving prohibited tribal member preference. Aside from the fact that tribal preference may be eliminated if the Ninth Circuit Court of Appeals decision is accepted in other parts of the United States, employment preference is under fire. Aside from the law review commentaries attacking it or suggesting ways to defeat it, there is

⁹⁸ See, e.g., Vicki J. Limas, *Sovereignty as a Bar to Enforcement of Executive Order No. 11,246 in Federal Contracts with Native American Tribes*, 26 N.M.L. REV. 257 (1996); Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Business*, 25 FLA. ST. U. L. REV. 679 (1998); and *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPL. RTS. & EMPLOY. POL’Y J. 175 (1998).

⁹⁹ 154 F.3d 1117 (9th Cir. 1998), cert. den., 68 U.S.L.W. 3432 (January 10, 2000). See also, Daniel W. Long, *Tribal Preferences under Title VII after Dawavendewa* (January 20, 2000), <<http://www.modrall.com/articles/article_45.html>> (Visited on June 26, 2001).

¹⁰⁰ 154 F.3d 1117 (9th Cir. 1998), cert. den., 68 U.S.L.W. 3432 (2000).

legislation pending in Congress which would eliminate the preference.¹⁰¹

Finally, we reach the issue of “devolution.” There are two ways of approaching Indian labor regulation. The first is the conventional application of Indian law.¹⁰² The second is to think about ways to shift power and authority to Indian nations. That can be done in federal legislation to increase the authority of Indian nations to freely pursue economic development initiatives, where Congress is advised by economists,¹⁰³ and it can be done through increased tribal, federal and state cooperation. Devolution is “the effort to shift decision-making power downward in the political structure from central to local governments.”¹⁰⁴ There is a general movement in federal government to transfer greater authority to the states (in legislation and court decisions), and there are some movements in the states to shift authority to counties and municipalities. Another part of this process is state recognition of the benefits of cooperative agreements with Indian nations to recognize their authority (with or without prompting by federal officials).¹⁰⁵ That requires a careful

¹⁰¹ H.R. 5523, the ANative American Equal Rights Act.” Brian Stockes, Congressional legislation targets Indian preference, *Indian Country Today* (November 1, 2000); <<<http://www.indiancountry.com/art.../headline-2000-11-01-02.shtm>>> (Visited on June 27, 2001).

¹⁰² See, G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N. DAK. L. REV. 267 (1996). Many assumptions about jurisdiction in many law review articles will need to be revised in light of the Akinson and Hicks decisions reviewed above.

¹⁰³ See, e.g., the testimony of Professor Joseph P. Kalt of the Harvard Project on American Indian Economic Development at Harvard University presented to the Senate Committee on Indian Affairs on September 17, 1996. It is a forceful economic argument in favor of Indian sovereignty and legislation to support and encourage it.

¹⁰⁴ Stephen Cornell & Jonathan Taylor, *Sovereignty, Devolution, and the Future of Tribal-state Relations 1*, National Congress of American Indians Mid-Year Session, Juneau, Alaska, June 26, 2000.

¹⁰⁵ *Id.*

analysis of the arguments for and against tribal-state cooperation and a recognition that (1) states lose nothing, and in fact have a lot to gain from tribal economic success; (2) Indian nation governments are in fact competent governments; with a demonstrated track record of success, and (3) there is no “race to the bottom” when Indian nations assume authority, but rather a new competition for excellence.¹⁰⁶ The development of tribal labor and employment codes is an essential part of successful economic development initiatives which will benefit everyone.¹⁰⁷

Finally, we reach an important miscellaneous issue, dispute resolution in general and the means to get nonmember compliance. There have been suggestions in this review that a lot can be done to get voluntary compliance, and there is great value in tribal-federal-state cooperation. What happens when there is a dispute? Tribal administrative quasi-judicial bodies must have integrity. While many of the tribal labor codes have sufficient due process protections, there are some institutional issues (addressed above). Is there a way to deal with suspicions that non-Indian cannot get a fair hearing before a tribal administrative body or court? One possible approach would be various forms of alternative dispute resolution at least to address inter-jurisdictional issues.¹⁰⁸

The consent problem, which was at issue in both the Atkinson and Hicks cases, is obtaining the consent of non-tribal businesses in the first place. The cases make it clear that implied consent by activities places a seemingly impossible burden on Indian nations, and it is obvious that the

¹⁰⁶ Id., at 4-7.

¹⁰⁷ See, WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt, eds. 1992).

¹⁰⁸ See, Lynn H. Slade, Alternative Disputes Resolution in Inter-Jurisdictional Disputes: An Industry Perspective (November 13, 1997); <<http://www.modrall.com/articles/article_25.html>> (Visited on June 26, 2001).

safest course is to obtain specific written consent rather than attempt to rely upon a statutory definition of what it means to do business in Indian Country. Consent would be fairly easy to get on reservations that have not been subjected to extensive checkerboarding as the result of the General Allotment Act of 1887.¹⁰⁹ Given the clear indication that Indian nations only have jurisdiction over non-Indians, if at all, on “tribal” land, there is the problem that if a business does not work on that kind of land, there is no jurisdiction. Tribes need a comprehensive approach. There is money to be made in Indian Country on various federal projects, initiatives funded by the tribe from its general fund monies and income, and even state projects. Many states are sensitive to tribal concerns when doing state projects within a reservation. One approach would be to conduct periodic business and contractor “pre-bids” where all businesses that are interested on doing business with a given tribe are invited to submit applications for approval to do business. That should include “border town” merchants who do business with tribes, with a discussion of their hiring and contracting activities. Applicants would be required to submit a written agreement that they will be bound by tribal law and by tribal adjudication fora if they want to do business with that tribe and conduct activities within the reservation. They would have to voluntarily submit to the tribe’s jurisdiction for any work done within the reservation, whether the work was done on trust land or not, and be bound by tribal labor law.¹¹⁰ One of the obvious concerns in both

¹⁰⁹ Checkerboarding refers to a pattern of land in various kinds of ownership, including trust land for the tribe, trust land for individual Indian allottees, and fee land, and sometimes additional mixes of federal U.S. Forest Service land, federal land maintained by the Bureau of Land Management, and state Aschool land” set aside under federal homesteading legislation. A map with different colors to show such ownership looks like a checkerboard.

¹¹⁰ On the question of how tribal prevailing wage rates would apply, if a given tribe has a prevailing wage rate law, it would apply to non-Indian businesses through a consensual construction contract. Language which makes the tribal prevailing rate apply would have to be inserted in the AA.I.A. Model Construction Contract” many Indian housing programs use for

the Atkinson and Hicks decisions was the problem of case-by-case determinations, depending upon the place where something happened, the actor's ethnicity, or the occupation of the person who did it, and that can be resolved by a "choice of forum" and "choice of law" agreement, and such agreements are usually upheld by courts so long as they have a reasonable relation to the jurisdiction. There is such a reasonable relation so long as the agreement is restricted to the given reservation.¹¹¹ A great deal of creativity, and the opportunity to use social norm theory C namely getting consent by exchanging it for the opportunity to do business C provides good leverage.¹¹²

We have a perfect vehicle to approach Indian labor and employment legislation in the Native American Housing Assistance and Self-Determination Act Amendments of 1999. They make technical amendments to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), including an amendment of Section 104(b)(3).¹¹³ Section 104(b)(1) requires Indian housing programs to comply with the Davis-Bacon Act¹¹⁴ by paying laborers working on projects funded with federal monies the prevailing "corresponding wage rate" that is paid to classes of workers employed on projects "of a similar character in the locality." The technical amendment adding a new subsection (b)(4) provides:

Application of Tribal Laws. Paragraph (1) shall not apply to any contract or agreement for assistance, sale, or lease pursuant to this Act, if such contract or agreement is otherwise

housing construction.

¹¹¹ There are special problems with off-reservation checkerboard areas, such as the Checkerboard Area of the Navajo Nation in northwest New Mexico, but they cannot be addressed here.

¹¹² Tribes should also explore the notion of voluntary agreements with bordertown merchants and their validity with EEOC and OFFCP.

¹¹³ Codified at 25 U.S.C. Sec. 4114.

¹¹⁴ Particularly the Act at 40 U.S.C. Sec. 276(a).

covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

What does this language mean?¹¹⁵ Senator Ben Nighthorse Campbell, who proposed the amendments, submitted a committee report to Congress that explains this language, which was section 5 of the amendments:

This section modifies section 104(b)(1). Currently, the wage rate of all Indian housing assisted under the Act must meet the requirements of the Davis-Bacon Act. Under the Davis-Bacon Act, wage rates for laborers are determined by the Secretary of Labor in accordance with the corresponding wage rate paid to classes of laborers employed on projects of a similar character in the locality. Thus, tribes or their tribally designated housing entities must pay wages that are no less than those prevailing in the local area. The construction of tribal housing is often disadvantaged by the application of the Davis-Bacon provisions because HUD's wage surveys are generally based on considerably higher wages earned in larger metropolitan areas with a large population of unionized contractors.

S. 400 [the amendment bill] grants tribes and tribally designated housing entities a limited, threshold exemption to the application of the Davis-Bacon provisions but only if fewer than 12 units of housing are to be built. Other HUD programs include a similar exception when fewer than 12 housing units are developed. The following HUD programs, among other programs, contain the "under 12 units" exception: (1) Section 202 Supportive Housing for the Elderly Program, (2) Section 811 Supportive Housing for Persons with Disabilities Program, and (3) housing under the Home Investment Partnership Program. In addition, Housing Opportunities for Persons with AIDS Program has a complete exemption from Davis-Bacon requirements.¹¹⁶ Application of Davis-Bacon increases the cost of construction and ultimately reduces the number of Indian homes that are built. On March 12, 1997, at a joint hearing before the Senate Committees on Indian Affairs and Banking, Housing and Urban Affairs, both Indian housing authorities and HUD officials stated that compliance with Davis-Bacon requires wage rates that are \$10.00 per hour higher than those of reservation wage rates.¹¹⁷ This inflated wage rate increases the cost of labor on

¹¹⁵ See, David J. Stephenson, Jr. & James F. Wagenlander, *The Davis-Bacon Act Under Proposed Indian Housing Legislation*, 1 INDIAN HOUSING L.Q. 264 (1996) for some of the background to the Davis-Bacon problem.

¹¹⁶ Note that this is language in the Senate report, and the bill, as passed, permits a tribal prevailing wage under tribal law rather than a 12 unit limit to waive the Davis-Bacon Act.

¹¹⁷ What was the source of the "\$10 per hour" figure? The testimony of Christopher D. Boesen of the National American Indian Housing Council to the Senate Committee on Indian Affairs on February 23, 2000 references (at page 5) a AGAO Report." In March of 1997, the United States General Accounting Office made a report to the Subcommittee on VA, HUD, and Independent Agencies of the House Appropriations Committee entitled *NATIVE AMERICAN HOUSING*:

the reservation. The ultimate result is that fewer homes are built in Indian communities. In a community that is in dire need of increased and improved housing, compliance with Davis-Bacon requirements impedes the maximum capabilities of NAHASDA.¹¹⁸

How can tribes take advantage of the amendment? It means what it says: The Davis-Bacon “area prevailing wage” limitation does not apply if the given contract or agreement is “covered” by one or more tribal laws or regulations which requires the payment of not less than “prevailing wages,” “as determined by the Indian tribe.” That means that so long as there is a tribal law which establishes a method of determining what the “tribal prevailing wage” is, that will oust the federal prevailing wage rates. How can that be done? There are three methods in existing Indian labor codes: The Navajo Nation has an extensive statutory provision which permits the Office of Navajo Labor Relations to conduct its own surveys to establish the prevailing wages for an “area” within the Navajo Nation (although “area” is not defined).¹¹⁹ One code authorizes the tribal TERO commission to adopt regulations to establish prevailing wages. Another simply sets a dollar figure for various occupations. It is a bad practice to set dollar amounts for things such as this in a statute, and such fixed rates could be attacked as not meeting the intent of the NAHASDA provision as being genuinely “prevailing.” It is appropriate to give the authority to a tribal agency in rule-making authority, because wage surveys can be difficult. Whether the prevailing wage

INFORMATION ON HUD’S HOUSING PROGRAMS FOR NATIVE AMERICANS (March 1997). It references Davis-Bacon problems and the increase of construction costs at pages 11, 14, and 15, and it states that due to HUD’s wage surveys which include metropolitan areas, “the rate is about \$10.00 per hour higher than the wage rate prevailing in the local tribal area.” *Id.*, at 15. Judy A. England-Joseph of GAO provided the same information in testimony before the Senate Committees on Indian Affairs and Banking, Housing and Urban Affairs on March 12, 1997, “A Native American Housing: Challenges Facing HUD’s Indian Housing Program” (largely repeating the information in *Id.*).

¹¹⁸ S. Rep. No. 106-145, 106th Cong., 1st Sess. 4 (1999) (footnotes omitted).

¹¹⁹ 15 NNC Sec. 607 (ANavajo Prevailing Wage”) (1995).

provisions are put in a tribal statute or in a regulation authorized by a statute, there should be a reasonable and rational method of determining a “prevailing” wage. It is not sufficient to establish a minimum wage, as some of the tribal labor codes do.

The basic problem tribal officials will have with wage surveys is that they are difficult to conduct, and data is often hard to obtain. Given the jurisdictional difficulties recited above, voluntary compliance by area employers may be difficult to get. Indian housing officials can advise how hard it is to do salary comparability studies, which are required by HUD, but this is another area where cooperation can be of benefit. Employers are required to make quarterly wage reports to the United States Department of Labor and to state labor departments in many states. The reports indicate the amount of salary paid to employees for the quarter and the occupations of the employees. If the U.S. Labor Department and state labor departments share that data with tribes and their housing programs, it should be fairly easy to do accurate salary surveys. While tribes are not required to report salary data to the states, many do to get state unemployment compensation insurance for their employees, and tribes should have a database for their own employees. There are two difficulties with this: The first is that general tribal employees may not have the same occupations that we are interested in for housing projects, and the second is that if the survey gets salary information based upon pre-existing Davis-Bacon wage rates, there would be little difference in outcome (other than removing nearby urban areas from the data base).

The following language has been proposed for tribal code provisions to take advantage of the technical amendments’ new opportunity:

PREVAILING WAGES - Pursuant to section 104(b)(3) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. Sec. 4114(b)(3)), all architects, technical engineers, draftsmen, technicians, laborers and mechanics employed in the development and operation of this affordable housing project shall not be paid less than the prevailing wages in this locality as determined by the Tribe and adopted pursuant to Tribal

law or regulation.

EXCEPTIONS TO PREVAILING WAGES - the preceding paragraph requiring payment of prevailing wages does not apply to any unpaid volunteer or any other volunteer who receives a nominal fee, expenses, or reasonable benefits and who is not otherwise employed at any time in the construction of this affordable housing project.¹²⁰

This too is a beginning. There will need to be constructive dialogue among federal and tribal officials and Indian housing organizations to address the practical and realistic method of approaching the prevailing wage issue.

Such discussions will be the beginning of something else, recognition of the fact that Indian nations need comprehensive labor codes as part of the legal infrastructure that is required for progressive Indian housing and economic development initiatives. In the past, we have concentrated on “bricks and mortar” issues in housing construction, but there is a larger picture. We need to progress further.

CONCLUSION

This report builds upon a survey of fifteen tribal labor codes, and it provides both a general legal analysis of issues which must be considered before taking the third step of developing an outline of a “model” Indian nation labor code. Given two recent United States Supreme Court opinions, we now have a better understanding of the perimeters of regulatory and adjudicatory jurisdiction over non-Indians in general and state officials in particular. Those rulings do have the effect of invalidating many provisions in the fifteen codes that were reviewed.

More importantly, the lesson from these new legal developments is that we must discuss

¹²⁰ Language provided by Kristy McCarthy, Coalition for Indian Housing and Development, on June 26, 2001. While this language is described as wording for a statute, in context, it looks more like construction contract language, referring to a tribal law or prevailing wage rate set under a statute or regulation.

new and innovative ways of obtaining cooperation and consent. There are many opportunities in the discussion and hints in the Hicks v. Nevada decision that there need to be new discussions of cooperative ventures with the states. We also need to take advantage of devolution and cooperation initiatives of the various federal agencies that work in Indian Country. While many may view the recent Supreme Court decisions as a setback, we must use them as new opportunities for Indian nation sovereignty. The economic development studies show that the effective exercise of sovereignty is a key to economic development, and we must utilize that sovereignty in comprehensive labor codes.

* * *

OUTLINE OF A “MODEL” INDIAN LABOR CODE

June 2001

INTRODUCTION

This outline builds upon a survey of fifteen Indian nation labor codes and a separate legal analysis based upon best practices in the codes, recent developments in the law of Indian nation jurisdiction, and an amendment to the Native American Housing Assistance and Self-Determination Act of 1996 that should prompt new initiatives to develop Indian nation labor legislation.

There are several problems with an approach to a labor code outline which must be discussed before attempting an outline or code-drafting checklist. The first has to do with the reason the word “model” is put in quotation marks. There are, as of March 13, 2000, 556 Indian nations in the United States that are recognized by the federal government. They range in size from the Navajo Nation, which has more than 25,000 square miles of land, and it and the Cherokee Nation of Oklahoma have the largest numbers of enrolled members, to Indian nations which have small populations and very small land bases. It is obvious that a “one size fits all” approach will not work, although there can be a menu of subject areas for labor law which even small tribes should find useful for consideration. While it is fairly easy to identify basic labor standards to codify, the problem is enforcement. Can a given tribe afford or support an enforcement agency, or would it be sufficient to provide private remedies that could be enforced in a tribal court, special court, or some kind of administrative adjudicative body?

A second problem is that most models for labor legislation require a large and expensive institutional infrastructure. That is, there are labor departments to enforce the

standards in labor codes, and they require many kinds of personnel to carry out enforcement, monitoring, education, sanctioning, the adjudication of disputes, and other functions. It may be possible and desirable to have such an agency, but the problem is funding, and as we saw in the legal review done previously, there are taxation jurisdiction problems in Indian Country. Again, it may be possible to devise alternative enforcement mechanisms in labor law that we have seen in some tribal labor codes, such as the ability of an aggrieved employee to file a claim directly in tribal court.

It is difficult to evaluate state labor codes, and it is unfortunate that we do not have a labor code model developed by a professional association or academic institution. Most state codes are the product of that state's history and industry. There have been controversies and disputes on issues such as labor unions, wage levels, mandatory arbitration, just cause for discharge (including its definition, burdens of proof, after-acquired evidence, and other problems) which have been resolved with employers or employees having the upper hand, or some form of compromise (including compromises that result in unusual labor provisions). Therefore, any code drafter must take great care when using any state code as a drafting model to be certain that the public policy and cultural climate of Indian nations are taken into account.

Research shows that there are no "model" labor codes in the United States. While one would assume that the International Labour Organization in Geneva, Switzerland could offer useful guidance for labor legislation, its conventions and standards tend to be too broad for practical use. While there is "model" legislation for countries such as Russia and Singapore, it is not likely to be useful for our purposes.

After reviewing tribal and state legislation it is obvious that framing definitions is important. What is an “employer”? An “employee”? Who is an “independent contractor” for purposes of the application of labor code provisions? Some of the tribal codes addressed these problems and others. There is a great deal of labor litigation in the United States, and new developments in definitions will be an important part of the task of drafting model legislation.

One of the challenges is identifying the basic standards and “core areas” for a labor code. What employment problems are there in Indian Country which must be addressed? What issues are unique to Indian Country? Several of the tribal labor codes have special provisions which require employers to give reasonable accommodation to Indian religious and cultural beliefs and practices, and that is a useful exercise. Should, for example, an employer be required to carry health insurance that covers the fees of medicine people and ceremonies? That is done in the Navajo Nation. Indian nations tend to recognize and advocate group rights, and it is likely that Indian common law supports contemporary international economic human rights, such as the provisions in Article 23 of the Universal Declaration of Human Rights that there is a right to have a job at a living wage and just conditions of work; Article 25, which recognizes the right to wellbeing of a person and their family, including food, housing and medical care and necessary social services; and Article 26, which recognizes the right to an education. What are the core areas, for example, which flow from Article 23?

Finally, as can be seen from the review of the tribal labor codes and contemporary Indian affairs law, any code for Indian Country must first address the jurisdictional foundations, including the kinds of activities by non-Indian employers that would have

“some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” as in the *Montana* Test? As noted previously, any code drafter will have to consider the implications of federal statutes of “general application,” federal preemption, conflicts with state policy where nonmembers are impacted, and other issues. Any drafter should be mindful that the legal evaluation previously done was based upon the inherent powers of Indian nations, and the Supreme Court reminded us that Indian nations also get powers from their treaties and from federal legislation. Both a given Indian nation's treaty or treaties should be studied, and federal legislation in the area must be studied as well.

With these considerations in mind, the following outline will address: (1) Issues pertaining to Indian nation powers and jurisdiction for a code, (2) definition issues, (3) regulatory infrastructure considerations, core or basic issues in employment law, and (4) other possible areas of consideration. The outline is intended to be a checklist for consideration. While parts of it may be repetitious, that is necessary to make certain that all subjects are included.

I.

INDIAN LAW ISSUES

A. POWER AND AUTHORITY

1. Identification of the relevant Indian treaty and its provisions
 - a. Treaty exclusion powers
 - b. Rights of others to enter and remain, or not
 - c. Powers to punish and relationships with United States
 - d. Other treaty provisions which are unique to the tribe and which may modify principles of general Indian law

2. Identification of relevant federal legislation
 - a. Legislation that delegates or recognizes Indian nation power and authority
 - b. Legislation that may give a federal agency the discretion to support tribal labor legislation
 - c. Legislation that may permit “baby statutes,” which are local statutes that meet or exceed federal standards
3. Identification of tribal constitution and bylaws powers
4. Identification of powers in a tribal business corporation under the Indian Reorganization Act
5. Review of general Indian law principles regarding the inherent powers of Indian tribes
6. Detailed examination and statement of the tribe’s situation (e.g. economy, unemployment, age cohorts, poverty, etc.) and a statement of labor issues which have a direct effect upon the tribe’s political integrity, economic security, and the health and welfare of the tribe *and* reservation residents
7. The Indian Civil Rights act and tribal Bills of Rights, and the need to have a statement of basic rights

B. JURISDICTION

1. Statement of jurisdiction based upon the treaty
2. Statement of jurisdiction based upon federal delegation or discretion
3. Who is an “Indian”?
4. Who is a “member”?
5. What is the tribal territorial jurisdiction?
 - a. Treaty definition

- b. Definition in statute or executive order that established the reservation
 - c. Are there off-reservation “dependent Indian communities,” and how are they defined?
- 6. What are the situations to obtain the consent of non-Indians?
 - a. Entry and residence permit
 - b. Commercial dealings with the tribe
- 7. The definition and rights of Indian entities and businesses

C. INDIAN PREFERENCES

- 1. Definitions
 - a. “Indian”
 - b. “Employer” and “covered entity”
 - c. “On or near the Reservation”
 - d. “Indian business or entity”
 - e. “TERO”
 - f. The agency and director
 - g. The commission or board
 - h. “Contract and subcontract”
- 2. Tribal employment rights office
 - a. Establishment
 - b. Director
 - c. Functions, powers and duties
 - d. Implementation of program
 - e. Processing complaints

- f. Annual reports
 - g. Duties of other tribal and federal programs
 - h. Relationship with other programs and agreements (including state anti-discrimination agencies)
- 3. Tribal employment rights review board or commission
 - a. Establishment
 - b. Qualifications of members
 - c. Compensation
 - d. Jurisdiction
 - e. Sanctions
 - f. Hearing procedures
 - g. Decisions
 - h. Appeals
 - i. Independence
- 4. Employment preference
 - a. Indian employment preference
 - b. Index of Indian applicants or hiring hall
 - c. Hiring
 - d. Layoffs
 - e. Promotions
 - f. Summer students
 - g. Collective bargaining agreements and unions
 - h. Individual complaints
 - i. Compliance and hearing procedures

j. Prohibition of retaliation

5. Contracting and subcontracting preference

a. Subcontracting preference

b. Scope of preference

c. Technical qualification and reasonable price

d. Submission of contracting and subcontracting plan

e. Operation of the contract or subcontract

f. Replacement of non-Indian firms by certified firms after project begins

g. Reports and monitoring

h. Individual complaints

i. Compliance and hearing procedures

j. Criteria for Indian contract preference certification

1) Ownership

2) Management control

3) Integrity of firm structure

4) Residence

k. Applications for certification

l. Certification determinations

m. Probationary certification

n. Final certification

o. Withdrawal of certification

p. Firms previously certified

- q. Annual and other reports
 - r. List of certified entities
 - s. Retaliation forbidden
- 6. Voluntary Indian preference
 - a. Voluntary preference defined
 - b. Voluntary Indian preference policy
 - c. Employment
 - d. Reporting
 - e. Publicity
 - f. Review of TERO actions

D. LABOR STANDARDS

- 1. Description of the agency or agencies who will enforce the labor standards in the code
- 2. Description of the labor standard areas
- 3. Application of the labor standards
 - a. Application to members
 - b. Application to non-members
 - 1) Indians
 - 2) Non-Indians

II.

DEFINITION ISSUES

Define:

- A. “Employer”

- B. “Employee”
- C. “Independent Contractor”
- D. “Agent” or “representative”
- E. Business entities
 - 1. Corporation
 - 2. Partnership
 - 3. Business trust
 - 4. Entity
 - 5. Individual
 - 6. Tribal agencies, programs, enterprises and corporations
 - 7. Non-profit and charitable organizations
- F. Indian preference
- G. Indian business or entity
- H. “On or near reservation”
- I. "Prevailing minimum wage" and the method to determine that wage
- I. Subjects of the labor code
- J. To whom the code will apply
- K. Indian-specific issues (listed in I)

III.

REGULATORY INFRASTRUCTURE ISSUES

- A. Define the agency or agencies to be created
- B. Describe the purposes of the agency or agencies

- C. Define the subject matter jurisdiction of the agency or agencies
- D. Define the power and authority of the agencies
 - 1. Rule-making authority and procedure
 - 2. Power to investigate
 - 3. Power to enforce (and procedural issues)
 - 4. Power to impose sanctions
 - 5. Fact finding
 - 6. Assessment of required remedial action
 - 7. Prevention of violations in the future
 - 8. Education
 - 9. Training
 - 10. Sanctions
 - a. Denial of privileges
 - b. Revocation of contracts, permits, or licenses
 - c. Actual and “make whole” damages
 - d. Civil penalties
 - e. Civil punitive damages
 - f. Liquidated damage provisions
 - g. Compliance and actions which must be taken to comply
 - h. Equitable and court relief
- D. Describe the agency personnel and their power and authority
- E. Describe a separate quasi-judicial hearing body
 - 1. Membership, tenure and removal

2. Independence and freedom from political control
3. General power, authority and jurisdiction
4. Procedural due process requirements
 - a. Notice
 - b. Opportunity to be heard
 - c. Fair hearings
 - d. Impartiality of the body
 - e. Right to counsel of one's own choice (paid by the party)
 - f. Compulsory attendance of witnesses and production of evidence
 - g. Confrontation and cross-examination
 - h. No prior knowledge of the facts by the hearing body and no communication with the enforcement agency or employees
 - i. Issuance, deadlines and contents of decision

F. JUDICIAL REVIEW

1. Designation of judicial appellate body (trial, appeals court or both)
2. Standard of review
 - a. On the record
 - b. Arbitrary, capricious and contrary to law

G. SUPPLEMENTARY AND EQUITABLE REMEDIES

1. Temporary, preliminary and permanent injunctions
2. Writs of mandamus, prohibition, certiorari, and assistance
3. Special provisions for the protection of civil rights

H. ALTERNATIVES TO AGENCY ACTION

1. Standards create a private right of action
2. Filing in court or administrative agency
3. Attorney fees
4. Statutory damages (e.g. treble) and penalties
5. Civil punitive damages
6. Equitable relief

IV.

CORE ISSUES

A. BASIC RIGHTS

1. Right to employment
2. Right to education and training
3. Right to fair treatment in employment
4. Right to fair compensation
5. Right to fair conditions of employment
 - a. Freedom from discrimination
 - b. Freedom from harassment, unfair treatment and bullying
 - c. Reasonable leave
 - d. Reasonable sick time and insurance coverage
 - e. Religious and cultural accommodation
 - f. Freedom of association
 - g. Right to grievance procedures

B. THE EMPLOYER-EMPLOYEE RELATIONSHIP

1. Formation of the employer-employee relationship
2. Definition of (or rejection of) employment at will
3. Basic conditions of employment
 - a. Workplace safety and freedom from abuse
 - b. Leave (vacation, illness, family emergency, pregnancy, military service, voting, education, holiday, religious, cultural, and special leave conditions, such as administrative leave)
 - c. Benefits (health insurance, life insurance, retirement program, education, bonuses and incentives)
4. Grounds for discipline
5. Definition of “just cause” for discipline or discharge and the burden of proof
6. Due process or equitable due process rights
7. Grievance procedures and appeals

C. COMPENSATION

1. Minimum wage
2. The prevailing minimum wage
 - a. Methodology for determining the wage
 - b. Rule-making provisions if that approach is used
 - c. Definition and application of the prevailing wage to defined employers and contractors
3. Payment of wages
 - a. Periodic pay (i.e. weekly, biweekly, monthly) and time following the pay period wages must be paid
 - b. Separation pay (i.e. when final pay must be paid out)

c. Payment of accrued leave or sick time on termination

d. Penalties

1) Double or treble damages based on pay that is due

2) Criminal penalties

3) Civil penalties

4) Enforcement (agency or court)

4. Assignment of wages

5. Garnishment (child support, etc.)

6. Voluntary deductions

D. PRIVILEGES AND PERQUISITES

1. Gratuities and tips

2. Bonds and photographs

3. Contracts (authority)

4. Purchases

5. Uniforms

6. Special privileges

E. WORKING HOURS

1. Exempt employees

2. Non-exempt employees

3. Overtime pay

4. Compensatory time

5. Voluntariness of overtime

6. Limitations on overtime (e.g. budget)

F. PRIVILEGES AND IMMUNITIES

1. Contracts against public policy
2. Misrepresentation in the solicitation of employees
3. Contractors
4. Alcohol and drug policies and rehabilitation
5. Employee assistance programs
6. Literacy assistance
7. Reemployment privileges
8. Political and social affiliations
9. Suits
10. Reasonable accommodation of disabilities, languages and religious and cultural considerations
11. Freedom from discrimination

G. EMPLOYEES

1. Wages, hours and working privileges
2. Occupational privileges and restrictions
3. Working hours
4. Minors

H. LICENSING

1. Entry or residence permit
2. Business licenses
3. Employer license
4. Taxes and fees

I. UNEMPLOYMENT RELIEF

J. HEALTH

1. Sanitary standards
2. General workplace safety standards

K. EMPLOYMENT RELATIONS

1. The contract of employment
2. Obligations of the employer
3. Obligations of the employee
4. Employee fiduciary duties
5. Employee inventions and ideas
6. Investigations of employees

L. APPRENTICESHIP

M. STUDENT EMPLOYMENT

N. CHILD LABOR STANDARDS

IV.

OTHER AREAS OF CONSIDERATION

A. WORKER'S COMPENSATION

B. UNIONS AND COLLECTIVE BARGAINING

1. Definition of collective bargaining
2. The right to bargain
3. Good faith
4. Organizing
5. Certification of union

6. Collective bargaining agreements
7. Decertification of union
8. Management and employee definition
9. Strikes and employee action
10. Mediation and arbitration
11. Judicial review and remedies

C. OCCUPATIONAL HEALTH AND SAFETY

D. TRIBAL SPECIFIC INDUSTRIES AND EMPLOYMENT

1. Gas and oil
2. Fishing
3. Forestry
4. Casinos
5. Livestock
6. Arts and crafts
7. Traditional economies

E. IMPLEMENTATION OF FEDERAL PROGRAMS

1. Housing
2. Labor
3. Health and safety
4. Environment
5. Economic development

F. ALTERNATIVE DISPUTE RESOLUTION, MEDIATION, AND TRADITIONAL INDIAN LAW

G. ADMINISTRATIVE PROCEDURES ACTS

H. CIVIL RIGHTS REMEDIES

1. Conventional models
2. Traditional remedies
3. Injunctive relief and sovereign immunity

CONCLUSION

This listing of an outline of labor law subjects is designed to prompt thinking and discussion about specific employment and labor standards and the means to enforce them. Indian nations are already familiar with personnel policies, so this outline will appear to be familiar. The basic issue is whether Indian nations wish to turn standards usually found in personnel policies into general legislation. The trick or the key to that will be jurisdiction over non-members, and a great deal of it will depend upon both the composition of the reservation in terms of land tenure, and as we have seen, consent and submission of nonmembers to the tribe's jurisdiction. Many of the new jurisdictional changes are very recent, and it will take time for Indian Country to understand, consider the implications of the new rules, and adapt to them.

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**Part # 3 INDIAN NATION LABOR CODES:
BEST PRACTICES**

**A Data Base of Summaries of
Selected Tribal Labor Codes**

July 2001

INTRODUCTION

The Davis-Bacon Act, at 40 U.S.C. Sec. 276(a) (1996), provides that laborers working on projects funded with federal monies must pay the prevailing “corresponding wage rate” that is paid to classes of workers employed on projects “of a similar character in the locality.” That requirement is incorporated in Section 104(b)(1) of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA”) (codified at 25 U.S.C. Sec. 4114). The wages “prevailing in the locality” are determined by the Secretary of Labor. As Congress recognized when it recently adopted a bill to make technical corrections to NAHASDA, when the Secretary identifies the prevailing wages in a given “locality,” that drives up the cost of housing construction because wage rates in the “local area” can include “considerably higher wages earned in larger metropolitan areas with a large population of unionized contractors” in the prevailing wage rates. Senate Report No. 106-145. Section 104(b)(1) is now modified by a new Section 104(b)(3), which provides:

Application of Tribal Laws. Paragraph (1) shall not apply to any contract or agreement for assistance, sale, or lease pursuant to this Act, if such contract or agreement is otherwise covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

This means that Indian tribes have the opportunity to adopt their own prevailing wage standards for NAHASDA projects. They can do so through a tribal “law,” including statutes, ordinances and council resolutions, or through “regulations” where a tribal administrative agency has the statutory authority to adopt regulations or rules. That strengthens tribal sovereignty, because the amendment recognizes that often, Indian reservations and other parts of Indian Country are frequently lumped together with areas outside Indian country in an inappropriate way, and it acknowledges the inherent power of Indian nations to exercise their sovereignty by enacting labor laws. The amendment offers a realistic approach to the cost of housing construction in Indian Country.

This amendment prompts Indian nation leaders to think about the problem of “prevailing wages.” How will they be set? The United States Department of Labor compiles reports of the amount of wages paid for different occupations from employer records. How can an Indian nation perform that task? The various states have their own labor departments, with the power to regulate labor and require employer compliance with labor laws; so Indian nations can do the same exercising their sovereignty. The change to NAHASDA prompts us to think about Indian nation labor law and possible new statutes to regulate labor practices in Indian Country. How do we go about doing that? We can take a “micro” approach of simply looking at some existing state labor codes and federal worker protection statutes, or we can take a “macro” or big approach of surveying existing Indian nation labor laws to establish the best existing labor law practices in Indian Country.

This study will identify, analyze, and annotate existing tribal labor codes to see the best practices being used in Indian Country. That will give us guidance and possible approaches to developing model or sample labor codes for the future. Indian nation labor codes began with the clarification of Indian preference in employment laws. A federal preference for employing Indians

dates from at least 1834, and it was continued in Section 12 of the Indian Reorganization Act of 1934. The United States Supreme Court upheld the constitutionality of Indian preference hiring in the case of *Morton v. Mancari*, 417 U.S. 535 (1974). When Congress enacted the Indian Self-Determination Act of 1975, to give grants and contracts to Indian nations to carry out federal functions, Indian preference then applied to tribal employment. Many Indian nations took advantage of that by enacting “Tribal Employment Rights Ordinances” and creating “Tribal Employment Rights Offices.” Both are popularly known as “TEROs.” Early versions of such laws were usually limited, giving hiring preference to tribal members and providing for some enforcement of preference rights. As the laws passed by various Indian nation councils evolved, however, we began to see new TERO codes which provided for general employment rights and grievance or complaint mechanisms. In turn, some Indian nations recognized the possibility that they could enact more comprehensive labor codes and establish administrative labor agencies. Those laws are the basis of this study, which collects and evaluates the various Indian country labor laws to analyze them to discover what the “best practices” in Indian Country happen to be.

IDENTIFICATION OF CODES

The labor laws of the following Indian nations have been identified and collected (in alphabetical order):

1. Agua Caliente Band of Cahuilla Indians (California)
2. Cherokee Nation (Oklahoma)
3. Confederated Tribes of the Colville Reservation (Washington)
4. Fort Peck Assiniboine and Sioux Tribes Reservation (Montana)
5. Gila River Indian Community (Arizona)
6. Hoopa Valley Tribe (California)
7. Minnesota Chippewa Tribe of Leech Lake Reservation (Minnesota)
8. Lummi Nation (Washington)
9. The Navajo Nation (Arizona-New Mexico-Utah)
10. Oglala Sioux Tribe of the Pine Ridge Reservation (South Dakota)
11. Stockbridge-Munsee Community of Mohican Indians (Wisconsin)
12. Central Council, Tlingit & Haida Indian Tribes of Alaska
13. Turtle Mountain Band of Chippewa Indians (North Dakota)
14. Confederated Tribes of the Umatilla Reservation (Washington)
15. White Mountain Apache Tribe of the Fort Apache Reservation (Arizona)

While a word search of the Internet shows that there are other Indian nations which have employment and labor laws, this is a random sampling of available codes. It is a sufficient sample for analysis, comparison, and an identification of best practices in Indian nation labor laws.

ANALYSIS & ANNOTATION

The analysis and annotations of these codes (in alphabetical order) is as follows:

1. Agua Caliente Band of Cahuilla Indians Tribal Labor Relations Ordinance

This law was enacted on September 14, 1999 to address a controversy in California about the rights of workers in new California casinos. It appears to be a general and model labor relations code for California's gaming tribes as a product of California's tribal-state gaming compact. There are thirteen sections, which address:

1. Applicability

The code applies to "any tribe" which employs 250 or more persons in a tribal casino or "related facility," and such tribes are required to adopt this particular "Tribal Labor Relations Ordinance (TLRO or Ordinance)." "Tribal casino" is defined as a Class III gaming facility under federal Indian gaming law. "A 'related facility' is one for which the only significant purpose is to facilitate patronage of the class III gaming operations." Tribes which did not operate a casino as of September 10, 1999, but which later open a casino, can delay adopting the ordinance until one year after the number of employees in a casino or related facility exceeds 250. Labor unions of the power to ask a tribal gaming commission to certify the number of casino-related employees it has, and either a union or the tribe can dispute the certification before the "Tribal Gaming Commission" or the "Tribal Labor Panel."

This is an example of a statewide approach to labor law for gaming tribes. This is a negotiated law which was the product of a great deal of controversy in California. The ordinance does not indicate whether the provisions of this model are fixed, or whether this is the minimum required by the compact. California Indian nations have the same inherent powers as the other Indian nations of the United States to regulate their own affairs, and all powers vested by a given tribal constitution and bylaws, with concurrent jurisdiction with the State of California.

2. Definition of employees

The ordinance applies to "any person" (also known as an "Eligible Employee") who is employed in a casino or related facility for Class III gaming. However, supervisors are exempted. A "supervisor" is a person who has hire-fire and disciplinary power, whose authority is not "merely routine or clerical," but requires the use of independent judgment. Covered employees also include employees of the Tribal Gaming Commission, security and surveillance department employees (excluding technical repair or equipment employees), employees who handle cash operations as a "cage" employee or money counter, and [card] dealers. The ordinance excludes managers and supervisory personnel while assuring that all gaming-related positions are covered.

3. Non-interference with regulatory or security activities

The law specifically prohibits interference with the Tribal Gaming Commission's duty to "regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance." The law cannot be read to interfere with casino surveillance and security systems or other internal control operations to protect the integrity of gaming operations. The Tribal Gaming Commission is excluded from the definition of "tribe" and its agents.

This provision is designed to make certain that security operations are independent of the law and that internal controls are not regulated by it. It recognizes the importance of the integrity of the gaming operation, so it is free from control.

4. Employee concerted activity

Employees who are covered by the law have the right to organize, form or join employee organizations and engage in collective bargaining. Importantly, employees also have the right to refrain from organizing (union) activities.

5. Unfair labor practices

This section puts limitations upon the tribe in its labor practices, and it is an unfair labor practice for the tribe or its agents:

- To interfere with, restrain, or coerce employees regarding their rights;
- To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to one, but that does not prohibit a union security or dues check-off;
- To discharge or discriminate against an employee because he or she files charge or gives testimony under the Ordinance;
- To refuse to bargain collectively with the representatives (i.e. union officials) of employees.

6. Union unfair labor practices

The Ordinance also prohibits labor organizations (unions) or their agents from:

- Interfering with, restraining or coercing employees in the exercise of their rights under the Ordinance;
- Engaging in, inducing or encouraging other persons to engage in a strike or a boycott or refusal to transport items or perform services, or threatening, coercing, or restraining any person. This provision does not apply when there is a “collective bargaining impasse.” It is designed to prohibit unions from urging employees who provide goods or services to the casinos to strike or refuse to work as leverage against the casino tribe;
- If one labor organization has been certified to represent employees, another cannot force or require the tribe to recognize or bargain with it;
- If a union is the collective bargaining representative of covered employees, it cannot refused to bargain collective with the tribe or an employer (if someone other than the tribe operates gaming);

- Attempting to influence the outcome of a “tribal governmental election,” but that prohibition does not apply to tribal members.

7. Free speech

Both the tribe and a given union have the right to free speech, and no form of speech in any form can be limited so long as it “contains no threat of reprisal or force or promise of benefit.”

8. Access to employees

Unions have the right to access to employees to organize them. However, such activities cannot interfere with the patronage of the casino or a related facility (i.e. the customers), and it cannot be done during employee work time. It must be done on employee non-work time in non-work areas, such as break rooms or locker rooms that are not open to the public. If there are licensing requirements for others with access to the casino or a related facility, the tribe can require union officials to become licensed, so long as the licensing provisions are not unreasonable, discriminatory, or designed to impede access for organizing. The tribe can designate other areas for access, such as parking lots and non-casino facilities on tribal lands.

To fine-tune what it means to interfere with normal work routines, union activities will not be permitted if the compromise security and surveillance systems in the casino and the reservation, security access limitations, internal security controls, or other systems to assure the integrity of gaming operations, or safety to persons and property.

If 30% of employees express an “interest” to the Tribal Labor Panel, a list of eligible employees and their last known address must be provided. The tribe can voluntarily produce an eligibility list at an earlier point in a union organizing campaign.

The tribe must “facilitate” the dissemination of union information to employees by allowing posters, leaflets and other written materials to be posted in non-public employee break areas where other employee announcements are posted. The posting is to be done by employees who want to post the materials.

9. Indian preference

Indian preference to “members of any federally recognized Indian tribe” is permitted, and there is no restriction on the obligation to follow tribal law, personnel policies, or tribal customs and traditions on Indian preference. However, if there is a conflict of such provisions and the Ordinance, tribal law, ordinances, and its customs and traditions “shall govern.”

10. Secret ballot elections

If 30% of eligible employees sign “authorized cards,” a secret ballot election must be held in thirty days after presentation of the cards to an elections officer. The election officer, who must be a member of the Tribal Labor Panel must hold the election, and he or

she also decides “all questions” on representation of the tribe or a labor organization. When a labor organization notifies the tribe of the intention to present authorization cards, an election officer must be chosen and preside.

An election officer must certify the labor organization as the exclusive bargaining represent of a unit of employees if it receives a majority of employee votes by secret ballot, if the election was conducted fairly. The election officer has the power to order a re-run election where there is employer or union misconduct. If the election officer determines that unfair labor practices by the tribe interfered with the election process, and the union can show that it had the support of a majority of the employees, the election officer must certify the labor organization. When an election officer makes an election decision, the tribe or the union can appeal that decision to a three-member panel of the Tribal Labor Panel.

11. Collective bargaining impasse

When a union is recognized, the tribe and the union must negotiate in good faith for a collective bargaining agreement. If negotiations reach an impasse, and the problem is not resolved in “tribal forum procedures” (set out in a later section) within sixty working days or an agreed time, the union has the right to strike. However, no strike-related picketing can be conducted on Indian lands.

12. De-certification of bargaining agent

If 30% or more of eligible employees sign a petition for de-certification of a certified union, then a secret ballot election must be held in 30 days from presentation of the petition. The election officer conducts the election, and there are the same kinds of fairness provisions as for organizing elections. If there is no collective bargaining agreement in place, a de-certification election cannot be held until one year after the initial certification of the union. Where there is a collective bargaining agreement, a de-certification petition cannot be filed more than 90 days, and no less than 60 days, after the expiration of a collective bargaining agreement. A petition can be filed at any time after a collective bargaining agreement has expired.

13. Dispute resolution mechanism

Disputes must be resolved using the dispute resolution mechanisms in this section, except for collective bargaining agreement negotiation impasses, which go through the first level. The first level of binding dispute resolution procedures for organizing, elections, unfair labor practices, and the discharge of eligible employees consists of an appeal to a “designated tribal forum,” such as a tribal council, business committee, or grievance board. There are time limits:

- Organizing, election procedures and unfair labor practices before a union is certified must be resolved within 30 working days;
- After a union is certified, and the dispute relates to an impasse during negotiations, the tribal forum must resolve the matter within 60 working days;

There is a second level of binding dispute resolution, namely a “Tribal Labor Panel,” which is made up of ten arbitrators “appointed by mutual selection of the parties.” That panel serves all tribes that adopt the Ordinance. Each member of the panel must have “relevant experience” in federal labor law or federal Indian law, with preference to those who have experience in both. When a dispute goes to the panel, one arbitrator from the panel can render a binding decision. If there is an objection, the dispute will be decided by a three-member panel. Where there is one arbitrator, five Tribal Labor Panel names are presented to the parties, and each party can strike up to two names. Who will strike the first name is decided by a coin toss. The arbitrator must “generally follow” American Arbitration Association labor dispute resolution procedural rules. Arbitrators must render written decisions.

There is a third level of binding dispute resolution, namely a motion to compel arbitration or to confirm an arbitration award in Tribal Court. That decision “may be appealed to federal court.” If the tribal court does not make a decision in 90 days, or if there is no tribal court, then the matter may go directly into federal court. If it declines jurisdiction, the tribe agrees to a limited waiver of sovereign immunity “for the sole purpose of compelling arbitration or confirming an arbitration award” ... “in the appropriate state superior court.”

While this example of a labor law is limited to collective bargaining in gaming tribes, it is an important reference for gaming tribes across the country. Collective bargaining agreements are usually lengthy documents, which address things such as employee compensation, working conditions, and employee grievances C the stuff of many labor codes. This gives an opportunity for the tribe to deal with its employees on basic employee issues for the term of the agreement, and to take a fresh look at labor issues at the expiration of a collective bargaining agreement.

The overall agreement is realistic because it recognizes Indian preference in employment. Although the preference is for Indians in general and not for tribal members only, that may be realistic in California, because there are many small bands and rancherias. The ordinance assumes that non-Indian employees will have the right to organize and collectively bargain over working conditions. The ordinance also gives deference to tribal law, including customary law (although there may be disputes over how it is determined by the tribe), and gives primary jurisdiction to a tribal court, before federal or state courts. If a federal court declines jurisdiction (which is likely in most cases because federal subject matter jurisdiction C the kinds of cases a federal court has the power to hear C is very limited), then there is a limited waiver of tribal sovereign immunity. It is strictly limited to requiring binding arbitration, enforcing an arbitration decision, or challenging a decision as violating the Ordinance. It appears, overall, that the tribe would only subject itself to non-monetary relief, having to do with organizing, unfair labor practices, and elections. There might be problems with sovereign immunity, depending upon the nature of proposed collective bargaining agreements and remedies offered under them. Overall, this ordinance is a sample of addressing the content of labor standards and dispute resolution methods through collective bargaining.

2. Cherokee Nation Tribal Labor Relations Ordinance

There are only a few Indian nations in the United States (e.g. the Cherokee Nation, the Navajo Nation, and the Turtle Mountain Band of Chippewa Indians) which have commercially-published bound statutes. The Cherokee Nation Code is published by West Publishing Company of Saint Paul, Minnesota. The “Cherokee Nation Employment Rights Ordinance” has six chapters in Title 40 of the Code. The chapters address these subjects:

Chapter 1: General Provisions

- Title
- Purpose: The title requires the fair employment of Indians and prohibits discrimination against Indians “in the employment practices of employers who are doing business with the Cherokee Nation on tribal lands.
- Definitions. The relevant definitions for our analysis include:
There is a “Committee,” meaning the “Cherokee Nation Employment Rights Committee,” which is the members of the Employment Committee of the Cherokee Tribal Council.
 - There is a “TERO” or Tribal Employment Rights Office.
 - One of the important definition elements of any labor code is the definition of “employer,” and that is “any person, company, contractor, subcontractor or other entity located or engaged in work with the Cherokee Nation, employing two or more persons.”
Federal, state and county government agencies are excluded from the definition, but “employer” includes “agencies, contractors, and subcontractors of all other agencies.”
 - The term “engaged in work” to determine who is an employer means that “if during any portion of a business enterprise or specific project, contract or subcontract, he or any of his employees spends a majority of time performing work under contract with the Cherokee Nation of Oklahoma and the work is performed on tribal lands.”
 - An “Indian” is “any person recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.”
Note: Most federal statutes require that an “Indian” be an enrolled tribal member. It is not clear what this definition means.
 - An “Indian-owned business” is any business entity which is “at least” 51% owned by Indians. The definition has detailed restrictions on proof of ownership, control, business value, and profit, and the firm must be “under significant Indian management

and control.” *Comment: The detailed restrictions on Indian control and management are an excellent example of provisions to prevent frauds and misuses of Indian preference in contracting law.*

- An employer is “located on the Cherokee Nation” if, during any portion of a business enterprise or specific project, contract, or subcontract, that employer “maintains a temporary or permanent office or facility on tribal lands.” *Comment: The Cherokee Nation is unique in its land tenure. What happens if an employer operates on tribal lands but refuses to maintain an office or facility on tribal lands?*
- “Tribal lands” includes all land held in trust for the Cherokee Nation by the United States or land owned by the Nation in fee simple.

Chapter 2: Cherokee Nation Employment Rights Committee

- This chapter addresses:
 - The establishment of a Cherokee Nation Employment Rights Committee
 - The general duty to “administer the employment rights program of the Cherokee nation...”
 - General powers: The committee can-
 - Operate under the Act and adopt rules and regulations “governing pertinent activities of TERO;”
 - Obtain federal, state, or other funding to supplement Council appropriations;
 - Establish numerical hiring goals and timetables specifying the minimum number of Indians an employer must hire by craft or skill level;
 - Require employers to establish or participate in job training to increase the pool of Indians eligible for employment;
 - Establish and administer a job bank and require employers to use it;
 - Prohibit employers from using job qualifications or requirements that “may bar” Indians from employment unless the criteria “are required by business necessity.” The committee can adopt EEOC [the U.S. Equal Employment Opportunity Commission] guidelines or adopt other requirements to eliminate employment barriers which are “unique to Indians in Indian Country;”

- Enter into agreements with unions;
- Require employers to give preference to tribal and other Indian-owned businesses;
- Establish employment-counseling programs;
- Hold hearings;
- Require employers to submit reports and take “all actions deemed necessary by the commission for the fair and vigorous implementation of this chapter;”
- Make cooperative agreements with federal employment rights agencies; and
- Take other actions necessary to achieve the purposes of the labor title.
- Rules, regulations and guidelines: The committee is required to adopt such documents, with the approval of the Council, “with all reasonable speed” upon formation.
- All funds the committee collects from employer fees or other sources are tribal funds.

Chapter 3: Indian Employment Rights, Requirements and Programs Generally

- Indian preference generally: Employers must give preference to Indians in hiring, promotion, training, and all other aspects of employment, and comply with the labor code and all rules and regulations.
- Preference in contracting and subcontracting: There is preference in the award of contracts and subcontracts to tribally-owned and Indian-owned businesses, and the TERO staff will maintain a list of such businesses to give to employers.
- There is preference in promotions “in accordance with required ratios.”
Note: This most likely refers to past federal programs, now largely abandoned, which gave employers data on minority compositions of workforces.
- There is a preference for students for summer student employment, and employers “shall make every effort” to promote after-school, summer and

vacation employment for Indian students.

- Numerical goals: The TERO staff can establish a minimum number of Indians for an employer work force, and set numerical goals for each craft, skill, mob classification, etc. used by any employer. The goals must be expressed in terms of man-hours in the given job classification. *Comment: Using man hours prevents the abuse of hiring people for part-time employment or very limited employment.*
- The TERO staff must review goals annually, and employers must give monthly reports indicating the number of Indians in the work force, compliance with goals, all persons hired and fired during the month, the job positions involved, and other information required by TERO.
- Employers can be required to participate in training programs for Indians, with a ratio of Indian trainees to be set by TERO.
- Employers are prohibited from using job criteria or personnel requirements which “bar” Indians from employment “unless such criteria or requirements are required by business necessity. *Note: The obvious source of this provision is Title VII of the Civil Rights Act of 1964. This links the tribe’s prohibition to federal law, and the current state of federal civil rights law is not healthy. Should the statute prohibit practices which “deter” Indians from employment rather than bar them? Also note that disparate impact discrimination claims do not do well under the current state of federal civil rights law.*
- Where there is a reduction in force or layoffs, employers must still maintain the “required ratio of Indian employees.”
- Indian preference requirements are also binding on contractors and subcontractors of employers.
- The TERO must establish and administer a Job Bank, but an employer can use any source for workers so long as the employer complies with the labor code.
- The TERO staff must establish counseling and other support programs to assist Indians with employment. Employers must cooperate with the committee to implement such programs.
- In any hearing before the committee on compliance with the law, the burden of proof is upon the employer, and not the employee, to show compliance.

Chapter 4: Union Collective Bargaining Agreements

- Where an employer has a collective bargaining agreement with a union, the union must file a written agreement stating it will comply with the labor code and all rules, regulations and orders of the committee. An employer may not commence work until the agreement is filed with the committee.
Comment: Given the federal Indian law requirement that non-Indians must consent to civil jurisdiction, with some courts ruling that such agreements must be specific, this is an excellent provision. However, this is a consideration which should be addressed before any contact is given to an employer by the Indian nation.
- Collective bargaining agreements must provide for:
 - Indian preference in referrals;
 - Cooperation with the TERO staff;
 - Training programs; and
 - Temporary work permits for Indians who do not choose to join the union.
- The “committee staff” is to provide a model union agreement.
- The code provisions on collective bargaining agreements do not constitute official recognition of any union or endorsement of any union activities within the Cherokee Nation.
- In any hearing on compliance with this chapter, the burden of proof to show compliance is on the employer and not the employee.

Chapter 5: Complaints and Hearings

- The committee can file a complaint against an employer, contractor, subcontractor, or union if it “has cause to believe” it failed to comply with the code, or rules, regulations or orders of the committee. The committee must attempt an informal settlement, but if that is not possible, the committee can request a hearing.
- Individual Indians may file complaints with the committee, which it must investigate and attempt an informal settlement. If that is not possible, the individual or the committee may request a hearing.

- An employer or union that feels that any provision of the code, or any rule, regulation or order of the committee is illegal or erroneous, it may file a complaint, and the committee must investigate an attempt at an informal settlement. If that cannot be achieved, the employer or union may request a hearing.
- If anyone requests a hearing, there must be written notice “to all concerned parties” which states the nature of the hearing and the evidence to be presented. The notice must advise parties of the right to be present at the hearing, present testimony of witnesses and other evidence, and to be represented by counsel at their own expense.
- The following procedures must be followed during hearings:
 - All parties may present testimony and other evidence and be represented by counsel at their own expense.
 - The committee may have the advice and assistance of counsel provided by the tribe.
 - The chairman or vice-chairman of the committee must preside, and the committee must ascertain the facts and “a reasonable and orderly fashion.”
 - Any hearing may be adjourned, postponed or continued in the committee’s discretion.
 - The committee can take immediate action at the close of hearing or take the matter under advisement.
 - The committee must notify the parties of its decision within 30 days after the last hearing.

Comments: There are several civil rights concerns about this chapter:

The statute gives the committee an investigatory and conciliation role and an additional role as the trier of fact and law in quasi-judicial adjudication. While this is similar to the structure of many state human rights and anti-discrimination bodies, there is a problem of separating the body’s investigatory role from its adjudication role. If the two are clearly separated so that (for example) independent committees staff perform the investigatory and charging role and the committee is independent of that function, then there should be no due process problems. If, however, the committee is intimately involved in investigation, and it hears facts when performing its conciliation role, then there are due process

problems with the independence of the body for purposes of a due process fair hearing.

If the committee is composed of elected council officials, and if it imposes any form of penalty, then there are problems of a possible bill of attainder, which is prohibited by the Indian Civil Rights Act.

Chapter 6: Enforcement and Remedies

- The penalties for any employer, contractor, subcontractor or union that violates the code, or a rule, regulation or order of the committee, include:
 - Denial of the right to do business within the Cherokee Nation;
 - Suspension of operations;
 - The payment of back pays and damages to compensate an injured party;
 - An order to summarily remove employees hired in violation of the law;
 - Monetary civil penalties;
 - Prohibition against engaging in future operations;
 - An order requiring the employment, training or training of Indians injured by any violation;
 - An order requiring changes in procedures and policies to eliminate any violation;
 - An order for any other provision to alleviate, eliminate or compensate for any violation;
 - A maximum penalty of \$500 for each violation; and
 - There is a separate violation for each day the violation exist.
 - A party may appeal any committee decision to the Judicial Appeals Tribunal of the Cherokee Nation under the tribal constitution.
- The committee and all tribal agencies that issue business permits are

responsible to notify all employers of the obligation to comply with the code, and there must be notification of the law in all bid announcements.

- No new employer may do business with the Cherokee Nation until it has “consulted with the committee for meeting its obligations.”
- Employers must file reports at the request of the committee, and it or its representatives have the authority to make on-site inspections during regular working hours to monitor compliance. The committee also has the right to inspect records of an employer or union, speak with workers, and conduct investigations on job sites.

This is an extensive labor code, but it is limited in its scope. While it addresses Indian preference employment and focuses upon compliance and remedies in that regard, there is no real statutory authority to deal with common problems in labor law, including wages, conditions of employment, hiring and termination practices, discrimination (on a basis other than Indian status), job safety, and other issues.

The definitions provide that the Cherokee Nation Employment Rights Committee, “until changed by the Tribal Council,” must be composed of the Employment Committee members of the Cherokee Tribal Council. In other words, elected officials of the political arm of the Cherokee Nation sit as investigatory and adjudicatory officials. Given the penalties the committee can impose, outlined above, there are equal protection problems with a legislative body acting as an adjudicatory body, and there are dangers that a given penalty can be attacked as being a bill of attainder.

Given contemporary rules regarding non-Indians giving consent to the civil jurisdiction of a given Indian nation, this code provides for plenty of notice of required compliance in advance. There will be a separate discussion of “on or near reservation” Indian preference problems in the next of a series of three studies on Indian nation labor codes which will focus on the problems and issues in more detail.

3. Confederated Tribes of the Colville Reservation

The Colville Tribe has three separate titles of its Code dealing with labor issues: An Industrial Safety and Health code, a Tribal Employment Rights code, and an Indian Preference in Contracting code. They provide:

Industrial Safety and Health (Title 6):

- Finding that personal injuries and illness arising out of employment impose a substantial burden on employees and employers, this law is adopted to create, maintain, continue, and enhance the industrial safety and health program of the

Tribes, to equal or exceed the standards prescribed by the Occupations [sic] Safety and Health Act of 1970. Comment: There has been a long period of controversy over the application of the federal OSHA law to Indian nations as a “law of general application.” While the Navajo Nation won the point of non-applicability under the Navajo Nation Treaty of 1868 (which restricts the classes of persons who can enter that Reservation), other Indian nations have lost, with a ruling that OHSA is a “law of general application” to Indian Country. This tribal law appears to be based upon a favorable court decision or a negotiated with the Occupational Safety and Health Administration.

- The pertinent definitions are:
 - An “employer” is any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in business, industry, profession, or activity “on” the Colville Indian Reservation who employs one or more employees or who contracts with one or more persons, for personal labor. The term includes the Tribes, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations.
 - An “employee” is an employee or an employer who is employed in the business of the employer and every person on the Reservation who is engaged in employment or working under an independent contract.
 - A “safety and health standard” is a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes which are reasonably necessary or appropriate to provide safe or healthful employment places.
 - A “work place” is any plant, yard, premises, room, or other place where an employee is or are located.
- The Colville Tribal Department of Industrial Health and Safety can, by rule, adopt a schedule of fees and charges to be paid by employers.
- The director of the Department may adopt rules and regulations for safety and health standards for conditions of employment. There must be public notice by publication in a newspaper of general circulation for the rule making, with a general description of the subject and information on how to obtain copies of the proposed rules and regulations for comments in writing. The director may hold a public hearing for notice and comment.
- The guidelines and standards for the rules are:

- Provide for the preparation, adoption, amendment, or repeal of rules and regulations;
- Provide for the adoption of standards at least as effective as the federal standards;
- Provide a method to encourage employers and employees to reduce the number of safety and health hazards and stimulate them to institute new and to perfect existing health and safety programs;
- Provide for standards dealing with gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents;
- Provide for reporting by employers;
- Provide for the frequency, method, and manner of work place inspections without advance notice;
- Provide for new or perfected occupational safety and health education programs and a program for voluntary compliance through the use of advice and consultation, with recommendations;
- Provide for standards for trenches, excavations, and safeguards around openings of hoist ways, hatchways, elevators, stairways, and similar openings; and
- Provide standards for safeguards for vats, pans, trimmers, cut off, gang edger and for saws, planers, presses, formers, cogs, gearing, belting, shafting, coupling, set screws, love rollers, conveyors, mangles in laundries, and similar machinery.
- Each employer must furnish each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death. Employers must comply with rules, regulations, and orders under this chapter.
- The director or a representative may, upon producing credentials to an owner, manager, operator, or agent in charge:
- Enter without delay at all reasonable times the factory, plant, establishment, construction site, or other area, work place, or environment where work is performed by an employee;
- Inspect, survey, and investigate during regular work hours and other

reasonable times and in a reasonable manner, any work place; and

- Require the attendance and testimony of witnesses and the production of evidence under oath. The Tribal Court has jurisdiction to address situations where such attendance, testimony or evidence is refused.
- An employer may apply to the director for a temporary order granting a variance from standards. An application must show that the employer meets basic standards and that the employer is unable to comply because necessary construction or alteration of facilities cannot be completed by the effective date, and the employer is taking all available steps to safeguard employees and has an effective program to come into compliance. A temporary order must prescribe practices, means, methods, operations and processes the employer must adopt. An application for an order must contain:
 - A specification of which standard the employer “seeks severance;”
 - A representation, supported by proof, that the employer is unable to comply with the safety and health standard for specified reasons;
 - A statement of steps taken and to be taken, with dates, to protect employees from the hazard covered by the standard;
 - A statement of when the employer expects to be able to comply with the standard, and what steps have been taken or will be taken, with dates, to come into compliance; and
 - A certification that the employer has informed his employees of the application by providing a copy to them by posting.
 - An employer may apply for an order of variance from any rule or regulation after giving notice to employees.
- Employer and employee representatives may accompany the director during a physical inspection of any work place.
- Employees must comply with this law. An employee or employee representative who believes there is a violation of a standard that threatens physical harm, or an imminent danger, may request an inspection. The notice must be in writing and set out the specific grounds. A copy will be provided to the employer, with safeguards for the confidentiality of the employee. If the director determines there are reasonable grounds to believe a violation or danger exists, he must make a special inspection. If he believes there are no

reasonable grounds or danger, he must notify the employer and the employee in writing.

- If upon inspection or investigation the director believes an employer has violated a standard or an order, he will issue a citation which describes the nature of the violation, citing why, and fix a reasonable time for abatement.
- If the violation is “such that a danger exists from which there is a substantial probability that death or serious physical harm could result,” the director can issue a citation and an order immediately restraining such a condition. Employees must be notified. The director can also request the tribal prosecutor to apply to the Tribal Court for a temporary restraining order.
- If the director issues a citation, he must notify the employer and state that the employer must appeal within fifteen working days. The appeal must be heard by the Colville Tribal Safety Committee, and employees also have a right to participate.
- Any person aggrieved by an order which has been upheld by the Safety Committee may make an appeal to the Tribal Court within thirty days of the communication of the Committee order.
- Discrimination or retaliation against employees is prohibited.
- The Tribal Court has jurisdiction to enjoin any condition or practice where there is a substantial probability of death or serious physical harm in an injunction or temporary restraining order.
- An employer who willfully or repeatedly violates the law may be assessed a civil penalty of up to \$50,000 for each violation. An employer who has received a citation for a serious violation may be assessed a civil penalty up to \$5,000 for each violation. For a non-serious violation, the civil penalty is \$3,000 per occurrence, unless the violation is de minimus. The civil penalty for failure to correct a violation may be assessed a civil penalty of up to \$5,000 for each day a failure or violation continues. An employer who violates posting requirements may be assessed a civil penalty of up to \$3,000 for each violation. A “serious violation” is one where there is a “substantial probability” that death or serious physical harm could result.
- The criminal penalties include:
 - Advance notice without the director’s consent of an inspection carries a penalty of a \$1,000 fine, 6 months imprisonment, or both;

- False statements, representations, or certifications carry a fine of \$5,000, 6 months imprisonment, or both;
 - Willful and knowing violations of the law are punishable by a fine of up to \$5,000, imprisonment for up to one year, or both;
 - Any employer who receives an order immediately restraining a condition who continues to use a machine or equipment whose use is prohibited may be punished by a fine up to \$5,000, 6 months imprisonment, or both.
 - All information obtained by the director which has a trade secret will be considered confidential.
- Employers must make, keep and preserve records of their activities relating to this chapter. There must be regulations on accurate records, periodic reports of work-related deaths, injuries and illnesses.
 - The director is authorized to adopt any provision for a tribal plan under OSHA and enter into agreements.
 - The health and safety standards must be for all industries, trades, crafts and employments. The standards should prescribe the use of labels to warn of hazards, symptoms, emergency treatment and precautions for safe use. They should describe suitable protective equipment, medical examinations, and other precautions.
 - The director must develop and maintain an effective program of collection, compilation and analysis of safety and health statistics.

Tribal Employment Rights (Chapter 10-1)

- This chapter provides that:
- There is a policy declaration that jobs, subcontracts, leases and contracts on or near the Reservation are important resources for Indian people, and Indians have unique employment rights that should be promoted. Indians are also entitled to the protection of federal laws against discrimination. Accordingly, there should be an employment rights program and office to optimize the law and powers to increase employment and eradicate discrimination.
- The pertinent definitions are:

- An “employee” is any person employed for remuneration;
 - An “employer” is any person, partnership, corporation, or other entity that employs two or more employees for wages
 - A “covered employer” is any employer with two or more employees who, during any 20 day period, spend 16 or more hours performing work within the Colville Reservation lands;
 - A “commercial enterprise” is any activity by tribal, state or federal governments that is not a traditional government function, as defined by the Internal Revenue service;
 - An “Indian contractor” is any firm that qualifies for Indian preference under this chapter;
 - An “Indian” is any member of a federally-recognized tribe;
 - A “local Indian” is any Indian who resides within the lands and territories of the Colville Reservation or within 35 miles of those lands, but Indians residing on the Spokane Indian Reservation are not local Indians;
 - A “covered employer” is one with two or more employees spending 16 or more hours performing work within the Reservation during any 20 consecutive day period.
- All covered employers must give preference to Indians who meet threshold requirements of the job, with first preference to local Indians.
 - Entities awarding contracts or subcontracts for supplies, services, labor or materials for \$5,000 or more where the majority of the work will occur within the Reservation must give contracting and subcontracting preference to qualified entities that are 51% or more Indian owned and controlled. Those requirements do not apply to tribal, federal or state governments or subdivisions. They do apply to subcontracts, with certain exceptions.
 - Any covered employer with a collective bargaining agreement with a union must obtain its written agreement, subject to approval, it will comply with the law.
 - There is a Colville Tribal Employment Rights Commission with our members, with one from each “reservation political district,” and one alternative member.

The Colville Business Council appoints members. They serve a two-year term. Three commissioners is a quorum.

- The Commission's powers include:
 - The power to carry out the provisions of this chapter, propose regulations, and submit proposals to the Council for action;
 - Hold administrative hearings and issue findings and orders; and
 - Hear appeals from the actions of the Director.
 - There is a TERO Program director, appointed by the Council, with administrative authority.
- The director may:
 - Assist the Commission to propose adoption, amendment and rescission of rules, regulations or guidelines
 - Assess sanctions and represent the TERO in hearings and appeals and before any court or other adjudicatory body.
- The Commission may enter into cooperative agreements with federal employment rights agencies.
- There is an employment rights fee of 2% (one time) of all construction contracts of \$5,000 or more of the total amount of the contract, and every employer must pay a quarterly fee of 2% of quarterly payroll. The fee does not apply to educational, health, governmental, or nonprofit employers. It does apply to contracts by such groups with for-profit employers.
- Any person, group of persons, or organization that believes that a covered employer has violated the law may file a complaint with the TERO. It must be in writing, under oath, and provide sufficient information for the director to carry out an investigation. The director must investigate complaints, and if there is reason to believe there has been a violation, and TERO has jurisdiction, the director must proceed.
- The director or a field compliance officer must make investigations to determine whether there has been a violation. For that purpose, they may enter a place of business or employment during business hours to monitor compliance.

- The Commission may administer oaths, issue subpoenas, take evidence, and require the production of books or records.
- When the director has reason to believe a violation has occurred, the director must notify the employer in writing, specifying the violations. The director must seek informal settlement, and if that cannot be reached, issue a formal notice of noncompliance. The notice must state the nature of the alleged violation and steps to come into compliance. The notice must give five days to comply. If the director believes that irreparable harm might result, he can require compliance in fewer than five days. The notice must also advise of the penalties and the right to appeal to the Commission. There is a bond provision if the director can show good cause of the employer removing itself or property before a hearing. Hearings are conducted by a separate chapter of the Tribal Code. If the Commission finds the violation alleged, it may assess certain penalties, including:
 - Denial of the right to commence business;
 - Suspension of the party's operation;
 - Termination of the party's operation;
 - Denial of the right to conduct further business
 - A remedial civil penalty of up to \$500 for each violation;
 - Order the payment of back pay to an aggrieved person;
 - Order the dismissal of an employee illegally hired;
 - Order such other action as is necessary.
- An appeal to the Colville Tribal Court must be taken within 20 days after receipt of the Commission decision. Appeals are governed by separate provisions for administrative appeals.
- Following a final decision for monetary damages, the Commission may petition the Tribal Court for an order to seize and hold for sale property to ensure payment of monetary damages.
- Preferential treatment of Indians and Indian-owned firms is required for all employers.
- All employers must be notified of the obligation to comply with the law, and all

bid announcements issued for work must contain a statement that the successful bidder will be obligated to comply with the law.

- Employers are required to submit a compliance utilization plan to the director before the employer may commence work. There must be hiring goals and timetables and a specification of the number of Indians the employer must hire, by craft and skill level. Employers must participate in training programs. No employer may hire a non-Indian to fill a vacancy until the hiring hall has certified no qualified Indian is available or until 72 hours after notifying the hiring hall of the vacancy. No employer can use job criteria that are barriers to Indian employment and the burden is on the employer to show business necessity. There must be agreements with unions to implement this chapter, and no such agreement constitutes recognition of endorsement of any union.
- Employers must submit a compliance plan, including an employment and training plan. There must also be a contracting and subcontracting plan.
- An employer may recruit and hire from any source, but no non-Indian may be employed until the employer gives the TERO 72 hours to locate and refer a qualified local or non-local Indian. Prior to commencing work, employers must identify key, regular, permanent employees. No person who is not a local Indian may be employed until that person has obtained a work permit from TERO.
- Employers are required to assist Indians become qualified through training programs, and employers are required to cooperate with them.
- Job qualifications that are barriers to the employment of Indians are not prohibited except upon the employer's showing of business necessity. Employers must also make reasonable accommodation to the religious beliefs and cultural traditions of Indian workers.
- Employers must give preference to Indians in promotions.
- Employers must give preference to Indian summer students and encourage opportunities for Indian students.
- Retaliation is prohibited.
- There must be counseling and support programs.
- Indian preference is required in contracting and subcontracting.
- Preference must be given to qualified firms in the award of all contracts, and an

entity may select a contractor in any manner it chooses, provided that:

- If competitive bidding or proposals are used, competition is limited to certified firms. If the entity is unsure if there are any qualified firms, it may first public a prior invitation for certified firms to submit a statement of intent. If there are no statements of intent from any technically qualified firm, the entity may advertise for bids or proposals without limiting competition to certified firms and it may make an award to the low bidder. If only one certified firm submits a bid or statement of intent, the entity must award the contract to the firm so long as it is technically qualified and is willing to perform the work for a reasonable price.
- If the entity selects a contractor through negotiations or informal process, it may not enter into a contract with a non-certified firm unless it has contacted every certified firm and the relevant field and determined that there is no certified firm that is technically qualified to perform the work at a reasonable price. No non-certified firm may be selected so long as a certified firm meets the threshold qualifications.
- There is a preference in the award of subcontracts to certified firms, with the same limitations as to contracts.
- Entities and their contractors and subcontractors must determine technical qualifications and a reasonable price:
 - If an entity determines there are no certified firms that are technically qualified, the entity must provide them a written description of areas in which it believes the firm is weak and steps to upgrade its qualifications. Certified firms may file complaints regarding the grounds of rejection.
 - Before rejecting all certified firms on the basis of price, the entity must offer one or more firms an opportunity to negotiate price.
 - Once an entity enters into a contract with a certified firm, the TERO will not intervene in any way unless a certified firm shows that action taken against it is intended to circumvent the law.
 - No Indian firm may represent that it is exercising management control of a project to qualify for Indian preference when in fact management control is exercised by a non-Indian entity, and the Indian entity is acting as a front or brokering its services.
 - While reciting abuses in certifying firms as Indian preference eligible, this section sets out specific criteria for evaluating firms as being

genuinely “Indian.”

- There is an application process for certification, with probationary certification and final certification. There is a procedure to withdraw certification.
- There are fees for doing business and collection procedures.
- Employers with a permanent place of business within the Reservation must pay one half of one percent of each quarter’s payroll.
- All entities must submit reports as required by TERO and there are provisions for on-site monitoring.
- If there is reason to believe an entity has failed to follow the law, the TERO must give notice in writing, specifying the alleged violations. The TERO must then conduct an investigation and attempt to achieve an informal settlement. If there can be no settlement, the director must proceed with enforcement procedures. Hearing procedures are set by a separate law.
- Sanctions include:
 - Denying the right to commence business;
 - A civil remedial penalty of \$500 for each violation;
 - Suspension of the party’s operations;
 - Termination of the party’s operations;
 - Back pay to an aggrieved Indian;
 - The dismissal of Indians illegally hired;
 - Other remedial action to insure compliance.
 - Appeals are to the Tribal Court in a separate appellate statute.
 - Hearing bonds are authorized.
 - There is a provision for post-decision attachment by the Tribal Court.
 - There are provisions for injunctions and temporary restraining

orders by the Tribal Court upon a showing of irreparable harm.

- The pre-hearing procedures include:
 - The employer's right to review the TERO case file;
 - A list of witnesses;
 - Pre-hearing interviews of witnesses;
 - Subpoenas of documents and things;
 - Postponements.
- The hearing provisions address:
 - The chair as the presiding officer with procedural authority;
 - The TERO director must be present;
 - Parties may have counsel "as an advisor;"
 - The hearing must be recorded;
 - Parties may testify without fear of reprisal;
 - The decision must be in writing and issued within 30 days after the hearing, and it must consist of:
 - The facts;
 - The finding with the legal and factual basis for the finding;
 - Orders and sanctions imposed, if any;
 - Information on the right to appeal;
 - Information on the authority of the Commission to act if the party fails to comply and fails to appeal; and
 - Any injunctive bonding requirements.

Indian Preference in Contracting (Chapter 10-3).

- The contracting preference requirements are:
- In general:
 - This chapter specifies the methods and procedures that agencies and instrumentalities of the Tribe must follow to give preference to qualified Indian-owned enterprises and organizations when contracting, and all contractors when subcontracting.
 - Agencies must comply with this chapter, and they are responsible for compliance of their contractors.
- The certification process addresses:
 - Proof of Indian ownership by showing membership in a federally recognized Indian tribe and evidence that the applicant is at least 60% Indian owned and at least 60% of the profits will flow to the Indian owner(s) during all portions of the contract or subcontract term.
 - There must be a showing of capability to manage all work.
 - Preference in the award of contracts and subcontracts let under an “Invitation for Bids (IFB)” process (i.e. conventional bid construction and material supply contracts) is required, and that process should not be used unless there is a reasonable expectation that two or more qualified Indian-owned enterprises are likely to submit responsive bids. There is a statutory formula to evaluate monetary bids.
 - If the award process is by a “Request for Proposals (RFP),” then the RFP may be restricted to Indian-owned firms. There should be no such restriction unless there is a reasonable expectation that “the required minimum number of qualified Indian-owned enterprises” are likely to submit proposals. There must be a point system to evaluate proposals. Pre-certification is permitted.
 - Where preference is not feasible, the agency must document its determination in writing, maintain files for TERO review for three years, and provide the TERO with a copy of the determination within 20 days of issuance.
- The “other preference provisions” are:
 - When both tribal and federal funds are used for a project, the work under each should be separately identified and federal Indian preference regulations apply to the federal portion. If the funds

cannot be separated, the federal standards apply.

- Each agency and contractor is responsible for enforcing and monitoring Indian preference, and they must take appropriate action in instances of non-compliance.
- Preference restrictions also apply to off-reservation activities.
- There is a complaint procedure for the filing of complaints against an agency or contractor. Complaints must be filed within 20 days from the date of the action or omission complained of. The agency or contractor must make an effort to resolve the complaint, with appropriate steps in the event of non-compliance. If the matter is not resolved within 15 days, the complaining party may make a complaint to the TERO Commission. The agency or contractor must provide a written report to the Commission stating all the facts and what was done. Upon receipt of the report, the Commission will make a determination, and it may order a hearing.
- The Commission may impose sanctions upon the agency or contractor upon a determination that the complaint was valid, with money damages up to the amount of profit the complaining contractor or subcontractor might reasonably have received. A manager of a tribal agency found to be in willful non-compliance may be subjected to disciplinary action.

These three Colville codes are well-written and drafted, and among the various versions of standard “TERO” legislation, its TERO code is perhaps the most complete and detailed.

4. Fort Peck Employment Rights Code

The Fort Peck Tribe of Montana’s employment rights code is in Chapter XIII of its codified statutes. It has seven chapters that address definitions, the Tribal Employment Rights Office, a Tribal Employment Right Review Board, employment preference, contracting and subcontracting preference, voluntary Indian preference, and liaison officers.

Chapter 1: Definitions

- The first definition is linked to the “on or near” Indian preference provisions of Title VII of the United States Civil Rights Act of 1964, and it defines “Near the Reservation” as being “within reasonable daily commuting distance of any Indian community on the reservation.

- “TERO” means the Tribal Employment Rights Office.
- “Director” means the TERO director.
- “Review Board” refers to the Tribal Employment Rights Review Board created by the code.
- A “Covered entity” under the code is any individual, corporation, association, partnership, or other entity doing business on trust land on the reservation. *Note: While the Fort Peck Reservation has established boundaries, this provision is restricted to trust land. The definition does not separate land held in trust by the United States for the Fort Peck Tribe or land held in trust for individual Indian allottees. The definition could be read to apply in all “Indian country” within the Fort Peck Reservation as such is currently defined in federal Indian law.*
- A “contract and subcontract” means all contracts, including but not limited to, contracts for supplies, services and equipment, “regardless of tier.”

Chapter 2: Tribal Employment Rights Office

- This section creates the “Fort Peck Tribal Employment Rights Office (TERO)” as an independent office of the [Assiniboine and Sioux] Tribes, reporting directly to the Tribal Executive Board in such manner as the Tribal Executive Board directs.
- This section provides for a director of TERO who is appointed by the Tribal Chairman, subject to the approval of the Tribal Executive Board, and who serves at the pleasure of the Board. The director has the authority to hire staff, expend funds appropriated by the Board, and obtain and expend funds from federal, state or other sources to carry out the purposes of the TERO.
- The functions of TERO are:
 - To implement and enforce the employment rights code.
 - To provide training, counseling and support to Indian workers on the Reservation in conjunction with tribal employment and training programs and other tribal and federal offices.
 - Cooperate with federal agencies to enforce federal anti-discrimination statutes, eliminate discrimination against Indians, and enforce Indian

preference in federal law or contracts with the federal government.

Observation: This code appears to have been written in an earlier time when the U.S. Labor Department funded Indian training programs, and it is designed to give the TERO the authority to get funding under such programs. In Montana, and many other states, the state investigates complaints of discrimination filed with the EEOC, which would include national origin and race discrimination against Indians. Similar codes should provide for cooperation with such state agencies.

- Initially, the TERO was required to develop and phase in programs “at a gradual pace” to ensure a stable and effective program and avoid “unnecessary disruption of the business environment on the Reservation.” The TERO has the discretion to implement programs on a Reservation-wide basis or implement programs for particular types of covered entities. No “significant new program” can be introduced or extended to “new types of covered entities” without the approval of the Tribal Executive Board.
- TERO must assist the Equal Employment Opportunity Commission (EEOC) and other federal agencies in ensuring protection of the rights of Indians under Title VII or other federal laws by disseminating information about complaints, meeting with EEOC and other federal agency officials, assisting Indians and employers in obtaining informal resolution of complaints and mediating, and assisting Indian in filing and processing charges where informal resolution fails.
- The TERO director must file annual reports with the Tribal Executive Board.
- Tribal employment and training programs and Bureau of Indian Affairs employment assistance programs are required to prepare Indians for job opportunities, coordinate with TERO to develop training programs, and cooperate with TERO in carrying out its functions.

Chapter 3: Tribal Employment Rights Review Board

- There is a Fort Peck Tribal Employment Rights Review Board, consisting of three members and two alternates appointed by the Tribal Executive Board, to serve at its pleasure. There is a quorum when there are two members or one member and an alternate.
- A Review Board member must have a high school diploma, be at least 25 years of age, not have been convicted of a felony or dishonorably

discharged from military service, not be affiliated with or employed by a business certified under the law, be physically capable of carrying out the duties of office, and "in the opinion of the Tribal Executive Board, Abe of sound judgment, good character and possess a reputation for honesty, fairness, and impartiality. *Comment: This provision is obviously designed to assure a fair and impartial quasi-judicial tribunal for administrative adjudication purposes to satisfy the due process requirement of an independent body.*

- The Tribal Executive Board determines the amount of compensation to be paid to the Review Board members.
- The Review Board's jurisdiction includes:
 - Hearings and sanctions under the Indian employment preference section.
 - Hearings and sanctions for violation of the Indian contracting and subcontracting provisions.
 - The certification of "Indian firms" under the code.
 - Reviewing the actions of TERO "at the instance of aggrieved parties."
- The Review Board has the power to deny or suspend the right to do business upon trust land, but an employer has a reasonable time to remove any equipment or other property it has "on the Reservation" and to arrange with another party to assume a contractual obligation. "Reasonable time" means a maximum of 30 days. The Board can deny or suspend the right to commence new business. It can award back pay or monetary relief "to correct harm done" by non-compliance, and it can impose civil fines of up to \$500 per violation. Each day an entity is out of compliance is considered to be a separate violation.
Comment: There should be no due process problem with an independent quasi-judicial administrative adjudication body such as this, which has the authority to grant specific relief (including what is essentially exclusion from the Reservation or the denial of the right to do business on trust land). There may be a challenge to a civil fine as being prohibited "punishment" of non-Indians. A levy of punitive damages in civil actions has been upheld in New Mexico as not being prohibited punishment. One problem, however, could be that if a large civil fine based upon many days of non-compliance is levied, a court might rule that there is no fair relation between that amount and damages to the Tribe as a form of liquidated damages set by the statute.

- Parties in hearings before the Review Board has the right to counsel at their own expense, to be present at the hearing, to present relevant sworn testimony and documentary evidence, to call witnesses, and to ask questions of witnesses of other participants. The Board need not observe formal rules of evidence, and hearings must be conducted in an orderly manner. *Comment: This section provides the minimum elements of civil procedural due process of law. While there may be some objection to the evidence standard, it is similar to the Montana rules for administrative quasi-judicial bodies.*
- The Review Board must issue a written decision after the hearing which states the grounds for the decision, and it must be sent to all participants by registered mail.
- A party can appeal a decision of the Review Board to the Tribal Court within 30 days after receipt of the decision. The court has the authority to reverse the Review Board only if the decision is arbitrary and capricious or unsupported by substantial evidence. *Comment: Many judicial review statutes in Indian Country provide for an evidentiary review of an administrative decision, but what is the court's role if there is a mistake of law or a violation of civil rights under the Indian Civil Rights Act or tribal civil rights law?*

Chapter 4: Employment Preference

- Every “covered entity” must give preference to “Indians resident on or near the Reservation” in hiring, promotion, and training of employees on trust land.
- TERO must maintain an “index” of Indians seeking employment and their qualifications.
- A business may recruit and hire employees from any source or the process it chooses, but it may not hire a non-Indian until the TERO certifies that no qualified Indian meeting the employer’s qualifications are listed on its index. TERO will identify such qualified Indian employees or make a referral from the index. As to job qualifications, an employer “may not include non-job-related qualifications which have a discriminatory impact on Indians.”
- Where there is a layoff or reduction in force, no Indian can be terminated if a non-Indian in the same craft or job stays employed. If the layoff is by crew, Indians must be transferred to crews that remain so long as there are non-Indians in the same craft or job employed.
- Employers must give preference to Indians in promotions and encourage Indians to seek promotion. If a supervisory position is filled by a non-Indian, but employer must file a report with the TERO stating what Indians applied for the

job, why they were not given the job, and the efforts to inform Indians of the opportunity.

- Indian preference applies to summer student help, and the employer must “make every effort” to promote after-school, summer, and vacation employment for Indian youth.
- A collective bargaining agreement is not an “excuse” for failure to comply with Indian preference. Employers with collective bargaining agreements must get an agreement from the union or give satisfactory evidence it will comply with the code, give “absolute preference” to Indians in referrals, establish mechanisms for Indians so they do not have to travel “great distances” to keep their place on union lists, establish journeyman upgrade and advance apprenticeship programs for Indian workers, “blanket in” Indians who qualify for and wish to join the union, and grant work permits for Indians who do not wish to join the union. TERO participation in any agreement with a union is not official tribal recognition of that union or endorsement of recruiting activities by the union.
- Any person or entity who believes a covered entity has not complied with the law can file a complaint with the TERO, regardless of a showing of personal harm.
- If the TERO has reason to believe, by a complaint or its own investigations, that a covered entity is not in compliance with the law, it must notify the entity in writing specifying alleged violations. If the alleged violator is a contractor or subcontractor, the holder of the permit must be notified. There is 20 days to pursue a voluntary and informal resolution of the problem. If no resolution can be reached within 20 days, the TERO must notify the Review Board and request a hearing within 20 days.
- Retaliation for the exercise of rights under the code is prohibited. The TERO also has the authority to petition the Tribal Court to order reinstatement or other relief to prevent harm caused by retaliation.

Chapter 5: Contracting and Subcontracting Preference

When a covered entity is engaged in any aspect of oil and gas development on trust land or engaged in the improvement of real estate on trust land, it must give preference to firms certified by the Tribes. *Note: This provision addresses business activities which are unique to the Fort Peck Reservation, and covers activities on trust land. This squarely covers issues of consent (so that consent should be in any Bureau of Indian Affairs-approved contract dealing with gas and oil leases or land development) and whether the activities are within Indian Country.*

- Covered entities must give contracts and subcontracts to certified firms and may not enter into such arrangements with firms that are not certified unless it has contacted every certified firm that is technically qualified and willing to perform the work at a reasonable price. If a certified firm meets the “minimum threshold qualifications,” no other firm can be selected. If a certified firm lacks the qualifications to perform the work, the entity must make a good faith effort to divide the work into smaller portions so the certified firm can qualify. An entities contractors and subcontractors must comply with this provision, and these requirements cannot be circumvented by hiring non-Indians and designating them as employees rather than contractors or subcontractors. Note: This provision addresses the common problem in Indian Country of Indian firms not being able to obtain bonding or other qualifying coverage. It addresses the abuse of hiring people as “employees,” when they are really contractors. The common abuse of designating an Indian as a “partner” is covered in the certification of Indian firms.
- A covered entity must determine the “technical qualifications” required for any contract or subcontract. If it determines that a certified firm is not qualified, it must interview the principals in all available certified firms to determine their knowledge and expertise and provide each certified firm that is rejected a description, in writing, of areas where the firm is weak the steps needed to upgrade its qualifications. The entity must evaluate a certified firm that does not have an established record based on the individual qualifications of its principals and other relevant factors which provide guidance on the firm’s ability to perform the work. *Comment: One of the problems with economic development in Indian Country is encouraging private Indian business. Individual Indian business people have problems with obtaining credit and capital, getting professional licenses, bonding, and they face other impediments to doing business. This section requires developers and employers to examine precisely what kinds of qualifications and skills are necessary for a given project, closely examine the exact skills and qualifications of Indian businesses, and attempt to include the Indian business or help it qualify in the future.*
- Before or at the time a covered entity submits a request for a permit, lease or authorization to the Executive Board, it must submit a contracting and subcontracting plan to the TERO for approval. The plan must indicate the contracts and subcontracts that will be offered and their dollar amounts. If a firm has already been selected for contract or subcontract work, it must be named, with an indication of whether it is a certified firm. If not, the applicant must indicate why a firm certified by TERO was not selected, and the name of contact persons in certified firms the applicant contacted, and why the firm was not selected. No authorization will be granted to any firm that submits a plan of

less than 100% of the value of subcontracts will be paid to certified subcontractors unless there is a showing that the applicant was unable to employ Indian firms for subcontracts or because there were an insufficient number of Indian firms qualified or available. To show that, the applicant must show that a sufficient number of Indian firms was not available to meet its goal, or firms that were available were rejected because they lacked the necessary technical qualifications, or that no certified firm was willing to do the work at a reasonable price after negotiation. Those who submit plans and get approvals cannot deviate from their plan, and the TERO has the right to inspect records to ensure compliance with the plan.

- The Tribes will not intervene in any contractual relationship with a certified firm unless a certified firm shows that action taken against it was intended to circumvent the requirements of the code.
- When a non-certified firm is hired because no certified firm existed at the time, and a certified firm comes into existence, TERO must immediately notify the entity of the existence of the certified firm. In that instance, the non-certified firm must be replaced with a certified firm if the contract or relationship with the non-Indian firm is expected to extend to more than one year after notification by the TERO, the certified firm is “technically qualified to do the work,” and the certified firm is prepared to undertake the work on the same terms, including price. If the non-certified firm has a year-to-year contract, it can be replaced only when the contract expires. If the contract expires within 120 days after notice of a certified term by TERO, the contract with the non-certified firm can be extended for no more than 30 days from the notice. If there is no written contract or its not a year-to-year contract, the entity has 30 days to replace the non-certified firm with the certified firm. These provisions may be waived on a showing of hardship.
- All entities must submit required reports to TERO, but they can refuse to submit information if it can show that it is “confidential for valid business purposes.” The TERO can make on-site inspections during regular business hours to monitor compliance and talk with any employee “so long as it does not interfere with the operations of the business.”
- Certified firms, a group of certified firms, or any other person or entity which believes there is failure to comply with code can file a complaint with the TERO, whether or not there is personal harm. *Note: There was a Montana Indian business contractor’s organization which was covered by this provision.*
- If the TERO has reason to believe, through a complaint or its own investigations, that an entity engaged in covered activity on trust land has failed

to comply with the code, the TERO must notify it of the alleged violation(s), along with contractors or subcontractors. There is 20 days to pursue a voluntary, informal resolution of the problem, and if that fails, the TERO must notify the Review Board for a formal hearing within 20 days.

- To receive certification as a firm eligible for Indian preference, the applicant must show:
 - The entity must have 51% Indian ownership, as demonstrated by formal ownership arrangements, value for ownership, and profits;
 - There must be “significant Indian management control,” shown through actual arrangements, including unitary firms and joint ventures;
 - The structure must have integrity and not be established to take advantage of Indian preference;
 - The employees must be such as to show there is no non-Indian control;
 - The experience and resources of the non-Indian partner(s) must be greater than the Indians to show a sound business reason for a non-Indian to accept a junior role other than to take advantage of Indian preference.
 - The applicant must have its principal place of business on or near the Fort Peck Reservation.
- The individual or entity must submit an application and a \$25 fee, and the application must set out:
 - Name, address, business name and address, the period of time the entity has done business on the Reservation, and if the applicant is an individual, proof that the applicant is an Indian;
 - Information to show that the applicant is eligible for Indian preference;
 - Information on the origins and history of the applicant and its employees for purposes of evaluation for Indian preference;
 - Proof the applicant is qualified to conduct and operate the business for which the certification is sought;
 - A statement of the applicant’s policy on the employment of Indians and

the history of past employment of Indians who are resident of the Reservation; and

- A statement that the applicant's statements are true and correct, and that if any material is false, the license will be void and of no force or effect.
- TERO may grant a six month probationary certificate, and it must monitor the firm's activities to ensure it operates in accordance with its application.
- The TERO can grant full certification or deny certification at the end of the probationary term.
- The TERO has the power to initiate proceedings to withdraw or suspend certification. If so, it must prepare an analysis and recommended disposition for the Review Board and send the firm notice, along with the grounds for the action. The Review Board must set a hearing date within 21 days of receipt of the analysis and recommended disposition. The TERO staff must present the case for suspension or withdrawal at the hearing, and the Board may withdraw certification, suspend certification for up to one year, put the firm on probation, or order corrective action within a fixed period of time. A firm whose certification is withdrawn may not reapply for up to one year.
- A firm holding an Indian preference certification prior to the effective date of the code remains certified without making a new application, but the certification can be withdrawn if the firm does not meet the Indian preference criteria.
- Certified firms must report any changes in ownership or control to the TERO within 60 days of the change. Certified firms must update the information they submitted in the initial application every year.
- The TERO must maintain a list of certified entities, post them in a conspicuous place and make them available to the public.
- Retaliation for the exercise of rights under the code is prohibited, subject to sanctions and TERO seeking protective orders from the Tribal Court.

Chapter 6: Voluntary Indian Preference

- Non-covered entities should give Indian preference.
- There is a request in a section that before opening a new business or beginning a new project, employers should notify the TERO of its intentions so the TERO

can ascertain how many employees the employers expects will be hired and the qualifications required. The TERO must determine how many Indians should be hired to give voluntary Indian preference. *Comment: This voluntary policy assumes that Title VII's "on or near reservation" provision has meaning and that employers will comply in good faith. This addresses the situation where the Indian nation may not have regulatory or adjudicatory jurisdiction over an employer, but the employer should take advantage of Title VII's provisions for Indian preference hiring.*

- The TERO must provide employers with a list of Indians in its index who meet the employer's qualifications or refer Indians to the employer.
- The voluntary preference policy applies to oil and gas subcontracting on or near the Reservation
- The first week of each month, the TERO must report the names of employers or entities it has found honoring and not honoring the Indian preference policy to the Executive Board. *Comment: This is an example of the use of social norm theory to carry out the policy without jurisdiction. That is, recent studies have shown that "shaming" businesses to be in compliance with the law is somewhat effective, and that praising businesses that comply has an even better effect.*
- The Tribes of the Fort Peck Reservation [Assiniboine and Sioux], and all tribally-owned corporations, must give Indian preference in awarding contracts and conducting business transactions.
- The TERO can publish the names of employers who are in compliance with, or not in compliance with, the Indian preference policy, with ten days notice to the entity and an opportunity to advise if there is a mistake.
- Any person aggrieved by an action of the TERO or its director can appeal it to the Review Board. The standard for review is whether the action was arbitrary, capricious, beyond the authority of the TERO, or in violation of federal or tribal law. There is no liability for monetary damages if the TERO, its director, or its employees acted in good faith.

Chapter 7: Liaison Officers

- Any covered entity engaging in geophysical exploration on trust land, drilling for oil and gas on trust land, or geophysical exploration or drilling for oil and gas on fee land where a right-of-way has been granted on trust land to facilitate the activity on fee land, must employ a Liaison Officer. Covered entities building roads, power lines, telephone lines, water lines, sewer lines, or oil or

gas transportation lines or other public utilities across trust land or across fee land where there is a trust land right-of-way, must employ a Liaison Officer if the project exceeds \$20,000.

- Liaison Officers must be employed from the start of a geophysical project through final inspection or from site preparation through completion, plugging, or abandonment, for drilling operations.
- The duties of a Liaison Officer are to:
 - Act as a liaison between the entity and the tribal oil and gas committee, the Tribal Minerals Resource Department, the TERO and the Bureau of Indian Affairs;
 - Detour projects around historical sites;
 - Inspect rights-of-way or the permitted or leased area for the condition of the land, livestock, and fencing throughout the project;
 - Report all violations of land damage, fire, employee discrimination, and TERO regulations to proper authorities; and
 - File weekly reports to the Tribal Oil and Gas Committee or Tribal Mineral Resources Department, TERO and the Bureau of Indian Affairs on all daily activities.

Comment: This is a fascinating provision, because it provides a means for the Tribes to have employers hire people to serve as an in-between with tribal and federal authorities, address tribal cultural concerns, check the condition of land and animals, report violations of law, and file reports to alert tribal officials and others. It is a means of regulatory enforcement where the employer pays for it. We may question how effective it is for an employer to have its own employee reporting violations, but this is a means of enforcement. If nothing else, it promotes the employment of tribal members.

- The Director of TERO sets the rate of compensation for liaison officers.

This is a very clever way of attempting to enforce Indian nation regulatory and adjudicatory jurisdiction and the Title VII “on or near reservation” Indian preference provision. It carefully gets around jurisdiction problems on a checker boarded reservation such as Fort Peck by limiting enforcement jurisdiction to activities on trust land and asking for voluntary compliance on fee land. It attempts to anticipate evasion of the law by covering specific instances of evasive activity, and it establishes realistic qualifications for Indian preference in contracting by defining the qualifications of Indian-owned firms in detail. It establishes relationships with federal anti-discrimination and other enforcement agencies with the obvious goal of involving those federal

agencies. It also recognizes the social norms content of civil rights law by providing for voluntary compliance, the praise of those who comply voluntarily, and public criticism of those who do not. While this code is limited in the labor law goals of offering detailed protection for workers, it is an example of a tribal regulatory and enforcement infrastructure for limited purposes which could be expanded. The quasi-judicial adjudicatory powers of an independent body comply with due process and the hearing body is insulated from the political body, except for appointment.

5. Gila River Indian Community

The Gila River Tribal Employment Rights Office is addressed in Chapter 1 of Title 12 of its Tribal Code. It is a short code, which provides that:

- There is a Tribal Employment Rights Office which is a “separate office and function” of the Community Office of Employment and Training, with the authority to issue rules, regulations and guidelines, and the power to hold hearings, subpoena witnesses and documents, require employers to submit reports, and take other actions “as are necessary for the fair and vigorous implementation of this chapter.”
- All employers “operating” within the exterior boundaries of the Gila River Indian Reservation are required to give preference to Indians in employment.
- Employers with collective bargaining agreements with a union must obtain the union’s written agreement it will comply with the Gila River Indian preference laws, rules, regulations, and guidelines. The TERO office can approve the agreement. It does not constitute official tribal recognition or sanction of any union.
- The Tribal Employment Rights Office is authorized to:
 - Set hiring goals for employers and specify the minimum number of Indians an employer should hire, by craft or skill level.
 - Require employers to establish or participate in training programs to increase the pool of qualified Indians on the Reservation “as quickly as possible.”
 - Establish a tribal job bank and impose a requirement that no employer may hire a non-Indian until the Job Bank certifies there is no qualified Indian available to fill a vacancy.
 - Prohibit employers from using qualifications criteria or other personnel requirements that serve as barriers to Indian employment unless the

employer can show that “such criteria or requirements are required by ‘business necessity.’”

- Require employers to give preference to Indian-owned firms and entities in awarding contracts and sub-contracts.
 - Establish programs, in conjunction with other government agencies, to counsel Indian workers to assist them in employment. Employers must cooperate with counseling programs.
 - Take other necessary actions to achieve the purposes and objectives of the code, except that a “significant new component” is subject to prior approval by the Tribal Council.
-
- The Comprehensive Employment and Training Act program (CETA) and the Bureau of Indian Affairs Training Act program are required to commit resources to prepare Indians for job opportunities, and the tribal employment and training office is required to establish a Construction Worker Training Program to be certified by the Department of Labor. The various offices must coordinate their activities. *Comment: This is a clever use of existing federal grant programs and training initiatives in a statute. Are these passing opportunities or long-term programs which can be addressed in a statute?*
 - The TERO’s funding is through the “Tribal CETA Program,” and there is a provision to seek monies from other federal programs before applying for tribal funding.
 - The TERO has the power to impose sanctions or penalties on any employer “only as a last resort.” The director of the office must first attempt to resolve any alleged failure to comply using informal means.
 - Employers who do not comply with the law may be subjected to a combination of civil sanctions, and the director can impose certain civil sanctions without the approval of the Community Council, namely:
 - Require an employer to make changes in its procedures and policies to comply with requirements;
 - Pay back pay, re-employ, promote, train, or give other relief to Indians who are harmed by non-compliance;
 - Impose monetary fines of up to \$1,000 per day for non-compliance;
 - Suspend an employer’s operation until corrective action is taken or a plan of corrective action is developed.

- The director can impose other sanctions with the approval of the Community Council:
 - Terminate an employer's operations on the Reservation; or
 - Prohibit the employer from engaging in future operations on the Reservation.
 - No sanctions can be imposed until the affected employer has been given an opportunity to present evidence to the director showing that a sanction or sanctions should not be imposed. The director must give at least five days notice of any proposed sanction to be imposed by the director of the Community Council.

This is a short and very simple TERO-labor statute, and it is a kind of “short-hand” version of the legislation reviewed above. Given recent developments in Indian nation jurisdiction law, the jurisdictional provisions of this code must assume that all or most of the land within the Gila River Indian Reservation is land held in trust for the Tribe or its members. There is neither a Council regulatory, enforcement, or adjudicatory body or an independent hearing body. Does that violate due process of law? Arguably it does not, so long as an employer can get a fair hearing before the director or the Community Council. This does not provide for appeals to, or any linkage with, a tribal court. That would be possible if the jurisdiction statute of the Tribal Court provides general civil jurisdiction for all activities within the reservation and for general injunctive powers.

6. Hoopa Valley Tribe

The Hoopa Valley Tribe of the Hoopa Valley Indian Reservation of California has extensive code provisions, and a statutory personnel policy that outlines the rights of employees. The personnel policy will not be reviewed, because it is an employer's document and not a code of general application.

A code enacted on April 27, 1995 (Ordinance No. 2-80) establishes the standards and procedures for employment practices and the application of Indian preference. It has an extensive preamble stating the reasons to enacting the law and identifying the conditions that prompted it, including a sound and progressive socio-economic environment, the need to clarify policies and procedures to insure consistent enforcement and employer compliance, and the need to expand and consolidate the TERO Office. The code is codified as title 13 of the Hoopa Valley Tribal Code, which is an extensive code published in looseleaf format and organized in ring binders. The “Standards and Procedures for Employment Practices and Application of Indian Preference” provisions of title 13 provide:

- The short title of the law is the “Tribal Employment Rights Ordinance” or “TERO.”
- There is a repealer of prior provisions, with a grandfather provision for existing

agreements and contracts.

- The TERO Commission has the authority to certify enterprises that meet the definition of “Indian firm” and to document minority small business contract eligibility or exemptions from state taxation. There is a limitation that certification will not oblige the Commission to advocate the claims of individuals or entities before any agency of another government.
- Certain standards for timber operations remain in place, so long as they do not conflict with the TERO ordinance.
- There is a definitions section which has these definitions:
 - An “Indian” is any member of a federally recognized tribe or any person who furnishes proof that he or she is recognized as Indian by the United States under its trust responsibility. *Comment: This definition recognizes that an individual can be an “Indian” for many purposes. It adopted the general federal statutory limitation that one is an “Indian” by membership in a “recognized” Indian tribe, but someone can also be an Indian in situations where other federal programs recognize one’s status as Indian.*
 - An “employer” is any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity “on the Hoopa Reservation,” and which employs two or more persons. *Comment: This assumes that most of the land within the reservation is trust or allotted land and that there is little or no checker boarding. The Hoopa Valley Tribe has been unsuccessful in litigating civil jurisdiction over fee land within the Reservation.*
 - An “Indian Firm” is a firm or business certified by the TERO Commission as eligible for Indian preference, “provided” that Indians hold at least 51% ownership in the firm or business and exercise “majority management control.”
 - A “minimum threshold” means a minimum level above which Indian preference will be required, established by job descriptions, interview committees, skills tests, RFP’s and license requirements, and other written agreements.
 - There is a Tribal Employment Rights Commission (TERO Commission) to implement and enforce the code, and provide “exclusive and independent investigation and administration of personnel actions and grievances arising under the Personnel Policies and Procedures of the Hoopa Tribe” (including unemployment, disability, and worker’s compensation laws) which cover the Tribe “or other entities.”

- The Commission can hire staff, obligate appropriated funds, and adopt bylaws, and it can:
 - Issue rules, regulations, interpretations of law, and guidelines for Indian preference. Rules must be approved by the Council. *Note: This language, which allows the Commission to make “interpretations of law,” gives it broad authority to give advisory opinions or make binding statements of law in decisions.*
 - Maintain an Indian Skills Bank to provide qualified Indian employees to employers. The Commission must actively recruit Indians for listing, and actively recruit and certify Indian firms.
 - Certify Indian firms, from on or off the Reservation, for Indian preference, minority small business contract eligibility, exemption from state taxes and bonds, and other purposes.
 - Register off-reservation contractors and sub-contractors, approve Indian preference plans, and issue permits.
 - Investigate complaints on violations of the law.
 - Hold hearings on any matter under its authority, including hearings on the issuance, modification, or revocation of any permit, license, certification, or assessment, and conduct adjudicatory hearings on violations of the law or of any other general tribal law or specific departmental employee grievance procedure.
 - Negotiate cooperative agreements with state and federal agencies relating to the law or to eliminate unlawful discrimination against Indians.
- The Commission has five members, who must be “in good standing in the community.” The Council appoints three members in October of even numbered years, and two are appointed in odd numbered years. The Council may remove members at any time for cause, subject to notice and an opportunity for a hearing. Commission decisions are by majority vote and three members constitute a quorum.
- There is a TERO Director who is the investigating agent for the Commission who is responsible for investigating, researching, reporting and documenting information required by the Commission. The director reports to the Commission.
- All employers must give preference to qualified Indians in all aspects of employment. No employer can recruit or employ a non-Indian unless the TERO Commission has

written notice that no qualified Indians are available for the position.

- The law applies to all employers (listing them) unless they are “clearly and expressly prohibited by federal and other tribal laws” from coverage.
- Indian preference applies to all job classifications, skill areas, and crafts and all administrative, supervisory, and professional classifications.
- Indians are qualified for employment if they meet “the minimum threshold requirements for such position,” and no employer may use any employment criterion that is not “legitimately related” to performance of the position.
- The Hoopa Valley Tribe must give Indian preference in order of (1) tribal membership, (2) Indian spouses of members, (3) “other resident local Indians” and (4) other Indians. Note: While some Indian preference laws give preference to member Indians, this provision separates general Indian preference from tribal membership for employers other than the Tribe itself. Some laws give preference to any spouse of a member, but this provision gives preference only to “Indian” spouses. There is no definition of who a “resident local Indian” is.
- Employers must prominently display a notice to all employees and applicants of their rights under the law.
- Employers are prohibited from retaliation against any person exercising rights under the law, and the Commission can impose sanctions for retaliation. The Commission can enter a retaliation order on its own or seek a remedy in Tribal Court. It is authorized to issue temporary injunctions to prevent unlawful conduct.
- There is a TERO tax on employers with total contract or annual gross revenues of one thousand dollars or more. The tax is 1% of the total gross value of any contract performed within the reservation or total annual gross revenues.
- All employers engaging in commercial or employment activities within the Reservation must:
 - Be certified by the Commission;
 - Have an Indian preference plan, which must be included in bids. The plan must identify proposed subcontractors, whether they are Indian-owned or not, and give information on good faith steps to identify Indian firms for subcontracts. A contractor cannot refuse to employ an Indian subcontractor for price so long as that firm’s price is within 5% of the lowest bid, calculated by multiplying the lowest bid by 105%. A contractor cannot refuse to employ an Indian subcontract so long as the firm “satisfies the threshold requirements for

technical qualifications.”

- An apparent successful bidder who fails to submit an Indian preference plan will be considered to be a non-responsive bidder.
- If the employer is awarded the bid, that successful bidder may not deviate from the plan or add or delete any existing new subcontracts or subcontractors without the written consent of the Contracting Officer and notice to the Commission.
- Contractors are prohibited from bid shopping, which is where a bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.
- Employers and subcontractors employed by a primary contractor which has one or more contracts totaling at least \$10,000 cannot participate in more than one area of the overall project. A superintendent or similar supervisor employed by the primary contractor cannot be employed in any other aspect of the project.
- Prospective contractors and bidders must identify their regular, permanent employees in the bid package. A “regular, permanent employee” is someone who has been on the annual payroll or is an owner. *Note: This is the “core employee” requirement, where genuine employees of a firm are not disqualified if they are not Indian. This is a difficult provision to apply in practice.*
- An Indian worker cannot be laid off so long as a non-Indian worker in the same craft is still employed, as long as the Indian worker meets the threshold qualifications of the job, unless the non-Indian has been employed 90 days or longer than the Indian. If the layoff is by crews, qualified Indians must be transferred to crews that are retained, so long as there are non-Indians in the same craft employed elsewhere on the Reservation under the same contract.
- There are grandfather provisions for existing contracts.
- Employers must submit monthly reports to the Commission showing the number of employees, a tally for Indians, monthly hires and fires, and other information as required.
- In implementing the Ordinance, the Commission may:
 - Impose numerical hiring goals and timetables, specifying the minimum number of Indians an employer must hire;
 - Attend and monitor job interviews;

- Prohibit employers from establishing “extraneous” qualification criteria or requirements that “serve as barriers to Indian employment;”
- Enter into agreements with unions and other employers to insure compliance;
- Require employers to give preference for contracts and subcontracts to Indian-owned firms and businesses;
- Establish programs of counseling and support for Indian workers to assist them to get employment. Employers can be required to participate in or cooperate with such programs;
- Issue permits to implement the Ordinance and other agreements.
- The Commission has certain enforcement powers, including:
 - Investigation and monitoring of complaints, concerns and inquiries about Indian preference “and other employment related concerns;”
 - Issue citations and subpoenas to employers on violations of the Ordinance or “other written personnel policies of the Council or tribal entities,” and impose civil penalties (including fines) “as may be reasonably necessary to remedy the consequences of a violation of this Ordinance or to deter future violations.”
 - Hold hearings to resolve complaints and hear concerns; and
 - Bring or defend a complaint in Tribal Court for enforcement of the Ordinance and personnel policies of the Tribe and tribal entities.
 - Appeals from the TERO Commission are to the Tribal Court. No standard of review is set under this section.
 - The Commission can consult with the Legal Department and can request representation in proceedings in Tribal Court in “complex cases,” cases of major impact, or cases where the workload of the Commission and the Department warrant. The section establishes a rebuttable presumption that there is no ethical conflict of interest.
- The Ordinance is remedial legislation “intended to rectify the long-standing problem of severe under-employment of Hoopa members and other Indians living in the Reservation community.” It is to be construed liberally to carry out its purposes. Doubtful issues are to be resolved in favor of filing a grievance and to obtain judicial review.

- There is a severability provision if any provision of the Ordinance is ruled to be invalid.
- Nothing in the Ordinance is a waiver of the Tribe's sovereign immunity.
- A separate ordinance (Res. No. 91-71A, March 6, 1995) provides for complaint procedures for the Hoopa Tribal Employment Rights Commission. It provides:
 - The purpose of the procedures is to establish clear and uniform procedures for complaints and other matters before the Commission.
 - Any individual, group of individuals, organization, business or entity who believes that any covered employer or entity has violated any requirement in the Ordinance or regulations can file a complaint with the TERO director.
 - The Director must investigate every complaint and every employee appeal under the personnel policies and report to the Commission. If the Commission believes there is a reason to believe there has been a violation, the Commission may schedule a hearing or take enforcement action. The TERO director must give a written report to a complainant within 15 days of the filing of a complaint.
- The Commission must investigate any violation of the law. The investigation must be carried out by the TERO director, who has the authority to enter the workplace to investigate, during working hours.
- If a complaining or appealing party or employer wishes a hearing, it may request one within ten work days after the mailing of the TERO director's report. The Commission can hold hearings on its own initiative. A hearing must be held within 30 working days after receipt of a hearing request. The hearing can be for an enforcement action, to hear input on proposals, to hear employee grievance appeals, or the hearing may be in furtherance of an investigation. The Commission must designate a hearing officer to preside.
- The Commission has the power to administer oaths, issue subpoenas, take evidence, and require the production of documents which are "material to the inquiry."
- If the Commission determines that a "violation of the TERO has occurred," it can notify the employer or entity, specifying the violation. The Commission can withhold the names of complainants when there is a "substantial reason ... to believe" there may be retaliation. The Commission must seek to achieve informal settlement, and if it cannot informally resolve the matter, it must issue a formal notice of non-compliance, which also advises of the right to a hearing before the Commission.

- The notice of non-compliance must set out the nature of the violation and the steps needed to comply. It must give at least five days to comply. A person receiving notice may request a hearing before the Commission, which must be held within five to twenty work days.
- If there is a danger that the person requesting the hearing may remove itself or its property from the jurisdiction prior to hearing, the Commission may require the party to post a bond in an amount to cover possible monetary damages. If the party fails or refuses to post the bond, the Commission can petition the Tribal Court for interim and injunctive relief.
- The Commission or an “authorized agent” may conduct the hearing. Technical rules of evidence do not apply. Hearings must be recorded.
- If the Commission determines a violation has occurred, it may take action.
- There is Tribal Court judicial review of Commission decisions, or if the Commission fails to act. A request for judicial review must be filed within twenty working days of receipt of the Commission decision. The standard for review is whether the decision is “arbitrary, capricious, or contrary to law,” the usual administrative law standard for judicial review.
- The Commission also has separate bylaws, which govern its internal operations.

The Hoopa Valley Tribe has a sophisticated TERO law which gives detailed coverage to the subject and includes tribal employment standards and employee grievances. There is some mixing of investigatory and adjudication duties for the TERO Commission, which may be grounds for due process challenges to the effect that if the Commission is too intimately involved with the investigation and review of a matter before the opportunity for an adversarial hearing, that will prejudice the Commission at such a hearing. The Tribal Court is available for interim remedies and for judicial review, based upon the facts or the law.

7. The Leech Lake Tribal Employment Rights Ordinance

Leech Lake’s Tribal Employment Rights Ordinance is based upon the “standard” TERO law which has been reviewed here, but it has two important provisions which deserve mention. First, the definitions section defines the term “conflict of interest” for purposes of public-private relationships would could cause a public official to disregard duties or be improperly influenced in making a public decision. That is an important aspect of TERO law management. Second, the Code defines “consensual relations with the tribe” to mean that “Any construction firm, contractor, architect, supplier of services, labor or materials who performs work within the Reservation boundaries with the tribal governments or it entities.”

The Code then addresses “consensual relations” and “non-consensual relations” in terms of required compliance plans for contracting and subcontracting. Where a covered entity intends to engage in a “consensual business activity,” it must file an acceptable plan to meet its obligations under the TERO law. Where there are Anon-consensual relations, or “the Project does not directly impact the Band’s lands,” the tribal TERO Commission will work with such contractors to work cooperatively “toward the goal of hiring qualified Indian workers.” This Code recognizes, and attempts to address, the problem of regulatory and ad judicatory jurisdiction, but in a manner which is not very satisfactory.

8. The Lummi Nation Tribal Employment Rights Ordinance

The Lummi Tribal Employment Rights Ordinance is codified in Title 25 of its Code. It is directed at Indian preference employment, citing general legislative need, Title VII of the U.S. Civil Rights Act of 1964 in Indian preference employment (at 42 U.S.C. Sec. 3200 C-1), the Bureau of Indian Affairs Indian Self-Determination and Education Assistance Act preference regulation 25 C.F.R. Sec. 2371.44), and Office of Federal Contract Compliance Program (OFCCP) regulations of January 1977 on Indian preference on or near reservation. The ordinance provides that:

- It is the “Lummi Tribal Employment Rights Ordinance” or “Lummi TERO.”
- All employers are required to give preference to Indians in contracting, subcontracting, hiring, promotion, training and all other aspects of employment. Note: Unlike other codes, there is no reference to a territorial jurisdiction or other limitations in the scope of application of the law.
- The ordinance is grounded in Article VI, Sec. 1(p) and Article VI, Sec. 2 of the Constitution and By-laws of the Lummi Tribe without an indication of what those powers provide.
- The relevant definitions are:
 - “Commerce” includes all trades, traffic distribution, communications, and transportation, provision of services, fishing, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, and energy resources production.
 - An “employee” is any person earning wages for work performed on or near the Lummi Indian Reservation.
 - An “employer” includes any person, company, contractor, sub-contractor, or other entity located or otherwise engaged in work on the Lummi Reservation which employs two or more persons for wages. It also includes state, county, and other governmental agencies, and the contractors and sub-contractors. It

includes the Lummi Indian Business Council, unless the Council is exempted under another law or the Personnel Manual. The term also includes contractors and sub-contractors of any other employer.

- A “covered employer” is any employer with two or more employees that spends 40 or more hours performing work within the boundaries of the Lummi Reservation during any 30-day period.
- An “Indian” is any enrolled member of any federally recognized Indian Tribe, and all other persons of one half or more Indian blood of tribes indigenous to the United States, Eskimos, and other aboriginal people of Alaska.
- An “Indian owned firm or entity” is any commercial, industrial or other business activity or entity in which “the equity ownership and controlling Indian ownership constitutes not less than 51%.”
- The definition of “Indian preference” is that all other qualifications being equal, qualified local Indians residing on or near the Lummi Reservation are given preference over non Indians in employment and training and will receive preferential treatment with first consideration being given to Lummi Tribal members, second consideration to other Indians, and third consideration to spouses of Lummi Indians. *Note: This is a tribal preference statute. An Indian spouse would qualify for the second consideration because that person is “Indian,” and non-Indian spouse would qualify for “third consideration” preference.*
- An Indian resident or Resident Indian is any Indian who resides in Whatcom County, Washington for sixty days.
- “Near the Reservation” means any employer located within daily commuting distance of the reservation.
- “Wages,” means payment for work done on a regular basis for another.
- The ordinance applies to all lands and areas within the exterior boundaries of the Lummi Reservation and other lands subject to the jurisdiction of the Tribe.
- There is a Tribal Employment Rights Commission to administer the TERO, with the powers to:
 - Establish and enforce TERO regulations;
 - Establish and collect TERO fees and taxes;

- Enforce the Indian Preference provisions of the TERO;
 - Investigate, report and take regulatory actions for compliance; and
 - Safeguard the jurisdiction of the Lummi Nation.
- There are three commissioners and one alternate, appointed by the Business Council, for staggered three-year terms.
- The Commission has the power to:
 - Use the tribal Personnel Department to hire and fire employees and to set salaries within an approved budget;
 - Establish rules and regulations;
 - Expend funds and seek other funding;
 - Establish numerical hiring goals and timetables, specifying the maximum number of Indians an employer must hire by craft or skills. Hiring goals and timetables for hiring, retention and promotion of Council employees must be negotiated with the Personnel Office, and disputes between individual employees and the Council are decided under the Personnel Manual. *Note: This section has provisions for all employers as to the maximum number of Indians that must be hired (rather than a minimum, as in other codes) and there is a special provision for tribal employees);*
 - Require employers to establish or participate in job training programs to increase the pool of Indians eligible for employment;
 - Prohibit employers from using job qualification criteria or personnel requirements that may bar Indians from employment unless the criteria are required by business necessity. The Commission may adopt EEOC guidelines or additional requirements to eliminate employment barriers unique to Indians and the reservation;
 - Recommend that the Council enter into agreements with unions and insure union compliance with the ordinance;
 - Require employers to give preference to tribal and other Indian owned businesses in contracts and subcontracts;
 - Hold hearings and subpoena witnesses and documents;

- Require employers to submit reports and take all action to implement the Ordinance;
- Recommend cooperative agreements to the Council with federal and state agencies to eliminate discrimination against Indians; and
- Take such other actions as are necessary to achieve the purposes and objectives of TERO office.
- All remedies must be exhausted before going to court. *Note: The exhaustion of remedies is usually a judicial abstention doctrine. It is put in this code to prevent other applications to the court.*
- Any person who is aggrieved by a decision of the TERO Director may appeal to the Commission by filing a petition for review and serving a copy on the TERO Director.
- When a petition is filed, the Commission Chair must schedule a meeting to hear it, and give at least five working days notice. There must be an electronic or verbatim record of the hearing. Testimony is under oath, and parties may be represented by counsel at their own expense. Such counsel must be admitted to practice before the Lummi Tribal Court. The Commission may receive any relevant evidence. The Commission must issue a written opinion of decision within fifteen working days after the close of the hearing, giving reasons for the decision. The filing of a petition for review does not stop the operation of the TERO Director unless the Commission so orders.
- Any person may appeal from the Commission to the Lummi Indian Business Council within ten calendars of the date of the Commission decision. The person taking the appeal must file a transcript of the hearing. The Council must take up the appeal at a meeting within thirty calendar days from the date of the transcript. Review is limited to whether the Commission afforded due process and a fair hearing, or errors of law. No new evidence may be received and no argument can be presented unless it was first presented to the Commission. The Council must issue a decision within fifteen calendar days of the meeting when the appeal is considered.
- Any person may appeal from the Council to the Tribal Court. The Council waives its immunity from suit for the limited purpose of such appeals. Only equitable relief may be awarded, and money damages cannot be awarded. Judicial review is limited to whether the appellant was given due process by the Council, or if the Council committed an error of law. Relief is limited to a declaration of the correct law for a new hearing before the Council.
- The Commission can hold hearings to investigate compliance with the ordinance. There must be written notice to all parties which states the nature of the hearing and the

evidence to be presented. Parties must be advised of their right to be present at the hearing, present testimony and other evidence, and to be represented by counsel at their own expense. Testimony is under oath.

- If the Commission has cause to believe that an employer, contractor, subcontractor, or union has failed to comply with the law, it can file a complaint and notify the party of the allegations. The Commission must attempt to achieve an informal settlement, and one cannot be achieved, the Commission may request a hearing.
- Individual Indians who believe they have been discriminated against by an employer because the complainant is an Indian may file a complaint with the Commission. The Commission must investigate an attempt to achieve an informal settlement, and one cannot be achieved, the individual or the Commission may request a hearing.
- The procedures at hearing are the following:
 - The parties present the testimony of their witnesses and other evidence;
 - The Commission may have the advice and assistance of the tribal attorney;
 - The Chair or Vice-chair must preside, and no formal rules of evidence or procedure need be followed. The Commission must “proceed to ascertain all the facts in a reasonable and orderly fashion;”
 - Proof is by a preponderance (“more likely than not”) standard
 - The Commission may continue hearings;
 - The Commission can take immediate action or take the matter under advisement at the close of the hearing; and
 - The Commission must notify all parties of its decision within fifteen days of the hearing.
 - The penalties for violations of the Ordinance or regulations are subject to civil sanctions which include:
 - Denial of the right to commence or do business;
 - Suspension of all reservation operations;
 - Payment of back pay and damages to compensate an injured party;

- An order to summarily remove employees hired in violation of the law;
 - Monetary civil penalties not to exceed \$500 per day for each violation or \$10,000 per violation;
 - Prohibition from engaging in any future operations on the Reservation;
 - An order requiring the employment, promotion, and training of Indians injured by the violation;
 - An order requiring changes in procedures and policies to eliminate the violations; or
 - An order for any provision necessary to alleviate, eliminate, or compensate for any violation.
 - The TERO director assesses penalties.
- There is an Employment Rights Office with a director, who reports to the Commission and the Administrative Director of the Council. The director is appointed by the Commission, with the usual administrative authority, and the power to issue regulations, rules, and guidelines to implement the ordinance. The director can hold hearings, subpoena witnesses and documents, require employers to submit reports, issue cease and desist orders, petition the Commission and Tribal Court for removal orders, and take other action to implement the ordinance. *Note: The power to petition for a “removal order” is unclear. Does that mean exclusion from the Reservation?*
- There is an Employment Rights Tax, of 1% of the total amount of contracts over \$10,000, paid in installments over the length of the contract. Covered employers, other than construction contractors, must pay an annual fee of one-half of one percent of annual payroll. The fee does not apply to Tribal, educational, health, governmental, or non-profit employers.
- The Commission can issue regulations in the same manner, and using the same procedure, as Council ordinances.
- The Commission must notify and send a copy of the Ordinance to every employer operating on the reservation and other interested parties. All bid announcements by a federal, state, or tribal agency, or other private or public entities, must contain language that the successful bidder will comply with the ordinance and all other rules, regulations and orders of the Commission. All tribal and federal agencies that issue

business or tribal permits and contracts are responsible to advise prospective employers of their obligations.

- As of the effective date of the ordinance, no new employer may commence work until they have consulted with the Director or Commission to meet their obligations under the ordinance.
- Employers must submit reports or other information as requested by the Commission. The Commission and the Director can make periodic on-site inspections during regular working hours to monitor compliance. The Commission and the Director have the right to inspect and copy all relevant records, and the right to speak to workers on conduct on-site inspections.
- Funds collected from employer taxes and other resources are to be put into a special account for use by the TERO office and the Commission.
- Employers with a collective bargaining agreement must obtain written agreement from a union or unions stating the union will comply with the Indian preference law.
- Employers with collective bargaining agreements must enter into a Compliance Plan. The payment of prevailing wages under the Davis-Bacon Act is not required unless such a prevailing wage provision is included in the Compliance Plan. *Comment: The statute does not tell us what a “compliance plan” is. Would this provision satisfy the NAHASDA Davis-Bacon waiver? Most likely not, unless the compliance plan addresses the issue of tribal prevailing wages.*
- The Lummi Tribal Police are authorized and directed to enforce any cease and desist or related orders issued by the Commission and the Director. The orders do not require a judicial decree or order for them to be enforceable. Police officers are not civilly liable for enforcing the orders when they are signed by the Director and Commission.
- There is a severability provision if any part of the ordinance is found to be invalid.
- The ordinance covers all employers operating within the exterior boundaries of the Reservation, whether or not they were doing so when the law is implemented.
- The ordinance is effective upon approval by the Lummi Indian Business Council.

This is an example of a TERO ordinance for a smaller tribe. Its jurisdiction provisions may predate recent federal court decisions regarding activities on fee land, or there may be little or not checker boarding in this reservation. The allocation of powers between the TERO Commission and the Director is somewhat confusing, and the division of rulemaking, investigatory, and decision-making is somewhat mixed. This is a model where the enforcement officer has

rulemaking, investigatory, and decision powers, subject to review by the Commission, the Council, and the tribal court.

9. The Navajo Nation

The Navajo Nation's labor code is in six chapters of Title 15 of the Navajo Nation Code. It is commercially published, but it has not been updated since its last publication in 1995. The labor provisions create and establish powers for the Office of Navajo Labor Relations (ONLR) and the Navajo Nation Labor Commission, and they set out labor provisions in the Navajo Preference in Employment Act (NPEA), child labor provisions, a worker's compensation code, and special provisions for the Crownpoint Institute of Technology. The ONLR, Commission, NPEA and child labor provisions are reviewed here.

- The Office of Navajo Labor Relations is covered in chapter 3 of Title 15, and it provides:
 - There is an Office of Navajo Labor Relations or ONLR.
 - ONLR's purposes are:
 - To monitor and enforce the Navajo Preference in Employment Act;
 - To implement and carry out Navajo Nation labor policies as established by the Navajo Nation Council;
 - To act as an administrative agency for employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment. Note: This is general labor jurisdiction, as is often found in state labor departments;
 - To gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation and working conditions. *Note: This too is a function much like similar state agencies;*
 - To recommend and propose policies, rules, regulations and guidelines, concerning labor and employment to the Human Services Committee of the Navajo Nation Council. Note: The committee has the power to promulgate regulations for enforcement of labor laws and policies and laws relating to veterans services under 2 NNC Sec. 604(B)(1) (1995); and
 - To assist and encourage the peaceful settlement of labor disputes within

the Navajo Nation.

The personnel powers of ONLR are set out in one section.

- The authority, duties and responsibilities of ONLR are:
 - To ensure employers comply with the NPEA in employment and training of enrolled members of the Navajo Nation;
 - To recommend appropriate services for the employment of Navajos;
 - To monitor and enforce Navajo labor laws, rules, policies and regulations;
 - To recommend laws, rules, regulations, guidelines and policies to accomplish the purposes of NPEA;
 - To require employers to submit reports and information to carry out the purposes of NPEA;
 - To give an annual report to the Council and a quarterly report to the Human Services Committee on the extent to which employers are complying with the NPEA;
 - To assist in coordinating education and job training programs to provide qualified Navajo workers for employers;
 - To ensure appropriate preferential treatment and training provisions in all agreements by employers;
 - To establish minimum employment and labor provisions for inclusion in all agreements entered into by employers;
 - To investigate and make administrative determinations on compliance by employers with the NPEA or labor provisions in contracts, leases, permits and other agreements;
 - To file formal complaints with the Navajo Nation Labor Commission, participate as a complainant in hearings, and to make application to the Commission for subpoenas; and
 - Take all necessary action to accomplish the purposes of the NPEA.
- The ONLR and its legal counsel are required to avoid ex parte communications

to avoid disclosure to the Commission and its staff of specific factual or legal issues concerned alleged violations of the NPEA under investigation which are not a matter of Commission record.

- The ONLR must have a main office in Window Rock, Navajo Nation (Arizona) and it may establish sub-offices.
- This section of the labor code, called a “Plan of Operations,” can be amended by the Government Services Committee of the Navajo Nation Council. *Note: This is an unusual provision which is unique to the Navajo Nation. The Government Services Committee takes the place of the former, powerful “Advisory Committee,” which had special legislative authority.*

The powers and authority of the Navajo Nation Labor Commission are set out in chapter 4 of Title 15:

- There is a Navajo Nation Labor Commission.
- The Commission’s purposes are to:
 - Serve as an administrative hearing body under the Navajo Preference in Employment Act;
 - Conduct and hold administrative hearings;
 - Process and decide all formal complaints before it; and
 - Adopt rules and regulations for hearings.
- The Commission’s organization is:
 - It has five members;
 - Two members are appointed by the Human Services Committee of the Navajo Nation Council with the concurrence of the Government Services Committee, and three members appointed by the President of the Navajo Nation with the concurrence of the Government Services Committee. *Comment: There are usually members of the Navajo Nation Council on the commission, and it is inappropriate for elected political officials to serve as adjudicators;*
 - The Commission members must be familiar with labor practices and requirements of the Navajo Nation. One member must be a worker who is familiar with union practices;
 - The Commission may elect officers;

- There are provisions for vacancies, conflicts of interest and compliance with the governmental ethics law.
- The authority, duties and responsibilities of the Commission are to:
 - Submit an annual report to the Human Services Committee, the Intergovernmental Relations Committee and the Navajo Nation Council;
 - Establish administrative and operating policies;
 - Regulate the course of hearings and conduct of participants;
 - Administer oaths;
 - Rule on motions and procedural matters;
 - Grant applications for subpoenas and rule on petitions to revoke them;
 - Inquire fully into all issues and obtain a complete record upon which decisions will be rendered;
 - Receive, rule on, exclude, and limit evidence, lines of questioning, or testimony which are irrelevant, immaterial, or unduly repetitious;
 - Examine witnesses to clarify facts and issues;
 - Direct the submission of briefs;
 - Issue findings of fact, conclusions of law and orders, and impose appropriate damages, sanctions, fines and other relief for non-compliance;
 - Set the amount of bonds and conditions;
 - Prepare and submit an annual budget; and
 - Exercise any other authority conferred by law.
- The chair calls meetings and three Commission members constitute a quorum. The Commission must adopt rules and keep a record of all proceedings. All formal action must be taken by a written resolution.
- The Commission may employ independent legal counsel and staff.

- The office and staff must be located in Window Rock, Navajo Nation (Arizona).
- The statute for the Commission, called a “Plan of Operation,” may be amended by the Intergovernmental Relations Committee of the Navajo Nation Council, with prior review of amendments by the Human Services Committee. *Note: The Intergovernmental Relations Committee is composed of the chairman of the Navajo Nation Council and the chairs of the other seven standing committees of the Council.*
- The Navajo Preference in Employment Act (NPEA) is set out in chapter 7 of the Title 15 Labor Code. It provides:
 - The law is called the Navajo Preference in Employment Act.
 - The purposes of the Act are:
 - To provide employment opportunities for the Navajo work force;
 - To provide training for the Navajo People;
 - To promote the economic development of the Navajo Nation;
 - To lessen the Navajo Nation’s dependence upon off-Reservation sources of employment, income, goods and services;
 - To foster the economic self-sufficiency of Navajo families;
 - To protect the health, safety, and welfare of Navajo workers; and
 - To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.
- The relevant definitions of NPEA are:
 - “Employment” is the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention and recall of employees;
 - An “employer” includes all persons, firms, associations, corporations, and the Navajo Nation and its agencies and instrumentalities, who engage the services of any person for compensation, as an employee, agent, or servant;

- “Navajo” is any enrolled member of the Navajo Nation;
- “Probable cause” is a reasonable ground for belief in the existence of facts warranting the proceedings complained of;
- “Necessary qualifications” are job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications for education, training and job-related experience, but excluding qualifications to perform other employment position responsibilities. A demonstrated ability to perform essential and basic responsibilities satisfy necessary qualifications;
- “Qualifications” includes the ability to speak or understand the Navajo language and familiarity with Navajo culture, customs and traditions;
- A “person” includes individuals, labor organizations, governments, and private and public, profit and nonprofit entities however organized;
- An “employee” is an individual employed by an employer;
- A “labor organization” or “union” is an organization which exists to deal with employers on grievances, employment disputes, wages, rates of pay, hours or other terms and conditions of employment.
- The Navajo employment preference is defined and regulated as follows:
 - All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contact with the Navajo Nation (and the reason for the bracketed language is not explained) must:
 - Give preference in employment to Navajos, including specific Navajo affirmative action plans and timetables to achieve the Navajo Nation goal of employing Navajos in all job classifications including management and supervisory positions;
 - When an employer commences business it must file a written Navajo affirmative action plan with the ONLR. Where there is a labor organization, the plan must be jointly filed by the organization and the employer. The labor organization must have the same obligations as the employer. The failure to file a plan, a plan which does not meet the requirements of the Act, or noncompliance with the plan is a violation;
 - The ONLR must give reasonable guidance and assistance to employers and labor organizations to develop and implement a Navajo affirmative

action plan. The ONLR can approve or disapprove a plan;

- There are specific requirements for Navajo preference, including:
 - Employers must specify a Navajo employment preference statement in job announcements, ads, and employer policies;
 - Employers must post an ONLR preference policy notice in a conspicuous place;
 - Seniority systems are subject to the Act and other labor laws, and they cannot operate to defeat or prevent application of the Act. Otherwise lawful and bona fide seniority systems are valid;
 - Employers must utilize Navajo Nation employment sources and job services for recruitment and referrals, but that obligation does not apply if a Navajo is selected and is a current employee;
 - Employers must advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, but that requirement does not apply if a Navajo is selected and is a current employee;
 - All employers must use non-discriminatory job qualifications and selection criteria in employment. *Note: The Navajo Nation Supreme Court has construed this subsection as a general anti-discrimination statute;*
 - Employers must not penalize, discipline, discharge, or take any adverse action against any Navajo employee without just cause, and a written notification citing just cause for any action is required in all cases. *Note: The Navajo Nation Supreme Court has used principles of equal protection to extend this protection to all employees (in a case involving a Hopi employee). The Court has struggled with the problem of when the written notification must be given;*
 - Employers must maintain a safe and clean working environment and provide conditions which are free of prejudice, intimidation and harassment. *Note: The Navajo Nation Supreme Court has pointed to the word “prejudice” as evidence the NPEA is also an anti-discrimination code. The issues of freedom from intimidation and harassment are controversial topics in general discrimination law, and the term “harassment” may be the basis for anti-bullying policies*

which are in development at this stage of labor law;

- Training must be an integral part of specific affirmative action plans and employer activities;
- There must be employer-sponsored cross-cultural programs in affirmative action plans, with programs to focus on education for non-Navajo personnel on Navajo culture;
- No fringe benefit plan on medical or other benefits, sick leave, or other personnel policy may discriminate against Navajos in coverage on the basis of cultural or religious traditions, coverage must accommodate such beliefs.
- Irrespective of the qualifications of any non-Navajo applicant, a Navajo applicant who demonstrates the necessary qualifications for an employment position must be hired, retained when there is a reduction-in-force, but among a pool of applicants, the best qualified Navajo may be hired or retained.
- Employers must have the necessary qualifications for each employment position in writing and provide a copy to applicants at the time they express an interest in the position.
- Employers doing business or engaged in any project or enterprise in the Navajo Nation within the territorial jurisdiction must submit employment information or reports as required to ONLR to determine compliance with the Act.

Navajos have a “basic right” to organize, bargain collectively, strike, and peaceably picket, but those rights do not apply to employees of the Navajo Nation. It is unlawful for any labor organization, employer or employment agency to take any action which directly or indirectly causes or attempts to cause any policy or decision which violates the Act.

There is an extensive prevailing wage statute, which addresses:

- Definitions:
 - A “prevailing wage” means the wage paid to a majority (more than 50%) of employees in the classification on similar construction projects in the area during a period of up to 24 months prior to the effective date of the prevailing wage set, but if the same wage is not paid to a majority of employees in the

classification, “prevailing wage” means the average of wages paid, weighted by the total number of employees in the classification.

- “Prevailing wage rate” means the rate established by ONLR.
- “wage” means the total of the basic hourly rate, and the amount of contributions paid to a bona fide fringe benefit fund, and costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits.
- “Area” for determining the prevailing wage means “the geographic area within the territorial jurisdiction of the Navajo Nation.” If there are insufficient similar construction projects in the area, it means the geographic boundaries of such contiguous municipal, county or state governments as ONLR determines necessary to secure sufficient wage information on similar construction projects.

Establishing wage rates:

- ONLR must establish a general prevailing wage for each classification within specified types of construction for all construction reasonably anticipated to occur in an area. ONLR must define classifications and types of construction in accordance with industry guidelines. Where construction is contemplated and prevailing wage rates have not been set, the “contract letting entity” must submit a written request for a project prevailing wage scale. The request must be submitted not less than 60 days prior to the scheduled date for bid solicitation and include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR must use best efforts to provide a project prevailing wage scale for each classification within 60 days of receipt of a request.
- In setting prevailing wage rates, ONLR must conduct surveys and collect data it deems necessary and sufficient to make a wage determination. Wage data may be collection from contractors, contractors’ associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area.

- No contract-letting entity, contractor or subcontractor may proceed with a construction contract without a contractual requirement for the payment of prevailing wages pursuant to an ONLR determination. Violation of that obligation renders the contract-letting entity and employer jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, with interest.
- This section does not apply to a contract for architects, engineers, legal or consultant services or the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or subcontractor; to a construction contract for a project with a total cost of \$2,000 or less; to a construction contract let by a natural person who is an owner for that person's personal, family or household purposes; to a construction contract performed by employees of an owner; to a construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act; to a construction contract which requires payment of wages pursuant to a wage scale established under a collective bargaining agreement; and there are exceptions for apprentices and trainees.
Comment: The subsection dealing with federal authorities setting the prevailing wage under the Davis-Bacon Act is an example of the renvoi principle in the law of conflicts of law. That is, the NPEA tells us there to look to the Davis-Bacon Act and similar provisions, and NAHASDA tells us to look back to Navajo Nation law. Given the existence of a Navajo Nation method of determining prevailing wages, the exception would not apply.
- Employers must adopt and implement work practices which conform to occupational safety and health standards imposed by law. *Comment: The Navajo Nation is unusual, because the Tenth Circuit Court of Appeals ruled that the federal Occupational Health and Safety Act (OSHA) does not apply to the Navajo Nation because of its 1868 treaty with the United States. Therefore the "standards imposed by law" are those under Navajo law, and there is a Navajo Nation agency similar to OSHA.*

All transaction documents (leases, contracts, etc.) Must contain a provision that the employer or other contracting party agrees to strictly abide by the requirements of the Act. If there is no such language, the terms and provisions of the Act are incorporated in the document as a matter of law. Every bid solicitation, etc. for prospective contracts must expressly provide that the contract will be performed in strict compliance with the Act. If that language is not in the solicitation, the terms of the Act are deemed to be incorporated in it as a matter of law.

- ONLR has the responsibility for enforcement, and there are extensive provisions for charges, an ONLR investigation, the dismissal of charges, a probable cause determination, settlement, an individual right to sue, ONLR charges, the ONLR right to sue, the initiation of proceedings before the Navajo Nation Labor Commission, preliminary relief, intervention in Commission proceedings and confidentiality. *Comment: There is a lengthy and detailed scheme for Navajos filing charges, their investigation by ONLR and an agency determination of “probable cause” to believe that an employer or other has violated the Act, and issuance of right to sue letters, and complaints to the Labor Commission by individuals or ONLR. The procedures generally mirror EEOC investigations, determinations, and conciliation efforts under Title VII of the U.S. Civil Rights Act of 1964. The Navajo Nation Supreme Court held, in a complaint brought by a Hopi employee, that any person can make a charge under the Act.*

Labor Commission Hearing:

When a written complaint is filed, the Commission must schedule a hearing within 60 days. There are provisions for notice, hearing procedures and a decision. The Commission also has its own hearing rules. The burden of proof to show “just cause” for an employment action is upon the employer. *Comment: The Navajo Nation Supreme Court struck down the provision that the employer’s burden proof is “substantial evidence” as violating due process of law, and the Court established the burden as the normal civil preponderance of evidence, where the employer must show that it was “more likely than not” that there was just cause.*

- The Commission can grant a broad range of remedies, including:
 - Remedial orders such as directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, corrective action, and, on a finding of an intentional violation, the imposition of civil fines. Liability for back-pay or other compensatory damages will not accrue for a period beyond two years prior to the date of the filing of the original charge with ONLR. Attorney fees for an individual suit are permitted if the respondent’s position was not substantially justified. An individual with a Commission ruling may enforce it in the Navajo Nation District Court. *Comment: The Navajo Nation Supreme Court has ruled that the fee rate for attorney fees is to be established by the fees charged by attorneys in the Navajo Nation judicial district and not the region. The Court declined to define what “substantially justified” means.*
- Any party may appeal a Commission decision to the Navajo Nation Supreme

Court and seek a stay of execution from the Commission. There is a provision for an appeal bond.

- A non-Navajo who is legally married to a Navajo is entitled to preference in employment upon proof of marriage by a valid marriage certificate. The non-Navajo spouse must have resided within the Navajo Nation for a continuous one-year period prior to an application for Navajo preference. This is a secondary preference to Navajos, so that first preference is given to Navajos, second to spouses of Navajos, third to other Indians, and fourth to non-Indians.
- No person may require an employee to take a polygraph examination as a condition for obtaining employment or a condition of continuing employment.
- The Human Services Committee of the Navajo Nation Council may promulgate rules and regulations to implement and enforce the Act. IT can adopt rules of procedure and practice for hearings.
- All prior inconsistent laws are appealed.
- There are provisions for the effective dates of the Act and amendments and severability.

Chapter 9 of Title 15 has only two child labor provisions:

- The Navajo Nation will adhere to applicable child labor laws in Arizona, New Mexico and Utah on work projects in those portions of the Navajo Nation, and the President of the Navajo Nation is authorized to promulgate additional protective regulations with respect to child labor. *Comment: A cross-reference note in the published version of this chapter points out that the Human Services Committee has been given the authority to adopt labor regulations. One of the issues in Navajo Nation housing legislation is the problem of federal demands for the adoption of legislation on short notice where the Navajo Nation Council has adopted state law by reference. That is a poor practice, and normally, foreign legislation should not be adopted by reference because of unique economic and social needs and cultural differences. The problem is balancing the time and cost of considering new legislation with immediate needs and federal restrictions.*

The Navajo Nation has a lengthy and detailed scheme in its law. The Navajo Nation statutes began with ATERO” legislation, such as that reviewed above, and the code evolved into a general labor code. The Navajo Nation Supreme Court has ruled that the NEPA is in fact a general labor code. Aside from setting Navajo preference standards, the NEPA establishes standards for the conditions of labor. Some are general, such as broad prohibitions against “discrimination” and “harassment.” The Act gives broad rulemaking authority for broad provisions to be fleshed out, but in the absence of rulemaking, the Navajo Nation Supreme Court is

fine-tuning the Act in written opinions. The legislation clearly separates investigative and adjudication functions between agencies, and there are detailed due process procedures. The Navajo Nation Supreme Court has noted the similarity in the Act's procedural provisions with those of Title VII of the U.S. Civil Rights Act of 1964. The difference is that under Title VII, when the EEOC issues a determination, there is a right to sue letter which permits individual charging parties to file suit in a federal district court. In the Navajo Nation scheme, litigation is in the Navajo Nation Labor Commission. The procedures are time-consuming, and they require a large agency infrastructure. In practice, it takes a great deal of time before right to sue letters are issued, and many are issued when the ONLR is unable to investigate the charge within the statutory time periods.

Some of the issues posed by the NEPA which are being addressed in litigation include Navajo Nation jurisdiction over employers doing business on fee land within the Reservation, jurisdiction over state and other non-Navajo Nation governmental entities, the viability and validity of Navajo preference rather than general Indian preference, and various due process-fairness in procedure issues. One policy problem which may rise to a civil rights issue (i.e. bills of attainder) is the practice of appointing elected Navajo Nation Council delegates to the Labor Commission to sit as adjudicators. In sum, however, the Navajo Nation code is different from the codes above because it is a general labor code and not simply Indian preference legislation. The Hoopa Valley Tribe's code addresses general labor standards for government employees, but the Navajo Nation code establishes them for all employers.

10. Oglala Sioux Tribe Tribal Employment Rights Office Code

The Oglala Sioux Tribe has TERO legislation, codified in Chapter 18 of its Code, and separate personnel policies and procedures, codified in Chapter 17. Only the TERO legislation will be reviewed here, because tribal personnel policies for government employees are similar to general American internal personnel policies. The “Tribal Employment Rights Office” code has the following provisions:

There is a lengthy declaration of policy which identifies the economic and social needs of the Oglala Sioux Tribe of the Pine Ridge Reservation and the need to address employment discrimination. The preamble references Title VII of the U.S. Civil Rights Act of 1964, the exemption for businesses giving Indian preference on or near an Indian reservation, Indian Self-Determination and Education Assistance Act regulations, and the regulations of the Office of Federal Contract Compliance Programs.

The authority for the code is based in Article IV, Section AI et seq. and Article V, sections 1 and 2 of the Constitution of the Oglala Sioux Tribe.

- The relevant definitions include:
 - “Commerce” includes all trades, traffic, distribution, communications, transportation, provisions of services, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, and energy resources production.
 - An “employee” is any currently working employee, an applicant for employment, or an employee whose work has ceased as a consequence of a labor dispute or an unfair labor practice. It does not mean an individual employed in domestic services with a family or person in a home or any person employed by someone who is not an “employer.”
 - An “employee on the Pine Ridge Reservation” is any employee who is in a non-managerial or non-supervisory position who spends in excess of one-tenth of working hours “on” the Pine Ridge Reservation. It also means any employee in a supervisory or managerial position who spends in excess of one-twentieth of working hours per month or per pay period, whichever is the lesser, “on” the Pine Ridge Reservation.
 - An “employer” is any person or entity who engages in commerce through compensated agents or servants, or who is hired for contracts for services, within the exterior boundaries of the entity acting as a contractor or subcontractor of an employer, directly or indirectly. It does not include the United States, a wholly-owned government corporation, or any state or its political sub-division, but it does include independent contractors or subcontractors of the United States or a state

or its political subdivision.

- A “covered employer” is any employer who employs two or more employees within the exterior boundaries of the Pine Ridge Reservation with a contract for \$2,500 or more.
- An “Indian” is any individual who is an enrolled member of an Indian tribe.
- An “Indian tribe” is any tribe, band, or other organized group or community which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians. *Note: This is a broad provision which includes groups other than “recognized” tribes, because some individual Indians who are members of “unrecognized” tribes are eligible for some programs and services because of their individual status as an “Indian.”*
- A “certified Indian-owned firm or entity” is any commercial, industrial, or other business firm or entity where 50% or more of ownership and actual management and control is exercised by an Indian or Indians.
- “Indian preference” means that Indians who are residents within the exterior boundaries of the Pine Ridge Reservation, without regard to tribal affiliation, must be given employment preference over non-resident Indians in employment, training, contracting or subcontracting, and that Indians -resident or non-resident- must be given preference over non-Indians in employment, training, contracting and subcontracting. *Note: This is a different approach to the tribal preference-general Indian preference dichotomy. That is, rather than require preference for tribal members, the preference is for residents of the Reservation over non-residents.*
- A “resident Indian” is any Indian who, on the date of any contract is let or an employment offer is made, has been a bona fide resident of the Pine Ridge Reservation for not less than 60 days.
- A “nonresident Indian” is any person who is not a “resident Indian.”
- A “non certified Indian owned firm or entity” is a commercial, industrial, or other business firm or entity with less than 51% of ownership or control.
- A “union” is any organization, association, or combination of skilled workers, which is organized to secure favorable wages, improved labor

conditions, improved hours of labor, and righting grievances brought against employment.

The code applies to all lands situated within the exterior boundaries of the Pine Ridge Reservation, as defined in Article I of the Oglala Sioux Tribe Constitution, and any other lands, within or outside those boundaries, which may be subject to the jurisdiction of the Oglala Sioux Tribe under any law of the United States. *Note: This may refer to the controversial issue of lands which are covered by treaty.*

- Covered employers must:
 - Give preference to resident Indians over nonresident Indians.
 - Grant preference to Indians over non-Indians in hiring, promotion, training, and all other elements of employment.
 - Grant preference to certified Indian-owned firms, with a principal place of business within the Reservation, over certified Indian-owned firms with a principle place of business outside the boundaries, in awarding contracts and subcontracts.
 - Employers must grant preference to certified Indian-owned firms, without regard to location, over non-certified firms with some Indian ownership, in awarding contracts and subcontracts.
 - Employers must give preference to non-certified firms with some Indian ownership with principal places of business within the Reservation over non-certified firms with some Indian ownership, regardless of the place of the principal place of business.
 - Employers must give contracting and subcontracting preference to non-certified firms with some Indian ownership, regardless of their principal places of business, over non-Indian-owned firms.

There is a Tribal Employment Rights Office with the general authority to implement the Indian preference policy with the specific duty of the “daily implementation” of this Ordinance. There is a Tribal Employment Rights Office to prosecute claims of noncompliance before the Tribal Employment Rights Commission.

The Director of the Office has the authority, duties, and responsibilities to:

- Develop and maintain a register with the names of Indian-owned firms certified for Indian preference by the Commission, and an identified of the respective areas of work for which the firms are considered

qualified.

- Develop and maintain a coordinate plan with the Pine Ridge Agency of the Bureau of Indian Affairs to disseminate the certificate register to all appropriate covered employers.
- To develop and maintain a plan to disseminate this Ordinance and any rules, regulations or guidelines of the TERO Commission, to all covered employers and all governmental entities letting contracts within the exterior boundaries of the Reservation.
- To ensure compliance with the Ordinance and any regulations.
- To enter into negotiations with employers to resolve, on an informal and voluntary basis, any claim of noncompliance.
- To inspect non-privileged information in the books and records of employers to ensure compliance with the law.
- To conduct on-site inspections at any time during the actual operation of the business for monitoring and compliance.
- To review Indian preference applications and conduct investigations on qualifications and submit an analysis and recommendations to the Commission.
- To initiate proceedings before the Commission to suspend or revoke an Indian preference certification of a firm when changed circumstances warrant.
- To monitor and ensure the collection of employment rights fees.
- To secure additional funding from alternative sources.
- To implement and maintain a Tribal hiring hall form for employers to select and employ qualified Indians.
- To establish minimum numerical hiring goals and timetables with the minimum number of qualified Indians an employer must employ, by craft, skill area, or job classification.
- To require employers to establish and maintain job training or apprenticeship programs to assist Indians to become qualified in

various crafts skills areas or job classifications.

- To prohibit employers from instituting and using job qualification criteria or personnel requirements which are barriers to the employment of Indians, unless the criteria are required by business necessity.
- To enter into negotiated agreements with unions to ensure union compliance with the Ordinance.
- To work in conjunction with federal agencies with regulations which provide for Indian preference in employment and contracting to coordinate Indian preference requirements, monitoring, and sanctioning activities.
- To assume the power of the Tribal Employment Rights Commission in emergency situations or under exigent circumstances.
- To take other actions or engage in other activities to achieve the purposes and objections inherent in the policy of Indian preference in employment and contracting.

There is a Tribal Employment Rights Commission, as follows:

- The Commission has five members who are appointed by the Tribal Council. One of the members must be a member of the Tribal Council. The terms of office is at the pleasure of the Tribal Council.
- The Commission has the general authority to implement and policy of Indian preference, and it has the specific authority to:
 - Establish and implement rules and regulations for all activities and procedures of the Commission;
 - Issue rules, regulations, and guidelines to implement the Ordinance;
 - Meet with the TERO Director and staff on a monthly basis to receive updates on the operation of the TERO Office;
 - Hold formal hearings, issue notices of hearing, subpoena witnesses and documents;
 - Impose any sanctions and grant any relief as authorized and prescribed in the Ordinance;

- Require covered employers to pursue corrective actions to come into compliance with the Ordinance;
 - Take other actions and engage in other activities to achieve the purposes and objectives of the Indian preference policy.
- There is an employment rights fee for covered employers of 5 of the total gross contract price per contract.
- There is a complaint and hearing procedure which provides:
 - Any person who believes that another has failed to comply with the Ordinance can file a written complaint with the TERO Office, whether or not that person suffered personal harm as a result of noncompliance.
 - Upon the filing of a complaint, the TERO Director must give written notice of the alleged noncompliance to the person against whom the allegation is made. The TERO Director must meet with that person in three days from the receipt of the notice to attempt to achieve a voluntary, information resolution of the matter through negotiation. If a resolution cannot be achieved at the end of a three day period, the Director must notify the Commission and request that it set a date for a formal hearing.
 - Upon the receipt of a request for hearing, the Commission must give written notice of a hearing, which advises each interested person of the person against whom the allegation has been made, the complainant, the TERO Director, and all other identified interested persons of the date, time and location of the hearing. The notice must advise each interested person of the nature of the hearing, the right to be present and participate, the right to present testimony and evidence and cross-examine, and the right to be represented by counsel at one's own expense. The Commission can issue subpoenas and direct the TERO Director to assist the complainant in presenting the claim.

There are rules of procedure which must be "recognized and adhered to," including:

- Each notified interested person has the right to be present at and participate in the hearing;
- Each has the right to present relevant sworn testimony and documentary evidence;

- There is a right to call witnesses and to cross-examine other witnesses;
- There is a right to counsel;
- The Chairman of the Commission must preside;
- Formal rules of evidence or procedure are not followed, but the Commission “shall proceed to ascertain the facts inherent in the matter in a reasonable and orderly manner;”
- There must be a complete transcript of proceedings;
- The Commission can continue hearings;
- The burden of proof is a preponderance of evidence. *Note: This does not indicate who bears the burden of proof. Customarily, the burden is upon the person who makes the accusation;*
- The Commission must issue a decision within three days of the date of the conclusion of the hearing.

The Commission can impose sanctions for noncompliance.

- The Commission can impose any one or a combination of sanctions for noncompliance, including:
 - A civil monetary fine of up to \$500 per violation, with each day of noncompliance constituting a separate violation;
 - Suspension or termination of the right to conduct business, with a reasonable period of time to remove equipment and other property and to arrange the assumption of outstanding contractual obligations with another person;
 - Prohibition of the future conduct of business within the Reservation for a definite or indefinite period;
 - Monetary or other appropriate relief as damages to compensate any person harmed by noncompliance;
 - An order for the immediate termination of any individual hired in contravention of TERO Indian preference requirements;

- An order for the immediate rescission of any contract or subcontract entered into in violation of TERO requirements;
- An order to employ, promote, or train any Indian individual adversely affected by noncompliance;
- An order to award a contract or subcontract to a qualified Indian-owned firm adversely affected by noncompliance;
- Order the award of back pay to adversely affected individuals;
- Order an employer to make changes in policies, procedures or conduct to secure compliance;
- If no appeal is filed within 21 days of a Commission decision, and the parties has failed to pay damages or comply with orders, the Commission may order the tribal police to confiscate, and hold for sale, such property as is necessary to ensure payment or compliance. The police have the authority to sell the property 30 days after confiscation and notice;
- The Commission can grant such other or further relief or sanctions that the Commission deems just and property. *Note: This can be a troublesome power if a lay body levies penalties which are excessive.*

Publication of the ordinance:

- Publication includes actual publication, “directing” copies to employers and government agencies, and a requirement for the TERO staff to ensure that all bid announcements issued by governments and other agencies comply.
- Employers must make written reports to the TERO Office as required by it, except for confidential information for valid business purposes. All written materials maintained by the TERO Office are “strictly confidential,” and the Office and its staff must maintain confidentiality.
- The TERO Director and staff and members of the Commission have the right to conduct periodic on-site inspections during the time of actual operation of the business to monitor compliance. They have the right to speak with a contractor, subcontractor, or employee on the site so long as the conversation does not interrupt business.
- Employers who intend to do business within the Reservation must first consult with the TERO Director and staff regarding Indian preference and the employer’s obligations.

- If an employer intends to enter into a collective bargaining agreement with a union, that employer must ensure that the agreement includes preference requirements, and the agreement is subject to the TERO Director's approval.
- Oglala Sioux Tribe police officers are authorized and directed to take reasonable enforcement actions to enforce cease and desist and related orders that are issued by the Commission, and Commission orders do not require an accompanying or affirming judicial order.
- Employers must accommodate the religious beliefs, traditions, and practices of Indian employees and Indian-owned firms. Comment: There are cultural considerations to doing business in Indian Country, including accommodating religious practices, such as leave for ceremonies and other religious events. This is an important provision.
- No person shall harass, intimidate or retaliate against the TERO Director, any staff member, or any member of the Commission. The TERO Director may issue a warning, describing the prohibited conduct, and request a formal hearing before the Commission if the warning is disregarded.
- Guidelines issued by the Commission are incorporated in the Ordinance by reference.
- Commission rules and regulations are subject to review and comment by interested persons who reside within the Reservation, the Commission must:
 - Publish proposed rules and regulations once in every newspaper with a principal place of business within the Reservation;
 - Receive written comments for 20 days following publication;
 - At the same time, the Tribal Council must review and discuss comments;
 - The Council then does a final review of the proposed rules and regulations, with consideration of changes based upon the comments, and approve and adopt the rules and regulations.
 - The adopted rules and regulations are forwarded to the Secretary of the Interior for review and approval. *Note: The secretarial approval requirement is a matter of local law and a governing tribal constitution. Under most constitutions with secretarial approval, council resolutions must be approved. That does not apply, however, to delegated rulemaking power so long as the delegation is approved by the Secretary.*

- There are severability, time for coverage, and effective date provisions.

There is a Wage and Hour Enforcement Office within the Tribal Employment Rights Office which has the authority to establish Tribal Wage Rates for employees of construction projects, which can establish by regulation a method of surveying the wage rates throughout the Great Sioux Nation as established by the Treaty of 1868, and the TERO Director has the authority to issue wage and hour determinations in accordance with the Wage and Hour Enforcement Office's regulations. The Commission has the authority to enforce wage and hour determinations and decisions using the same procedures as the TERO Ordinance. Future contracts for the construction, repair, modification, or enhancement of property will be issued without first submitting a copy of the plans, specifications, advertisement for bids, general and special conditions, and instruction to bidders to the TERO Office at least 30 days prior to bid opening.

While this is a fairly standard ordinance, compared with the others reviewed above, it is unique in the way it addresses employee religious freedom and its method for setting prevailing wages for construction. There is an extensive statute to guide the Office of Navajo Labor Relations, but this statute vests the authority to set prevailing wages to a special office, with the authority to make regulations. That may be a more flexible way to satisfy the new provisions of NAHASDA, because there will be certain difficulties and issues about the method to set prevailing wages in the future, and the ability to establish a methodology by regulation allows for flexibility and prompt action.

11. Stockbridge-Munsee Tribe Employment Rights Ordinance

While most of the codes reviewed thus far are "TERO Ordinances" which focus upon Indian preference in employment, the Stockbridge-Munsee Employee Rights Ordinance is an example of a general labor code. Its provisions are:

A preamble which addresses the maintenance of peace and good order and the regulation of economic activities, and which recognizes the need to create laws to govern and protect its employees, "especially where state and federal laws do not apply."

The purpose of the ordinance is to address differences between employees and supervisors, protect employee rights, including a stable working environment, the right to file grievances, and seek assistance to solve on-the-job problems through established policies and procedures. The Tribe defines and establishes employee rights and a grievance process to give an opportunity to have recourse for their grievances.

There are several definitions, including:

- A "corrective action" is documented oral warnings, written warnings,

probation or suspension;

- To “discriminate” is to refuse to hire, to terminate or to treat a person differently with respect to promotion, compensation or other terms and conditions of employment;
- An “employee” is any individual or appointee hired or appointed by the Stockbridge-Munsee Community or a subordinate organization;
- The “employee handbook” is the “Information Handbook for Employees of Mohican Nation” which was effective on October 1, 1996, or any successor document adopted by the Tribe;
- “Established policies and procedures” are the policies, guidelines and procedures in the Employee Handbook and its inserts or any resolutions or ordinances adopted by the Tribal Council;
- “Exempt employees” are employees who are exempt from the overtime pay provisions of the Tribal Fair Labor Standards Ordinance. Exempt employees are paid a salary and do not earn overtime pay for hours worked over 40 hours per week;
- “Nonexempt employees” are all employees who are not exempt employees;
- An “orientation period” is a period of up to 120 days during which employees are subject to “rigorous performance evaluations;”
- “Political appointees” are employees hired by the Tribal Council to serve at the pleasure of the Tribal Council. They are high level executive positions that are so vital to the execution of the Council’s policies that the Council must be free to entrust the positions to individuals who enjoy the Council’s complete confidence. Political appointments are not subject to the employment posting policy;
- “Probationary employees” are employees who have not successfully completed the orientation period;
- “Reasonable accommodation” means reasonable modifications or adjustments to the work environment or the manner or circumstances under which a position is customarily performed, that enable a qualified person with a disability to perform the essential functions of the position if such accommodation does not cause the Tribe, or an employing agency, undue hardship. “Reasonable accommodation” does

require measures that would result in an expenditure of tribal funds;

- “Restricted duty” means restrictions on an employee’s hours or work duties that temporarily prevent the employee from performing all essential job duties but to not prevent the employee from performing some essential duties, provided that the restrictions are recommended by a physician, subject to a review by a physician selected by the Tribe;
- “Sexual harassment” means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. It includes conduct directed by a person at another person of the same or opposite sex.

The basic rights of all employees cover the following areas:

- Unemployment compensation;
- Basic human rights in regard to age, sex, disability, race, creed, religion, political affiliation, national origin, color, sexual orientation, marital status and ancestry. Employees shall not be discriminated against in these basic rights, provided that:
 - This shall not infringe on the right of the tribal government to discriminate based on tribal political affiliation with respect to political appointees;
 - It is not a violation to treat a person differently based on disability if the disability prevents the person from adequately performing all essential job duties and no reasonable accommodation is available;
 - It is discrimination based on sex to discriminate based on pregnancy, childbirth, maternity leave or related medication conditions; and
 - It is not a violation to discriminate based on sex where sex is a bona fide occupational qualification.
- Employees are entitled to leave benefits consistent with the federal Family Medical Leave Act unless superseded by a tribal act;
- While the Council has the sovereign right to bar labor union organizing from the reservation, it recognizes the right of employees to meet during nonworking hours to discuss their common interests in regard to employee workplace issues

and concerns without threat of retaliation or dismissal;

- Employees are entitled to compensation vacation time, sick time, funeral leave, National Guard and reserve call-up time, as provided in established policies and procedures;
- An employee unable to vote during nonworking hours has reasonable time off with pay to vote in tribal, federal, state or local elections, in according to established policies;
- There is a guarantee of equal pay for men and women doing the same job;
- All types of sexual harassment are prohibited, and all employees shall be treated with courtesy, respect and dignity;
- Employee privacy will be protected in:
 - Safeguards from unauthorized use of personnel records, including background investigations;
 - Interview boards will maintain full confidentiality of information given during their involvement in the hiring process;
 - Employees may review and copy their personnel files except for (a) records of possible criminal offenses, (b) letters of reference for the employee, (c) materials used for staff management, (d) information that would invade another person's privacy, or (e) records relevant to a pending claim between an employer and the employee;
 - No employee will be subjected to random drug testing more than three times in any twelve month period, except for employees with a previous positive finding in a drug test or employees under suspicion of drug use;
- Any Employees Assistance Policy (AEAP") in effect at the time of employment will be enforced. Employees who fail "related testing procedures," including those for medical problems, will be provided treatment under the EAP, if the employee has not been guilty of conduct that merits termination;
- Employees must not be retaliated against, harassed or dismissed when they report violations of any rules, regulations, laws, ordinances, or policy at any level of government or employment to the tribal government;
- Employees cannot be terminated from employment without just cause; and

- Established personnel policies shall reflect these listed rights.

There are other rights which are not subject to grievances, including:

- The Tribal Fair Labor and Standards Ordinance;
- Workers Compensation and Disabilities, as adopted by the Tribe;
- A safe work place, including buildings, environment, equipment, safe work practices and safety education and training;
- A required enforcement of policies to protect workers from harassment and sexual harassment, such as threats, intimidation, physical or verbal abuse, from co-workers or non-employees during working hours.

There are different classes of rights for purposes of appeal: Some rights are appeal able to the Tribal Court, and other issues are handled in internal grievance process in the Employee Information Handbook. An employee must exhaust internal grievance process before a Tribal Court appeal is available. Where there is a termination, an employee may waive the internal grievance process and file a claim with the Tribal Court. The Human Resources Director may waive exhaustion of the internal grievance process upon a showing that it would not further the process of resolving the problem.

An employee must initiate the internal grievance process or court action within 30 calendar days of the event or events that give rise to the employee's claim.

The court procedures are:

- A petition can be in any written format, but must include this information:
 - Name and address of the petitioner;
 - An identification of which rights have been violated;
 - A brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner's supervisor;
 - A specific request for relief.
- The employer must file a written answer within 20 days.
- After the answer is filed, the court must schedule an informal conference to discuss

preliminary matters, including scheduling, motions, discovery and whether there is a possibility of settlement.

- At trial, the petitioner has the burden of proof to show a violation by a preponderance of evidence.
- Upon a finding of credible evidence that a violation has occurred, the court can order back pay up to one year's wages, reinstatement, or any other non-monetary remedy tailored to remedy the violation.
- There is a Tribal Peacemaker Ordinance, which can be used in employment disputes.

There is a separate Stockbridge-Munsee Employee Preference Policy Ordinance, in Chapter 54 of its Code, which provides:

- The purpose of the ordinance is the optimum employment of Indian people in the Community, and their spouses or related family members, to build self-sufficiency, sovereignty and an economy that combats poverty and social ills, and assures that the Community receives the maximum benefits generated by its entities and enterprises. Discriminatory employment practices must not be tolerated. The purpose of the ordinance is to provide maximum employment opportunity and preference in hiring, promotion, transfer, training, lay-offs, interim appointments and all other aspects of employment.

The relevant definitions are:

- An “employee” is any person paid wages, salary, or stipend by the Community or any of its entities and enterprises;
- “Employer” means the Community, its subdivisions, entities and enterprises, and it also includes the Mohican Housing Authority;
- “Preference” means people will be employed according to a priority listing as long as they meet the qualifications of the job description or job announcement;
- “Meet qualifications” mean that the applicant or employee possesses the skills, education, experience or other job-related requirements in the job description or job announcement;
- “Enrolled Member” means a person who is officially enrolled;
- “Direct Descendant” means any person whose biological father or biological mother is an enrolled member;

- “Spouse” means the legally married spouse of an enrolled member;
- “Other Indian” means any person who is enrolled in a federally recognized or state recognized Indian tribe, or any Tribe recognized by the Stockbridge-Munsee Tribal Council.

Establishing Preference

- Preference must be given when it is established that the employee or applicant meets the qualifications in the job description or announcement. If that person has the qualifications, he or she is eligible for the position and shall not be denied if another person at a lower preference has higher qualifications than those necessary for the position. If more than one person on the same preference level meets qualifications, the decision-makers have discretionary power. Job qualification requirements which are not necessary to the position and which act as barriers to employment preference are prohibited.

The order of preference for hiring, promotion, transfers, training, lay-offs, interim appointments, and all other aspects of employment is:

- Enrolled member;
- Direct descendant;
- Spouse;
- Other Indian.
- The ordinance applies to all entities, enterprises, and organizations operating under the Community.
- The Ordinance is enforced by the Human Resources Department or hiring agencies. When an employee is hired, the hiring committee or official must complete an “Employment Preference Compliance Report,” and it must be completed and signed by the appropriate Human Services Director.
- This ordinance is to be read with the Employee Rights Ordinance to give the employee or applicant the maximum benefits of both. If there is any dispute or conflict in the language and provisions of the ordinances, the dispute must be resolved in favor of the employee or applicant.
- There is an effective date.

- The remedies include suit in the Tribal Courts by employees or application. Money damages are not available in any suit, and the sole remedy is appointment to the job, promotion, transfer, or interim appointment that was denied as the result of a violation. The complainant may also be given a similar unfilled position if one is available. A complaint must be filed in Tribal Court within five business days of receipt of notice that the applicant did not receive the position.

These are unique statutes. The Employee Rights Ordinance is largely civil rights based, and it incorporates separate personnel policies by reference. The Employee Preference Policy Ordinance is restricted to tribal employment programs. There is reference to a casino and casino employment in the Preference Policy Ordinance.

12. Tlingit-Haida Tribal Employment Rights Ordinance

Title 7 of the Tlingit-Haida Code covers the Tribal Employment Right's [sic] Office. It provides that:

- The Central Council creates the ACCTHITA Tribal Employment Rights Office (TERO)" as a section of the Employment and Training Division, and:
- The TERO Officer is appointed by the Manager of the Employment and Training Division, subject to approval of the President.
- The Office can issue rules, regulations and guidelines, as approved by the Council, for employment rights.
- "Native organizations" with five or more employees, operating "within the exterior boundaries of the Central Council communities," are required to give Indian preference, and they are required to comply with the rules, regulations and guidelines of the TERO Office.
- Employers with collective bargaining agreements must secure written agreements from unions to comply with the Indian preference law.
- An employer that does not abide by the law are subject to sanctions, including the denial of the right to commence business, the suspension of operations, the denial of the right to conduct further business, and the payment of back pay or other relief.

The TERO Officer may:

- Impose numerical hiring goals and timetables, and specify the minimum

number of “Natives” an employer must hire, by craft or skill level;

- Require participation in training programs;
- Establish a tribal jobs pool and require that no employer may hire a non-Native until the jobs pool has certified that no qualified Native is available to fill the vacancy;
- Prohibit employment criteria that are barriers to Native employment unless they are a business necessity;
- Make agreements with unions;
- Require preference in the award of subcontracts;
- Establish counseling programs;
- Take other actions necessary to achieve the purposes of the law.
- There is a provision for cooperative agreements with federal employment rights agencies.
- There is provision for an employment rights fee.

This is an unusual law, in that it binds “Native organizations” only, using the usual TERO model, but we do not know what a “Native organization” happens to be.

13. Turtle Mountain Band Tribal Employment Rights Office

The Turtle Mountain Band of Chippewa Indians is unique among the various Indian nations, because several years ago, it commercially published (Allen-Smith Company) a code which is essentially a version of the Field Code, a codification of English-American common law which was also adopted by California, Montana and North Dakota. It appears, however, that the Turtle Mountain Band is separately publishing other, more specific, subject matter statutes. Among them is the Tribal Employment Rights Ordinance. It provides:

General provisions and purpose:

- This is the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance.
- There is a policy to promote employment opportunities for Indians and business opportunities for Indian firms and contractors and provide direction,

management and business standards for the Reservation. The tribal work force must have an opportunity to gain employment on or off reservation through preference in harmony with congressional enactments giving Indians special employment rights.

Definitions:

- Employers may seek clarification on all TERO requirements and definitions at a pre-bid conference for any on-reservation construction project or by directing inquiries to the TERO Commission.
- An “employer” is any person, business, company, contractor, subcontractor, or other entity located or engaged in work on the reservation, employing one or more persons, without regard for whether the employer or its owner is Indian or non-Indian or a tribal member or not. The term excludes federal, state, county and tribal government. Tribally-owned or tribally-chartered private, for profit corporations, are employers. Tribally owned or tribally chartered nonprofit corporations are also employers. Indian organizations under the Indian Self-Determination and Education Assistance Act are employers. Tribally owned corporations are also employers.
- A person is “engaged in business on the reservation” if, in connection with any portion of a business enterprise or specific project, contract or subcontract, the employer or any of its employees or agents perform work within the exterior boundaries of the reservation. Employers with both on-reservation and off-reservation business locations are subject to TERO in their off-reservation locations of they are on lands adjacent to the reservation.
- An “Indian” is any person recognized as an Indian by the United States Government pursuant to its trust responsibility. The recognized preferences are for (1) Indians residing in Rolette County, North Dakota; (2) Indians residing in other counties in the State of North Dakota; and (3) any Indian recognized by the U.S. government pursuant to its trust responsibility wherever residing.
- “Residence” or “residing” means the place of domicile of the applicant at the date of seeking employment or contracting preference, and resides within 90 days of the application. Domicile is the place where an individual has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.
- An “Indian-owned business” is a business entity (in whatever form) that is at least 51% owned by a federally recognized Indian Tribe or by Indians, which has been screened and certified by the MBE/WBE office or the Indian Business Development Center in Bismark, North Dakota. Note: The statute does not

define what an AMBE/WBE” office is or describe the two programs.

- An employer is “located on the reservation” if doing business or performing work within the exterior boundaries of the reservation.
- The “Reservation” is the Turtle Mountain Reservation proper and all tribal land and trust property held by the U.S. Government for the Tribe in Rolette County, North Dakota, including all land within the exterior boundaries and the tribal land and trust property. *Comment: The wording of this definition does not tell us the precise land status involved here. It tells us that all “tribal land and trust property” in Rolette County is included, and that would likely refer to lands held in trust for the tribe and individual allotments. They’re many individual off-reservation allotments in that region.*
- A “key position” is an ongoing position where a person is a permanent employee for a period of one year prior to the contract and it is vital to the contractor’s ability to perform the contract as he bid it, or to the special operation of a crew familiar with each other in their duties to be performed. *Comment: This is a different statement of the “core crew” exemption to Indian preference hiring that is frequently a problem. The difficulty lies in the definition of a contractor’s bona fide employees who have already been working for a period of time, and workers the contractor relies upon to regularly complete contracts.*

The Turtle Mountain Chippewa Tribal Employment Rights Commission:

- The Commission is made up of one council member (with an alternate council member) appointed by the Council and four members appointed by the Council at large from the reservation community. The Council appoints the chairman.
- Commissioners hold office for two years.
- A commissioner may be removed by the Council upon conviction of a crime, gross neglect of duty, misfeasance or malfeasance in office, ineligibility to serve, or for missing three consecutive meetings without good cause. Specific written charges must be given ten days before a Council hearing for removal, and the commissioner has an opportunity to answer the charges before action.
- If a commissioner dies, resigns, is incapacitated, leaves the reservation, or is removed from office, the Council must appoint an eligible person to fill the vacancy for the remaining term of office.

- The Commission has the general duty to administer the employment rights program in accordance with the Ordinance.

The Commission's powers are to:

- Establish rules and regulations for the activities of the Commission, with the approval of the Council;
- Set a minimum wage scale for construction employment at the beginning of each calendar year;
- Expended appropriated funds;
- Obtain funding from federal, state or other sources;
- Impose numerical hiring goals and timetables, specifying fair minimum number of Indians an employer may hire by craft or skill level;
- Promote employer-training programs to increase the pool of Indians eligible for employment;
- Assist the TERO Director in administering a tribal hiring hall;
- Require that an employer may hire non-Indians for non-key positions only after the hiring hall has certified that qualified Indians are unavailable to fill vacant positions;
- Prohibit employers from using job qualifications criteria or personnel requirements that bar Indians from employment unless they are required by business necessity;
- Enter into agreements to insure union compliance with the Ordinance;
- Give preference to tribal and Indian-owned business in the award of contracts or subcontractors;
- Establish counseling programs to assist Indians to retain [sic] employment.
- Hold hearings and subpoena witnesses and documents;
- Require employers to submit reports and take actions deemed necessary for the fair and vigorous implementation of the Ordinance;

- Enter into cooperative agreements with federal employment rights agencies to eliminate discrimination against Indians;
- Take such other actions as are deemed necessary to achieve the purpose and objectives of the Ordinance.

Turtle Mountain Chippewa Tribal Employment Rights Program:

- All employers are required to give preference to equally qualified Indians in hiring, promotion, training, and all other aspects of employment, contracting and subcontracting. That applies only to facilities or components or divisions of an employer located on or engaged in business on the reservation, or for employers with both on-reservation and off-reservation. Those employers are also subject to the TERO in their off-reservation locations, if they are on lands adjacent to the reservation.
- Indian preference is binding on all contractors, subcontractors, and minority businesses, regardless of tier. The TERO Commission is responsible for insuring that they comply with the requirements.
- The Commission must establish the minimum number of Indians each employer should employ during any year that he or any employees are located or engaged in work on the reservation. There must be numerical goals for each craft, skill area, classification, etc. used by an employer, including administrators, supervisory and professional categories. The goals must be expressed in terms of number of Indian employment as a percentage of the total man-hours worked by the employer's workforce in the particular job classification. Numerical goals must be based on surveys of available Indian manpower pool and of projected employment opportunities. New employers must meet with the Director or the Commission as long before actually beginning work as possible and give the Commission a list of the number and kind of employees expected to be employed. The Commission and Director must then set specific goals and timetables for the employer, and the employer must agree to meet the goals in writing. For existing employers, the goals are set as a percentage of new employees expected to be employed in the coming year. The Commission must review goals every year to reflect changes in the number of available Indians or changes in employer hiring plans. Employers must submit monthly reports. If the Commission or the Director has reason to believe that an employer is violating the Ordinance by not meeting goals, the Commission or the Director may file a complaint. The Commission has the initial burden of proving that the employer has failed to meet its goals. Upon proof of such a failure, the employer has the burden of proving that it has met or is meeting its goals or has made a good faith effort to meet its

goals. There is no excuse that the employer has a collective bargaining agreement and the union has failed to refer Indians.

- Employers must participate in training programs to assist Indians to become qualified in the employer's various job classifications. Employers must employ the maximum number of Indian trainees or apprentices' possible. The Commission can set a ratio of trainees to qualified workers in consultation with the employer. The number of Indian trainees in construction projects must be one trainee for every four journeymen. Employers with a collective bargaining agreement with a union but get an agreement by the union to establish an advanced journeyman upgrade and apprenticeship program.
- Employers are prohibited from using job qualification criteria or personnel requirements which bar Indians from employment. The Commission has the initial burden to show that a job qualification or criterion is not required by business necessity. Upon prima facie proof that a given qualification or criterion is not necessary, the employer has the burden to prove that it is.
- The Commission must establish and administer a tribal hiring hall. An employer may recruit from any source by the process it chooses, but an employer may not hire a non-Indian until it gives the Commission or Director a reasonable time to locate a qualified Indian and the tribal hiring hall has certified that a qualified Indian is unavailable.
- The Commission must establish counseling and support programs to assist Indians to obtain employment. Employees must cooperate with the Commission for such programs.
- Every employer must give preference in the award of any contract or subcontract to Indian-owned businesses, and their names must be supplied to employers for their use. Employers must take every step feasible to identify or locate Indian-owned businesses. A 10% preference will be given to qualified Indian owned businesses in Rolette County.
- No Indian worker may be laid off or terminated in a reduction in force if a non-Indian worker in the same job classification is still employed, unless the termination is under a lay-off procedure previously agreed to by the Commission in writing. A non-Indian must be terminated first of the Indian has the minimum qualifications for the job classification.
- Indians must be given preferential consideration for promotions, and they must be encouraged to seek them. When a supervisory position is filled by a non-Indian, the employer must file a report with the Commission on

efforts to inform Indian workers of the position, what Indians applied, and why any Indian was not hired.

- Employers must give Indian students preference for summer student employment, and employers must make best efforts to promote after school, summer and vacation employment for Indian students.

Fee Assessment:

- Contractors, subcontractors, and business entities with a negotiated contract of \$10,000 must pay a one-time fee of 3% of the total amount of the contract. This applies to construction contractors, manufacturers, material men and suppliers. A 3% fee also applies to professional services, A/E [architectural and engineering] firms, consultants and legal services, regardless of dollar amount.
- Fees paid to the TERO Office are to be placed in the general account for the Council to appropriate for use by the Commission.
- Any person, employer, or vendor doing business in the reservation must obtain and maintain a tribal business license before commencing work. Licenses are issued annually.

Every union with a collective bargaining agreement with an employer must file a written agreement it will comply with the Ordinance. An employer may not commence work on the reservation until the agreement is filed with the Director or the Commission.

- Every union agreement must provide that:
 - The union will give absolute preference to Indian residents in job referrals;
 - The union will cooperate with the Commission or Director;
 - The union will allow Indians to register for job referral lists by telephone or mail;
 - The union will establish a journeyman upgrade and advanced apprenticeship program;
 - The union will include all Indians who qualify for journeyman or apprenticeship status and wish to join the union;
 - The union will grant temporary work permits to Indians who do

not wish to join the union.

- Employers will provide a model union agreement for use by unions.
- This Ordinance is not a waiver of sovereign immunity.

Complaints and hearings:

- The Commission or Director, an individual employee, or a union may request a hearing, in which case written notice of a hearing must be given to all parties concerned of the nature, time and place of hearing and the evidence to be presented. The notice must advise the parties of their right to be present and to present testimony and other evidence, the right to be represented by counsel at their own expense, and that the Commission may be represented by the tribal general counsel.
- If the Commission or Director believes that an employer, contractor, subcontractor, or union has failed to comply with the law, they may file a complaint and notify the party of the alleged violations. The Commission or Director must attempt to achieve an informal settlement, and if that cannot be achieved, the Commission or Director may request a hearing.
- If an Indian believes an employer has not complied with the law, or believes that he or she has been discriminated against for the fact of being an Indian, that person may file a complaint in writing with the Director, specifying the violation. The director must then investigate and attempt to achieve an informal settlement. If that cannot be done, the individual or the Director may request a hearing. Retaliation for exercising such rights is prohibited.
- If an employer or union believes that any provision of the law or an order that is illegal or unclear, it can file a complaint with the Director. The Director must investigate and attempt an informal settlement, and if that cannot be achieved, the employer, a union, or the Commission may request a hearing.

The rules for hearings are:

- All parties may present testimony and other evidence and may be represented by counsel at their own expense;
- The Commission must tape proceedings and preserve all tapes, pleadings and physical evidence, which are the record for any appeal;

- The Commission may have the advice and assistance of the tribal general counsel;
- The Chairman or Vice Chairman must preside, and formal rules of evidence do not apply, but the Commission shall proceed to ascertain the facts in a reasonable and orderly fashion;
- Any matter to be proven must be established to the satisfaction of the Commission or the preponderance of the evidence. Note: The “satisfaction of the Commission” standard instead of the civil preponderance rule could lead to accusations of bias or the lack of a fair hearing;
- A hearing can be continued at the discretion of the Commission or Director;
- The Commission may take immediate action or take the matter under consideration at the conclusion of the hearing;
- The Commission or Director must notify the parties of its decision in 30 days;

The Commission can issue subpoenas;

- A party leaving a scheduled hearing will be subject to entry of an adverse finding by default, unless authorized by the Commission;
- Any party who does not appear for a scheduled meeting will be subject to an adverse finding by default unless the absence was approved by the Commission;
- Complaints must be filed with the TERO Office within 30 days of the incident.

The penalties for violation are:

- Denial of the right to commence or continue business inside the Reservation or adjacent tribal land;
- Suspension of all operations inside the reservation;
- The payment of back pay to compensate any injured party;

- An order to summarily remove an employee hired in violation of the law;
- Monetary civil penalties;
 - A prohibition from engaging in any future operations on the reservation;
 - An order requiring employment, promotion and training of Indians injured by violations;
 - An order for changes in procedures or policy necessary to eliminate the violation;
 - An order for any other provision to eliminate the violation;
 - There is a maximum penalty of \$500 for each violation, and each day a violation exists is a separate violation;
- The Commission or Director may apply to the Tribal Court for an order to enforce any final Commission order.
- There is a right to appeal a Commission decision to the Tribal Court. The Court of Appeals (with a law trained judge presiding) has the jurisdiction to reverse, affirm or modify any Commission decision if the order was not supported by substantial evidence or the decision was clearly erroneous as a matter of law.
- The Tribe must appropriate funds as necessary and available to establish training programs to prepare tribal members for job opportunities.
- The Commission or Director must notify all employers of the Ordinance and obligations to comply. All bid announcements must have language that the successful bidder will be obligated to comply with the law. The Tribal Council may issue business licenses to employers. The Director must send a copy of the Ordinance to every employer operating on the reservation.
- No new employer may commence work until it has a license and consulted with the Commission or Director and developed a plan to meet its obligations under the Ordinance.
- Employers must submit reports and other information to the Director or Commission. The Director has the right to make on-site inspections during regular working hours to

monitor compliance, and the right to inspect and copy relevant records. All information collected by the Director is confidential unless disclosure is required for a hearing.

- One section sets out a tribal minimum wage scale for various occupations, subject to revision.
- There is a severability section.
- The Indian preference requirements set by the Ordinance are separate and apart from federal Indian preference requirements. *Comment: One of the dangers of basing tribal law on federal statutes or incorporating federal statutes or regulations by reference is that there may be unfavorable changes or judicial interpretations other than what the tribe intends. This is a good provision to prevent federal court decisions in separate civil rights-discrimination cases from binding the tribe.*
- Where there is a construction contract of \$500,000 or more where the Tribe or the Turtle Mountain Housing Authority or any other tribal agency or instrumentality solicits bids, there are special rules:
 - Where the entity soliciting bids has a project team to oversee the project, the TERO Director will be a non-voting member of the team during the pre-bid and construction phases of the project.
 - Where there is such a team, it must approve numerical goals and there can be no enforcement proceeding unless it is cleared with that team.
 - The TERO Office or tribal legal counsel must answer all written requests for pre-bid interpretations of TERO requirements.
 - All day-to-day TERO office functions continue to apply to such projects.

This is another example of what might appear to be a “boilerplate” TERO law, but there are significant minor changes and additions in this law, as there are in the others. This ordinance also suffers from a lack of clarity in the duties of the Commission and the TERO director, would could be the basis for a claim of the lack of a fair hearing or pre-adjudication bias by the Commission.

14. Umatilla Tribe Employment Rights Ordinance

The Umatilla Employment Rights Ordinance provides that:

Definitions:

- An “employer” is any person, company, contractor, subcontractor, or other entity located or engaged in work on the Reservation, or other entity engaged in work on the Reservation. The term also includes state, county, tribal, and contractors of all governmental agencies.
- An employer is “engaged in work on the Reservation” if during any portion of business enterprise or a specific project, contract, or subcontract, he or any of his employees spends a majority of time performing work within the exterior boundaries of the Reservation on a continuing basis.
- An “Indian” is any person recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.
- An “Indian-owned business” is a business entity of which at least 51% is owned by Indians.
- “Located on the reservation,” means that if during any portion of a business enterprise or specific contract or subcontract, he maintains a temporary or permanent office or facility within the exterior boundaries of the Reservation.
- The term “reservation” means the Umatilla Indian Reservation, Oregon.

Umatilla Tribal Employment Rights Office:

- The director is appointed by the Tribal Chairman with the approval of the Tribal Board. The director has the authority to hire staff, expend appropriated funds, and seek other funds. The Office has the authority to issue rules, regulations, and guidelines to implement employment rights, hold hearings, subpoena witnesses and documents, require employers to submit reports, and take other action for the fair and vigorous implementation of the ordinance.

Umatilla Employment Rights Program:

- All employers operating within the exterior boundaries must give preference to Indians in hiring, promotion, training, subcontracting, and all other aspects of employment, and comply with Indian preference laws.
- An employer with a collective bargaining agreement must work with the

Office to obtain a written agreement from the union that it will comply with Umatilla Indian preference laws. The agreement is subject to the approval of the Office. An agreement is not official recognition or sanction of any union.

- Any employer who fails to comply with the law or fails to obtain necessary agreements from a union is subject to sanctions, including: denial of the right to commence business, fines, suspension of the employer's operation, termination of the operation, denial of the right to conduct further business, payment of back pay or other relief to correct any harm done, and summary removal of employees hired in violation of law.
- The Director can impose sanctions after giving the employer an opportunity to present evidence showing why it did not violate the law or why it should not be sanctioned. An employer can appeal a decision by the Director imposing sanctions to the Commission.

The Employment Rights Office is authorized to:

- Impose numerical hiring goals and timetables to specify the minimum number of Indians an employer must hire, by craft or skill level;
- Require employers to establish or participate in training programs to increase the pool of qualified Indians as quickly as possible;
- Establish a tribal hiring hall and impose a requirement that no employer may hire a non-Indian until the hiring hall has certified that no qualified Indian is available;
- Prohibit any employer from using qualification criteria or personnel requirements that serve as barriers to Indian employment unless the employer can show that the criteria are required by business necessity;
- Enter into agreements with unions to insure union compliance;
- Require employers to give preference in the award of subcontracts to tribal and other Indian-owned firms and entities;
- Establish programs of counseling and support to Indian workers to assist them to retain employment. Employers may be required to participate in or cooperate with such programs;
- Take other action as necessary to achieve the purposes and objectives

of the law.

- The Office is authorized to enter into cooperative relationships with federal employment rights agencies to eliminate discrimination against Indians on and off the Reservation. The Office must investigate the feasibility of establishing a tribal FEPC and entering into a formal relationship with the EEOC. *Comment: This provision is unusual, because it recognizes that there are state fair employment practice agencies or human rights commissions and that the EEOC contracts with them to hear federal discrimination cases. This section authorizes the possibility of a Umatilla agency with an agreement with the EEOC.*
- The program can charge employers an employment rights fee of one-half of one percent of the total amount of a construction contract (a one-time fee). Employers with gross sales of \$50,000 or more must pay a fee of one-half of one percent of its annual payroll. The fee does not apply to educational, health, governmental, or non-profit employers.
- The Tribal Employment and Training Program (CETA) and the BIA Employment Assistance Program must devote resources to preparing Indians for job opportunities.
- If any provision of the ordinance is held invalid, the remainder will remain in force.

Tribal Employment Rights Commission:

- There is a Tribal Employment Rights Commission.
- There will be five Commission members, appointed by the Board of Trustees. Members hold office for two years, and there is no limit to the number of terms a commissioner may serve.
- Any person 21 years or older who works or resides “on” the Reservation is qualified to be a commissioner.
- The commission elects a chair annually, and the Chair presides at all meetings and is authorized to sign required documents.

The Commission conducts hearings on tribal employment rights matters and it also has the following powers:

- To elect a chairman and to recommend removal of a member of the

Commission;

- To establish rules and regulations governing the Commission's activities;
- To take other actions consistent with the Ordinance;
- The Commission can hold formal and informal meetings and regulate its procedures. Where possible, consensus is required for Commission decisions. If consensus cannot be achieved, the affirmative vote of at least five commissioners is required. At least two commissioners must sign written agreements or plans, directive complaints, and appeals. The Commission cannot supervise TERO personnel. *Comment: Surely there must be a mistake in this section. If the Commission is composed of five commissioners, and consensus would be among all five, then why is a vote of five commissioners required absent consensus? The authority of two commissioners to take certain actions is not clear. The prohibition against the Commission supervising TERO personnel properly separates adjudication and quasi-legislative functions from the investigatory and enforcement agency.*
- A commissioner may be removed by the Board of Trustees for good cause after notice and a hearing. If a commissioner dies, resigns, be incapacitated, become disqualified or removed from office, there is a vacancy and the Board must fill the unexpired term. Missing three consecutive meetings is a ground for automatic removal.

Scope of Commission Hearings:

- Any action of the TERO Director may be appealed to the Commission.
- Any person appealing a sanction of the Director must file a written statement with the Commission, with a copy to the Director, within seven days of the receipt of the Director's decision. The statement must describe the nature of the Director's action and the relief requested of the Commission.
- The Director has two weeks from the day the appeal is received by the Director to respond to the statement in writing.
- On receipt of the response, the Commission must set a date, time, and place of hearing and notify all concerned parties. Parties are responsible to insure that witnesses attend the hearing.

Commission Hearing Procedure:

- The hearing will be opened promptly and at the time specified.
- Requests for delay must be in writing to the Commission three days prior to the hearing date.
- The complainant presents his or her case first.
- Only the complainant, respondent, Commission, and the witness being examined and the recorder will be allowed in the hearing room at any one time. Parties may have an attorney present, but only as an advisor. The attorney may not cross-examine. Comment: The normal due process canon of administrative law is that individuals have the right to counsel in hearings. There may be a civil due process right to cross-examine witnesses.
- Both parties have the opportunity to present opening statements.
- Parties (not their lawyers) may examine and cross-examine witnesses, and the Commission will be flexible and informal with evidentiary matters and procedural questions.
- Written testimony is permitted into evidence when a witness cannot appear. When a party wishes to use written testimony of a witness who cannot appear, there must be an advance request and an explanation of the non-appearance. Affidavits are permitted, and a signed but unsworn statement may be admitted into evidence only “under unusual circumstances” and when the Commission is satisfied that the testimony cannot be obtained otherwise.
- Testimony is under oath or affirmation.
- Closing statements must be permitted.
- The presiding official may:
 - Administer oaths or affirmations;
 - Rule on offers of proof;
 - Limit the number of witnesses when testimony would be

unduly repetitious;

- Exclude persons from the hearing for contemptuous misbehavior that obstructs the hearing.
- The Commission must render a decision within ten days of the date of the appeal.
- Hearings will be recorded, but any person wishing a transcript must bear its costs.

Enforcement of a Commission Order:

- The Director may file a petition in the tribal court to seek:
 - Enforcement of all or part of a Commission order that has not been appealed;
 - Enforce all or part of any court order issued on appeal.
- A petition must contain all pertinent facts about the order, including a copy of the order, and state which parts of the order must be enforced and against whom, set forth facts to show how the order is not being obeyed. The Director must serve the parties.
- On receipt of a petition, the court must set a hearing and subpoena all necessary parties. A hearing must be held within ten days from the date of filing
- The Director has the burden of proof to show that the order has not been complied with.
- The court must render a decision on the petition at the close of hearing and enter whatever order is necessary or appropriate.

Appeals to Tribal Court of Appeals:

- Any action of the Commission may be appealed to the Tribal Court of Appeals, and appeals are on the record.
- An appeal must be filed within fourteen days from the date of receipt of the Commission decision, it must be in writing, and it must set forth what issues are being appealed and the grounds for the appeal.

- The appellant is responsible for the costs of a hearing transcript. The court must review the hearing record and it may render its opinion with or without oral arguments or written briefs.

Penalties for Violation:

- The penalties include:
 - Denial of the right to commence or continue business inside the reservation;
 - Suspension of operations inside the reservation;
 - Payment of back pays and damages to compensate an injured party;
 - An order to summarily remove an employee hired in violation of law;
 - Monetary civil penalties;
 - A prohibition in engaging in future operations on the Reservation;
 - An order requiring changes in procedures and policies to eliminate the violations;
 - An order requiring employment, promotion and training of Indians injured by the violation;
 - An order making any other provision necessary to alleviate, eliminate or compensate for any violation.
 - The maximum penalty is \$500 per violation, and each day during which a violation exists is a separate violation.

Emergency Relief:

- If the Director feels that immediate and irreparable injury, loss or damage will result before the Commission or Court of Appeals is able to act, the Director may file a motion for a temporary restraining order with the Tribal Court.
- The motion must state the nature of the injury, loss or damage expected to result

and why relief is necessary to prevent immediate and irreparable consequences, and specify the type of relief requested.

- The court must rule upon the motion within 48 hours of filing, excluding weekends.
- The Director is responsible to notify the employer of a court hearing and will serve notice on the employer.
- The Director must prove to the court that a temporary restraining order is justified.
- After the hearing, the court must grant or deny the motion.
- A temporary restraining order is effective for thirty days, after which it must be renewed or superceded by an order of the Commission after a full hearing or after a decision by the Court of Appeals.

There is a separate section for the Umatilla Human Rights Office, which provides:

Director:

The Director is appointed by the Tribal Chairman, subject to the approval of the Board of Trustees. The Director can hire staff, expend appropriated funds, obtain and expend other funds, and the Office has the authority to issue rules, regulations, and guidelines to implement employment rights, hold hearings, subpoena witnesses and documents, require employers to submit reports, and take other action for the fair and vigorous implementation of the Ordinance.

Coverage:

Guidelines are binding on employers. An “employer” is any person, company, contractor, subcontractor, or other entity that is located or otherwise engaged in work on the Reservation. The term “employer” also includes state, county and tribal agencies and contractors or subcontractors of a governmental agency.

Publication:

The obligation of all employers to comply with tribal employment rights requirements must be made to known to all employers. Bid announcements issued by tribal, federal, state or other private or public entity must contain a statement that the successful bidder will be obligated to comply with “these guidelines.”

Other agencies engaged in contracting must inform employers of their obligations

and send copies to every employer.

Specific Indian Preference Obligations of Covered Employers:

- The office must establish the minimum number of Indians each employer must employ during any year its employees work on reservation. Numerical goals must be set by craft, skill area, job classification, etc. and include administrative, supervisory, and professional categories. Goals must be expressed in terms of man-hours of Indian employment as a percentage of total man-hours of the work force in that classification. The goals must be realistic and be based on surveys of available Indian manpower and projected employment opportunities.
- Goals must be established for the entire work force of new employers. The employer must meeting with the Office as much before beginning work as possible, and the employer must complete an employment opportunity survey to provide a list of the number and kinds of employees it projects it will need. The Office will then set specific goals and timelines for that employer. They must be incorporated into its plan for complying with the law, and the employer must agree to meet the goals.
- The goals must be reviewed by the Office at least once a year and revised as necessary to reflect changes in the number of Indians available or changes in the employer's hiring plans. The employer must submit monthly reports indicating the number of Indians in its work force, how it is meeting its goals, monthly hires and fires, and other information.
- Each employer must meet its minimum goal or demonstrate it has made best efforts to meet its goals. The Office may issue a note of non-compliance based upon the reports and other evidence, or if there is reason to believe that the employer is not meeting or making a good faith effort to meet its goals. An employer is entitled to a hearing within ten days of receipt of the notice.
- All employees will participate in training programs to assist Indians to become qualified in the various job classifications used by the employer. Employers in construction must employ the maximum number of trainees or apprentices possible. The Office can set a ratio of trainees to qualified workers, and in construction, that number shall be no less than the minimum ratio established by the Department of Labor.
- Employers with collective bargaining agreements must work with the Office to obtain written agreements from all unions which state that the union will comply with Indian preference requirements before the employer is permitted to commence work. The union must agree to give absolute preference to Indians

in referral, cooperate with the tribal hiring hall, and establish mechanisms so Indians do not have to travel great distances to retain their place on union lists, etc.

- An employer may use no job qualification criteria or personnel requirements which serve as a barrier to the employment of Indians which is not required by business necessity. The burden is on the Office to show that a given requirement is a barrier, and the burden is then on the employer to demonstrate that such criteria are requirement is a business necessity. Employers must also make reasonable accommodation to the religious beliefs of Indian workers.
- An employer may recruit and hire from any source by the process he chooses, but he may not hire a non-Indian until he has exhausted the supply of applicants referred by the tribal hiring hall and has given the Office reasonable time to locate a qualified Indian. Any non-Indian worker who was employed in a job that was not cleared through the hiring hall procedure is subject to summary removal.
- The Office must provide counseling and support services to Indians who are employed, and employers must cooperate with those services.
- Employers must give preference to tribally owned or Indian-owned firms and enterprises in subcontracts. An Indian owned firm is one that is qualified as such under BIA Self-Determination regulations. The Office must maintain a list of such firms.
- No Indian worker will be terminated in a layoff or reduction in force if a non-Indian worker in the same craft is still employed. The non-Indian will be terminated first so long as the Indian meets the threshold qualifications for the job. If the layoff is by crews, qualified Indians will be transferred to crews that will be retained so long as there are non-Indians in the same craft employed elsewhere. The seniority of non-Indians will not justify the Indian preference requirements.
- Indians will be given preferential consideration for promotions and employers will encourage Indians to apply. When a supervisory position is filled by a non-Indian, the employer will file a report stating what Indians applied, the reasons they were not given the job, and what efforts were made to inform Indian workers of the opportunity.
- Indians shall be given preference in hiring summer student help. Employers must make every effort to promote after-school, summer and vacation employment for Indian youth.

Subcontractors.

- Indian preference requirements are binding on all subcontractors and are deemed to be part of subcontract specifications. The employer must insure that all subcontractors comply with these requirements

Compliance plans:

- New employers cannot commence work on the reservation until they have met with the Office and developed an acceptable plan to meet its obligations.

Reporting and on-site inspections:

- Employers must submit reports and other information requested by the Office. The Office has the right to make on-site inspections during regular hours and inspect and copy relevant records. It can interview employees on the job site. Information gathered by the Office is confidential, unless required for a hearing.

Compliance and hearing procedures:

- If the Director believes an employer (including a subcontractor) has failed to comply, he or she must notify the employer in writing, specifying the violations. The employer can request a hearing within ten working days from the date of receipt of the notice. If the Director determines the employer is out of compliance and has not made a best effort to comply, he or she must impose sanctions and order the employer to take corrective action.

Sanctions:

- The sanctions for non-compliance include:
- Monetary fines;
- Suspension of employer operations;
- Termination of the employer's operation;
- Prohibiting the employer from future operations on the reservation;
- Requiring the removal of certain workers or prohibiting the hiring of certain workers;
- Back pay, employment, promotion, training or other relief to Indians who were

harmed;

- Requiring changes in procedures as necessary for compliance.

Appeals:

- An employer has the right to appeal any decision of the Director to the Commission. A Commission decision may be appealed to the Umatilla Tribal Court.

Individual complaint procedure:

- Any Indian, group of Indians, or representative of a class of Indians who believes an employer has failed to comply, or who believe they have been discriminated against as Indians, may file a complaint with the Office, whether or not they were personally harmed. Upon receipt of a complaint, the Office must investigate and attempt an informal settlement. If that cannot be achieved, the Director must hold a hearing and make a determination of the validity of the charge. If there is a finding of non-compliance or discrimination, the Director must grant relief to make the complainant whole.
- If an employer or union believes any provision, rule, or order is illegal or erroneous, it may file a complaint with the Office. Upon the receipt of a complaint, the Office must investigate and attempt to conciliate. If that cannot be done, any party may request a hearing.

EEOC Deferral Status:

- The Office is authorized to enter into a cooperative relationship with federal employment rights agencies, such as the EEOC or OFCCP. The Office must look into the feasibility of a formal relationship with the EEOC as provided in Section 706 of Title VII of the 1964 Civil Rights Act.

Compliance fee:

- Every contractor or subcontractor with a contract of \$50,000 or more must pay a one-time fee of one-half of one percent of the contract amount.
- Every employer with gross sales of \$50,000 or more must pay an annual fee of one-half of one percent of annual payroll. The fee is not required of education, health, or non-profit organizations.

The Umatilla Employment Rights Ordinance is an example of the “standard” TERO law.

15. White Mountain Apache Labor Code

The White Mountain Apache Tribe has a labor code with general provisions, a minimum wage chapter, and unemployment and workers compensation programs. Those chapters provide:

Chapter One: General Provisions -

The purpose and intent of the law is to:

- Provide right to Indians to use because jobs in private employment on or near the Fort Apache Indian Reservation are an important resource;
- Enforce the unique and special employment rights of Indians;
- Protect Indians under federal laws to combat employment discrimination; and
- Establish an employment rights program and office to use the law and powers to increase the employment of Indians and eradicate discrimination against them.

The pertinent definitions are:

- An “employer” or “non-tribal employer” is any non-tribal government employer or contractor doing business on the Fort Apache Indian Reservation, including tribal member employers, but not including the government, its operations, departments or enterprises.
- “Indian preference” means priority in order of enrollment, being an Indian spouse of an enrolled member, or being an “other Indian.” For Indian Self-Determination Act programs, the order of preference is being a “local Indian and other Indians. *Comment: This provision attempts to separate employment under federal programs, with “general Indian” requirements in regulations (particularly those of the OFCCP) from general employment so that tribal preference is stated as “local Indians,” and there is tribal preference for other employment. This distinction takes into account the realities that on many Indian reservations, non-member Indians are a small percent of the population.*

There is a White Mountain Apache Tribe Labor Relations Department, which is an “independent office” which reports to the Director of Administration and Finance. The Director is appointed by the tribal chairman, with the general authority to administer the program, obtain and expend funding, issue rules, regulations and guidelines, hold hearing, subpoena witnesses and

documents, require employers to submit reports, and take other action for fair and vigorous implementation of the law.

- All non-tribal employers operating within the exterior boundaries of the Reservation are required to give preference to Indians in hiring, promotion, training and other aspects of employment.
- Employers with a collective bargaining agreement with a union must obtain an agreement that the union will comply with the law. The agreement is subject to the approval of the Department.

The Department has the power to:

- Impose numerical hiring goals and timetables to specify the minimum number of Indians to be hired, by craft or skill level;
- Require employers to establish or participate in training programs;
- Coordinate the establishment of a tribal hiring hall and to require that no employer may hire a non-Indian until the hiring hall certifies that there is no qualified Indian available for a vacancy;
- Prohibit employers from using qualification criteria or personnel requirements that are barriers to Indian employment unless the employer can demonstrate that the criteria or requirements are required by business necessity. The Department must adopt the EEOC guidelines on those matters, and it can impose its own additional requirements;
- The Department can enter into cooperative relationships with federal employment rights agencies.
- There is an employment rights fee of one percent (one time) of the total amount of a construction contract, and every employer with five or more employees, or with gross sales of \$15,000 or more, must pay a quarterly fee of one percent of quarterly employee payroll. The fee does not apply to education, health, governmental or non-profit employers or tribal utilities franchises.

The sanctions for non-compliance include:

- Denial of the right to commence business;
- Fines;

- Suspension of the employer's operation;
 - Termination of the employer's operation;
 - Denial of the right to conduct any further business
 - Payment of back pay or other relief to correct any harm;
 - Summary removal of employees hired in violation of the law;
- Sanctions are imposed by the Labor Relations Officer after notice and an opportunity to present evidence. There is an employer right of appeal to the tribal court.
 - All reservation employment and training functions (including JTPA and the BIA Employment Assistance Program) must devote necessary resources to prepare Indians for job opportunities. The Labor Relations Officer must coordinate with the Director of the Tribal Personnel Office to identify job openings, definitions of skill levels and training requirements. The Tribal Personnel Office must develop and maintain a "skills bank" or inventory of unemployed Indian workers.
 - Tribal governmental operations, departments and enterprises must also give preference to qualified Indians in hiring, promotion, training and all other aspects of employment. On request, tribal employers must submit a report to the Department which includes a description of all employees as to (1) number of employees who are enrolled members, (2) number of Indian employees who are spouses of enrolled members, and (3) number of Indian employees who are not enrolled or married to a member. Complaints of non-compliance by a tribal hiring authority can be made to the Labor Relations Officer to file a grievance on behalf of the employee, or the employee can file a grievance. No grievance can be brought to the Tribal Council until all administrative remedies have been exhausted and there is a final determination by the Grievance Committee. The Department does not have adjudicative authority, regulatory powers, or control over tribal governmental operations or employment procedures.

Chapter Two: Minimum Wages --

- The purpose and intent of this chapter is to protect and stabilize the wages employed on the Reservation, and to provide employees with "some measure of adequate remuneration for their labor and to provide them with a certain standard of living rather than to receive compensation which often may be uncertain and fluctuating." This is also done to increase job stability and the

stability and unity of families for economic well being.

- The relevant definitions are:
 - The “minimum wage” is \$3.35 per hour and the “prevailing minimum wage as increased from time to time pursuant to the (federal) Fair Labor Standards Act, but no other exemptions or provisions of the Federal Wage and Hour Law shall apply to construe or interpret this minimum wage standard.

Note: This definition does not address Davis-Bacon requirements.

- This chapter applies to any employer who engages in business within the exterior boundaries of the Reservation, and such employers must pay the minimum wage of \$3.35 per hour and increases as established by federal law.
- This chapter does not apply to livestock associations, youth camps employing minors under age 16, and other employers the Council may declare to be exempt.
- The Tribal Employment Rights Office must conduct a survey of compliance for all employers, and the Labor Relations Department has the authority to issue rules, regulations, and guidelines to implement this chapter, hold hearings, subpoena witnesses, require reports and take other actions for fair and vigorous implementation.
- All employers must comply with those rules, regulations and guidelines.

The sanctions for non-compliance include:

- Denial of the right to commence business;
- Civil penalties;
- Suspension of employer operations;
- Termination of employer operations;
- Denial of the right to conduct further business; and

- The payment of back pay to correct any harm or injury suffered by an employee.
- In addition to those sanctions, there is liability for a civil penalty of \$150 to \$500 for a first offense, or \$500 to \$1,000 for a second offense. Where there is a willful violation, the employer must pay the aggrieved employee treble the amount of wages wrongfully withheld. Willful violators may be excluded from the Reservation. Retaliation is prohibited.

Chapter Three: Unemployment Benefits --

- Any person making a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase a benefit or other payment under Arizona law or an employment security act of another jurisdiction, for self or another, may be punished by a fine of \$25 to \$200, 60 days imprisonment, or both. Each false statement or failure to disclose a material fact is a separate offense.
- If the Tribal Court finds fraud resulting in the payment of benefits to which the person is not entitled, that person is liable to repay the amount to the Commission or have that sum deducted from future benefits.

Chapter Four: Workers Compensation --

- The Tribe adopted as tribal procedure and law the worker's compensation laws and rules of the State of Arizona, and any amendments.
- All references in Arizona laws and procedures to "local authorities," State of Arizona, "Superior Court," "Industrial Commission" or related agencies shall mean the corresponding agencies of the Tribe.
- The tribal judge may request a visiting judge and an administrative law judge to hold hearings, as necessary.
- Prior inconsistent laws are repealed.
 - This chapter is not a waiver of sovereign immunity.
 - Upon the filing of a petition or complaint, the Tribal Court must forward a copy to the tribe's worker's compensation carrier within five days of filing.
 - This chapter must be interpreted "consistent with tribal governmental

structure and organization and Arizona State Court decisions.

This labor code essentially adopts an abbreviated version of the “standard” TERO law, without a TERO commission; it establishes a minimum wage and ties that wage to federal minimum wage standards; it establishes a tribal criminal penalty for violation of applicable unemployment compensation programs; and it adopts the Arizona worker’s compensation law, as construed by the State, for tribal worker’s compensation claims. While it is difficult for an Indian nation to prepare and adopt complete codes of law, and there are reasons for “domesticating” state laws to promote local control, it is a dangerous practice for one sovereign to link its laws to the interpretations of another.

CONCLUSION

These summaries of fifteen Indian nation labor codes are raw material. They are designed to serve as a database for an analysis of the “best practices” among them and the core of an outline for a uniform or model Indian nation labor code. This material, along with an analysis of the most current trends in Indian affairs law, guidance from international human rights standards, and checklists of the terms of state labor codes, will help guide analysis and the formulation of an outline.

* * *

[Federal Register: September 10, 1996 (Volume 61, Number 176)]
[Notices]
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Part II

Department of Health and Human Services
Indian Health Service

Department of Housing and Urban Development

Department of the Interior
Bureau of Indian Affairs

Interdepartmental Agreement on Indian Housing Program; Notice

[[Page 47788]]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing
[Docket No. FR-3763-N-02]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Interdepartmental Agreement on Indian Housing Program

AGENCIES: Offices of the Indian Health Service (HHS); the Assistant Secretary for Public and Indian Housing, (HUD); and the Bureau of Indian Affairs, (Interior).

ACTION: Notice of Interdepartmental Agreement.

SUMMARY: This notice announces an Interdepartmental Agreement which sets forth the guidelines by which HUD, the Bureau of Indian Affairs, and the Indian Health Service will coordinate their efforts in the delivery of services and financial assistance to Tribes and Indian Housing Authorities.

EFFECTIVE DATE: September 10, 1996.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, Room B-133, 451 Seventh Street, SW, Washington, DC 20410; telephone (202) 755-0032. Hearing- or speech-impaired individuals may access this number by calling the Federal Relay Service TTY at 1-800-877-8339. (With the exception of the ``800'' number, these are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. September 2, 1994 Notice of Proposed Interdepartmental Agreement

On September 2, 1994 (59 FR 45702) HUD published a notice which proposed to set forth the working relationship among HUD, the Bureau of Indian Affairs (BIA), and the Indian Health Service (IHS) in the delivery of services to Tribes and Indian Housing Authorities (IHAs) in conjunction with the planning and construction of new housing developed with financial assistance of HUD's Indian housing program.

The Interdepartmental Agreement (IA) establishes a general foundation for this cooperative effort and guidelines by which each of the three agencies will interact with Tribal governments and IHAs. The IA will be supplemented, as necessary, by individual Memorandums of Agreement (MOA) developed between local decision makers and the specific Federal agencies assisting in the development of the housing.

The BIA Housing Improvement Program (HIP) was eliminated from this IA to streamline the agreement among all signatory agencies in the development of HUD Indian housing programs. It is anticipated that the IHS and the BIA will be addressing the BIA-HIP separately. Other sections pertaining to program procedures are more appropriately covered in the program handbook or program NOFA and have been deleted from the IA.

HUD solicited public comments on the proposed IA. Eight comments were received. The following section of the preamble presents a summary of the comments raised by the commenters, and HUD's responses to these comments.

II. Comments on the September 2, 1994 Notice of Proposed Interdepartmental Agreement

Comment. Two commenters wrote that proposed section 5.2.1 of the IA, which concerns the construction of access roads, should be revised to clarify that the BIA ``has responsibility for access roads which provide public access to cluster sites only and not private access to individual sites which the BIA is prohibited from constructing.''

Response. HUD has adopted the comment by revising section 5.2.1 to exclude individual homesites from the access road construction requirements.

Comment. One commenter wrote that the language in proposed section 5.2.1 granting the BIA a lead time of 2\1/2\ years in the construction of access roads should be revised. The commenter believed that ``in the 2\1/2\ year interim, the `temporary' access road built by the IHA becomes unacceptable as there is a void of responsibility for constructing a permanent access road. The BIA should be required to pick up these roads immediately after the IHA has completed the project.''

Response. HUD has not revised the IA as a result of this comment. Due to budgetary prioritization, the 2\1/2\ year time-frame is necessary for BIA to complete its part of the project.

Comment. Two of the commenters urged that the IA provide for greater coordination in National Environmental Policy Act (NEPA) compliance efforts. One of the commenters recommended that section 7.0 be revised to specify that each signatory agency will follow procedures

in a manner which will avoid or minimize delays and that timelines for compliance will be included in time schedules worked out at the project coordination meeting. The other commenter suggested that the IA permit the designation of a lead agency ``in performing NEPA compliance where the project encompasses the functions of all [three] agencies.'' The commenter believed this would expedite the development of a project by eliminating ``multiple comment periods, multiple opportunities for litigation, and multiple FONSI's or EISs.''

Response. Based upon the IHS's recommendation, HUD has revised the IA as a result of these comments. Section 7.0 now provides that in order to minimize delays, HUD, or the Tribal government which has assumed HUD's NEPA responsibility, shall be the lead agency for the preparation of all required environmental statements.

Comment. One commenter wrote that the IA should address land acquisitions since, according to the commenter, ``acquisitions require as much coordination between the BIA and HUD as does development.'' Specifically, the commenter believes the BIA should delegate authority to area offices to approve land acquisitions. Alternatively, the commenter proposed that the BIA designate a person to exclusively review and approve HUD financed land acquisitions. Moreover, the commenter suggested that the IA require NEPA review of these acquisitions.

The commenter also suggested that HUD and the BIA coordinate their acquisition related time requirements. The commenter believed that, due to the time needed by the BIA to take land in trust, some IHAs may not be able to meet HUD's requirement that construction commence within 30 months of a program reservation date. The commenter urged that HUD and the BIA ``negotiate time lines and procedures to avoid these conflicts.''

Response. HUD and the BIA will work more closely in coordinating time requirements.

Comment. One commenter wrote to suggest that proposed section 2.2 of the IA be revised to specify that the BIA will review and approve all Tribal trust, restricted fee and allotted land housing leases in accordance with 25 CFR part 162. Furthermore, the commenter suggested additional language stating that BIA will review and approve all easements to housing sites in accordance with 25 CFR part 169. Lastly, the commenter recommended that proposed section 2.3 be revised to

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require that all housing sites have approved easements and leases before the start of construction.

Response. HUD has adopted the first two elements of this comment. In reference to requiring the IHAs to complete all easements and leases prior to construction, this is a requirement that is inappropriate for this IA since the IA does not encompass the Indian Housing Authorities. This is a requirement that would more appropriately be added to the local Memorandum of Understanding (MOU).

Comment. One commenter objected to the fact that proposed section 2.2 of the IA ``does not specifically state that the BIA is responsible for funding access road construction in HUD assisted housing projects.'' According to the commenter, ``this weakens the BIA's responsibility of supporting HUD-assisted housing projects.''

Response. HUD has not adopted this comment. The IA does not have the force of law, but merely sets forth the coordination efforts of HUD, the BIA, and the IHS. Accordingly, the comment is inappropriate for inclusion in the IA.

Comment. Two commenters objected to the language in proposed section 6.3, IHS PARTICIPATION IN HUD FUNDED SANITATION FACILITIES CONSTRUCTION, which states that the IHS ``may participate'' in the construction of sanitation facilities. According to the commenters ``this statement does not adequately commit the IHS to execute their

responsibility for sanitation system development which servers [sic] Native Americans.'

Response. Based on the IHS's recommendation, HUD has adopted this comment by revising section 6.3 to require that the IHS endeavor to participate in the construction of sanitation facilities.

Comment. One commenter wrote that because the IA's scope is limited to Indian mutual help and low rent programs, it does not go far enough in achieving coordination between the signatory Federal agencies. The commenter recommended that other programs, such as Indian HOME and the BIA Housing Improvement Program (HIP) be included in the IA.

Response. HUD has not revised the IA as a result of this comment. The HOME and HIP programs have different requirements and agency responsibilities. If the coordination of efforts becomes a problem for these programs, separate agreements can be negotiated.

Comment. One of the commenters recommended that language be inserted in section 5.0, DEVELOPMENT OF ON-SITE AND OFF-SITE ROADS, which includes the ``standards of road design and construction that would be required to assure States, cities, counties, townships, etc. assume responsibility for the maintenance and up-keep of roads and streets within the on-site construction area.'' These standards would be in effect when the State and local government have construction and design requirements that exceed ASHTO requirements.

Response. HUD has not revised the IA as a result of this comment. Under 24 CFR 905.250, the IHAs are already required to comply with appropriate local road design standards.

Comment. One of the commenters recommended that the IA specify which agencies are responsible for the costs of complying with Federal, State, or local statutory requirements. Among other examples, the commenter pointed to the costs associated with meeting EPA environmental requirements.

Response. HUD has not revised the IA as a result of this comment. The question of financial responsibility for complying with the various statutory requirements is more properly addressed in the individual MOAs.

Comment. One commenter wrote that the IA was vague concerning IHS duties. The commenter urged that the IA be revised to specify that the IHS has the responsibility of providing water, waste water and solid waste facilities, and O&M infrastructure.

Response. Based on the IHS's recommendation, HUD has adopted this comment by revising section 6.2. This section now details the IHS's statutory authority and responsibility for utilizing HUD funds to provide sanitation facilities for HUD financed Indian homes.

The text of the Interdepartmental Agreement follows:

Interdepartmental Agreement on the Indian Housing Program

The Department of Housing and Urban Development--Office of Native American Programs

The Department of Interior--Bureau of Indian Affairs

The Department of Health and Human Services--Indian Health Service

1.0 Statement of Purpose

The purpose of the Interdepartmental Agreement (IA) is to set forth the working relationship among the Department of Housing and Urban Development (HUD), the Bureau of Indian Affairs (BIA), and the Indian Health Service (IHS) in the delivery of services to Tribes and Indian Housing Authorities (IHAs) in conjunction with the planning and construction of new Indian housing developments. The above agencies share a common goal to assist Tribes in improving their living environment through the delivery of quality housing and infrastructure.

This goal can be more readily achieved with an efficient and integrated utilization of available resources.

This Interdepartmental Agreement establishes a general foundation for this cooperative effort and the guidelines by which each of the three agencies will interact with Tribal governments and IHAs. The IA will be supplemented, as necessary, by individual Memorandums of Agreement (MOA) developed between local decision-makers and the specific federal agencies assisting in the development of the housing.

2.0 General Agency Responsibilities

2.1 HUD Responsibilities. HUD will provide financial and technical assistance for the development and management of low income housing and community developments in Indian and Alaska Native areas through the mutual help/low rent Indian Housing Development Program.

2.2 BIA Responsibilities. BIA will provide real estate and transportation assistance to IHAs pursuant to 25 CFR parts 162, 169, and 170. These services may include (i) assistance in preparing appropriate lease documents for housing sites and required easements; (ii) review, approval and recordation of all required trust or restricted fee land lease and easement documents; where resources are available, providing assistance in obtaining real estate appraisals; (iii) development of access roads to housing sites in accordance with the Tribe's road priorities; (iv) providing maintenance services to those IHA constructed roads and streets accepted into the BIA road systems in accordance with 25 CFR part 170; and (v) provision of other support, when available, necessary for the timely development of housing.

2.3 IHS Responsibilities. The IHS provides a comprehensive primary and preventive health services delivery system for American Indians and Alaska Natives. The environmental health component of IHS assists Tribes in the development of Tribal sanitation facilities [water, waste water, and solid waste facilities and operation & maintenance (O&M) infrastructure]. IHS has the primary responsibility and authority to provide Native American homes and communities with the necessary sanitation facilities and related services.

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3.0 Agency Coordination

3.1 Processing Procedures. The signatories of the IA agree to maintain timely and relevant processing of regulations, handbooks, notices and other administrative guidance for use by Tribes and IHAs. All signatory agencies will be given an opportunity to comment on such documents before they are made effective.

3.2 Program Administration. The signatories of the IA agree to enforce the provisions of current program guidelines with their respective area/regional offices. Disputes between or among the signatory agencies may be made in writing to the head of the appropriate area or field office involved, with a copy to the other agencies. Unresolved disputes extending more than 90 days beyond the date of submission shall be referred, in writing, to the Headquarters Working Group for resolution. This group is composed of the Director, Office of Native American Programs in HUD; Director, Office of Trust Responsibilities in BIA; and the Director, Division of Environmental Health in IHS.

3.3 Information Sharing. Whenever possible, the signatory agencies will provide, or cause to be provided, copies of housing and supporting infrastructure planning documents, to include utility master plans, transportation plans, and IHA comprehensive housing plans, to the appropriate area/regional offices of other signatory agencies.

HUD Field Offices of Native American Programs will provide

quarterly reports on the progress of HUD's assisted housing projects to BIA and IHS. These reports will indicate the method of construction, project number, and number of units. Scheduled and actual completion dates for applicable project review points will be provided, where available.

3.4 Grant Award. Signatory agencies will provide copies of applicable housing and supporting infrastructure grant/project award notices to the other signatory agencies as soon as practicable after notification to Tribes.

4.0 Development of Housing Units

4.1 HUD Responsibilities.

4.1.1 Applications. HUD will advise IHAs to use BIA and IHS information on existing infrastructure and new construction recommendations to support proposed housing project applications for funding.

4.1.2 Project Coordination. HUD will advise IHAs to use handbooks concerning procedures the IHA may use to determine what assistance they need from the BIA and IHS. At the request of a Tribe through the IHA, the BIA (including Area Road Engineers and Realty Officers) and IHS will provide, to the extent feasible, technical reviews and recommendations on project planning, design and construction documents involving supporting infrastructure, and related requirements at appropriate project review points. Appropriate project review points will be determined on a project by project basis and may include: project coordination schedule review, housing site feasibility review, project plan review, project final inspection, and record drawings review. Schedules or commitments made as a result of project coordination require the approval of the appropriate IHS and/or BIA official.

4.1.3 Standard vs Assisted Housing Development Method. The Standard Method of development refers to all procedures, guidelines and requirements associated with the normal development of an Indian housing project by an administratively capable IHA. The Assisted Method contains all of the procedures, guidelines and requirements associated with the development of an Indian housing development by an IHA which has requested additional HUD assistance due to its inexperience or lack of staff resources, or by an IHA which has been deemed by HUD to need additional assistance, monitoring and supervision during the development process. The Standard Method will require less technical assistance by the signatory agencies as compared to the Assisted Method.

4.2 BIA Responsibilities.

Leases, Easements and Real Estate Appraisals on Trust or Restricted Fee Property. Where resources are available, the BIA will provide real estate appraisals at the request of the IHA. All leases and easements shall be approved by the BIA.

5.0 Development of On-site and Off-site Roads

5.1 HUD Responsibilities.

On-Site Street Construction. HUD will provide sufficient funds for the construction of on-site streets, in accordance with the American Association of State Highway and Transportation Officials (AASHTO) standards. The IHA will have the overall responsibility for construction of on-site streets. The Tribal government must determine the type of streets to be constructed in conjunction with housing projects, and whether the streets will be included in the BIA Roads System for maintenance by the BIA. HUD will advise each IHA and Tribe which receives a HUD Housing Grant that the on-site streets must be designed and constructed to AASHTO standards to be eligible for inclusion on the BIA Roads System.

5.2 BIA Responsibilities.

5.2.1 Access Road Construction. When requested by the Tribal government, and when resources are available, the BIA will plan and construct access roads to housing developments, excluding individual homesites. Sufficient lead time is required to develop access roads. This lead time may be as much as 2\1/2\ years. The BIA will coordinate access road construction with the IHA and make every effort to complete such roads prior to the completion of the housing project.

5.2.2 Road/Street Maintenance. IHA-developed streets may be added to the BIA Roads System only when the street(s) and related curb, gutters and drainage features have been built to acceptable AASHTO specifications and standards as well as to the requirements of section 504 of the Americans with Disabilities Act, and the right-of-way is transferred to the BIA. When requested by the Tribal government, and when resources are available, the BIA Area Office will accept IHA developed streets on the BIA Roads System and will provide ongoing maintenance for those streets that meet the above specifications and standards.

6.0 Development of Sanitation Facilities

6.1 HUD Responsibility. To the extent that funds are appropriated by Congress, HUD will provide funding to IHAs to develop water, waste water, solid waste facilities, and O&M infrastructure necessary to support individual low-rent or mutual help housing projects financed by HUD. O&M infrastructure includes the plant, equipment, tools and training needed by utility authorities to provide continuing sanitation service to the residents of HUD-financed homes, as well as the long range planning necessary to identify and implement those requirements.

6.2 IHS Authority. Under section 302(b)(3) of the Indian Health Care Improvement Act, the IHS has the authority to receive HUD funds to provide sanitation facilities for Indian homes financed by HUD.

6.3 IHS Participation in HUD Funded Sanitation Facilities Construction. When requested by the Tribe and the IHA, IHS will endeavor to participate in the construction of sanitation facilities funded by HUD under the mutual help/low rent HUD-assisted housing development program. IHS participation will be on a project by

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project basis, pursuant to an approved MOA duly executed by the IHA, Tribe, IHS, and if necessary, HUD.

6.4 Individual and Community Sanitation Systems. Where it is determined that sanitation facilities are feasible and necessary, the following conditions will apply:

6.4.1 HUD will finance the installation of all dwelling plumbing facilities.

6.4.2 Where facilities serve only HUD-assisted housing project homes, HUD will fund the total cost of the sanitation facilities necessary to serve the project. Where HUD-assisted housing project homes are interspersed with existing homes also served by a sanitation facility, HUD shall fund a prorated share of sanitation facilities costs. All community sanitation system construction, improvement, or expansion will be designed on the basis of a total community concept, such that the proposed sanitation facilities are (a) safe and adequate to meet the environmental health needs of residents, (b) compatible with Tribal infrastructure development, (c) economically feasible to construct and operate, and (d) in compliance with applicable codes, ordinances, and industry standards.

7.0 Environmental Compliance

Each signatory agency (HUD, BIA, and IHS) shall be responsible for

following its own applicable procedures addressing the requirements of the National Environmental Policy Act (NEPA), and related and/or similar environmental legislation and/or Executive Orders. A Memorandum of Understanding (MOU), dated June 21, 1991, signed by BIA, HUD, IHS, and the Environmental Protection Agency, clarifies each agency's role in environmental protection.

In the implementation of the roles and responsibilities identified in the MOU and herein, signatory agencies will, to the extent feasible, adopt and/or combine environmental documents which are provided by the other signatory agencies. Joint use of environmental documents that comply with NEPA and related regulations will reduce duplication and paperwork. Copies of one signatory agency's environmental determination documentation (e.g., archeological review) may be required by another signatory agency prior to granting approvals; however, the approving agency shall not require the applying agency to change procedures, format, etc., during the review process and prior to granting its approval.

Unless otherwise provided for in a duly executed MOA, HUD, or a Tribal government which has assumed HUD's NEPA responsibility, shall be the lead agency for the preparation of environmental review, assessments and impact statements in compliance with NEPA for all HUD-assisted housing and related infrastructure projects. When BIA and IHS participate directly in these projects, they shall be cooperating agencies for the purposes of NEPA compliance.

Dated: April 30, 1996.

Donna E. Shalala,
Secretary, Department of Health and Human Services.

Dated: August 19, 1996.

Bruce Babbitt,
Secretary, Department of the Interior.

Dated: May 6, 1996.

Henry G. Cisneros,
Secretary, Department of Housing and Urban Development.
[FR Doc. 96-22923 Filed 9-9-96; 8:45 am]
BILLING CODE 4160-16-P; 4210-33-P; 4310-02-P

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TITLE XIII-EMPLOYMENT

Chapter 1. Definitions

Sec. 101. Definitions.

For the purposes of this Chapter:

- (a) "Near the Reservation" means within reasonable daily commuting distance of any Indian community on the Reservation;
- (b) "TERO" shall mean the Tribal Employment Rights Office established by Section 201;
- (c) "Director" shall mean the director of TERO appointed under Section 202
- (d) "Review Board" shall mean the Tribal Employment Rights Review Board created by Section 301;
- (e) "Covered entity" shall mean any individual, corporation, association, partnership, or other entity doing business on trust land on the Reservation,
- (f) "Contract and subcontract" shall mean all contracts, including but not limited to, contracts for supplies, services, and equipment, regardless of tier.

Chapter 2. Tribal Employment Rights Office

Sec. 201. Establishment.

There is hereby created the Fort Peck Tribal Employment Rights Office (TERO) as an independent office of the Tribes, reporting directly to the Tribal Executive Board in such manner as the Tribal Executive Board directs.

Sec. 202. Director.

The director of TERO shall be appointed by the Tribal Chairman subject to the approval of the Tribal Executive Board, and shall serve at the pleasure of the Tribal Executive Board. The director shall have the authority, subject to the approval of the Tribal Executive Board, to hire staff, expend funds appropriated by the Tribal Executive Board, and to obtain and expend funds from federal, state or other sources to carry out the purposes of TERO.

Sec. 203. Functions.

TERO shall:

- (a) Implement and enforce all provisions of this Title;
- (b) Provide training, counseling and support to Indian workers on the Reservation in conjunction with tribal employment and training programs and other appropriate tribal and federal offices;

(c) Cooperate with federal agencies to enforce federal anti-discrimination statutes, eliminate discrimination against Indians, and to enforce all Indian preference requirements in federal law or contracts with the federal government.

Sec. 204. Implementation of programs.

(a) In implementing this Title, TERO shall develop and phase in programs at a gradual pace in order to ensure a stable and effective program and avoid unnecessary disruption of the business environment on the Reservation;

(b) TERO may implement programs or components of programs on a Reservation- wide basis or it may implement programs covering particular types of covered entities

(c) No significant new program or component of a program shall be introduced, or extended to new types of covered entities, without prior approval of the Tribal Executive Board.

Sec. 205. Processing discrimination complaints.

TERO shall assist the Equal Employment Opportunity Commission (EEOC) and other federal agencies in ensuring protection of the rights of Indians under Title VII of the Equal Employment Opportunity Act of 1972 or other federal laws, by:

(a) Disseminating information informing Indians and others that Indians are protected by federal law against employment discrimination, and of the procedures for making employment discrimination complaints. Such dissemination may include meetings, conferences, distribution of written materials, and other publicity;

(b) Meeting with appropriate offices of the EEOC and other federal agencies as necessary to arrange mutually satisfactory methods of promoting and enforcing the employment rights and preferences of Indians;

(c) Assisting Indians and employers in obtaining informal resolution of discrimination complaints by meeting with both parties and mediating a mutually agreeable solution;

(d) Where informal resolution fails, and the Indian involved desires to press a formal discrimination complaint, assisting the Indian in filing and processing charges of unlawful discrimination with the EEOC, the Office of Federal Contract Compliance, or other appropriate federal agencies, in accordance with the regulations and procedures of those agencies.

Sec. 206. Annual reports.

The TERO Director shall present to the Tribal Executive Board such reports as the Tribal Executive Board may require, including at least annual reports on TERO's activities. The annual reports shall include:

(a) A description of the activities and programs TERO has conducted in the preceding year;

(b) A description of the activities and programs TERO plans to carry out in the upcoming year;

(c) A plan for financing TERO for the upcoming year. The director should consider new funds or reallocation of existing funds from such sources as CETA, ONAP, EEOC, BIA employment assistance, HUD and EDA;

(d) Such other information as the Tribal Executive Board may require.

Sec. 207. Duties of other employment programs.

Tribal employment and training programs and BIA employment assistance programs on the Reservation shall, to the extent consistent with the laws and regulations governing them:

(a) Devote such part of their resources as is necessary to prepare Indians for job opportunities opened up by programs under this Title;

(b) Coordinate with TERO in the development of their training programs;

(c) Co-operate with TERO in carrying out Section 203(b) of this Chapter.

Sec. 301. Establishment.

- (a) There is hereby created the Fort Peck Tribal Employment Rights Review Board;
- (b) The Review Board shall consist of three (3) members and two (2) alternates appointed by the Tribal Executive Board, who serve at the pleasure of the Tribal Executive Board;
- (c) A quorum shall consist of two (2) or more members or one member and one alternate. When, at the time scheduled for a meeting to begin, a member is present but not a quorum, the member may call in either alternate in order to make a quorum.

Sec. 302. Qualifications.

To be eligible to serve on the Review Board, a person must have a high school diploma, be at least twenty five (25) years of age, not have been convicted of a felony, not have been dishonorably discharged from the Armed Forces, not be affiliated with or employed by a business certified or seeking certification under Chapter 5, be physically capable of carrying out the duties of the office, and in the opinion of the Tribal Executive Board, be of sound judgment, good character and possess a reputation for honesty, fairness and impartiality.

Sec. 303. Compensation.

The compensation of members of the Review Board shall be fixed from time to time by the Tribal Executive Board.

Sec. 304. Jurisdiction.

The Review Board shall:

- (a) Conduct hearings and impose sanctions for violations of the Indian employment preference in accordance with Section 409 of this Title;
- (b) Conduct hearings and impose sanctions for violation of the Indian contracting and subcontracting preference in accordance with Section 508 of this Title;
- (c) Make certification decisions with respect to Indian firms in accordance with Sections 511 through 515 of this Title
- (d) Review actions of TERO at the instance of aggrieved parties, in accordance with Section 607 of this Title.

(AMENDED AS PER RESOLUTION NO. 2315-87- 02, DATED 02/25/87.)

Sec. 305. Sanctions.

The Review Board, after a hearing may impose upon any covered entity which fails to comply with any applicable provision of this Title any of the following sanctions:

- (a) Denial or suspension of the right to do business on trust land within the Reservation, provided that the employer shall be given a reasonable time to remove equipment or other property it may have on the Reservation and to arrange with another party For assumption of any contractual obligations it has on the Reservation

"Reasonable time", shall mean a maximum of thirty (30) days unless an extension of time for removal is requested from and granted by the TERO Review Board, upon a showing of legitimate reason(s).

(AMENDED AS PER RESOLUTION NO. 2464-89-5, DATED 05/23/89.)

- (b) Denial or suspension of the right to commence new business on trust land within the Reservation;
- (c) Payment of back pay or other monetary relief to correct harm done to Indians or other entities by the non- compliance;
- (d) Civil fines, not to exceed five hundred dollars (\$500.00) per violation. Each day a covered entity is found to be out of compliance may be considered as a separate violation.

Sec. 306. Hearing procedures.

At all hearings before the Review Board, all participants shall have the following rights:

- (a) To be represented by counsel at their own expense;
- (b) To be present at the hearing;
- (c) To present relevant sworn testimony and documentary evidence, to call witnesses, and to ask questions of witnesses of other participants.

All hearings before the Review Board shall be conducted in an orderly manner, but formal rules of evidence need not be observed.

Sec. 307. Decisions after hearing.

After the hearing, the Review Board shall issue its written decision. All decisions shall state the grounds therefor. A copy of the decision shall be sent to all participants by registered mail.

Sec. 308. Appeals.

A party shall have the right to appeal any decision of the Review Board to the Tribal Court. An appeal shall be filed within thirty (30) days after receipt of notice of the Review Board's decision. The TERO director shall represent the interests of the Tribes on the appeal. The Court shall reverse the decision of the Review Board only where it finds that decision to be arbitrary and capricious, or Unsupported by substantial evidence.

Chapter 4. Employment Preference

Sec. 401. Indian employment preference.

Every covered entity is required to give preference to Indians resident on or near the Reservation in hiring, promotion and training of employees on trust land within the Reservation. The provisions of this Chapter apply to all such hiring, promotion and training.

Sec. 402. Index of Indian applicants.

TERO shall maintain an index of Indians seeking employment, and their qualifications. The index shall be maintained and cross-referenced so that TERO can easily and efficiently determine whether any Indians in the index meet the qualifications for a particular job and can develop a list of those who do.

Sec. 403. Hiring.

(a) A covered entity may recruit and hire employees or trainees from whatever source and by whatever process it chooses, provided that it may not hire a non-Indian until TERO certifies that no Indians meeting the qualifications set by the covered entity are listed on its index.

(b) If a covered entity brings work crews or teams or preexisting employees onto the Reservation to perform specific projects on trust land, such crews or teams must include not less than eighty percent (80%) Indians, unless TERO certifies that no Indians meeting the qualification for such crews or teams are listed on its index.

(c) Upon request, TERO will provide a covered entity with a list of those Indians in its index who meet the qualifications specified by the covered entity, or will refer a specified number of such Indians to the entity.

(d) The qualifications set by the covered entity under subsection (a) may not include non-job-related qualifications which have a discriminatory impact on Indian applicants.

(AMENDED AS PER RESOLUTION NO. 788-88-5, DATED 05/11/88.)

Sec. 404. Layoffs.

In all layoffs and reductions in force, no Indian shall be terminated if a non-Indian worker in the same craft or job remains employed. If a covered entity lays off by crews, qualified Indians shall be transferred to crews that will be retained so long as there are non-Indians in the same craft or job employed.

Sec. 405. Promotion.

Every covered entity shall give preference to Indians in consideration for promotion and shall encourage Indians to seek promotion opportunities. For all supervisory positions filled by non-Indians, the employer shall file a report with TERO stating what Indians applied for the job, the reasons why they were not given the job, and the efforts made to inform Indians of the opportunity.

Sec. 406. Summer students.

Indians shall be given preference in the hiring of summer student help. The employer shall make every effort to promote after-school, summer, and vacation employment for Indian youth.

Sec. 407. Effect of collective bargaining agreements.

In no event shall a collective bargaining agreement with any union constitute an excuse for failure to comply with the Indian preference policy of this Chapter. Covered entities with collective bargaining agreements shall obtain any necessary agreement from any union with which it has a collective bargaining agreement or give other satisfactory

- (a) Comply with this Chapter;
- (b) Give absolute preference to Indians in referral, regardless of which union referral list they are on;
- (c) Establish mechanisms, such as phone or mail registration, or a union sub-office near the Reservation, so that Indians do not have to travel great distances to retain their place on union lists;
- (d) Establish necessary journeyman upgrade and advance apprenticeship programs for Indian workers
- (e) "Blanket in" to the union all Indians who qualify and who wish to join the union; and
- (f) Grant work permits to Indians who do not wish to join the union.

TERO's participation in a written agreement with a union shall not constitute official tribal recognition of any union or tribal endorsement of any recruiting activities conducted by any union.

Sec. 408. Individual complaints.

Any person or entity which believes that any covered entity has failed to comply with the requirements of this Chapter may file a complaint with TERO whether or not the complaining party can demonstrate it is personally harmed by the alleged non-compliance.

Sec. 409. Compliance and hearing procedures.

If TERO has reason to believe, either as a result of a complaint filed pursuant to Section 408 or through its own investigations, that a covered entity has failed to comply with any of the requirements of this Chapter, TERO shall so notify the entity in writing specifying the alleged violations(s). If the party being so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity may be a party to all further negotiations, hearings and appeals. The entity cited and TEPO shall have twenty (20) days to pursue a voluntary, informal resolution of the problem. If no such resolution can be reached at the end of twenty (20) days, TERO shall notify the Review Board and request that it set up a formal hearing on the problem within twenty (20) days of Such notice. The procedures at such hearings shall be as provided in Chapter 3. TERO shall pursue on behalf of the Tribes complaints it determines to have merit. If the Review Board decides that an entity has failed to comply with the ordinance, it may impose one or more of the sanctions provided for in Section 305.

Sec. 410. Retaliation forbidden.

Any covered entity and any union or person subject to tribal jurisdiction which retaliates against any employee, employer, union, or other entity because of its exercise of rights under this Chapter, or compliance with provisions of this Chapter, shall be subject to the sanctions set forth in Section 305. In additions, if the Review Board determines a complaint has merit, TERO may petition the Tribal Court to order reinstatement or other temporary or permanent injunctive relief to prevent harm or further harm caused by such retaliatory actions.

Chapter 5. Contracting and Subcontracting Preference

(THIS CHAPTER AMENDED AS PER RESOLUTION NO. 231 5-87-2, DATED 02/25/87.)

Sec. 501. Indian subcontracting preference for development of trust oil and gas and for construction contracting.

Every covered entity engaged in any aspect of development of oil and gas from trust land within the Reservation, or engaged in contracts for the improvement of real estate of any kind whatsoever on trust land within the Reservation, shall give preference to firms certified by the Tribes under this Chapter in all contracts and subcontracts to be performed on the Reservation.

Sec. 501.1. Scope of preference.

An entity engaged in activity subject to this Chapter may not enter into a contract or subcontract with a firm not certified under this Chapter unless it has contacted every certified firm in the relevant field and has determined that there is no certified firm that is technically qualified to perform the work required and willing to do so at a reasonable price. So long as a certified firm meets minimum threshold qualifications, no other firm may be selected for any contract or subcontract. If the entity determines that a certified firm lacks the qualifications to perform all of the work required under a contract or subcontract the entity shall make a good faith effort to divide the work required into smaller portions so that the certified firm can qualify for a portion of the work. An entity engaged in activity subject to this Chapter shall be responsible for the compliance of all its contractors and subcontractors with this Chapter. No entity shall circumvent the requirements of this Section by hiring non-Indians and designating them as employees rather than contractors or subcontractors.

Sec. 502. Responsibility for evaluation of technical qualification and reasonable price.

(a) Technical qualifications. A covered entity engaged in activity subject to this Chapter shall determine the technical qualifications required for a particular contract or subcontract. However, if the entity determines that all certified firms are not qualified, the entity must first (1) interview the principals in all available certified firms to determine their knowledge and expertise in the area and (2) provide to each certified firm it rejects a description, in writing, of areas where it believes the firm is weak and steps it could take to upgrade its qualifications. The entity shall evaluate a certified firm that does not yet have an established record on the basis of the individual qualifications of the principals in the firm, their equipment, and any other relevant factors which provide guidance on the firm's ability to perform the work.

(b) Reasonable price. A covered entity engaged in activity subject to this Chapter may use any process it chooses for determining a reasonable price including, but not limited to, competitive bidding (open or closed) or private negotiations. However, before an entity can reject a certified firm on the basis that it is not willing to do the work at a reasonable price, it must offer the certified firm an opportunity to negotiate price. If there is only one technically qualified certified firm, an entity must enter into negotiations on price with such firm and contract with that firm if a reasonable price can be negotiated. No covered entity may reject a certified firm on the grounds that the price is not reasonable, and subsequently contract with a non-certified firm at the same or a higher price.

Sec. 503. Submission of a contracting and subcontracting plan.

(a) Before, or at the same time as, a covered entity submits a request for a permit, lease or other authorization to engage in activity subject to this Chapter to the Executive Board, it must submit a contracting and subcontracting plan to TERO for approval. The plan shall indicate contracts and subcontracts that will be entered into in such activity and projected dollar amounts thereof. If the entity has already selected a firm to perform any contract or subcontract work, it shall list the name of that firm and indicate whether or not it is a certified firm. If the firm selected is not a certified firm, the covered entity shall further indicate why each certified firm registered with TERO in the relevant area of endeavor was not selected, and the name of a contact person at each certified firm with which the covered entity dealt. No authorization shall be granted to any firm which submits a plan indicating that less than one hundred percent (100%) of the value of all subcontracts will be paid to certified firms unless the entity can demonstrate that it was unable to employ Indian firms for subcontract categories because there was an insufficient number of Indian firms qualified or available. To make such a demonstration the entity must show, at a minimum, that it interviewed all Indian firms listed on the TERO register in that area of endeavor and that: (1) a sufficient number was not available to enable it to meet the goal; or (2) the ones that were available and would have enabled the entity to reach the goal were rejected because they lacked the necessary technical qualifications; or (3) that no certified firm was willing to do the work at a reasonable price after negotiation as required by Section 502;

(b) No entity authorized to engage in activity subject to this Chapter shall deviate from its plan in a manner that diminishes the percentage of Indian subcontracting, without prior written notification to TERO, and obtaining prior written approval of TERO;

(AMENDED AS PER RESOLUTION NO. 2465-89-5, DATED 05/23/89.)

(c) TERO shall have the right to inspect the records of any entity to ensure that a plan is complied with.

Sec. 504. Operation of the contract or subcontract.

Once an entity enters into a contract with a certified firm, the Tribes will not intervene in any way in the relationship between the parties unless a certified firm demonstrates that action taken against it is intended primarily to circumvent the requirements of this Title.

Sec. 505. Replacement of non-Indian firms by certified firms after a project is underway.

(a) When an entity hires a non-certified firm because no certified firm exists at the time the non-certified firm was hired and a certified firm subsequently comes into existence, TERO shall promptly notify the entity of the existence of the certified firm;

(b) The entity shall replace the non-certified firm with a certified firm if:

(1) The contract or relationship between the entity and the non-Indian firm is expected to extend more than one year beyond the date of notification by TEPO;

(2) The certified firm is technically qualified to do the work, and

(3) The certified firm is prepared to undertake the work on the same terms, including price, as the non-certified firm performing the contract.

(c) If the relationship between the entity and the non-certified firm is through a year-to-year contract, the non-certified firm shall be replaced only when the contract expires; provided that, if the contract expires within one hundred twenty (120) days following notification that a certified firm is available, the entity shall have the right to extend the contract with the non-certified firm to a date not to exceed thirty (30) days from that notice,

(d) If there is no written contract or if the contract is not a year-to-year contract, the entity will have thirty (30) days after notification by TERO to replace the non-Indian firm with the certified firm;

(AMENDED AS PER RESOLUTION NO. 2466-89- 5, DATED 05/23/89.)

(e) The requirements of this Section may be waived or the transition period extended by TERO in individual cases upon a showing of hardship upon the covered entity.

Sec. 506. Reports and monitoring.

(a) All entities engaged in any activity subject to this Chapter shall submit such reports to TERO as it requests. An entity may refuse to submit any information which it can demonstrate must remain confidential for valid business purposes;

(b) Employees of TERO shall have the right to make on-site inspections during regular business hours in order to monitor compliance with this Chapter and shall have the right to talk to any employee on-site so long as it does not interfere with the operations of the business.

Sec. 507. Individual complaints.

Any certified firm, group of certified firms, or other person or entity which believes that any entity engaged in activity subject to this Chapter has failed to comply with the requirements of this Chapter may file a complaint with TERO whether or not the complaining party can demonstrate it is personally harmed by the alleged non-compliance.

Sec. 508. Compliance and hearing procedures.

If TERO has reason to believe, either as a result of a complaint filed pursuant to Section 507 or through its own investigations, that an entity engaged in activity subject to this Chapter on trust land has failed to comply with any of the requirements of this Chapter, TERO shall so notify the entity in writing specifying the alleged violation(s). If the party being so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity may be a party to all further negotiations, hearings and appeals. The entity cited and TERO shall have twenty (20) days to pursue a voluntary, informal resolution of the problem. If no such resolution can be reached at the end of twenty (20) days, TERO shall notify the Review Board and request that it set up a formal hearing on the problem within twenty (20) days of such notice. The procedures at such hearings shall be as provided in Chapter 3. TERO shall pursue on behalf of the Tribes complaints it determines to have

merit. If the Review Board decides that an entity has failed to comply with this Chapter, it may impose one or more of the sanctions provided for in Section 305, and may order the party to take such corrective actions as are necessary to remedy any harm done to the Tribes or to certified firms by the non-compliance.

Sec. 509. Criteria for Indian contract preference certification.

To receive certification as a firm eligible for Indian preference an applicant must satisfy all of the following criteria:

(a) Ownership. The entity must be fifty one percent (51%) or more Indian owned. The applicant must demonstrate the following:

(1) Formal ownership. That an Indian or Indians own(s) fifty one percent (51%) or more of the partnership, corporation, joint venture, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes: (i) financial ownership and (ii) control. The Indian(s)' ownership must provide him or her with a majority of voting rights or other decisional mechanisms regarding all decisions of the firm and the Indian(s) must receive at least a majority of the firm's assets upon dissolution;

(2) Value. The Indian owner(s) must provide real value for his/her majority ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his/her ownership share. It will not be considered "real value" if the Indian(s) purchased his/her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, or any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills marketing connections, or similar benefits to the firm that there is good reason to believe the arrangement would have been entered into even if there were not an Indian preference program in existence;

(3) Profits. The Indian owner(s) must receive at least fifty one percent (51%) of all profits. If there is any provision that gives non-Indian owner(s) a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, bonus tied to profits, or other vehicles, certification will be denied. Salary scales will be reviewed to ensure that the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that Indian owners receive at least fifty one percent (51%) of the profits.

(b) Management control. The firm must be under significant Indian management control. The firm must be able to demonstrate that:

(1) Unitary firms (non-joint ventures). One or more of the Indian owners is substantially involved as a senior level official in the day-to-day management of the firm. The Indian owner does not have to be the 'Chief Executive Officer'. However he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she: (1) is qualified to serve in the senior level position; and (2) is sufficiently knowledgeable about the firm's activities to be accountable to the Tribes on the firm's activities. This provision shall be waived when: (1) the firm is one hundred percent (100%) Indian-owned and the Chief Executive Officer is the spouse and/or parent of the owner(s), the family lives on or near the Reservation, and the majority of employees are Indian; or (2) the firm is owned by ten (10) or more persons, is at least seventy percent (70%) Indian-owned, the Chief Executive Officer and the highest-salaried employee in the firm are Indian, and a majority of the employees are Indian;

(AMENDED AS PER RESOLUTION NO. 2467-89-5, DATED 05/23/89.)

(2) Joint ventures. A joint venture will be required to demonstrate that the Indian firm, in addition to meeting the requirements on management control set out in subsection (b)(1) above, is, in fact, the controlling partner in the joint venture. The venture will be required to demonstrate that the Indian partner has the experience and expertise to manage the entire operation and that the non-Indian partner is providing specialized or limited resources or expertise to the venture and is not the manager in fact.

(c) Integrity of structure. The firm must not have been established solely or primarily to take advantage of the Indian preference program. In evaluating an applicant under this criterion TERO will consider the factors set out below. TERO shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian preference program and in questionable cases shall deny certification:

(1) History of the firm. Whether the history of the firm provides reason to believe it was established primarily to take advantage of the Indian preference program, particularly whether the firm, a portion of the firm, or key actors in the firm originally associated with a non-Indian-owned business that gained little of business value in terms of capital, expertise, equipment, etc. by adding Indian ownership or by merging with an Indian firm.

(2) Employees. (i) whether kry non- Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non Indian firm is controlling the applicant; (ii) Whether Indians are employed in all or most of the positions for which qualified Indians are available. A high percentage of non-- Indian employees in such positions will provide reason to believe the firm was established primarily to benefit non-Indians.

(3) Relative experience and resources. Whether the experience, expertise, resources, etc., of the non— Indian partner(s) is so much greater than that of the Indian(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm or venture other than to be able to take advantage of the Indian preference program.

(d) Residence . The entity must have its principal place of business on or near the Fort Peck Reservation.

Sec. 510. Applications for certification.

An individual or entity seeking certification as eligible for Indian preference shall submit a completed application, accompanied by an application processing fee of twenty five dollars (\$25.00), to TERO on forms provided by TERO office. TERO staff will be available to assist an applicant in filling out and filing the application.

The application shall contain, at a minimum, the following information:

(a) The applicant's name, residence, business name and address, the period of time the applicant has resided or done business on the Reservation, and if the applicant is an individual, satisfactory proof that the applicant is an Indian.

If the applicant is other than an individual, the name, address and period of residence at that address of each partner, officer and other person owning a financial interest in the net earnings of the applicant's on-Reservation business, The percentage ownership interest of each partner, officer, and other person in the applicant's net earnings from on-Reservation activities whether such partner, officer and other person is Indian or non-Indian, and if Indian, satisfactory proof that the individual is an Indian;

(b) Information sufficient to demonstrate that the criteria of Section 509(a) and (b) are met;

(c) Information concerning the origins and history of the applicant, and its employees sufficient to allow evaluation of the firm under Section 509(c);

(d) Satisfactory proof that the applicant is qualified to conduct and operate the business for which certification is sought;

(e) A statement of the applicant's policy with respect to the employment of Indians resident on the Reservation and a history, if any, of past employment of Indians resident on the Reservation;

(f) A statement reading as follows:

The undersigned each hereby certify on behalf of the applicant and each for himself or herself that the foregoing statements are true and correct and that if any material is false, any license granted pursuant to this application shall be void and of no force or effect.

Sec. 511. Certification determinations.

Within twenty one (21) days after receipt of a completed application, TERO shall review the application, request such additional information as it believes appropriate (the twenty one (21) day period shall be stayed during the time any request for additional information is outstanding), conduct such investigations as it deems appropriate, and submit an analysis and recommended disposition to the Review Board. Copies of the analysis and recommended disposition shall be kept confidential and shall not be made available to the applicant or any other party. When it is so required, TERO may extend the processing period by an additional twenty one (21) days, by sending notification of the extension to the applicant by registered mail. Within fifteen (15) days of receipt of TERO's analysis and recommended disposition, the Review Board shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, and Agency and The TERO office at least five (5) days prior to the hearing. In addition, any other party wishing to present information to the Review Board shall be entitled to do so, by requesting, no less than one (1) day prior to the hearing, an opportunity to participate and may be represented by counsel. Hearings and any appeals shall be conducted as provided in Chapter 3 of this Title.

Sec. 512. Probationary certification.

An applicant granted certification shall be issued a six (6) month probationary certificate, upon payment to TERO of a fifty

dollars (\$50.00) certification fee. During that period, TERO shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period, TERO shall have the right to request and receive such information and documents as they deem appropriate.

Sec. 513. Final certification.

At the end of the probationary period the Review Board, after receiving recommendations from TERO, shall either grant full certification or deny certification.

Sec. 514. Withdrawal of certification.

From information provided in the change notices or Annual Reports required by Section 516, on the basis of a written grievance filed by any other firm or person, or on its own initiative, TERO may initiate proceedings to withdraw or suspend certification for any firm. TERO shall prepare an analysis and recommended disposition for the Review Board and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds thereof. The Review Board shall then set a date for a hearing, which shall be held within twenty one (21) days after it receives the analysis and recommended disposition from TERO. At the hearing, TERO staff shall present the case for suspension or withdrawal and the hearing shall be conducted as in Chapter 3 of this Title. After the hearing, the Board may: (1) withdraw certification; (2) suspend certification for up to one (1) year; (3) put the firm on probation; and/or (4) order that corrective action be taken within a fixed period. A firm that has had its certification withdrawn may not reapply for a period of one (1) year.

Sec. 515. Firms certified prior to the adoption of these criteria.

Each firm holding Indian preference certification from the Tribes prior to the effective date of this Chapter shall remain certified without submitting a new application under Section 510. However, if any such firm does not meet the criteria of Section 509, certification may be withdrawn in accordance with Section 514.

Sec. 516. Annual and other reports.

Each certified firm shall report to TERO, in writing, any changes in its ownership or control status within sixty (60) days after such changes have occurred. Each certified firm, on the anniversary of its receipt of permanent certification, shall update the information provided in its initial application on an Annual Report form provided by TERO. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.

Sec. 517. List of certified entities.

TERO shall maintain a current list of all entities certified pursuant to this Chapter. Copies of this list shall be posted in a conspicuous place in the TERO office, shall be made available to the interested public, for a reasonable copying fee, and shall be brought to the attention of those persons, associations, partnerships and corporations seeking to employ subcontractors for activity subject to this Chapter. No preference as between certified entities shall be indicated on the list.

Sec. 518. Retaliation forbidden.

Any covered entity and any union or person subject to tribal jurisdiction which retaliates against any employee, employer, union, or other person because of the person's exercise of rights under this Chapter, or compliance with provisions of this Chapter, shall be subject to the sanctions set forth in Section 305. In addition, if the Review Board determines a complaint has merit, TERO may petition the Tribal Court to order reinstatement or other temporary or permanent injunctive relief to prevent harm or further harm caused by such retaliatory actions.

(SECTIONS 519-522 ARE REPEALED AS PER RESOLUTION NO. 2315-87-2, DATED 02/25/87.)

Chapter 6. Voluntary Indian Preference

Sec. 601. Voluntary Indian preference policy.

(a) It is the policy of the Tribes that all employers on or near the Reservation, which are not covered entities subject to Chapter 4 of this Title, should give preference to Indians resident on or near the Reservation in hiring and promotion of all employees;

(b) It is the policy of the Tribes that all entities engaged in activities on or near the Reservation, which would be subject to Chapter 5 of this Title if they were conducted on trust land, should give preference to firms certified under Chapter 5 in contracting and subcontracting.

(AMENDED AS PER RESOLUTION NO. 2315-87-2, DATED 02/25/87.)

Sec. 602. Employment

(a) Prior to opening a new business or beginning a new project requiring the hiring of employees on or near the Reservation, the Tribes request that an employer notify TERO of its intentions. TERO shall ascertain how many employees the employer expects to hire and the relevant qualifications for each job category. Based on the availability of qualified Indians, TERO shall determine how many Indians should be hired, and when, for each employer to honor the voluntary Indian employment preference policy of Section 601(a);

(b) TERO shall monitor all employers on or near the Reservation to determine whether the policy of Section 601(a) is being honored. Following appropriate consultation and investigation TERO shall issue certificates of compliance to employers honoring the employment preference policy, and certificates of non-compliance to employers not honoring the policy. Employers without good cause refusing TERO access to information necessary to make such a determination shall be issued a certificate of non-compliance;

(c) Upon request, TERO shall provide any employer on or near the Reservation with a list of those Indians in its index who meet the qualifications specified by the employer, or will refer a specified number of such Indians to the employer.

Sec. 603. Oil and gas subcontracting.

(a) Prior to beginning a new project on or near the Reservation, the Tribes request that an entity engaged in activity subject to 601(b) notify TERO of its intentions. TERO shall consult with all such entities to assist in carrying out the contracting and subcontracting preference policy of Section 601(b). For each such entity TERO shall ascertain what contracts and subcontracts the entity expects to let. Based on the availability of certified firms, TERO shall determine how many certified firms should be utilized for the entity to honor the voluntary policy;

(b) TERO shall monitor all entities engaged in activity subject to 601(b) to determine whether the policy of Section 601(b) is being honored. Following appropriate consultation and investigation, TERO shall issue certificates of compliance to entities honoring the policy and certification of non-compliance to entities not honoring the policy. Entities without good cause refusing TERO access to information necessary to make such determination shall be issued a certificate of non-compliance;

(c) Upon request, TERO shall provide any entity engaged in activity subject to 601(b) with copies of the list of certified entities maintained pursuant to Section 517.

(AMENDED AS PER RESOLUTION NO. 2315-87- 2, DATED 02/25/87.)

Sec. 604. Reporting.

The first week of each month, TERO shall report the names of employers and entities it has found honoring and not honoring the policy of this Chapter to the Executive Board.

Sec. 605. Preference for contracts with the Tribes and tribal corporations.

The Tribes, and all tribally owned corporations, shall give a preference to employers and entities which comply with the policy set forth in this Chapter in the awarding of contracts and in all other business transactions.

Sec. 606. Publicity.

(a) With the approval of the Executive Board, TERO may publicize in newspapers or otherwise, the names of employers or entities in compliance with, and the names of employers or entities not in compliance with, the Tribes' Indian preference policy;

(b) A least ten (10) days prior to the publication of the name of any employer or entity that employer or entity shall be notified that it will be named, and in which category. If an entity believes a mistake has been made, it may so advise TERO and seek a change.

Sec. 607. Review of TERO's actions.

Any person aggrieved by an action of TERO, its Director or employees under this Chapter shall have a right to appeal the action to the Review Board in accordance with Chapter 3. The challenged action shall be upheld unless the person

aggrieved can show that the action was arbitrary, capricious, beyond the authority of TERO as set forth in this Chapter, or in violation of federal or tribal law. The Executive Board and its Chairman, TERO and its Director and employees shall not be liable for monetary damages for actions taken in good faith under this Chapter by TERO, its Director or employees.

Chapter 7. Liaison Officers

(THIS CHAPTER AMENDED AS PER RESOLUTION NO. 231 5-87-2, DATED 02/25/87.)

Sec. 701. Requirement for liaison officers.

(a) Any covered entity engaged in:

- (1) geophysical exploration on trust land;
- (2) drilling for oil and gas on trust land; or

(3) geophysical exploration or drilling for oil and gas on fee land where a right-of-way has been granted across trust land to facilitate the activity on fee land, shall employ a Liaison Officer.

(b) Any covered entity constructing a road, power line, telephone line, water line, sewer line, or oil or gas transportation line or other public utility:

(1) across trust land; or

(2) across fee land if a right-of-way has been granted across trust land to facilitate the construction, shall employ a Liaison Officer if the total cost of the project is expected to exceed twenty thousand dollars (\$20,000.00).

Sec. 702. Duration.

The Liaison Officer shall be employed:

(a) on a geophysical project or project subject to Section 701 (b) from the start of the project, ordinarily beginning with the surveying, through the final inspection of the Tribes;

(b) on drilling for oil and gas from site preparation through completion, or plugging and abandonment, of the well.

Sec. 703. Duties.

The duties of the Liaison Officer shall be as follows:

(a) Act as liaison between the covered entity and the Tribes' oil and gas committee, the Tribal Minerals Resources Department, TERO and the Bureau of Indian Affairs;

(b) Detour projects around tribal historical sites, such as buffalo jumps, teepee rings, burial grounds, social areas, etc., to the extent feasible;

(c) Inspect the right-of-way or the permitted or leased area for the condition of the land, livestock, and fencing prior to the project's start, during the project and at the completion and final inspection of the project or termination of the Liaison Officer's duties as stated in Section 702;

(d) Report all violations of land damage, fire, employee discrimination, and TERO regulations and complaints to the proper authorities;

(e) File weekly reports to the Tribal Oil and Gas Committee, or Tribal Mineral Resources Department, as appropriate, TERO, and the Bureau of Indian Affairs on all daily activities.

Sec. 704. Compensation.

The Liaison Officer shall be paid by the covered entity according to a rate of compensation established by the Director of TERO with the approval of the Executive Board.



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**ORDINANCE OF THE HOOPA VALLEY TRIBE
HOOPA VALLEY INDIAN RESERVATION
HOOPA, CALIFORNIA**

ORDINANCE NO. 2-80, AS AMENDED

DATE APPROVED: APRIL 27, 1995

SUBJECT: ESTABLISHMENT OF STANDARDS AND PROCEDURES FOR EMPLOYMENT
PRACTICES AND APPLICATION OF INDIAN PREFERENCE

WHEREAS: The Hoopa Valley Tribe adopted a Constitution and Bylaws on June 20, 1972, which the Commissioner of Indian Affairs approved on August 18, 1972, and Article IX, Section 1 (f) thereof authorizes the Hoopa Valley Business Council to "provide assessments or license fees...."; Article IX, Section 1(g) thereof authorizes the Council to "negotiate with the Federal, State, and local governments on behalf of the tribe"; Article IX, Section 1(j) thereof authorizes the Council to "exclude from the restricted land of the Hoopa Valley Indians persons not legally entitled to reside therein"; and Article IX, Section 1(l) thereof authorizes the Council to "safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation"; and

WHEREAS: As part of the solutions for developing a sound and progressive socio-economic environment for the Hoopa Valley Reservation community, the Hoopa Valley Business Council has determined that access to employment opportunities is a major part of a comprehensive approach, and toward that end has enacted a Tribal Employment Rights Ordinance providing for Indian preference in hiring and contracting; and

WHEREAS: There is a need to clarify the policies and procedures of previous TERO enactments to insure consistent enforcement by the Tribe and full compliance by all employers conducting commercial or employment activities within the Reservation; and

WHEREAS: There is also a need to expand and consolidate the authority of the TERO Office so that it may regulate all aspects of employment practices on the Reservation, including those regulated under previous TERO enactments.

THEREFORE BE IT NOW RESOLVED THAT: The Hoopa Valley Business Council does hereby amend Ordinance No. 2-80 in a manner that substitutes this Amendment as Title 13 of the Law and Order Code of the Hoopa Valley Tribe, and further declares that except as expressly provided herein, any and all previous TERO enactments are hereby repealed and shall be of no effect.

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

**SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND
APPLICATION OF INDIAN PREFERENCE**

BE IT FURTHER RESOLVED THAT: Ordinance No. 1-85 is hereby amended to confirm Council's intent that said Ordinance require all covered employers to maintain Workman's Compensation Insurance, and to develop a practical definition that effectively distinguishes employees from subcontractors, and the Legal Department is hereby authorized and directed to revise the language of said Ordinance in a manner consistent with this amendment and to present it for Council's ratification not later than the second Regular Council Meeting after the meeting at which this TERO Ordinance is approved.

BE IT FURTHER RESOLVED THAT: All matters arising under this Title shall be regulated, administered, and adjudicated exclusively under the procedures set forth herein, and shall not be subject to any different or concurrent procedures set forth in the Personnel Policies of the Tribe, in the Appellate Review Procedure approved by Resolution No. 83-147 of November 22, 1983, or in any other tribal law or policy that might otherwise be applicable in the absence of this clause.

BE IT FURTHER RESOLVED THAT: The policies and procedures embodied in this Ordinance are intended to fulfill a fundamental obligation of the Council to provide for the basic welfare of the members of the Hoopa Valley Tribe and other Indians of the Reservation community.

BE IT FURTHER RESOLVED THAT: The Tribal Chairman's Office, in consultation with the Legal Department shall take all steps necessary to transmit this Ordinance to the Bureau of Indian Affairs for approval for enforcement with respect to non-members of the Tribe, pursuant to Article IX, Section 1(1) of the Tribal Constitution; provided, however, that this Ordinance shall be deemed approved if not acted upon by the Bureau of Indian Affairs within sixty (60) days of its transmission from the Tribe.

TITLE 13

STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND APPLICATION OF INDIAN PREFERENCE

13.0 SHORT TITLE

The short title of this ordinance shall be the Tribal Employment Rights Ordinance, or TERO.

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND
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13.1 EFFECT ON PRIOR ENACTMENTS

13.1.1 Repeal. Amendments 1 through 7 of the TERO Ordinance, Resolution 81-101 and the TERO Guidelines approved thereby, and Council Resolution No. 88-75 are hereby repealed and shall be of no further force and effect; provided, however, that any existing agreements or contracts authorized under these now repealed enactments shall remain in effect until such agreements or contracts expire or are terminated; and provided, further, that the TERO Commission established by this Ordinance may terminate any existing Indian preference agreement and issue a permit in conformance with this Ordinance upon notice to the affected party and opportunity for a hearing.

13.1.2 Enforcement of Ordinance No. 1-85, Certification of Indian Firms. The TERO Commission is authorized to certify that an enterprise meets the definition of an Indian firm set forth in Section 13.2.4 for purposes of Indian preference, and for documentation of minority small business contract eligibility or claimed exemptions from state taxation and wage performance bond requirements; provided, however, that certification as provided herein shall not oblige the Commission to advocate the claims of private individuals and entities before any agency of another government.

13.1.3 Fair Operating Standards and Dispute Resolution Procedures for Reservation Timber Sales Preserved Pending Approval of Administrative Rules. TERO procedures established for Reservation timber sales under the former MOU between Hoopa Forest Industries and the Bureau of Indian Affairs, and consisting of (1) Exhibit A to TERO Amendment No. 7, May 21, 1987, Fair Operating Standards and Procedures, and (2) the Report of Timber Sale Contract/MOU Work Group, April 15, 1987, including in particular the Contractor-Subcontractor Dispute Procedure, are hereby preserved to the extent that they do not conflict with the substantive provisions of this Ordinance; provided that the TERO Commission established by this Ordinance shall review, revise, and subject to Council approval, reissue these procedures as administrative rules not later than 60 days after the effective date of this Ordinance.

13.2 DEFINITIONS

13.2.1 "Indian" means any member of any federally recognized

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tribe, or any person who furnishes documentary proof that he or she is recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.

13.2.2 "Hoopa Reservation" or "Reservation" means the Hoopa Valley Indian Reservation as defined under Article III of the Constitution and Bylaws of the Hoopa Valley Tribe.

13.2.3 "Employer" means any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity on the Hoopa Reservation, and which employs two or more persons.

13.2.4 "Indian Firm" means a firm or business certified by the TERO Commission as eligible for Indian preference in contracting and subcontracting; provided that Indians hold at least 51% ownership interest in such firm or business and exercise majority management control.

13.2.5 "Commission" and "Office" mean the Tribal Employment Rights Commission and its Office and the Tribal Office of Employment Relations.

13.2.6 "Council" means the Hoopa Valley Business Council.

13.2.7 "Minimum Threshold" means a minimum level above which Indian preference will be required as established by:

1. Job Descriptions;
2. Interview Committees;
3. Skills Tests;
4. RFP's and License Requirements;
5. Other Written Requirements.

13.3 ESTABLISHMENT OF TERO COMMISSION AND OFFICE

13.3.1 Establishment and Purpose of Commission

The Hoopa Valley Business Council does hereby establish the Tribal Employment Rights Commission (TERO Commission) for the purposes of (A) implementing and enforcing the provisions of this Ordinance, and (B) providing exclusive and independent investigation and administrative review of personnel actions and grievances arising under the Personnel Policies and Procedures of

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the Hoopa Valley Tribe, Tribal Ordinance No. 1-85, Unemployment, Disability, and Workman's Compensation Insurance Ordinance, as amended herein, or other Council enactments regulating employment practices of the Tribe or its entities (including without limitation the Hoopa Valley Development Enterprise and its subsidiaries and successors) or other employers or contractors within the Reservation.

Consistent with the third "Resolved" clause of this Ordinance, the procedures set forth in this title shall supersede any and all other procedures set forth in the Tribe's Personnel Policies and Procedures or in the Appellate Review Procedure approved in Resolution 83-147 with respect to any matter regulated hereby.

13.3.2 General Powers of the Commission

(A) Organizational Authority. The Commission may hire immediate TERO staff, obligate funds appropriated by the Council, and secure and obligate funding from Federal, State or other sources to carry out its duties and functions under this Ordinance. The Commission is further authorized and directed to adopt such organizational bylaws as are necessary to enable it to carry out its duties and functions. The Commission shall report directly to the Council. The TERO Commission shall be subject to the Conflict-of-Interest and Nepotism Ordinance of the Hoopa Valley Tribe.

(B) Regulatory Authority.

(1) The Commission shall issue rules, regulations, interpretations of law, and guidelines for Indian preference necessary to implement this Ordinance. Such rules shall become effective upon written approval of the Council. Approved rules shall be codified in the Revised Code of the Hoopa Valley Tribe, and the Commission shall take other reasonable steps to insure that the general Reservation community is on notice of all Indian preference and employment related laws.

(2) The Commission shall maintain an Indian Skills Bank as a means of providing qualified Indian employees to employers, contractors, and subcontractors. The Commission shall actively recruit Indians for listing in the Skills Bank. The Commission shall also actively recruit and certify Indian firms as eligible for Indian

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Preference in contracting and sub-contracting.

(3) The Commission is authorized to certify Indian firms, from on or off the Reservation, for purposes of Indian preference, minority small business contract eligibility, exemption from state taxation and wage performance bond requirements, and other purposes. The Commission shall develop administrative rules to implement this authority, which shall include provisions and procedures for revocation of such certifications.

(4) The Commission may register off-reservation contractors and sub-contractors, approve Indian Preference Plans, and issue permits to such contractors according to rules and procedures to be developed, which shall include procedures for revocation of such permits.

(5) The Commission is further authorized and directed to investigate complaints regarding any violation of the provisions of this Ordinance or any other tribal law the Commission is authorized to enforce; the Commission may also investigate possible violations on its own initiative.

(C) Adjudicatory Authority

The Commission may hold hearings on and determine any matter under its authority, including but not limited to hearings necessary to the issuance, modification, and revocation of any permit, license, certification, or assessment authorized hereunder, as well as any adjudicatory hearing regarding violations of the provisions of this Ordinance or of any other general tribal law or specific departmental employee grievance procedure. The Commission shall promulgate simple and fair rules of procedure to govern its adjudications, and is authorized to issue compliance orders and to impose civil penalties in the form of fines.

(D) Cooperative Agreements with Other Governments

The Commission may negotiate, and upon Council approval, enter into cooperative agreements with agencies of state and federal government in order to implement the intent of this Ordinance, eliminate unlawful discrimination against Indians, and to provide for review of other employment related issues.

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13.3.3 Composition of the Commission

(A) The Commission shall be composed of five (5) members in good standing in the community. Three (3) members of the Commission shall be appointed by the Council in October of even numbered years, each for a term of two (2) years; and two (2) members shall be appointed in odd numbered years, each initially for a term of one (1) year, thereafter being appointed in October of odd-numbered years each for a term of two (2) years. Any member may be removed by the Council at any time for cause, subject to notice and opportunity for a hearing before Council. All terms of office shall commence on October 1 of the year position becomes vacant.

(B) Decisions of the TERO Commission shall be made by a majority vote. A quorum shall consist of any three of the five Commission members.

(C). Any Commission member who is also on the staff of the Council shall be disqualified from any involvement in decisions affecting the tribal department or entity with which he or she is employed.

13.3.4 Powers of the TERO Director

The TERO Director shall have those powers delegated by the Commission as it deems necessary to carry out this Ordinance. The Director shall be the investigating agent for the Commission responsible for investigating, researching, reporting and documenting any information required by the Commission. The Director shall report directly to the Commission.

13.4 INDIAN EMPLOYMENT PREFERENCE POLICY AND PROCEDURES

All employers shall extend a preference to qualified Indians, as provided herein, in all aspects of employment, including but not limited to recruitment, hiring, promotion, lateral transfers, retentions, training, contracting, and subcontracting. No employer may recruit, hire, or otherwise employ any non-Indian for any employment position covered by this Ordinance, unless and until the TERO Commission has furnished written notice to such employer that no qualified Indians are available for such position.

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13.4.1 Applicability

Unless clearly and expressly prohibited by federal and other tribal laws, this Ordinance shall apply to all employers, including but not limited to: The Council and all its programs, departments, and chartered entities or enterprises; private employers and independent contractors and subcontractors, including those performing work for the Council, the State of California, or the United States.

13.4.2 Covered Positions

The Indian Employment Preference Policy of this section shall apply to each and every job classification, skill area, or craft recognized or utilized by an employer, including administrative, supervisory, and professional classifications.

13.4.3 Qualified Indians; Employment Criteria

An Indian shall be qualified for employment in a position if he or she meets the minimum threshold requirements for such position, and such Indian shall be accorded the preferences to which he or she is entitled under this Ordinance. No employer may utilize any employment criterion that is not legitimately related to the performance of the position.

13.4.4 Eligible Indians

(A) Hoopa Valley Tribe and its Entities. The Hoopa Valley Tribe and its programs, departments, and chartered entities and enterprises shall extend Indian preference according to the following priorities:

- (1) Members of the Hoopa Valley Tribe;
- (2) Indian spouses of members of the Hoopa Valley Tribe;
- (3) Other resident local Indians.
- (4) Other Indians.

13.4.5 Notice of Employee Rights. All employers subject to this Ordinance shall prominently display a notice to all employees and

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applicants for employment of their rights under this Ordinance and other tribal departmental grievance procedures.

13.4.6 Employer Retaliation Prohibited. It shall be violation of this Ordinance for any employer to take any adverse personnel or hiring action, or to retaliate in any way, against any person who attempts to exercise rights protected under this Ordinance. Employers found by the Commission, pursuant to an adjudicatory hearing, to have engaged in retaliation shall be subject to appropriate sanctions to be imposed by the Commission. The Commission may in its discretion either hold a hearing or file action in Tribal Court to review an allegation of unlawful retaliation. The Tribal Court is authorized to issue temporary injunctions for enforcement of this provision to prevent unlawful conduct.

13.5 ESTABLISHMENT OF TERO TAX AND FEES

There is hereby established a TERO tax to be paid to the TERO Commission by each prime contractor, and by each employer operating within the exterior boundaries of the Hoopa Reservation, whose total contract or annual gross revenues is \$1,000.00 or more. The tax shall be equivalent to one percent (1%) of the total gross value of any contract performed within the Reservation or of the total annual gross revenues. The TERO tax may be paid in incremental payments, subject to the prior written approval of the Commission. The proceeds of the tax shall be placed in a separate account for use in implementing this Ordinance and shall be governed under guidelines approved by the Tribal Fiscal Department. A contractor or employer failing to pay the TERO Tax shall be subject to sanctions imposed by the Commission.

13.6 SPECIAL REQUIREMENTS FOR CONTRACTORS AND SUBCONTRACTORS

The requirements of this Section apply to all employers engaging in commercial or employment activities within the Reservation pursuant to public or private contract:

13.6.1 Certification by Commission

Any contractor or subcontractor claiming eligibility for Indian preference under this title shall submit documentation acceptable to the Commission, pursuant to its authority under

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Section 13.3.2 (B)(3), that is an Indian firm as defined in Section 13.2.4.

13.6.2 Indian Preference Plan

Each contractor shall include in its bid an Indian Preference plan for the master contract and any subcontracts. The plan shall indicate the name of the proposed subcontractor, whether it is an Indian-owned firm and if not, information on the good faith steps taken to identify Indian firms for the subcontract. A contractor may not refuse to employ an Indian subcontractor for the reason of price so long as the Indian firm's price is within five percent (5%) of the lowest bid, calculated by multiplying the lowest bid by 105%. A contractor may not refuse to employ an Indian subcontractor for the reason that a non-Indian firm is more qualified so long as the Indian firm satisfies the threshold requirements for technical qualifications.

13.6.3 Failure to Submit Indian Preference Plan

An apparent successful bidder who fails to submit an Indian preference plan prior to award of the contract shall be considered a non-responsive bidder for the purpose of awarding the contract.

13.6.4 Amendments to Plan

If awarded the bid, the contractor may not deviate from the plan or add or delete any existing new subcontracts or subcontractors without the written consent of the Contracting Officer or his designee and notice to the Commission. Any amendments to the Indian Preference Plan must be in writing and approved prior to the date of implementation.

13.6.5 Bid Shopping Prohibited

A contractor is prohibited from engaging in bid shopping as a means of avoiding its Indian subcontract preference obligations. Bid shopping is defined as any practice which a bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.

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13.7 JOB CATEGORIES

Employers or subcontractors employed by a primary contractor under one or more contracts totaling at least \$10,000 shall not participate in more than one area of the overall project for which such employer or subcontractor is employed. A superintendent or any person in a similar capacity employed by the primary contractor shall not be employed in any other aspect of said project.

13.7.1 Identification of Regular, Permanent Employees

Prospective contractors and bidders shall identify regular, permanent employees, including those included in subcontractors, in the bid package. Such employees may be employed on the project whether or not they are Indian. A regular, permanent employee is one who is and has been on the contractor's or subcontractor's annual payroll, or is an owner of the firm. The fact that an individual has worked for the contractor on previous projects shall not of itself qualify that individual as a regular, permanent employee. Exceptions for superintendents and other key personnel may be granted by the Commission on a case-by-case basis. Any contractor or subcontractor which fills vacant employment positions in its organization immediately prior to undertaking work pursuant to a contract on the Hoopa Reservation shall provide evidence acceptable to the Contracting Officer and the Commission that such actions were not intended to circumvent the provisions of this Ordinance.

13.7.2 Lay-Offs

No Indian Worker shall be laid off as long as a non-Indian worker in the same craft is still employed, no as long as the Indian meets threshold qualifications for the job, unless such non-Indian has been employed for more than 90 days longer than such Indian. If the contractor lays off by crews, qualified Indians shall be transferred to any crew that will be retained, as long as there are non-Indians in the same craft employed elsewhere on the Reservation under the same contract.

13.7.3 Existing Contracts, Employers

Any existing contracts or other work presently operating under an agreement with the Tribal Employment Rights Office will continue under the same written guidelines and rules. Each employer shall provide to the Commission a list of employees and their Indian

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affiliation, if any, as part of the implementation of this Ordinance.

13.7.4 Reporting Requirements

Each employer shall submit monthly reports to the Commission on a form provided indicating the number of employees, including a separate tally of Indians, it has on its work force, monthly hires and fires, and other information as may be identified on the form. An employer who fails to submit monthly reports shall be subject to sanctions provided under this Ordinance.

13.8 IMPLEMENTATION

In implementing the requirements of this Ordinance, the Commission may:

13.8.1 Numerical Hiring Goals

Impose numerical hiring goals and timetables that specify the minimum number of Indians an employer must hire.

13.8.2 Training Programs

Require employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Indians on the Hoopa Reservation. Such training programs must have prior approval from the Contracting Officer and should preferably be included in the bid package. If training programs are not included in the bid package, the Commission shall give due consideration to the increase in cost, if any, for performing the program.

13.8.3 Attend and monitor all job interviews as a non-voting participant.

13.8.4 Prohibit an employer from establishing extraneous qualification criteria or other requirements that serve as barriers to Indian employment.

13.8.5 Enter into agreements, subject to approval by the Hoopa Business Council, with unions and other employers to insure compliance with this Ordinance.

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13.8.6 Require employers to give preference in the award of contracts and subcontracts to Indian-owned firms and businesses.

13.8.7 Establish programs to provide counseling and support to Indian Workers to assist them to retain employment. Employers may be required to participate in and/or cooperate with such support and counseling programs.

13.8.8 Issue Permits

Issue permits for implementation and provisions of this Ordinance and other agreements entered into under the authority of this Ordinance.

13.9 ENFORCEMENT BY TERO COMMISSION

In implementing this Ordinance the Commission shall have the following powers of enforcement:

13.9.1 Investigation, Monitoring

To investigate and monitor complaints, concern, and inquiries regarding Indian preference and other employment related concerns.

13.9.2 Issue Notices of Non-Compliance and Compliance Orders

To issue notices of non-compliance with this Ordinance or other rules, regulations, or policies of an employer, Council, or other tribal entity, and to issue such orders as reasonably necessary to remedy the non-compliance.

13.9.3 Citations, Subpoenas, and Penalties

To issue citations and subpoenas to employers regarding violations of this Ordinance or other written personnel policies of the Council or tribal entities, and to impose such civil penalties, including fines, as may be reasonably necessary to remedy the consequences of a violation of this Ordinance or to deter future violations.

13.9.4 Hearings

To hold such hearing as may be necessary to resolve complaints

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and hear concerns regarding the matters covered under this Ordinance.

13.9.5 File and Defend Cases in Tribal Court

To bring or defend a complaint in Tribal Court for enforcement of this Ordinance, personnel policies of the Council, or other tribal entity against any employer within the exterior boundaries of the Hoopa Reservation.

13.10 TRIBAL COURT

Appeals of decisions of the TERO Commission may be filed under the rules of the Tribal Court. The Tribal Court is hereby authorized to hear and dispose of complaints and other actions brought under this Ordinance and other personnel policies of the Council and other entities.

13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title, the Commission shall consult with the Legal Department, and may request representation in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the Legal Department warrant. There is hereby established a presumption, rebuttable only upon a clear written explanation by the Legal Department that no ethical conflict in interest is present, in which the Tribal Chairman and in his discretion the Council concerns, that the Legal Department shall not defend any entity of the Tribe in a proceeding before the TERO Commission or in Tribal Court.

**13.12 PRINCIPLES OF CONSTRUCTION; SEVERABILITY; SOVEREIGN
IMMUNITY PRESERVED**

13.12.1 This Ordinance is remedial legislation intended to rectify the long-standing problem of severe under-employment of Hoopa tribal members and other Indians living in the Reservation community. Accordingly, it is to be construed liberally to achieve its purposes. Doubtful issues are to be resolved in favor of a right to file a grievance and to obtain judicial review.

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13.12.2 If any part of this Ordinance is found to be invalid for any reason, it is the intent of the Council that the remaining provisions remain in force to the maximum extent possible, and that they continue to be construed according to the provisions of this Section.

13.12.3 Except as expressly provided herein, nothing in this Ordinance is to be construed as a waiver of the Tribe's sovereign immunity from unconsented lawsuit, nor as consent by the Tribe to bring an action against the Tribe, its officers, or any of its departments or entities.

C E R T I F I C A T I O N

I, the undersigned, as Chairman of the Hoopa Valley Business Council, do hereby certify: that the Hoopa Valley Business Council is composed of eight members, of which six (6) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held this 27th day of April, 1995; that this Ordinance was adopted at said meeting by a vote of five (5) for and none (0) against; and that since its adoptions this Ordinance has not been altered, rescinded, or amended in any way.

DATED THIS 27TH DAY OF APRIL, 1995.


DALE RISLING, CHAIRMAN
HOOPA VALLEY TRIBAL COUNCIL

ATTEST:


PAMELA HAMMOND, EXECUTIVE SECRETARY
HOOPA VALLEY TRIBAL COUNCIL

RESOLUTION OF THE HOOPA VALLEY TRIBE
HOOPA INDIAN RESERVATION
HOOPA, CALIFORNIA

RESOLUTION NO: 91-71 A, AS AMENDED

DATE APPROVED: MARCH 6, 1995

SUBJECT: ESTABLISHING COMPLAINT PROCEDURES FOR THE HOOPA TRIBAL
EMPLOYMENT RIGHTS COMMISSION.

WHEREAS: The Hoopa Valley Tribe did on June 20, 1972, adopt a Constitution and Bylaws which was approved by the Commissioner of Indian Affairs on August 18, 1982, and this Constitution and Bylaws authorized the Hoopa Valley Business Council to enact ordinances promote the general welfare of the Hoopa Valley Tribe; and

WHEREAS: The Tribal Council did on April 19, 1990, did adopt Ordinance No. 2-80, Tribal Employment Rights Ordinance, as amended; and

WHEREAS: The procedures contained herein establish a fair and uniform internal process for how complaints are to be handled by the Tribal Employment Rights Commission.

NOW THEREFORE IT BE RESOLVED: That the Hoopa Valley Business Council does hereby adopt the Complaint Procedures for the Hoopa Tribal Employment Rights Commission.

I. PURPOSE

The purpose of these procedures is to establish clear and uniform procedures for handling complaints and other matters before the Tribal Employment Rights Office Commission. These procedures are intended to be guidelines for the TERO Commission and interested individuals and shall be subject to the provisions of the overriding authority of the Tribal Employment Rights Ordinance.

II. PROCEDURES FOR FILING COMPLAINTS

(a) Filing of Complaint

Any individual, group of individuals, organization, business or entity who believes any covered employer or entity, or the Commission has violated any requirements established in the Tribal Employment Rights Ordinance or regulations issued pursuant to it, may file a complaint with the TERO Director. The complaint may be typed or handwritten, provided that handwritten complaints must be legible after photocopying, and shall provide such information as is necessary to enable the Commission to carry out an investigation.

(b) Complaint Investigation

The Director shall investigate and report to the Commission on every complaint and every appeal of employee grievance decisions under the Personnel Policies and Procedures filed with the Office. If upon investigation, the Commission determines there is a reason to believe a violation has occurred or the Director determines that the employee grievance remains unresolved, the Commission may schedule a hearing on the matter or may take enforcement actions as provided by the Tribal Employment Rights Ordinance. Within fifteen (15) work days after receipt of the complaint, and as needed thereafter, the Director shall provide the complaining or appealing party a written report on the results of the investigation. The report shall include a clear explanation of the Commission's preliminary findings and recommendations (or, in employee grievance appeals, the Director's findings and recommended decision), and the parties' right to a hearing before the Commission. This time period may be adjusted upon mutual agreement of the parties.

III. INVESTIGATIONS

The Commission, shall investigate as deemed necessary to determine whether any covered employer or other entity has violated any provision of the TERO or any rule, order, or other instrument issued pursuant to it. Such investigation shall be carried out by the director. The director may enter, during working hours, the place of business or employment of any employer for the purpose of such investigation, and may require the covered employer or entity to submit such reports and other information as he/she deems necessary to monitor compliance with the requirements of the TERO and rules issued pursuant to it. The director shall also

investigate appeals of employee grievances in an effort to conciliate them. The director shall make a written report and recommendation as to each investigation.

IV. HEARING BEFORE THE COMMISSION

If requested by the complaining or appealing party or covered employer or entity, within ten (10) work days, after the mailing of a written report of the investigation, or on its own initiative, the Commission shall conduct a hearing on any matter before the Commission no later than thirty (30) work days after receipt of the request. Such hearing may be for enforcement action, to hear input on proposals, to hear appeals of the Director's recommended decisions on employee grievances, or may be in furtherance of an investigation of a matter before the Commission. Hearing notices shall be sent by first-class mail to each of the identified parties involved in the matter and shall be publically notices at least fifteen (15) work days before the hearing date. The Commission shall designate a hearing officer to preside over the hearing. Commissioners shall not be shown copies of investigative reports concerning employee grievances.

V. POWER TO REQUIRE TESTIMONY AND PRODUCE RECORDS

For the purpose of investigations, hearings and following up on complaints, which in the opinion of the Commission, are necessary and proper for the enforcement of the Ordinance, the TERO Commission Chairman may administer oaths or affirmations, subpoena witnesses, take evidence, and require by citation, the production of books, papers, contracts, agreements and other documents, records or information ;which the Commission deems necessary or material to the inquiry.

VI. ENFORCEMENT OF ORDINANCE

(a) Complaint Sustained

When, after conducting an investigation, the Commission determines that a violation of the TERO has occurred, the Commission shall notify the covered employer or entity in writing, specifying the violation. The Commission may withhold any names of the complaining party if there is substantial reason based on the record of the investigation to believe such party will be subject to retaliation. The Commission shall seek to achieve a informal settlement that results in satisfactory action by the employer or entity that resolves the violation. If the Commission is unable to informally resolve the matter, the Commission shall issue a

formal notice of non-compliance, which shall also advise the party of his/her right to a hearing before the Commission.

(b) Issuance of Notice of Non-Compliance

The formal notice of non-compliance shall set out the nature of the violation and the steps that must be taken to comply with the TERO. It shall provide the employer or entity with a reasonable time, which in no event shall be less than five (5) days from the date of receipt of such notice, to comply, unless the Commission, based on consultation with the Office of Tribal Attorney, has reason to believe irreparable harm will occur during that period, in which case the Commission may require that compliance occur within fewer than five (5) days. Any person, department or entity receiving a notice of non-compliance may request a hearing before the Commission which shall be held no sooner than five (5) work days and no more than twenty (20) work days, at the Commission's discretion, after the date for compliance set forth in the Commission's non-compliance notification.

(c) Requirement to Post Bond

If the party requests a hearing and the Commission, based on consultation with the Office of Tribal Attorney, believes there is a danger that the requesting the hearing will remove itself or its property from the jurisdiction of the Tribe prior to the hearing date, it may, at its discretion, require the party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be assessed against the party.

If the party fails or refuses to post said bond, the Commission may petition the Hoopa Tribal Court for such interim and injunctive relieve as is appropriate to protect the rights and interests of the Commission and other parties during the pendency of the complaint and hearing proceedings.

(d) Hearing Procedures

Any hearing held pursuant to the TERO shall be conducted by the Commission or their authorized agent. Conduct of the hearing shall be governed by rules of practice and procedure that may be adopted by the Commission or Tribal Council. The Commission shall not be bound by technical rules of evidence under TERO, and no informality in any proceeding shall be cause for invalidation of any order, decision, rule or regulation made, approved or confirmed by the Commission,

except as may be provided under Tribal law. Each hearing shall be recorded and kept on file in the Office.

(e) Action of the Commission

If it is determined that a violation has occurred, the Commission may take action against the party as prescribed in the TERO. Actions that result in work closures should normally be taken after other methods of resolving the matter have not achieved satisfactory results. The Commission's decision shall be in writing and shall be served on each of the identified parties no later than fifteen (15) work days after the close of the hearing. If the Commission requires a transcript to assist it in making a decision, the hearing will be deemed closed upon its receipt. Once served with the decision, if a party fails or refuses to comply with the decision and failure to comply may cause irreparable harm to any party to the matter or property, the Commission may seek injunctive relief from the Hoopa Tribal Court to preserve the rights of the Commission, any parties, or property.

(f) Tribal Court Review

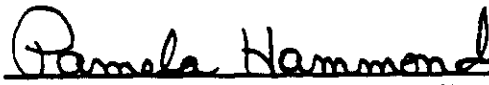
Any party to the matter may request review of the final decision of the TERO Commission in Hoopa Tribal Court. A request for review may also be filed against the prevailing party and the Commission if the Commission failed to act within the time periods set forth in Sections II (b) and IV above, unless extended by mutual agreement among the parties. In a case where the Commission has failed to act, for the purpose of adjudicating the action, the Court shall deem the previous action upon which the matter was before the Commission as the final action of the Commission. A request for Tribal Court review shall be filed in the Tribal Court no later than twenty (20) work days from the date of the receipt of the decision of the Commission from the date the Commission fails to act. Any proceeding in Tribal Court shall be governed by rules and procedures provided in the Tribal Code and Rules of Court. The Court shall uphold the decision of the Commission unless it is proven that the decision of the Commission is arbitrary, capricious or not in accordance with law. If the decision of the Commission is reversed or modified, the Court shall direct the Commission as to further action in the matter.

C E R T I F I C A T I O N

I, the undersigned, as Chairman of the Hoopa Valley Business Council do hereby certify that the Hoopa Valley Business Council is composed of eight members of which 5 were present constituting a quorum at a special meeting thereof; duly and regularly called, noticed, and convened, and held this 6th day of March, 1995; and that this Ordinance was duly adopted by a vote of 4 for and 0 against, and that said resolution has not been rescinded or amended in any way.

DATED THIS 6TH DAY OF MARCH, 1995


DALE RISLING, CHAIRMAN
HOOPA VALLEY TRIBAL COUNCIL

ATTEST: 
PAMELA HAMMOND, EXECUTIVE SECRETARY
HOOPA VALLEY TRIBAL COUNCIL

RESOLUTION THE HOOPA VALLEY TRIBE
HOOPA INDIAN RESERVATION
HOOPA, CALIFORNIA

RESOLUTION NO: 91-71 B

DATE APPROVED: MAY 30, 1991

SUBJECT: ESTABLISHING BYLAWS OF THE HOOPA TRIBAL EMPLOYMENT RIGHTS
COMMISSION.

WHEREAS: The Hoopa Valley Tribe did on June 20, 1972, adopt a Constitution and Bylaws which was approved by the Commissioner of Indian Affairs on August 18, 1972, and this Constitution and Bylaws authorized the Hoopa Valley Business Council to enact ordinances promote the general welfare of the Hoopa Valley Tribe, and

WHEREAS: The Tribal Council did on April 19, 1990, did adopt Ordinance No. 2-80, Tribal Employment Rights Ordinance, as amended, and

WHEREAS: The procedures contained herein establish a process through which the business and affairs of the Tribal Employment Rights Office shall be managed.

NOW THEREFORE BE IT RESOLVED: That the Hoopa Valley Business Council does hereby adopt the Bylaws of the Hoopa Tribal Employment Rights Commission.

BYLAWS OF THE TERO COMMISSION

ARTICLE I - TERO COMMISSION

Section 1. General Powers - The business and affairs of the Tribal Employment Rights Office (hereinafter "TERO") shall be managed by the TERO Commission (hereinafter "Commission").

Section 2. Office Hours - The regular office hours of the Tribal Employment Rights Office shall be 8:00 am until 5:00 pm. If for any reason the office does not remain open to the general public during that period, the Commission shall designate an interim TERO agent to serve until the Director's return.

Section 3. Regular Meetings - The Commission shall have regular meetings at 7:00 pm on the second and fourth Tuesdays of each month.

Section 4. Special Meetings/Hearings - Special meetings of the Commission may be called by the Commission Chairman or by at least

two (2) Commissioners. Hearing shall be called by a majority affirmative vote of the Commission.

Section 5. Notice of Meetings/Hearings

(a) Meetings - Notice of any meeting shall be made by written notice, including a proposed agenda of the meeting, delivered personally at least two (2) days or mailed first-class mail to each Director at his address at least 4 days before the meeting, and shall be publically noticed for that same period. Any Commissioner may waive notice of any meeting.

(b) Hearings - Notice of any hearing shall be made by written notice delivered by first-class mail at least two (2) weeks to first-class mail to each named party and shall be publically noticed for that same period.

Section 6. Quorum - 3 Commissioner shall constitute a quorum for the transaction of business at any meeting of the TERO Commission.

Section 7. Manner of Acting - The act of the majority of the Commission present at a meeting at which a quorum is present shall be the act of the TERO Commission.

Section 8. Vacancies - Any vacancy of the TERO Commission shall be filled by the affirmative vote of a majority of the Hoopa Tribal Council. A Commissioner appointed to fill a vacancy shall serve for the unexpired term of his/her predecessor.

Section 9. Compensation - The TERO Commission may be paid such compensation as may be approved by resolution of the Hoopa Tribal Council. The Commission shall be eligible for additional compensations as provided under Tribal law for such expenses as vehicle mileage, per diem, los. of wages, etc.

Section 10. Removal of Commissioners - A Commissioner may be removed by the Tribal Council for cause or for missing miss three (3) consecutive regular meetings of the Commission without being excused by the Commission. A Commissioner removed for cause by the Tribal Council shall have the right to a hearing before the Council within ten (10) working days to present evidence why that Commissioner should not be removed. The hearing decision of the Council shall be final.

ARTICLE II - COMMISSION OFFICERS

Section 1. Number - The Commission at its initial meeting shall elect from its membership a Vice-Chairman and Secretary who shall serve for a one-year (1) term. Such other officers may be elected by the Commission as may be needed.

Section 2. Removal - Any officer of the Commission may be removed by a majority vote of the Commission for cause.

Section 3. Vacancies - A vacancy in any office may be filled by the Commission for the unexpired portion of the term.

Section 4. Commission Chairman - The Chairman of the Commission shall be the TERO Director. The Chairman shall preside at all meetings of the Commission unless excused by that body. He/she may sign with the Secretary, or any other officer authorized by the Commission, any contracts or other instruments which the Commission has authorized to be executed. In general, the Chairman shall perform all duties as prescribed by the Commission, from time to time. The Chairman shall be a non-voting member of the Commission.

Section 5. Vice-Chairman - In the absence of the Chairman or in the event of his inability or refusal to act, the Vice-Chairman shall perform the duties of the Chairman and when so acting shall have all powers of, and be subject to all restrictions of the Chairman, provided however, that the Vice-Chairman shall vote on matter before the Commission. In addition, he shall perform such other duties as shall, from time to time, be assigned to him/her by the Commission. However, while acting as the TERO Chairman, the Vice-Chairman shall not be entitled to wages and other benefits that may be available to the position of Director, as an employee.

Section 6. Secretary - The Secretary shall record, or cause to have recorded, and maintain a full report of all proceedings of each meeting of the Commission and shall in general perform all duties as may, from time to time, be assigned to him/her by the Commission, and shall witness all contracts.

ARTICLE III - FINANCES, CONTRACTS, LOANS, CHECKS

Section 1. Finances - The finances and financial reports for the TERO Commission shall be under the direct supervision of the Director and Tribal Fiscal Department. The Director shall report on financial activities of the Tribal Employment Rights Office and provide any information requested by the Commission. The Director shall prepare for Commission approval annual budgets and modifications thereto, proposals and other documents needed for the operations of the Office.

Section 2. Contracts - The Commission may authorize any officer or agent of the TERO Commission to enter into any contract or agreement, or execute and deliver any instruments in the name of or on behalf of the Commission, and such authority may be general, or confined to specific assurances, for the purpose of enforcing the Tribal Employment Rights Ordinance or to conduct the necessary operations of the Office. The Secretary of the Commission shall witness all contracts. The Commission or its authorized agents shall not enter into any contract that purports to waive the sovereign immunity of the Commission as a Tribal entity or of the Hoopa Valley Tribe, unless the waiver of immunity is approved by the Tribal Council.

Section 3. Loans - No loan shall be contracted on behalf of the

Commission and no evidences of indebtedness shall be issued in the name of the Commission unless authorized by a resolution of the Commission. Such authority may be general or confined to specific assurances.

Section 4. Checks, Drafts, etc. - All checks, drafts, or other orders for the payment of money, or notes or other evidence of indebtedness issued in the name of the Commission shall be signed by an officer or officers, agents of the Commission and in such manner as shall, from time to time, be determined by a the Commission, and shall be in conformance with the Budget Ordinance of the Hoopa Tribe.

ARTICLE VI - AMENDMENTS

Section 1. Amendments - Amendments to these Bylaws may be made by the Tribal Council upon receipt of a proposal by the TERO Commission in accordance with the Legislative Procedures Act of the Hoopa Valley Tribe.


C E R T I F I C A T I O N

I, the undersigned, as Chairman of the Hoopa Valley Business Council do hereby certify that the Hoopa Valley Business Council is composed of eight members of which 6 were present constituting a quorum at a special meeting thereof; duly and regularly called, noticed, and convened, and held this 30th day of May, 1991; and that this Ordinance was duly adopted by a vote of 5 for and 0 against, and that said resolution has not been rescinded or amended in any way.

DATED THIS 30TH DAY OF MAY, 1991


DALE RISLING, CHAIRMAN
HOOPA VALLEY BUSINESS COUNCIL

ATTEST:


CHRISTENA PHILLIPS, EXECUTIVE SECRETARY
HOOPA VALLEY BUSINESS COUNCIL

RESOLUTION OF THE HOOPA VALLEY TRIBE
HOOPA VALLEY INDIAN RESERVATION
HOOPA, CALIFORNIA

RESOLUTION NO. 91-147

DATE APPROVED: September 26, 1991

SUBJECT: AMENDMENT OF TRIBAL EMPLOYMENT RIGHTS ORDINANCE REGARDING
ROLE OF OFFICE OF TRIBAL ATTORNEY

WHEREAS: The Hoopa Valley Tribe adopted a Constitution and Bylaws (Tribal Constitution) on June 20, 1972, which was approved by the Commissioner of Indian Affairs on August 18, 1972, and which was "ratified and confirmed" by Congress in Section 8 of P.L. 100-580; and

WHEREAS: Article V of the Tribal Constitution, as amended, establishes that the Hoopa Valley Tribal Council is the governing body of the Tribe; and

WHEREAS: The Tribal Council has enacted Ordinance No. 2-80, as amended April 19, 1990, known as the Tribal Employment Rights Ordinance, which provides, among other things, for the TERO Commission to hear appeals of personnel actions taken by the Tribe and tribal departments and entities; and

WHEREAS: Section 13.11 of the TERO Ordinance, which governs legal representation of the TERO Commission, was enacted at a time when only one Tribal Attorney was employed by the Tribe, and imposes restrictions on the legal representation of the Tribe and tribal departments and entities in personnel matters, which restrictions are unnecessary and unduly burdensome when more than one Tribal Attorney is employed by the Tribe; and

WHEREAS: The professional conduct of attorneys employed on the Hoopa Valley Reservation by the Tribe is subject to regulation by the Tribe and, pursuant to 25 C.F.R. Part 89, by the United States; and

WHEREAS: Lack of legal representation by a Tribal Attorney for the Tribe and its departments and entities in personnel matters poses an immediate threat to tribal resources and assets, and immediate action is necessary to provide for needed legal representation.

NOW THEREFORE BE IT RESOLVED THAT: Section 13.11 of the Tribal Employment Rights Ordinance is amended to read as follows:

RESOLUTION NO. 91-147

DATE APPROVED: September 26, 1991

SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding
role of Office of Tribal Attorney

PAGE 2

13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title, the Commission shall consult with a Tribal Attorney, and may request representation by a Tribal Attorney in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the Office of Tribal Attorney warrant. The fact that a Tribal Attorney has advised the Tribe or a tribal department or entity on a personnel matter, or represents the Tribe or a tribal department or entity before the TERO Commission or the Tribal Court on a personnel matter, shall not preclude another Tribal Attorney from advising and representing the TERO Commission on the same matter, if:

(a) the Tribal Attorney advising and representing the TERO Commission has not been personally and substantially involved in the matter on behalf of the Tribe or the tribal department or entity taking the personnel action; and

(b) files on the matter kept by each of the two Tribal Attorneys are segregated and are not readily accessible to the other attorney; and

(c) the two Tribal Attorneys have not discussed the matter substantively and have not shared with each other confidential or privileged information related to the matter, and do not do so during the pendency of the matter before the TERO Commission or any appeal therefrom.

BE IT FURTHER RESOLVED THAT: This amendment is enacted pursuant to Section 6.10 of the Legislative Procedures Act and shall take effect immediately. This amendment shall be routed to tribal departments promptly for departmental comments pursuant to the Legislative Procedures Act, and shall be placed on the Tribal Council agenda for permanent enactment within thirty days.

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CERTIFICATION

I, the undersigned, as Chairman of the Hoopa Valley Tribal Council,

RESOLUTION NO. 91-147

DATE APPROVED: September 26, 1991

SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding
role of Office of Tribal Attorney

PAGE 3

do hereby certify: that the Hoopa Valley Tribal Council is composed of eight (8) members of which six (6) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held on this 26th day of September, 1991; that this Resolution was duly adopted by a vote of five (5) in favor, none (0) opposed, and none (0) abstaining; and that since its approval this Resolution has not been rescinded, amended, or modified in any way.

DATED THIS 26TH DAY OF SEPTEMBER, 1991.


DALE RISLING, CHAIRMAN
HOOPA VALLEY TRIBAL COUNCIL

ATTEST:


for DEIRDRE R. YOUNG, TRIBAL SECRETARY
HOOPA VALLEY TRIBAL COUNCIL

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hvt.res. 91-147

RESOLUTION OF THE HOOPA VALLEY TRIBE
HOOPA VALLEY INDIAN RESERVATION
HOOPA, CALIFORNIA

RESOLUTION NO. 91-180

DATE APPROVED: November 21, 1991

SUBJECT: AMENDMENT OF TRIBAL EMPLOYMENT RIGHTS ORDINANCE REGARDING
ROLE OF OFFICE OF TRIBAL ATTORNEY

WHEREAS: The Hoopa Valley Tribe adopted a Constitution and Bylaws (Tribal Constitution) on June 20, 1972, which was approved by the Commissioner of Indian Affairs on August 18, 1972, and which was "ratified and confirmed" by Congress in Section 8 of P.L. 100-580; and

WHEREAS: Article V of the Tribal Constitution, as amended, establishes that the Hoopa Valley Tribal Council is the governing body of the Tribe; and

WHEREAS: The Tribal Council has enacted Ordinance No. 2-80, as amended April 19, 1990, known as the Tribal Employment Rights Ordinance, which provides, among other things, for the TERO Commission to hear appeals of personnel actions taken by the Tribe and tribal departments and entities; and

WHEREAS: Section 13.11 of the TERO Ordinance, which governs legal representation of the TERO Commission, was enacted at a time when only one Tribal Attorney was employed by the Tribe, and imposes restrictions on the legal representation of the Tribe and tribal departments and entities in personnel matters, which restrictions are unnecessary and unduly burdensome when more than one Tribal Attorney is employed by the Tribe; and

WHEREAS: The professional conduct of attorneys employed on the Hoopa Valley Reservation by the Tribe is subject to regulation exclusively by the Tribe and, pursuant to 25 C.F.R. Part 89, by the United States; and

WHEREAS: This action is taken following compliance with the Legislative Procedures Act of the Hoopa Valley Tribe.

NOW THEREFORE BE IT RESOLVED THAT: Section 13.11 of the Tribal Employment Rights Ordinance is amended to read as follows:

13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title,

RESOLUTION NO. 91-180

DATE APPROVED: November 21, 1991

SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding
Role of Office of Tribal Attorney

the Commission shall consult with a Tribal Attorney, and may request representation by a Tribal Attorney in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the Office of Tribal Attorney warrant. The fact that a Tribal Attorney has advised the Tribe or a tribal department or entity on a personnel matter, or represents the Tribe or a tribal department or entity before the TERO Commission or the Tribal Court on a personnel matter, shall not preclude another Tribal Attorney from advising and representing the TERO Commission on the same matter, if:

(a) the Tribal Attorney advising and representing the TERO Commission has not been personally and substantially involved in the matter on behalf of the Tribe or the tribal department or entity taking the personnel action; and

(b) files on the matter kept by each of the two Tribal Attorneys are segregated and are not readily accessible to the other attorney; and

(c) the two Tribal Attorneys have not discussed the matter substantively and have not shared with each other confidential or privileged information related to the matter, and do not do so during the pendency of the matter before the TERO Commission or any appeal therefrom.

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CERTIFICATION

I, the undersigned, as Chairman of the Hoopa Valley Business Council, do hereby certify: that the Hoopa Valley Business Council is composed of eight (8) members of which seven (7) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held on this twenty-first day of November, 1991; that this Resolution was duly adopted by a

RESOLUTION NO. 91-180

DATE APPROVED: November 21, 1991

SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding
Role of Office of Tribal Attorney

vote of six (6) in favor, none (0) opposed, and none (0) abstaining; and that since its approval this Resolution has not been rescinded, amended, or modified in any way.

DATED THIS TWENTY-FIRST DAY OF NOVEMBER, 1991.


DALE RISLING, CHAIRMAN
HOOPA VALLEY BUSINESS COUNCIL

ATTEST: 
DEIRDRE R. YOUNG, EXECUTIVE SECRETARY
HOOPA VALLEY BUSINESS COUNCIL

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Title 15

Labor

CHAPTER	SECTION
1. [Reserved]	1
3. Office of Navajo Labor Relations	201
4. Navajo Nation Labor Commission	301
5. [Reserved]	401
7. Navajo Preference in Employment Act	601
9. Child Labor	801
11. Workers' Compensation	1001
13. Crownpoint Institute of Technology	1201

Chapter 1. [Reserved]

HISTORY

Note. Former Chapter 1, "Office of Labor" (CF-22-75, February 21, 1975), was superseded by the current Navajo Nation Division of Human Resources. For current information see the Division of Human Resources Plan of Operation. Also see Enabling Legislation for the Division of Human Resources in Title 2 of the Navajo Nation Code.

Chapter 3. Office of Navajo Labor Relations

SECTION

201. Establishment
202. Purposes
203. Personnel
204. Authority, duties and responsibilities
205. Avoidance of ex parte communications
206. Place of office
207. Amendment

§ 201. Establishment

The Office of Navajo Labor Relations ("ONLR") was originally established by CJA-4-72 and underwent a name change in 1976 to the Division of Equal Opportunity and Employment. The original name as the Office of Navajo Labor Relations was reinstated and its Plan of Operation amended by ACJY-134-85.

HISTORY

ACJY-159-87, July 21, 1987.
ACJY-134-85, July 18, 1985.
CJA-4-72, §1, January 19, 1972.

§ 202. Purposes

The purposes of the ONLR are as follows:

- A. To monitor and enforce the Navajo Preference in Employment Act ("NPEA").
- B. To implement and carry out the labor policies of the Navajo Nation as established by the Navajo Nation Council.
- C. To act as an administrative agency for matters relating to employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment.
- D. To gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation, and working conditions.
- E. To recommend and propose policies, rules, regulations, and guidelines, concerning labor and employment to the Human Services Committee and the Navajo Nation Council.
- F. To assist and encourage, where appropriate, the peaceful settlement of labor disputes within the territorial jurisdiction of the Navajo Nation.

HISTORY

ACJY-159-87, July 21, 1987.
ACJY-134-85, July 18, 1985.
CJA-4-72, §1, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

§ 203. Personnel

- A. There is established the position of Director, ONLR, and such other positions as may from time to time be budgeted by the Navajo Nation Council or by any other source available and acceptable to the Division of Human Services.
- B. The Director of ONLR shall be hired by the Executive Director of the Division of Human Resources. All other department personnel will be hired by the Director of ONLR. Hiring and compensation shall be in accordance with Navajo Nation personnel policies and procedures.
- C. The Director of ONLR shall report and be responsible to the Executive Director of the Division of Human Services.

HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, §1, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

§ 204. Authority, duties and responsibilities

ONLR shall have the powers necessary and proper to carry out the purposes set forth in §202 of this Plan of Operation. ONLR is hereby authorized and directed:

A. To ensure that all employers are complying with the NPEA in the employment and training of enrolled members of the Navajo Nation;

B. To recommend appropriate services for the employment of Navajos desiring work with employers;

C. To monitor and enforce Navajo labor laws, rules, policies and regulations;

D. To recommend laws, rules, regulations, guidelines and policies as may be necessary to accomplish the purposes of the NPEA;

E. To require employers to submit such reports and information as deemed necessary to carry out the purposes of the NPEA;

F. To report annually to the Navajo Nation Council, and quarterly to the Human Services Committee, the extent to which employers are complying with the NPEA;

G. To assist in coordinating such education and job training programs as necessary to provide qualified Navajo workers for employers;

H. To ensure appropriate preferential employment and training provisions are included in all agreements entered into by employers;

I. To establish minimum employment and labor provisions (including employment, registered apprenticeship participation, wages, promotion, termination, grievance procedures, and related employment matters) for inclusion in all agreements entered into by employers;

J. To investigate and make administrative determinations concerning compliance by employers with the NPEA or labor provisions in contracts, subcontracts, leases, permits or other agreements;

K. To file formal complaints with the Navajo Nation Labor Commission (the "Commission"), participate as complainant in hearings held by the Commission and make application to the Commission for subpoenas requiring the attendance and testimony of persons or witnesses and production of documents; and

L. To take all necessary action to accomplish the purposes of the NPEA.

HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

§ 205. Avoidance of ex part communications

Except as otherwise permitted or required by law, ONLR and ONLR's legal counsel shall take reasonable measures to avoid: (a) disclosure to members, staff and legal counsel of the Commission of specific factual or legal issues concerning alleged violations of the NPEA under investigation by ONLR and not a matter of record before the Commission; and (b) ex parte communications to Commission members, staff or legal counsel concerning a pending proceeding before the Commission without notice to the respondent employer which is a party in such proceeding.

HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

§ 206. Place of office

ONLR shall have its main office in Window Rock, Navajo Nation (Arizona). ONLR may also establish sub-offices at such other locations as the Director, in consultation with the Executive Director of the Division of Human Services, deems appropriate.

HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

§ 207. Amendment

Upon recommendation by the Human Services committee, this Plan of Operation may be amended from time to time as deemed necessary by the Government Services Committee of the Navajo Nation Council.

HISTORY

ACJY-159-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

Chapter 4. Navajo Nation Labor Commission

SECTION

- 301. Establishment
- 302. Purposes
- 303. Organization
- 304. Authority, duties and responsibilities
- 305. Meeting; procedure
- 306. Staff
- 307. Place of office
- 308. Amendment

§ 301. Establishment

A. The Board of Directors of the Office of Navajo Labor Relations (the "Board") was originally established by CJA-4-72 and underwent a name change in 1976 to the Board of Directors of the Division of Equal Opportunity and Employment. The Board's original name was reinstated and its Plan of Operation amended by ACJY-134-85.

B. The Board is continued under the name Navajo Nation Labor Commission (the "Commission") and shall have the powers prescribed in this Plan of Operation, as well as such additional powers as may be granted to the Commission by law.

HISTORY

ACJY-160-87, July 21, 1987.

ACJY-134-85, July 18, 1985. (Previously codified as the "Board of Directors" at 15 NNC §203).

CJA-4-72, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

§ 302. Purposes

The purposes of the Commission shall be to:

- A. Act as the administrative hearing body under the Navajo Preference in Employment Act.
- B. Conduct and hold administrative hearings in accordance with applicable Navajo Nation laws concerning Navajo employment preference.
- C. Process and decide all formal complaints filed before it.
- D. Adopt rules and regulations for Commission hearings.

HISTORY

ACJY-160-87, July 21, 1987.

§ 303. Organization

The Commission shall consist of five members.

A. **Membership.** The Commission shall consist of: (a) two (2) members appointed by the Human Services Committee of the Navajo Nation Council with the concurrence of the Government Services Committee of the Navajo Nation Council; and (b) three (3) members appointed by the President of the Navajo Nation with the concurrence of the Government Services Committee.

B. **Commission Members Qualifications.** The two members appointed by the Human Services Committee and the three members of the Commission appointed by the President of the Navajo Nation shall be familiar with labor practices and requirements of the Navajo Nation. One appointed member shall be a Navajo worker familiar with union practices. The Executive Director of the Division of Human Services, the Directors of any department within the Division of Human Services, employees of the Division of Human Services or its departments, and Council Delegates shall not be eligible to serve as members of the Commission.

C. **Officers.** The officers of the Commission shall be elected every four (4) years from among the Commission by a majority vote of the Commission and shall consist of a Chairperson, Vice-Chairperson, and Secretary.

1. **Chairperson.** The Chairperson of the Commission shall preside at meetings of the Commission, assure orderly meetings in accordance with accepted parliamentary rules, and sign all documents as required for action of the Commission.

2. **Vice-Chairperson.** The Vice-Chairperson shall serve in the absence of the Chairperson and in the performance of this service shall exercise all the powers and bear all the responsibilities of the Chairperson.

3. **Secretary.** The Secretary shall fulfill all legal obligations of the Commission, and carry out such duties as may be prescribed. In the absence of the Chairperson and Vice-Chairperson, the Secretary shall preside at all meetings of the Commission.

D. **Term of Office.** Each member of the Commission shall serve for a term of four (4) years and until his or her successor is appointed.

E. **Commission Vacancies:**

1. Any Commission member may resign by submitting thirty (30) days prior written notice of their resignation and such resignation shall be accepted by the Commission at the next Commission meeting.

2. Any member of the Commission shall be removed from the Commission if:

a. Such member has been convicted of any crime reflecting upon such member's honesty or ability to fulfill the fiduciary obligations imposed by law upon such member; or

b. Such member violates the disclosure of conflicts of interest requirements set forth below:

(1) No contract or other transaction between any Commission member and any employer, company, person, corporation, association, partnership, joint venture, labor union, governmental organization or entity of any kind in which one or more of the Commission members has an interest directly or indirectly shall be valid for any purpose, unless the entire interest of that person or the Board of Directors of such entity is fully disclosed to the Commission and the proposed contract or transaction is approved by the affirmative vote of at least a majority of the entire Commission who are not so interested. The Commission shall submit any such contract or transaction for further approval at any regular meeting of the Ethics and Rules Committee of the Navajo Nation Council. Any such contract or transaction which is approved by a vote of the majority of the Ethics and Rules Committee of the Navajo Nation Council shall be valid and binding upon the parties.

(2) The Commission shall submit any contract or transaction wherein a Navajo Nation officer or employee may have any interest directly or indirectly in the matter or transaction to any regular meeting of the Ethics and Rules Committee of the Navajo Nation Council for approval. Any such contract or transaction which is approved by a vote of the majority of the Ethics and Rules Committee of the Navajo Nation Council shall be valid and binding upon the parties.

(3) This section shall be subject to any subsequent requirements or regulations adopted pursuant to the Navajo Nation Ethics in Government Law.

3. In the event a Commission member is found to be in violation of §303(E)(2), such member shall be forthwith removed from his or her position, effective upon written notice of removal by the Chairperson of the Commission. The Commission shall promptly submit the appropriate information and facts concerning the violation and removal to the authority (the President of the Navajo Nation or the Human Services Committee) which appointed such member.

4. In the event a vacancy is created on the Commission by reason of resignation, removal or any other reason, such vacancy shall be filled by the authority which is authorized to appoint members to such vacant seat, in accordance with the procedure prescribed in

§303(A) and (B). Appointment of a replacement member shall be made within thirty (30) days after the date the appointing authority receives written notification of the vacancy.

HISTORY

IGRMA-59-93, March 15, 1993.

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*
Government Services Committee of the Navajo Nation Council, 2 NNC §343 (B)(3).

§ 304. Authority, duties and responsibilities

The Commission is authorized and directed to:

A. Submit an annual report of its activities to the Human Services Committee, the Intergovernmental Relations Committee and the Navajo Nation Council;

B. Formulate overall administrative and operating policies pertaining to the function of the Commission;

C. Regulate the course of hearings and conduct of participants;

D. Administer oaths and affirmations;

E. Rule on motions and other procedural matters;

F. Grant applications for subpoenas and rule on petitions to revoke subpoenas;

G. Inquire fully into all issues and obtain a complete record upon which Commission decisions can be rendered;

H. Receive, rule on, exclude, and limit evidence, lines of questioning, or testimony which are irrelevant, immaterial, or unduly repetitious;

I. Examine witnesses for the purpose of clarification of the facts and issues;

J. Direct the submission of briefs and set the time for the filing thereof;

K. Issue findings of fact, conclusions of law and order, and impose appropriate damages, sanctions, fines and other relief for non-compliance;

L. Set the amount of bond and such appropriate conditions thereto as the Commission may deem necessary;

M. Prepare and submit an annual budget; and

N. Exercise such other authority as may be conferred by law.

HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*
Intergovernmental Relations Committee of the Navajo Nation Council, 2 NNC §824 (B)(1)

§ 305. Meetings; procedure

A. Meetings shall be called by the Chairperson of the Commission for business transactions or as required by pending cases filed before the Commission. Three (3) members of the Commission shall constitute a quorum for the transaction of business.

B. The Commission may hold meetings with the Human Services Committee of the Navajo Nation Council for informational and coordinating purposes as it deems appropriate.

C. The Commission shall adopt rules for the conduct of its meetings and keep a record of all its proceedings and transactions. All formal substantive action shall be taken by written resolution duly certified by the presiding officer, or memorialized by written memorandum setting forth the action taken.

D. Members of the Commission may receive compensation and shall be reimbursed for expenses (per diem and mileage at the Navajo Nation rate) incurred in connection with the performance of their duties. All Commission expenses shall be paid from the budget of the Commission.

HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

§ 306. Staff

The Commission may employ independent legal counsel and staff as it deems necessary or appropriate to carry out the duties and responsibilities herein set forth. The duties of the staff shall include all administrative responsibilities of the Commission including recording and transcription of hearings.

HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

§ 307. Place of office

The Commission shall have its office and staff located in Window Rock, Navajo Nation, (Arizona).

HISTORY

ACJY-160-87, July 21, 1987.

§ 308. Amendment.

This Plan of Operation may be amended from time to time by the Intergovernmental Relations Committee of the Navajo Nation Council. Prior to any such amendment, the Human Services Committee shall review and recommend any change or proposed amendment to this Plan of Operation.

HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*
Intergovernmental Relations Committee of the Navajo Nation Council, 2 NNC §824 (B)(1).

Chapter 5. [Reserved]

HISTORY

ACJY-126-60, July 20, 1960.

ACJN-74-60, June 13, 1960.

Note. Previous Chapter 5, "Wages", §§401-401, repealed by CD-79-82, December 16, 1982.

Chapter 7. Navajo Preference in Employment Act

HISTORY

Former Chapter 7. Former Chapter 7 was repealed in its entirety by CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

CAU-39-63, August 20, 1963.

CA-54-58, August 26, 1958.

SECTION

- 601. Title
- 602. Purpose
- 603. Definitions
- 604. Navajo employment preference
- 605. Reports
- 606. Union and employment agency activities; rights of Navajo workers
- 607. Navajo Prevailing wage
- 608. Health and safety of Navajo workers
- 609. Contract compliance
- 610. Monitoring and enforcement
- 611. Hearings
- 612. Remedies and sanctions
- 613. Appeal and stay of execution
- 614. Non-Navajo spouses
- 615. Polygraph test
- 616. Rules and regulations
- 617. Prior inconsistent law repealed
- 618. Effective date and amendment of the Act
- 619. Severability of the Act

§ 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

HISTORY

CO-78-90, October 25, 1990.

CAU-63-85, §1, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

§ 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;
 2. To provide training for the Navajo People;
 3. To promote the economic development of the Navajo Nation;
 4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;
 5. To foster the economic self-sufficiency of Navajo families;
 6. To protect the health, safety, and welfare of Navajo workers; and
 7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.
- B. It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 NNC §254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counseling in association with a person described in clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 604. Navajo employment preference

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this §604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor organization, only the non-complying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omis-

sions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act, provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and *bona fide* seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 605. Reports

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Navajo Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than ten (10) business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 606. Union and employment agency activities; rights of Navajo workers.

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

HISTORY

CO-73-90, October 1990.
CAU-63-85, August 1, 1985.

§ 607. Navajo prevailing wage

A. Definitions. For purposes of this section, the following terms shall have the meanings indicated:

1. The term "prevailing wage" shall mean the wage paid to a majority (more than 50 percent) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.

2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this section.

3. The term "wage" shall mean the total of:

a. The basic hourly rate; and

b. The amount of: (a) contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a *bona fide* fringe benefit fund, plan or program for the benefit of employees; and (b) costs to the contractor or subcontractor which may be reasonably anticipated in providing *bona fide* fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeships or other similar programs; or other *bona fide* fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to satisfaction of the conditions prescribed in §§607(E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

6. "Apprentice" means: (a) a person employed and individually registered in a *bona fide* apprenticeship program registered with the

U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a state or Indian Tribe and recognized by the Bureau; or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person: (a) registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration; or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to: (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.

9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

B. Establishment of wage rates.

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entry shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to

the scheduled date for bid solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale for each classification involved in the project construction within 60 days after receipt of a request therefor.

2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.

3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

a. The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;

b. The proposed classification is utilized in the area by the construction industry; and

c. The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.

4. Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:

(1) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;

(2) The type of construction for which the rate was established;

(3) The effective date, described as the date of publication of the notice or other specified date;

(4) The address and telephone number of ONLR; and

(5) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

a. General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

b. A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

c. Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.

d. Fringe benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:

(1) The deduction is not contrary to applicable law;

(2) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;

(3) No profit or other benefit is obtained as a result of deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and

(4) The deduction serves the convenience and interests of the employee.

C. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this section in the absence of a contractual requirement for payment of prevailing wages pursuant

to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).

1. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.

2. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of §607(C) shall render such employer liable for the amount of such deduction, together with interest thereon.

3. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

4. If following a hearing under §611 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.

5. The liabilities described in this §607(C) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under §611.

D. Exemptions. This section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under §607(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.

2. A construction contract relating to a project having a total cost of \$2,000 or less.

3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.

4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.

5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C., §§276(a) *et seq.*, (as amended), or other federal law applicable to such project.

6. A construction contract to the extent such contract requires payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.

7. With the exception of the provisions of §607(C), an apprentice, provided that the apprentice is paid not less than: (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of §607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of §607(C), a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of §607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 608. Health and safety of Navajo workers

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 609. Contract compliance

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 610. Monitoring and enforcement

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

B. Charges.

1. Charging Party. Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An individual Charge and ONLR Charge are collectively referred to herein as a "Charge".

2. Form and Content. A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:

- a. The name, address any telephone number of the charging party;
- b. The name and address or business location of the respondent against whom the Charge is made.
- c. A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of;
- d. With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;
- e. The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and
- f. A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.
- g. ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. Place of Filing. Individual Charges may be filed in any ONLR office. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.

4. Date of Filing. Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.

5. Amendment. A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.

6. Time Limitation. A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of:

- a. The date on which the charging party had actual knowledge of the claim; or
- b. Taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of:

(1) The date of termination of such violation, pattern or practice; or

(2) The date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the Commission or in any Court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo Court or administrative body (other than the Commission) on any claim which also arises under applicable common, statutory or other law independent of this Act.

7. Notice to Respondent. Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act. ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to

the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.

8. Withdrawal of Charge.

a. ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his or her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.

b. Any charging party may, in his or her discretion, withdraw an Individual charge by filing a written notice of withdrawal with the ONLR Office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.

9. Overlapping Charges. Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.

10. Informants. Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in §610(M) and in the absence of the written consent of the informant, neither the identity of the informant nor any information provided by such informant shall be disclosed to the respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate deci-

sion; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant:

a. The informant's name may be disclosed, but his or her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise; and

b. With the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under §610(M).

C. Investigation of Charges.

1. ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the act has been violated.

2. Subpoenas.

a. The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:

(1) The attendance and testimony of witnesses;

(2) Responses to written interrogatories;

(3) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control of which are lawfully obtainable by such person; and

(4) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

b. Service of the subpoena shall be effected by one of the methods prescribed in §610(O). A subpoena directed to a natural person shall be served either on the person at his or her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least eighteen years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the terri-

torial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least eighteen years of age, including an employee of ONLR.

c. The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.

d. Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either:

(1) Comply with the subpoena (with any modifications thereof reflected in the Director's decision); or

(2) Within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

e. In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is established that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.

f. Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this section.

D. Dismissal of Charges.

1. Individual Charges. ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:

a. The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;

b. The Individual Charge was not filed within the time limits prescribed by §610(B)(6);

c. The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;

d. The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approval by ONLR, which accords substantially full relief for the harm sustained by such party; or

e. The Charge has been settled pursuant to §610(G).

2. ONLR Charges. ONLR shall dismiss an ONLR Charge upon determining that:

a. No probable cause exists to believe a violation of the Act has occurred;

b. The Charge was not filed within the time limits prescribed by §610(B)(6); or

c. The Charge has been settled pursuant to §610(G).

3. Partial Dismissal. In the event a portion of a Charge is dismissable on one or more of the foregoing grounds, only such portion of the Charge shall be dismissed and the remainder retained by ONLR for final disposition.

4. Notice. Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to §610(H).

E. Probable Cause Determination. Following its investigation of a Charge and in the absence of a settlement or dismissal required under §610(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which

probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated. Any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.

F. Conciliation. If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations in an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in §610(H) or initiate a Commission proceeding under §610(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under §610(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.

G. Settlement.

1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in §610(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.

2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in §610(H)(2)(a)(3).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.

4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this section. A charging party asserting a claim for breach may either seek:

a. Enforcement of that portion of the settlement agreement alleged to have been breached; or

b. In the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this section, be deemed to arise on the accrual date of the breach.

H. Individual Right to Sue.

1. Individual Charges.

a. Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before the Commission in accordance with the procedures prescribed in §610(J), if:

(1) The Individual Charge has been dismissed by ONLR pursuant to §610(D)(1);

(2) ONLR has issued a probable cause determination under §610(E), there has been a failure of conciliation contemplated by §610(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or

(3) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.

b. After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

2. ONLR Charges.

a. Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in §610(J), if:

(1) The ONLR Charge has been dismissed by ONLR pursuant to §610(D)(2);

(2) ONLR has issued a probable cause determination under §610(E), there has been a failure of conciliation contemplated by §610(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;

(3) ONLR has entered into a settlement agreement under §610(G) to which such aggrieved person is not a party; or

(4) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.

b. After the expiration of 180 days following the date an ONLR Charge was filed and prior to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. Content of Notice. A notice of right to sue shall include the following information:

a. Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by §610(J);

b. A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;

c. A copy of the Charge; and

d. A copy of any written determination of ONLR with respect to such Charge.

4. ONLR Assistance. Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

1. ONLR Right to Sue.

1. Individual Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under §610(E) and there has been a failure of conciliation contemplated by §610(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party

commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under §610(L).

2. ONLR Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable determination under §610(E) and there has been a failure of conciliation contemplated by §610(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under §610(L).

J. Initiation of Commission Proceedings. Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission.

1. Complaints shall satisfy each of the following conditions:

a. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this section;

b. The underlying Charge was filed within the time limits prescribed in §610(B)(6); and

c. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

2. Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (2) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limits prescribed in §610(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice viola-

tions of the Act which continued to persist during the time limits prescribed in §610(B)(6) for refiling such Charge.

K. Preliminary Relief. Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.

L. Intervention in Commission Proceedings. Within three business days after the date on which any complaint, or petition pursuant to §610(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have a unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.

M. Confidentiality.

1. Conciliation. In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under §610(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the court of conciliation if:

- a. The evidence is otherwise discoverable; or
- b. The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

2. Charge, Records and Information.

a. Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the

Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:

(1) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor; or

(2) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities have a governmental interest in the subject matter of the Charge; or

(3) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

b. Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

2. Privileged Information. Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in §610(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

N. Non-retaliation. It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take or attempt to induce another person to take, any action adversely affecting:

1. The terms and conditions of any person's employment or opportunities associated with such employment;
2. An applicant's opportunity for employment;

3. The membership of an employee or applicant for employment in a labor organization; or

4. Any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.

O. Service of Documents. Service of any notice, determination or other document required to be transmitted under this section shall be accomplished by personal delivery or certified mail, return receipt requested.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 611. Hearing

A. The Commission shall schedule a hearing within sixty (60) days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.

1. Notice. The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state that: (a) the violations may be contested at a hearing before the Commission; and (b) any party may appear by counsel and cross-examine adverse witnesses.

2. Upon application by a party to the Commission or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the Complaint, including a subpoena ordering, under oath as may be appropriate:

- a. The attendance and testimony of witnesses;
- b. Responses to written interrogations;
- c. The production of evidence; and
- d. Access to evidence for the purpose of examination and copying.

3. The Commission is authorized to administer oaths and compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is authorized to enter a default determination against the non-appearing and/or non-complying party.

B. Burden of proof. In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by clear and convincing evidence.

C. Hearing. The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.

1. The Commission shall not be bound by any formal rules of evidence.

2. The respondent shall have the opportunity to answer the complaint and the parties shall have the right to legal counsel, to present witnesses, and to cross-examine adverse witnesses.

3. The Commission shall issue its decision by a majority vote of a quorum present which shall be signed by the Chairperson of the Commission.

4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.

5. Records of the proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.

6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

§ 612. Remedies and sanctions

A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:

1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.

2. In the case of an individual suit initiated pursuant to §610(H), award costs and attorneys' fees if the respondent's position was not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.

B. In the absence of a showing of good cause therefor, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such actions as are just, including without limitation any one or more of the following:

1. In the case of non-compliance with a subpoena of documents or witnesses:

a. An order that the matters for which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

c. An order striking pleading or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

2. In the case of non-compliance by a party or non-party with a Commission subpoena of documents or witnesses or with any other order of the Commission:

a. An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine; or

b. An order directing the disobedient person to pay the reasonable costs and/or attorneys fees caused by the non-compliance.

C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 NNC §§551 *et seq.*, as amended.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

§ 613. Appeal and stay of execution

A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within ten (10) days after receipt of the Commission's decision.

B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements have been satisfied:

1. Appellant is likely to prevail on the merits of the appeal;

2. Appellant will be irreparably harmed in the absence of a stay;

3. Appellee and interested persons will not be substantially harmed by a stay;

4. The public interest will be served by a stay; and

5. An appeal bond or other security, in the amount and upon the terms prescribed by subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.

C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations.

1. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:

a. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;

b. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the Navajo Nation Supreme Court;

c. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and

d. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

2. The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

3. In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

4. No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as *amicus* in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the right to file opening, answering and reply briefs, and the right to present oral argument to the Court.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 614. Non-Navajo spouses

A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration.

B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.

C. Non-Navajo spouses having a right to secondary preference under this section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

§ 615. Polygraph test

A. No person shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.

B. For purposes of this section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.
Note. The words "lie detector" were changed to "polygraph".

§ 616. Rules and regulations

The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under §611 of the Act, provided that such rules are consistent with the provisions of the Act.

HISTORY

CO-73-90, October 25, 1990.
CAU-63-85, August 1, 1985.

Chapter 9. Child Labor

SECTION

801. Adherence to child-labor laws of states

802. Authority to promulgate additional regulations

§ 801. Adherence to child-labor laws of states

The Navajo Nation shall adhere as nearly as may be possible to the applicable child-labor laws of the states of Arizona, New Mexico and Utah on work projects within those portions of the Navajo Nation lying within each respective state.

HISTORY

CA-53-58, §1, August 29, 1958.

Note. Slightly reworded for purposes of statutory form.

§ 802. Authority to promulgate additional regulations

The President of the Navajo Nation is authorized to promulgate such additional protective regulations with respect to child labor on the Navajo Nation as he or she deems necessary and proper to protect the best interests of the Navajo Nation.

HISTORY

CA-53-58, §2, August 29, 1958.

CROSS REFERENCES

The Human Services Committee of the Navajo Nation Council has the authority to promulgate regulations for the enforcement and implementation of the labor laws and policies of the Navajo Nation. 2 NNC §604(B)(1).

Note. Slightly reworded for purposes of statutory form.

§ 617. Prior inconsistent law repealed

All prior Navajo Nation laws, rules, regulations, and provisions of the Navajo Nation Code previously adopted which are inconsistent with this Act are hereby repealed.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 618. Effective date and amendment of the Act

A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval by the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.

D. The time limits prescribed in §610 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in §610 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in §610.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

§ 619. Severability of the Act

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.

HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Chapter 11. Workers' Compensation

SECTION

- 1001. Establishment of Program
- 1002. Definitions
- 1003. Acknowledgment of Program
- 1004. Insurance fund—Purpose; administration
- 1005. Rates
- 1006. Custodian; duties
- 1007. Payment of benefits
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- 1048. Compensation exempt from execution
- 1049. Benefits

HISTORY

Note. All reference to "Workmen's Compensation" in this chapter have been changed to "Workers' Compensation". Previous references in this section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

§ 1001. Establishment of Program

There shall be a Workers' Compensation Program for all employees of the Navajo Nation, including all Enterprise employees, Council Delegates, Chapter officers, Grazing Committee members and others as set out in 15 NNC §1002 (G)(1) and (2).

HISTORY

ACAU-94-78, §101, August 22, 1978.

§ 1002. Definitions

In this chapter, unless the context otherwise requires:

- A. "Adoption" shall include cases where persons are treated as adopted as well as those of legal adoption.
- B. "Award" means the findings or decision of the Review Board of the amount of compensation or benefits due an injured employee or the dependents of a deceased employee.
- C. "Child" includes dependent step-children, adopted children and acknowledged illegitimate children, but does not include married children unless they are dependents.
- D. "Claimant" means the injured covered member or dependents of same in the event of death of the covered employee.
- E. "Compensation" means the compensation and benefits provided by this chapter, i.e., "indemnity" means weekly disability payments, and

"medical" means medical expense, mileage and other expenses associated with medical treatment.

F. "Course and scope of employment" shall mean the time, place and circumstances under which the accident occurred. An injury must arise out of and be in the course and scope of employment in order that a claim be compensable.

G. "Covered member," "employee," "worker" means:

1. Every person in the service of the Navajo Nation elected, appointed or hired and carried on the payroll of the Navajo Nation, including all Enterprise employees, Council Delegates, Chapter officers, Grazing Committee members;

2. Volunteer fire fighters, in the course and scope of performing a service for the Navajo Nation as a volunteer fire fighter; this will apply only when the volunteer fire fighter is working under the direction and control of a recognized organization of the Navajo Nation; and,

3. Every person employed by an organization that is considered a member of this chapter by assessment of and payment for compensation benefit premiums.

4. Excluded as not in the employ of the Navajo Nation are consultants, independent contractors and all other persons not considered to be directly employed by the Navajo Nation unless a contractual agreement between the Navajo Nation and a non-related entity provides for workers' compensation. In that event, the contract shall be specific as to who, when, where and why this coverage is provided by the Navajo Nation; this will apply only when the non-related entity and covered members have agreed to all terms, conditions and provisions of this chapter.

5. The final determination as to the employment status of an individual shall be made by the Review Board.

H. "Death" is any fatality of the employee from work injury or occupational disease.

I. "Dependents" are the following persons, and they only shall be deemed dependents under the provisions of this chapter:

1. The widow/widower, if living with the deceased at the time of his or her death or legally entitled to be supported by him or her as a dependent;

2. A child under 18 years of age, or incapable of self-support, unmarried and dependent upon the deceased;

3. A parent or grandparent; if actually dependent upon the deceased;

4. A grandchild, brother or sister, only if under 18 years of age, or incapable of self-support and dependent upon the deceased;

5. A person is considered to be dependent upon the employee when requiring more than 50 percent contribution from the employee toward his or her support. The relation of dependency must exist at the time of the injury.

J. "Intoxication" means blood alcohol content in excess of .10 percent or conviction of the offense of driving while intoxicated or words to that effect, by any lawful jurisdiction.

K. "Minor employee" shall mean a minor working at an age and at an occupation legally permitted. Such minor shall be deemed of the age of majority for the purpose of this chapter. No other person shall have any claim or right to compensation for an injury to a minor employee, but an award of a lump sum of compensation to the minor employee shall be paid only to his or her legally appointed guardian.

L. "Parent or grandparent" means the natural father or mother or the natural grandfather or grandmother of the deceased employee.

M. "Review board" means the Workers' Compensation Employee Benefit Review Board of the Navajo Nation, formerly known as the Disability Board.

N. "Settlement" means the date the release of all claims is executed and the monetary terms of the agreement are met.

O. "Week" means seven calendar days, 30 calendar days equals one month.

HISTORY

ACAU-94-78, §113, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous subsection (13) or (M) pertaining to the use of masculine pronouns throughout this chapter has been deleted. Previous references in this section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

§ 1003. Acknowledgment of Program

A. All covered members shall be conclusively presumed to have elected to take workers' compensation in accordance with the terms, conditions and provisions to include the schedule of benefits of this Program by virtue of membership in the Program; to include acknowledgment that the Navajo Nation is, in fact, a sovereign Nation for the purposes of workers' compensation, governed by the laws as set forth by the Navajo Nation Council and that no other state compensation law is applicable to injuries sustained by the covered members.

B. The Personnel Services Department of the Navajo Nation or the management of the Enterprises and member organizations hiring employees, shall be responsible for explaining the provisions of this Program to the employees and shall post in a conspicuous location a notice as follows:

NOTICE TO EMPLOYEES

All employees are hereby notified that the Navajo Nation is a sovereign Nation for the purposes of workers' compensation, governed by the laws as set forth by the Navajo Nation Council and that no other state compensation law is applicable to injuries sustained by an injured employee. If you do not fully understand the terms, conditions, provisions and schedule of benefits of the Navajo Nation Workers' Compensation Program, contact your supervisor for further details.

HISTORY

ACAU-94-78, §102, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous reference in this section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

§ 1004. Insurance fund—Purpose; administration

A. There shall be a fund maintained for the purpose of payment for compensation claims and associated expenses as provided herein.

B. The fund shall be part of the Workers' Compensation Fund account maintained on the records of the Financial Services Department.

C. The funds shall be obtained by assessment of a percentage of that amount recovered for employee benefits, in conjunction with the Financial Services Department, Window Rock, Arizona, and/or by assessment charges to the various Enterprises and departments based on a specified rate adjusted annually at the beginning of each fiscal year based on the experience of the previous fiscal year. Collection shall be made by the Financial Services Department.

D. Failure of a participating organization to pay the assessed amount within 60 days from the date of billing shall subject that organization to possible suspension from this Program, as deemed appropriate by the Review Board. Failure of a member organization to pay its share shall not affect the rates of other member organizations in good standing.

HISTORY

ACAU-94-78, §104, August 22, 1978.

§ 1005. Rates

A. The rates charged shall be at the direction of the Workers' Compensation Employee Benefit Review Board, adjusted in accordance with the loss experience of each contributor on an annual basis. Payment of death claims or the equivalent shall not be charged directly against any one contributor but shall be distributed to all contributors; i.e., pooled to prevent excessive rates to any one contributor. Adjusted rates shall

become effective at the beginning of the succeeding fiscal year following the announced adjustments.

B. The Review Board, in fixing rates, shall provide for an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, and other necessary reserves and surplus determined by the Review Board. The amount of surplus and reserves shall not be less than \$500,000.

C. The Review Board may, in its discretion, apply tentative rates subject to modification in accordance with the loss experience of each Enterprise or department.

D. An Enterprise or other member organization which misrepresents to the Review Board the amount of payroll upon which the premium to be paid to the insurance fund is based is liable to a penalty of 10 times the amount of the difference in premium paid and the amount the Enterprise or organization should have paid. The penalty shall be assessed by the Review Board and collected by the Financial Services Department at Window Rock, Arizona, and placed into the insurance fund. An organization assessed such a penalty shall have the right of appeal as in the case of a claimant, under 15 NNC §1011. Once a penalty is found just and payable, payment shall be made within 30 days thereafter or benefits for members of that organization shall be suspended until payment is made.

HISTORY

ACAU-94-78, §105, August 22, 1978.

§ 1006. Custodian; duties

A. The Financial Services Department shall be custodian of the insurance fund; and all authorized disbursements therefrom shall be paid by the Financial Services Department, upon presentation of vouchers submitted and authorized by the Navajo Nation Insurance Services Department Risk Manager or his or her representative within its stated authority.

B. Internal control procedures will be established by the Financial Services Department.

C. The fund shall be subject to an annual audit or more frequently, if requested by the President of the Navajo Nation.

HISTORY

ACAU-94-78, §106, August 22, 1978.

CROSS REFERENCES

The Budget and Finance Committee of the Navajo Nation Council is authorized to require reports from and to monitor the financial performance of all offices, divisions, departments, enterprises, authorities, committees, boards, commissions

or entities having oversight or control over fiscal matters or financial obligations to the Navajo Nation. See 2 NNC §374(B)(8).

§ 1007. Payment of benefits

The Insurance Services Department shall administer this chapter in accordance with the terms and conditions as described herein, and submit properly approved vouchers for payment to the Financial Services Department for all manner of compensation claims as provided for in the schedule of benefits. Contested claims shall be referred to the Review Board, which shall conduct hearings as the need may arise.

HISTORY

ACAU-94-78, §107, August 22, 1978.

§ 1008. Insurance Services Department—Powers and duties

A. The Insurance Services Department shall be empowered to request medical reports, police reports, autopsy reports and special investigations, engage the services of adjusters and consultants, and perform other activities as required to process any claim for benefits or to further the intent of this chapter. Payments for expenses associated with this Activity will be made at the direction of the Navajo Nation Insurance Services Department's Risk Manager from the Workers' Compensation Fund, by submitting vouchers to the Financial Services Department for payment upon approval by the Financial Services Department.

B. Payment of claims shall be made at the direction of the Risk Manager of the Navajo Nation Insurance Services Department or his or her authorized representative within the Workers' Compensation branch.

C. Complete and accurate administrative records and claim files shall be maintained on all activities relating to the Workers' Compensation Program. All closed files shall be preserved for not less than six years.

D. The Insurance Services Department shall provide administrative support to the Review Board, make recommendations, and provide other assistance as deemed appropriate.

HISTORY

ACAU-94-78, §108, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1009. Benefit Review Board—Membership

A. There shall be a Workers' Compensation Employee Benefit Review Board for the Navajo Nation. The Review Board shall be composed of a minimum of five regular members, one of which shall serve as chairperson of the Review Board and two alternate members. The

Review Board chairperson and members shall be appointed by the President of the Navajo Nation.

B. The President of the Navajo Nation may remove any member of the Review Board for cause.

HISTORY

ACAU-94-78, §109, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1010. Hearings

A. Any member of the Review Board having a personal interest in the subject matter presented before the Board shall immediately disqualify himself or herself for cause and a previously appointed alternate member shall serve.

B. The employee shall have the right to challenge for cause any member of the Review Board and in that event, a previously appointed member or members shall serve.

C. The employee shall have the right to be represented by an attorney in all matters presented before the Review Board, to cross-examine all witnesses and to review all evidence of any nature, as may relate to the matter under consideration.

D. The Review Board shall have the right to cross-examine the employee claimant and all witnesses and to perform such discovery activity as may be deemed necessary to fully explore all aspects surrounding the occurrence and injury.

E. The Review Board shall not be bound by the rules of evidence or by technical or formal rules of procedure and may conduct investigations in such a manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out the spirit of this chapter.

F. A full and complete record shall be kept of all proceedings held before the Review Board of an investigation and testimony, by a recording device or by a stenographer.

G. The Review Board shall convene as necessary; but in no event will an employee be deprived of a hearing for more than 30 days from date of notice to the Review Board of his or her request for a hearing; provided:

1. That the issue is to determine whether the claim is compensable or non-compensable;
2. That the employee's condition is stationary for rating and award purposes, i.e., he or she is not under treatment, and the necessary factual information has been obtained, making a decision of the Board possible;

3. That the issue relates to the permanent and stationary condition of the claimant, (15 NNC §1035).

H. A claimant may request an evaluation for award purposes while remaining under medical treatment, with the approval of the Review Board.

I. Any award agreed to by the claimant for benefits under this chapter shall constitute a full and final settlement and all benefits shall cease upon settlement, except where the award provides for other than a lump sum settlement. If other than a lump sum settlement, the terms of the award agreement shall apply.

J. All parties shall have the right to continue the hearing after it has first convened for the purpose of further developing evidence.

HISTORY

ACAU-94-78, §110, August 22, 1978.

§ 1011. Decision final

A. The decision of the Review Board shall be by majority vote of no less than three members and a quorum shall consist of no less than five members.

B. The decision of the Review Board shall be final, with the right of appeal resting with the Supreme Court of the Navajo Nation. No court of the Navajo Nation, except the Supreme Court of the Navajo Nation, on appeal, shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any decision of the Review Board.

HISTORY

ACAU-94-78, §111, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1012. Annual report

A. The Review Board shall annually, on or before September 30, make a report to the President of the Navajo Nation for the preceding fiscal year. The report shall include:

1. A statement of the number of awards made;
2. A general statement of the causes of accidents for which the awards were made;
3. A detailed statement of disbursements from the insurance fund; and
4. Other matters which the Board deems proper to call to the attention of the President of the Navajo Nation, including recommendations.

B. The Insurance Services Department shall provide each organization which is a member of the Workers' Compensation Program a quarterly "Experience Report" providing information as to employees

injured, amounts paid for indemnity and medical, and an annual explanation of the rate-setting formula.

HISTORY

ACAU-94-78, §112, August 22, 1978.

§ 1013. Compensation as exclusive remedy

The right to receive compensation pursuant to the provisions of this chapter for injuries sustained by a covered member shall be the exclusive remedy against the Navajo Nation and employees thereof, except where the injury is caused by the fellow employee's willful misconduct and the act causing the injury indicates a willful disregard of life, limb or bodily safety of the insured employee, in which event, the injured employee may, at his or her option, either claim compensation or maintain an action at law for damage against the fellow employee or employees before the Navajo Nation Courts.

HISTORY

ACAU-94-78, §114, August 22, 1978.

§ 1014. Choice of remedy as waiver of alternate remedy

A. An employee, or his or her legal representative in the event death results, who accepts compensation, waives the right to exercise any option to institute proceedings in court against an employee of the Navajo Nation.

B. An employee, or his or her legal representative in the event of death, who exercises any option to institute proceedings in court against an employee of the Navajo Nation as provided for in 15 NNC §1013, waives any right to compensation.

HISTORY

ACAU-94-78, §115, August 22, 1978.

§ 1015. False statement or representation to obtain compensation; penalty and forfeiture

If, in order to obtain any compensation, benefit or payment under the provisions of this chapter, any person willfully makes a false statement or representation, such person shall forfeit all rights to such compensation, benefit or payment upon proof that the offense was committed, as ruled by the Review Board, subject to the appeal provisions stated in 15 NNC §1011.

HISTORY

ACAU-94-78, §116, August 22, 1978.

§ 1016. Injury reports

A. Information obtained by the attending physician or surgeon while in attendance of the injured person shall not be a privileged communication if such information is required by the Navajo Nation for a proper understanding of the case and a determination of the rights involved.

B. The Navajo Nation shall have the right to request a full and complete report from the physician or surgeon at times and in the form and details as deemed necessary and to present specific questions required to evaluate the claim.

C. The covered person acknowledges the right of the Navajo Nation to obtain such information by the covered person's acceptance of the Workers' Compensation Program of the Navajo Nation.

HISTORY

ACAU-94-78, §117, August 22, 1978.

§ 1017. Report of accident

A. When an accident occurs to an employee, the employee shall immediately, or as soon as possible thereafter, report the accident and the injury resulting therefrom to his or her immediate supervisor, who in turn shall report to his or her department or organization, as appropriate.

B. All accidents resulting in injury or death must be reported to the Navajo Nation Insurance Services Department within five working days of the date of occurrence by the responsible department or organization.

HISTORY

ACAU-94-78, §118, August 22, 1978.

CROSS REFERENCES

See ACAU-94-78, Exhibit "A", August 22, 1978 regarding Notice to employees.

§ 1018. Disclosure of preexisting disabilities

A. All employees of the Navajo Nation, its enterprises, divisions, departments and other covered organizations, shall disclose any preexisting physical or mental disorder or disability at time of hire and before commencing employment or before becoming a covered person under this chapter, as provided herein.

B. Any claim for aggravation of a preexisting condition which was not disclosed may be declined by the Review Board under this chapter if that person had knowledge of the preexisting condition and intentionally failed to disclose the preexisting condition on the employment application.

HISTORY

ACAU-94-78, §103, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1019. Right to compensation and medical treatment benefits

A. Every covered person coming within the provisions of this chapter who is injured, and the dependents of every such covered person who is killed by accident arising out of and in the course of his or her employment, wherever the injury occurred, unless the injury was purposely self-inflicted or otherwise limited or excluded by the terms and conditions of this chapter, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of the injury or death or occupational disease, such benefits as are provided under this chapter including the provisions of 15 NNC §1049 hereof; the current Schedule of Benefits approved and certified by the Government Services and Budget and Finance Committees of the Navajo Nation Council pursuant thereto; and such medical and related expenses incurred thereby, as provided in subsection (B) of this section.

B. This program shall pay for treatment by a person licensed to practice medicine by any state within the United States, or foreign country if the injury occurs outside of the United States, including prescribed medication, care provided by a hospital or other accredited medical facility, surgical treatment and treatment by licensed chiropractors and other recognized, properly licensed or certified medically related practitioners recognized by the Navajo Nation, reasonably required at the time of the injury, and during the period of disability attributable thereto, to the extent such expenses are not covered by any other valid and collectible insurance or other benefit program to which the employee is otherwise entitled. In no event shall the program be liable for expenses or reimbursement for medical, surgical, hospital or related benefits to which the injured person may be entitled to receive from or through the United States Public Health Service or any federally funded or sponsored Indian Health Service programs; nor in any event shall the Workers' Compensation Program of the Navajo Nation be considered or understood to be an "alternative source" for payment of the expense of such services.

HISTORY

CF-2-82, February 3, 1982.

ACAU-94-78, §119, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous reference to the "Advisory Committee of the Navajo Tribal Council" has been changed to the "Government Services and Budget and Finance Committees of the Navajo Nation Council" pursuant to CD-68-89, Resolved Clause 10, 2 NNC §§343(B)(4),

374(B)(4) and (8), and 933(A). See also the powers and purposes of the Human Services Committee of the Navajo Nation Council at 2 NNC §601 *et seq.*

§ 1020. Time limit for reporting of claims

A. Claims for injury shall be made within one year from the date of occurrence.

B. Claims for occupational disease shall be made within one year from date of first notice by a physician; but in no event, longer than three years from the date employee terminates his or her employment with the Navajo Nation.

HISTORY

ACAU-94-78, §143, August 22, 1978.

§ 1021. Burden of proof

A. The burden of proof, except as set forth in 15 NNC §1022, shall rest upon the covered person, or his or her dependents in the case of death, to prove:

1. That the injury complained of was a result of an accident or occupational disease;
2. That it arose out of his or her employment; and
3. That it arose while in the course of his or her employment.

HISTORY

ACAU-94-78, §120, August 22, 1978.

§ 1022. Presumptions

When a covered person is found dead by accident under circumstances indicating that the accident took place within time and place limits of employment and no conclusive evidence is present to exclude coverage as provided herein, it shall be the presumption that death arose out of employment and benefits shall be paid.

HISTORY

ACAU-94-78, §121, August 22, 1978.

§ 1023. Acting under employer's directions

Any covered person who is injured or killed while following the directions of his or her employer or his or her employer's agent shall be considered to have been in the course and scope of his or her employment and shall be entitled to compensation benefits.

HISTORY

ACAU-94-78, §122, August 22, 1978.

§ 1024. Aggravation of preexisting disease or condition

If an injured person is suffering from a disease or injury at the time the accident occurs and the disease or injury is aggravated thereby, the disease or injury is compensable for payment of medical and indemnity. For the purpose of settlement for permanent partial or permanent total disability, the amount of the award for that disability as set forth in the schedule of benefits may be reduced or denied in its entirety by the Review Board in consideration of the following:

A. A prior settlement from any source for the same disability;

B. A preexisting physical disability, that disability being to a lesser degree than the disability currently claimed; payment for the extension of the original disability which resulted from the covered person's employment applicable under this chapter, i.e., the difference between the degree of disability of the employee before the covered accident or occupational disease and the degree of disability after the covered accident or occupational disease.

HISTORY

ACAU-94-78, §123, August 22, 1978.

§ 1025. Going to and returning from work

An accident occurring to an employee while on the way to or from work is not within due course of his or her employment unless such traveling is in connection with his or her work from the time his or her travel starts either at his or her place of work or his or her home. This will not apply if the employee deviates from a reasonably direct route of travel, not in the interest of the employer, or during other activities within the travel, not necessitated by the employment activity and not in the interest of the employer.

HISTORY

ACAU-94-78, §124, August 22, 1978.

§ 1026. Occupational disease

A. Occupational disease is one that arises out of a particular trade or occupation from a particular industrial process. It is a disease to which a broker is not ordinarily subject or exposed to outside or away from his or her employment.

B. It is the intent of this chapter to provide benefits for those employees who incur disability or death as a result of occupational disease such as, but not limited to, silicosis, chronic lead poisoning, loss of hearing, etc.

HISTORY

ACAU-94-78, §125, August 22, 1978.

§ 1027. Compensation precluded by neglect or refusal of employee to submit to treatment

No compensation shall be payable for the death or disability of an employee if his or her death is caused by, or insofar as his or her disability may be aggravated, caused or continued by, an unreasonable refusal or neglect to submit to or follow any competent or reasonable surgical treatment or medical aid.

HISTORY

ACAU-94-78, §126, August 22, 1978.

§ 1028. Injury or death by consumption or application of drugs or chemicals

No benefits of any nature shall be payable for injury and/or death caused or contributed to by any drug, (except those drugs prescribed by a physician), including narcotics and hallucinogens, or any gas or fumes, taken or inhaled voluntarily, or by voluntary poisoning.

HISTORY

ACAU-94-78, §144, August 22, 1978.

Note. Parentheses added for clarity.

§ 1029. Intoxication

Benefits shall not be payable for any covered person injured or killed while intoxicated as defined in 15 NNC §1002, regardless of whether or not the intoxicated condition was the proximate cause of the injury or death, i.e., it is necessary only to prove that the covered person was intoxicated at the time of the accident to deny benefits under this chapter.

HISTORY

ACAU-94-78, §149, August 22, 1978.

§ 1030. Acts of God; limitations

Injury or death deemed an "Act of God" shall be considered compensable provided other qualifying conditions are met, except injury or death which results from a natural cause, i.e., heart attack, stroke or other natural body function failure, not arising out of the employment.

HISTORY

ACAU-94-78, §148, August 22, 1978.

§ 1031. Periodic medical examination of employee; effect of refusal or obstruction of examination or treatment

A. An employee entitled to compensation shall submit himself or herself for medical examination from time to time at a place reasonably

convenient for the employee, if and when requested by the Insurance Services Department or the Review Board.

B. The request for the medical examination shall fix a time and place having regard to the convenience of the employee, his or her physical condition and ability to attend. The employee may have a physician present at the examination if procured and paid for by himself or herself.

C. If the employee refuses to submit to the medical examination or obstructs the examination, his or her right to compensation shall be suspended until the examination has been made, and no compensation shall be payable during or for such period.

D. Any physician who makes, or is present at, the medical examination provided by this section may be requested to testify as to the result thereof; and the cost of this appearance shall be at the expense of the Workers' Compensation Program.

E. The Review Board may reduce or suspend the compensation of an employee who persists in unsanitary or injurious practices tending to imperil or retard his or her recovery, or who refuses to submit to medical or surgical treatment reasonably necessary to promote his or her recovery.

HISTORY

ACAU-94-78, §127, August 22, 1978.

§ 1032. Liability of third person to injured employee; subrogation powers

A. If a covered person entitled to compensation under this chapter is injured or killed by the negligence or wrong doing of another not in the employ of the Navajo Nation, its Enterprises, divisions or other covered member organizations, such injured employee, or his or her dependents in the event of his or her death, may pursue his or her remedy against such other person while receiving benefits under this chapter.

B. If the employee entitled to compensation under this chapter or his or her dependents do not pursue his or her or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the Navajo Nation. Such a claim so assigned may be prosecuted or compromised by the Navajo Nation for benefits paid.

C. If employee proceeds against such other person, compensation, medical, surgical, hospital benefits and death benefits shall be paid as provided in this chapter and the Navajo Nation shall have a lien on the amount actually collectable from such other person to the extent of such compensation, medical, surgical, hospital benefits and death benefits

paid. Compromise of any claim by the covered person or his dependents at an amount less than the compensation, medical, surgical, hospital benefits and death benefit provided for shall be made only with written approval of the Review Board.

D. The Navajo Nation shall have the right of subrogation for the amount of payments made for indemnity or medical payments under this chapter, upon the completion of a settlement with the claimant.

E. Any person eligible for benefits under this chapter, who may be eligible for benefits under the uninsured motorists provisions of the Tribal Automobile Comprehensive Program, must elect to recover benefits from either this Workers' Compensation Program or the Tribal Automobile Comprehensive Program. In no event may a person receive benefits under both insurance programs.

HISTORY

ACAU-94-78, §128, August 22, 1978.

§ 1033. Waiting period

No indemnity benefits shall be allowed under the provisions of this chapter for any accidental injury which does not result in the workers' disability which lasts more than seven consecutive days. If the period of the workers' disability lasts for more than 28 consecutive days from the date of his or her accidental injury, indemnity benefits shall be allowed from the date of disability. An employee may not recover indemnity payments for the period of time that he or she is compensated by annual or sick leave, at the employee's option. Annual or sick leave time taken shall apply against the waiting period for indemnity payments. Compensation benefits for indemnity and medical payments shall not be payable for a period in excess of 520 weeks.

HISTORY

ACAU-94-78; §129, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1034. Total disability; definition and qualifying requirements; limitations

A. "Total disability" means complete incapacity to engage in an occupation as a result of an occupational injury or disease. Occupation means any vocation for which the employee is or becomes reasonably fitted by education, training or experience.

B. Independently of any other cause, the entire and irrecoverable loss of sight of both eyes, or the loss by actual severance through and above the wrist or ankle joint of both hands or feet, shall be considered total disability even if the employee shall engage in an occupation.

C. An award of total disability shall be in lieu of all lesser scheduled benefits that may be applicable to the injury that created the condition of total disability.

HISTORY

ACAU-94-78, §146, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1035. Condition permanent, stationary and rateable; termination of benefits

When an employee's physical condition reaches a point where no further medical treatment is deemed appropriate or useful to correct a disability as supported by a competent medical authority:

A. The employee's condition shall be considered permanent, stationary and rateable;

B. The employee shall be notified in writing that his or her condition is permanent, stationary and rateable and that all benefits, if being claimed at that time, shall cease 30 days from date of notice;

C. The employee shall be advised of the amount payable to him or her in accordance with the terms, conditions, provisions and schedule of benefits of this chapter;

D. The Insurance Services Department shall tender the amount payable to the employee within the 30-day termination period;

E. Failure of the employee to execute the required documents and to accept such payment shall constitute the employee's refusal to settle his or her claim; and

F. The employee may request a hearing before the Review Board as provided for in this chapter.

HISTORY

ACAU-94-78, §145, August 22, 1978.

§ 1036. Notice by disabled employee of absence from locality

No employee may leave the locality in which he or she is receiving treatment while the necessity of having medical treatment continues without written approval of the Review Board. Any employee leaving the locality in which he or she is receiving medical treatment without such approval may forfeit his or her right to compensation during such time, as well as his or her right to reimbursement for his or her medical expenses and any aggravation of his or her disability.

HISTORY

ACAU-94-78, §138, August 22, 1978.

§ 1037. Compensation for death

If an accidental injury sustained by a worker proximately results in his or her death within two years following his or her accidental injury, compensation shall be paid in the amount and to the persons entitled thereto, as follows:

A. If there are no eligible dependents, compensation shall be limited to the funeral expenses, not to exceed \$2,500, and the expenses provided for medical and hospital services for the deceased, together with all other sums which the deceased should have been paid for compensation benefits up to the time of his or her death, payable to the estate of the deceased; or

B. If there are eligible dependents at the time of the worker's death, payment shall consist of a lump sum as set forth in the schedule of benefits.

HISTORY

ACAU-94-78, §130, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

§ 1038. Line of dependency; payment of benefits

The line of dependency for payment of death benefits shall be in the order set out below, provided each qualifies as a dependent under the terms and conditions of this chapter:

A. First to the surviving spouse, if there are no children. If dependent children exist at time of employee's death, payment is to widow or widower, subject to the provisions of 15 NNC §1039;

B. If no surviving spouse, to the dependent single child, 100 percent of death benefit; or if more than one dependent child, to be divided among such dependent children, share and share alike;

C. To a parent or parents, if no surviving spouse or eligible children, if dependent upon the deceased employee, 100 percent of death benefit if only one parent; to be divided among both parents if both are dependent upon deceased employee, share and share alike; or

D. If there are no eligible dependent spouse, children or parents, the death benefit shall be divided among all other eligible dependents, share and share alike.

HISTORY

ACAU-94-78, §131, August 22, 1978.

§ 1039. Apportionment of compensation

Compensation to a dependent widow or widower shall be for the use and benefits of the widow or widower and the dependent children; and the Review Board may, upon proper application at time of award,

apportion the compensation between them in such a way as it deems best for the interest of all beneficiaries.

HISTORY

ACAU-94-78, §132, August 22, 1978.

§ 1040. Artificial members

In all cases where the injury is such as to permit the use of artificial members, including teeth and eyes, the Workers' Compensation Program shall pay all expenses connected with the artificial member.

HISTORY

ACAU-94-78, §133, August 22, 1978.

§ 1041. Replacement of artificial members

The Workers' Compensation Program shall, during the lifetime of the employee, replace or repair any artificial member or members, including dentures and artificial eyes, that were originally provided to the injured employee by the Program.

HISTORY

ACAU-94-78, §147, August 22, 1978.

§ 1042. Hernia

Employees, in order to be entitled to compensation for a hernia, must clearly prove:

A. That the hernia is of recent origin;

B. That this appearance was accompanied by pain;

C. That this was immediately preceded by some accidental strain suffered in the course of employment; and

D. That it did not exist prior to the date of the alleged injury. If a worker, after establishing his or her right to compensation for a hernia, as provided above, elects to be operated upon, the operating fee and reasonable hospital expenses shall be paid by the Workers' Compensation Program. In case such worker elects not to be operated upon and the hernia becomes strangulated in the future, the results from the strangulation shall not be compensated.

HISTORY

ACAU-94-78, §134, August 22, 1978.

§ 1043. Disfigurement benefits

For serious permanent disfigurement about the body, in addition to other compensation benefits that may be allowed under this chapter, an additional sum for compensation on account of the serious perma-

ment disfigurement, as the Review Board deems just, may be paid, not to exceed \$2,500.

HISTORY

ACAU-94-78, §135, August 22, 1978.

§ 1044. Vocational rehabilitation services

In addition to the medical and hospital services provided, the employee shall be entitled to such vocational rehabilitation services, including retraining or job placement, as may be necessary to restore him or her to suitable employment when he or she is unable to return to his or her former job. Such additional compensation shall not exceed \$3,000.

HISTORY

ACAU-94-78, §136, August 22, 1978.

§ 1045. Eyewear

The Workers' Compensation Program shall pay for frames and/or lenses of a like kind and quality as any damaged as a result of an accident which results in a compensable injury to the employee during the course and scope of his or her employment, but shall not pay for eye examinations unless there is a potential injury to the employee's eyes from the occurrence.

HISTORY

ACAU-94-78, §140, August 22, 1978.

§ 1046. Clothing

An employee who incurs damages to his or her clothing during an accident which results in a compensable injury shall be paid for replacement clothing of a like kind and quality.

HISTORY

ACAU-94-78, §141, August 22, 1978.

§ 1047. Travel to and from a medical facility

The injured employee shall be compensated for mileage to and from a medical facility at a rate consistent with the travel allowance authorized by the established Navajo Nation travel policy in effect at the time the travel was performed. The injured employee may be compensated for food and lodging while receiving medical treatment in excess of 100 miles from his or her home of record at a rate consistent with the per diem allowance authorized by the established Navajo Nation travel policy in effect at the time the expense was incurred.

HISTORY

ACAU-94-78, §142, August 22, 1978.

§ 1048. Compensation exempt from execution

Compensation shall be exempt from claims of creditors and from any attachment, garnishment or execution; and it shall be paid only to such worker or his or her personal representative or such other persons as the Review Board may, under the terms of this chapter, appoint to receive or collect the same.

HISTORY

ACAU-94-78, §137, August 22, 1978.

§ 1049. Benefits

A. A schedule of benefits shall be established by the Government Services and Budget and Finance Committees of the Navajo Nation Council, reviewed annually during the first session after commencement of the new fiscal year for adjustments as the need might appear, and shall become a part of this chapter upon date of certification.

B. If an injury or occupational disease has left the covered member with a permanent bodily impairment, compensation for a specified number of weeks is payable, in one lump sum, without regard to presence or absence of wage loss in the future. For loss or loss of use of body members, schedules of the number of weeks for which compensation is payable are provided.

C. For other nonscheduled permanent impairments, a calculation of percentage of total permanent disability is made. The award made pursuant to the schedule of benefits is the exclusive remedy. This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law as found in many states. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one instead of a specifically proven one based on the individual's actual wage loss experience. The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at the employee's earning record for some relatively short temporary period preceding the compensation award. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effect of the impairment on the employee's earnings each time the employee contends that his or her earnings are being adversely affected.

D. To avoid this protracted administrative task for which the Navajo Nation may lack trained personnel, the schedule of benefits approach has been devised.

E. For the purpose of this chapter, scheduled losses are recognized in three forms, presenting an ascending degree of difficulty: loss of a particular member; loss of use of a member; and unscheduled or more generalized impairments which are rated on the percentage of disability (loss of total body function) of the entire body, from the scheduled amount for permanent total disability.

F. A total loss of use of a member exists whenever, by reason of injury, such member no longer possesses any substantial utility as a member of the body.

G. The percentage of permanent partial disability, i.e., partial loss of use of the member or entire body, is arrived at by calculating the percentage that the proven disability bears to the total disability, i.e., total loss of use of the member or entire body.

H. The unit by which weekly indemnity payments are measured consists of $66\frac{2}{3}$ percent of the "average weekly wage". The computation of the average weekly wage is based upon gross actual wages during the preceding 90-day period. Average weekly wages shall mean the earnings of the injured employee in the employment in which he or she was working at the time of the injury during the period of 90 days immediately preceding the date of the injury; but where for exceptional reasons the foregoing would be unfair, either to the employee or the Navajo Nation, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. Maximum weekly indemnity payable is \$200. Disability benefits are measured by multiplying the gross average weekly wage times the number of weeks reflected in the schedule of benefits, or percentage thereof in a case of partial disability.

I. Schedule of benefits:

1. All persons earning less than \$125 per week shall be rated at a weekly wage of \$125, regardless of income, for the purpose of determining benefits under this chapter.

2. Maximum award for a single disability or combination of disabilities paid in accordance with the schedule of benefits is \$40,000.

3. SCHEDULE OF BENEFITS

a. ARM

- (1) Dextrous
 - (a) At or near shoulder 60 weeks
 - (b) At elbow 50 weeks
 - (c) Between elbow and wrist 47 weeks
- (2) Nondextrous
 - (a) At or near shoulder 53 weeks
 - (b) At elbow 47 weeks
 - (c) Between elbow and wrist 44 weeks

b. HAND

- (1) Dextrous 37 weeks
- (2) Nondextrous 33 weeks

c. THUMB

- (1) Total 17 weeks
- (2) At proximal joint 10 weeks
- (3) At distal joint 7 weeks

d. FIRST FINGER

- (1) Including metacarpal 8 weeks
- (2) At proximal joint 6 weeks
- (3) At second joint 5 weeks
- (4) At distal joint 4 weeks

e. SECOND FINGER

- (1) Including metacarpal 7 weeks
- (2) At proximal joint 5 weeks
- (3) At second joint 4 weeks
- (4) At distal joint 3 weeks

f. THIRD FINGER

- (1) Including metacarpal 5 weeks
- (2) At proximal joint 4 weeks
- (3) At second joint 3 weeks
- (4) At distal joint 3 weeks

g. FOURTH FINGER

- (1) Including metacarpal 5 weeks
- (2) At proximal joint 4 weeks
- (3) At second joint 3 weeks
- (4) At distal joint 3 weeks

h. ALL FINGERS-pertaining to one hand,

- except thumb 19 weeks

- i. LEG
 - (1) At or near hip joint 60 weeks
 - (2) At or above knee 47 weeks
 - (3) Between knee and ankle 40 weeks
- j. FOOT
 - (1) At ankle 33 weeks
- k. GREAT TOE
 - (1) Including metatarsal 12 weeks
 - (2) At proximal joint 5 weeks
 - (3) At second joint 3 weeks
- l. ONE TOE
 - (1) Including metatarsal 4 weeks
 - (2) At proximal joint 3 weeks
 - (3) At second joint 3 weeks
- m. ALL TOES, same foot 12 weeks
- n. EYE-ONE
 - (1) Total Blindness 37 weeks
- o. EYE-BOTH
See Total Disability
- p. EAR
 - (1) Total deafness, one ear 12 weeks
 - (2) Total deafness, both ears 45 weeks
- q. LOSS OF LIFE 125 weeks
- r. TOTAL DISABILITY 125 weeks
- J. Other benefits
 - 1. Mileage (see 15 NNC §1047). Mileage from resident address of employee to the medical facility and return, based on mileage shown on official state maps as issued by the states involved, plus reasonable local mileage, not to exceed 20 miles per trip, upon presentation of a statement by the employee and signed by the employee, showing date or dates and points traveled. The rate shall be equal to the prevailing rate payable to Navajo Nation employees for similar travel.
 - 2. Meals and lodging (see 15 NNC §1047). For employee only, unless his or her condition warrants a relative or other person to assist; payment for this additional person shall be at the discretion of the Insurance Services Department. The allowable expense shall be equal to the prevailing amount payable to Navajo Nation employees, for similar expense. For lodging, maximum per person, \$17.50, unless a special circumstance would create a higher cost, an increase above the maximum is allowable at the discretion of the Insurance Services Department.

3. Land or air ambulance charges (for injured employees only) shall be recognized and payable under this chapter. Expenses for the return of an employee injured away from his or her place of employment, except by ambulance, are not reimbursable under this chapter, i.e., if an employee was sent to some distant locality by his or her organization, is injured, treated and released, that employee is considered to be in the charge of his or her organization for the return travel expense.

4. All claims for reimbursement must be supported by valid receipts showing the date and place of services, meals, lodging, etc., to be reimbursable.

HISTORY

ACAU-94-78, §150, August 22, 1978.

Note. Regarding Government Services and Budget and Finance Committees, see note under §1019.

Chapter 13. Crownpoint Institute of Technology

SECTION

- 1201. Establishment; name; place; duration
- 1202. Status
- 1203. Purposes and powers
- 1204. Board of Directors
- 1205. Powers and duties of the Board of Directors
- 1206. Officers
- 1207. Board meetings
- 1208. Dissolution
- 1209. Amendments

§ 1201. Establishment; name; place; duration

A. There is established by the Navajo Nation Council of the Navajo Nation, a corporation to be known as Crownpoint Institute of Technology.

B. The principal place of business of the Corporation shall be at Crownpoint, New Mexico, but it may establish such other places of business, consistent with these Articles, as the Board may determine.

C. The duration of the Corporation shall be perpetual.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

Crownpoint Institute of Technology, Inc., was formerly known as "Navajo Skill Center."

§ 1202. Status

A. This Corporation is organized as a non-profit, nonmembership corporation, wholly owned by the Navajo Nation, and organized exclusively for educational, charitable and governmental purposes.

B. The Corporation is a non-profit vocational technical educational institution of the Navajo Nation government, and is to be considered part of the "Navajo Nation" for purposes of the Navajo Sovereign Immunity Act, 1 NNC §551 *et seq.*

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1203. Purposes and powers

A. The Corporation is organized for the primary purpose of providing programs of post-secondary vocational education and college academic programs to qualified persons, in appropriate fields, including on-the-job training, and to conduct other socially beneficial programs to promote health care, adult education, and social welfare, and any other activities intended to alleviate poverty or lessen the burdens of government, and to do all things appropriate to the furtherance of these purposes, including the construction and operation of buildings and other physical facilities for the carrying out of its programs.

B. The Corporation is further organized for the purposes of securing funds from public and private sources for support and maintenance of its educational programs, and all related purposes, and developing and implementing programs and activities not inconsistent with its status as an educational institution of the Navajo Nation, its purposes as stated in these Articles, or with the allowable activities of organizations qualified as charitable or educational within the meaning of §501(c)(3) or any successor section of the Internal Revenue Code, that generate income to the Corporation in the course of providing vocational education and training to students.

C. In furtherance of these purposes, and consistent with these Articles and other applicable law, the Corporation shall have the power to receive and administer funds, take and hold by bequest, devise, gift, grant, purchase or otherwise, either solely or jointly with another, any property, real, personal or otherwise or any interest therein, without limitation as to amount or value; to sell, convey or otherwise dispose of such property, and to invest, reinvest or deal with the principal and income thereof in such manner as, in the judgment of the Board, will best promote and serve the interests of the Corporation; to enter into contracts and to incur debts and liabilities up to the amount of the Corporation's assets; to sue and be sued, subject to and in conformity with the provisions of the Navajo Sovereign Immunity Act, 1 NNC §551 *et seq.*, and provided that the Corporation shall have no power to waive the sovereign immunity of the Navajo Nation; and to do any and all other acts or things, within or without the Navajo Nation, appropriate or convenient to achieve the purposes for which it is organized or for any other lawful purposes not inconsistent therewith, and not in contravention of any applicable law.

D. No substantial part of the activities of the Corporation shall consist of disseminating any political propaganda or attempting to influence legislation, nor shall the Corporation participate or intervene in any political campaign on behalf of any candidate for public office.

E. No part of the income of the Corporation shall inure to the benefit of any director or officer of the Corporation, or of any private person, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to reimburse expenses incurred in the course of such services, and to make payments and distributions in furtherance of its purposes and above-described.

F. Notwithstanding any other provision hereof, the Corporation shall have no power to engage in any activity prohibited to organizations described in §501(c)(3) of the Internal Revenue Code or its successor, except that so long as the Corporation is determined to be a political subdivision of the Navajo Nation within the meaning of 26 U.S.C. §7871, it shall have the power to do any acts or things permitted of such political subdivisions.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1204. Board of Directors

A. The general affairs of the Corporation shall be managed and its policies established by a Board of Directors composed of five (5) members. Board members should have some prior experience in or familiarity with the fields of education, business, industry, government or labor.

B. Persons shall be nominated to fill vacancies on the Board by the President of the Navajo Nation and the names submitted to the Government Services Committee of the Navajo Nation Council, which must confirm the nominees by majority vote.

C. Board members shall serve terms of three (3) years each, and terms shall be staggered so that approximately one-third of the seats on the Board become vacant each year. A Board member shall continue to serve after the formal expiration of the term until a successor has been confirmed by the Government Services Committee.

D. Should a Board member resign before the expiration of his or her term, the President of the Navajo Nation shall nominate a successor to complete the term, subject to confirmation by the Government Services Committee.

E. No action of the Board shall be of any validity unless taken at a duly called meeting of the Board at which a quorum is present, or unless subsequently ratified by a majority vote at such a meeting. No individ-

ual Board member shall have the authority to act for or bind the Board unless the Board has expressly authorized such action in advance.

F. At its first regular meeting following the confirmation of new members each year, the Board shall elect officers consisting of a chairperson, a vice-chairperson, and a secretary. The chairperson shall call and conduct meetings, and prepare the agenda in consultation with the president of the Corporation, and shall execute all official documents on behalf of the Board as the Board directs. The vice-chairperson shall act in the place of the chairperson in the event of the latter's absence or disability. The secretary shall maintain the records of the Board. The Board may from time to time delegate additional duties to its officers. Officers of the Board shall serve until their successors are elected.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1205. Powers and duties of the Board of Directors

In its management of the Corporation, the Board shall have the following powers and duties:

A. To report no less than once a year to the Education Committee of the Navajo Nation Council on the operation of the Corporation and at such other times as the Committee determines on matters of concern to the Committee;

B. To review and approve the annual budget of the Corporation and all requests and proposals for funding, whether by contract, grant or otherwise;

C. To establish, and review and revise from time to time as appropriate, the program priorities of the Corporation and to insure that budget and funding proposals are consistent therewith; and are covered by adequate insurance at all times;

D. To review and approve training curricula and program plans, in accordance with established program priorities of the Corporation;

E. To insure that the Corporation takes all necessary steps to maintain full accreditation of its instructional programs by recognized accreditation agencies;

F. To issue appropriate certificates and diplomas to students who satisfactorily complete their training programs and/or studies, of the Corporation and to confer appropriate certificates and degrees. Such certificates shall be executed by the chairperson of the Board;

G. To review and approve all administrative and instructional policies and procedures, and all publications issued to employees or students setting forth such policies and procedures, and to insure that such publications, and the policies and procedures contained therein, are periodically reviewed and updated;

H. To review and approve monthly reports from the various administrative branches of the Corporation, including financial reports, and generally to insure that administrative matters are being handled efficiently and professionally;

I. To establish and periodically review Corporation policies pertaining to student tuition and fees, and changes, (if any) to be more to outside organizations for use of Corporation facilities;

J. To insure that the Corporation remains in compliance with all applicable federal and Navajo Nation laws and regulations, including but not limited to health and safety standards;

K. To establish and periodically review standards and qualifications for admission of students to educational and training programs operated by the Corporation;

L. To insure that approved Corporation policies and procedures are being enforced appropriately by the administrative staff, and, in accordance with those policies and procedures, to sit as the ultimate reviewing body with respect to employee grievances;

M. Subject to the availability of funds, to insure that the Corporation's facilities are kept in good and usable condition, are properly maintained and secured, and are covered by adequate insurance at all times;

N. To insure that all training and other activities conducted by the Corporation pursuant to a grant or contract with another public or private agency are carried out in full compliance with the terms of the grant or contract documents and with any applicable laws or regulations;

O. To select and hire the President of the Corporation, and such other executive officers as the Board may determine, and fix their salaries, and to oversee their activities and, where necessary, take appropriate disciplinary measures against such officers up to and including removal;

P. To establish and periodically review an appropriate salary and job classification schedule for employees of the Corporation;

Q. To review and approve all contracts for personal services to be entered into by the Corporation, and for purchases or sales of equipment in excess of \$100,000.00, provided, that the Board may require that procurement contracts for lesser amounts be submitted to it for approval in particular circumstances;

R. To review and approve transactions to be entered into by the Corporation affecting any interest in real property;

S. To accept (or reject) any gift, grant, bequest or devise to or on behalf of the Corporation;

T. To establish and review periodically, and to ensure compliance with policies governing financial accounting for the Corporation, and to provide for a full and independent audit of the Corporation's finances at least annually;

U. To defend litigation initiated against the Corporation or against any director, officer or employee thereof for an act committed in the course of his or her official duties; and

V. As appropriate, and in accordance with specific guidelines, to delegate the execution of any of the foregoing duties and powers to the President or other appropriate administrative officers of the Corporation, or to consultants engaged for that purpose; provided that the Board shall remain ultimately responsible for all matters set forth in this article.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Education Committee of the Navajo Nation Council, 2 NNC §484(B)(4).

§ 1206. Officers

A. The day-to-day administration of the affairs of the Corporation shall be vested in a President, who shall be hired by the Board. The President shall be responsible for all aspects of the Corporation's operation, including administrative, personnel, fiscal, plant operation and maintenance, training, monitoring, funding, planning, development, student services, security, counseling, and other such activities, and shall have such other duties as the Board may delegate from time to time. The President shall plan and attend all meetings of the Board, develop the agenda therefor in conjunction with the Board chairperson, and shall report to the Board on all matters of Corporation business requiring the Board's attention. The President shall see to the execution and implementation of all actions and policies of the Board, and with the Board chairperson shall represent the Corporation in dealings with funding agencies and other public and private entities. The President shall also exercise all powers of the Corporation not specifically dele-

gated to the Board by these Articles, and such other powers as the Board may delegate to him or her.

B. The Corporation may have such other officers as the Board shall determine.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1207. Board meetings

A. The Board shall meet monthly, at a place and time to be determined at the previous meeting. Special meetings of the Board shall be called at the request of the Chairperson, or on the written request of at least two (2) members of the Board, delivered to the Board's secretary. Unless otherwise determined by the Board, such meetings shall be open to interested persons, provided, that all official action of the Board shall be taken in open meetings. Each Board member shall receive written notice of any meeting of the Board.

B. No official business shall be conducted at any meeting of the Board at which a quorum is not present. A quorum shall consist of three (3) members.

C. The Board shall determine its own rules for the conduct of business. Votes may be taken by voice vote or show of hands, but on the request of any member a roll call vote shall be taken on any official action.

D. The Board shall insure that minutes of all meetings are taken and are kept on file at the offices of the Corporation.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1208. Dissolution

In the event the Corporation is dissolved, all of its property and other assets shall revert to the Navajo Nation government, and shall be used for charitable, educational, or other governmental purposes of the Navajo Nation.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

§ 1209. Amendments

These Articles may be amended by a two-thirds vote of the Board, at the meeting following the meeting at which the amendment is proposed, subject to the concurrence of the Education and Government Services Committees of the Navajo Nation Council.

HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

CROSS REFERENCES

Education Committee of the Navajo Nation Council, 2 NNC §484(b)(4).

Government Services Committee of the Navajo Nation Council, 2 NNC §343.

See CD-68-89, Resolved Clause 10.

CHAPTER 53
STOCKBRIDGE-MUNSEE TRIBAL LAW
EMPLOYEE RIGHTS ORDINANCE

Preamble

The Stockbridge-Munsee Tribe is firmly committed to the principal of tribal self-government. Consistent with federal policy, tribal government provides a wide range of public services, including general governmental services, the maintenance of peace and good order, and the promotion and regulation of economic activities within the sovereign jurisdiction of the tribe. Pursuant to the inherent sovereign powers of the Tribe and the powers expressly delegated to the Tribal Council by the tribal constitution, the tribal government recognizes the need for creating laws to govern and protect its employees, especially where state and federal laws do not apply.

Section 53.1 Purpose

The Stockbridge-Munsee Tribal Council recognizes that on occasion, differences may arise between employees and supervisors due to misunderstanding, lack of communication, or concern over supervisory decisions. The Stockbridge-Munsee Tribal Council further recognizes that employees of the Mohican Nation, comprised of all branches of government and business, need protection of their rights including a stable working environment and the right to file a grievance and seek assistance in solving on-the-job problems via the proper, established policies and procedures. The Stockbridge-Munsee Tribe, through this ordinance, seeks to define and establish employees rights and to establish a grievance process allowing all tribal employees an opportunity to have recourse for their grievances.

Section 53.2 Definitions

(A) CORRECTIVE ACTION means any documented oral warnings, written warnings, probation or suspension generated by administration/management.

(B) DISCRIMINATE means to refuse to hire, to terminate or to treat a person differently with respect to promotion, compensation or other terms or conditions of employment.

(C) EMPLOYEE for the purposes of this ordinance shall mean any individual and/or appointee hired or appointed by the Stockbridge-Munsee Community or any subordinate organization thereof.

(D) EMPLOYEE HANDBOOK means the "Information Handbook for Employees of Mohican Nation" effective October 1, 1996, as amended, or any successor document prepared for employees and adopted by the Tribe.

(E) ESTABLISHED POLICIES AND PROCEDURES means the policies, guidelines and procedures published in the Employee Handbook and its inserts or in resolutions or ordinances adopted by the Tribal Council.

(F) EXEMPT EMPLOYEES means employees exempt from the overtime pay provisions of the Tribal Fair Labor Standards Ordinance. Exempt employees are compensated on a salary basis and do not earn

overtime pay for hours worked over 40 hours per week.

(G) **NONEXEMPT EMPLOYEES** means all employees who are not exempt employees.

(H) **ORIENTATION PERIOD** means a period of up to 120 days during which employees are subject to rigorous performance evaluations. Failure to meet performance standards will result in termination of employment consistent with established personnel policies and procedures of each existing tribal employment division. Such termination may occur at any point during the orientation period. The Tribal Council may designate by motion or resolution an exception to the 120-day limit for those positions such as law enforcement officers or others, where the nature of the job requires a longer orientation period.

(I) **POLITICAL APPOINTEES** means those employees who are hired by the Tribal Council and serve at the pleasure of the Tribal Council. **POLITICAL APPOINTEES** are high level executive positions that are so vital to the execution of the Tribal Council's policies that the Council must be free to entrust the positions to individuals who enjoy the Council's complete confidence. Political appointments are not subject to the employment posting policy.

(J) **PROBATIONARY EMPLOYEES** means employees who have not successfully completed the Orientation Period.

(K) **REASONABLE ACCOMMODATION** means reasonable modifications or adjustments to the work environment or to the manner or circumstances under which a position is customarily performed, that enable a qualified person with a disability to perform the essential functions of the position if such accommodation does not cause the Tribe, or the employing agency of the Tribe, undue hardship. "Reasonable accommodation" does require measures that would result in an expenditure of tribal funds.

(L) **RESTRICTED DUTY** means restrictions on an employee's hours or work duties that temporarily prevent the employee from performing all essential job duties but which do not prevent the employee from performing some essential job duties, provided such restrictions are recommended by a physician, subject to review by a physician selected by the Tribe.

(M) **SEXUAL HARASSMENT** means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. **SEXUAL HARASSMENT** includes conduct directed by a person at another person of the same or opposite sex. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.

Section 53.3 Guaranteed Employee Rights

The Stockbridge-Munsee Tribal Council ordains that all employees, exempt or nonexempt, are guaranteed basic employment rights as outlined in the following areas:

(A) All employees are eligible for unemployment compensation in accordance with applicable laws, rules and regulations as adopted by the Stockbridge-Munsee Tribe.

(B) The Tribe recognizes basic human rights in the workplace in regard to age, sex, disability, race, creed, religion, political affiliation, national origin, color, sexual orientation, marital status and ancestry. Subject to the Tribe's Employment Preference Ordinance, employees shall not be discriminated against for these basic rights, provided that:

(1) This paragraph shall not infringe on the right of the tribal government to discriminate based on tribal political affiliation with respect to political appointees.

(2) It is not a violation of this Ordinance to treat a person differently based on disability if the disability prevents the person from adequately performing all essential job duties and no reasonable accommodation is available.

(3) It is discrimination based on sex to discriminate based on pregnancy, childbirth, maternity leave or related medical conditions.

(4) It is not a violation of this Ordinance to discriminate based on sex where sex is a bona fide occupational qualification.

(C) Employees shall be entitled to leave benefits consistent with the federal Family Medical Leave Act, unless superseded by a tribal Medical Leave Act.

(D) While the Tribal Council has exercised its sovereign right to bar labor union organizing from the reservation, it recognizes the right of employees to meet during nonworking hours to discuss their common interests in regard to employee workplace issues and concerns without threat of retaliation or dismissal.

(E) Employees shall be entitled to certain compensated vacation time, sick time, funeral leave, National Guard and reserve call-up time as provided under the established policies and procedures.

(F) Employees shall be entitled to a compensated leave during jury duty and court ordered or subpoenaed appearances, pursuant to established policies and procedures.

(G) An employee unable to vote during nonworking hours shall be granted reasonable time off with pay to vote in any tribal, federal, state or local election according to established tribal policies and procedures.

(H) The Tribe guarantees equal pay for men and women doing the same job and who would otherwise be compensated equally based on experience, education, performance and years of service.

(I) The Stockbridge-Munsee Tribe prohibits all types of sexual harassment. All employees shall be treated with courtesy, respect and dignity while employed by the Tribe and all of its agencies. Employees should immediately report sexual harassment to the appropriate person as identified in the Employee Handbook at which time an investigation in accordance with the established policies and procedures shall take place.

(J) Employees' privacy shall be protected in the following ways:

(1) Personal records, including background investigations, developed during the hiring process and actual employment will be safeguarded from unauthorized use.

(2) Interview boards shall maintain full confidentiality of information given during their involvement in the hiring process with a failure to do so resulting in disciplinary action up to and including termination. Tribal employers and departments shall not collect information about employees that is not job related and based on business necessity.

(3) An employee may review and copy his or her personnel files except for those items regarding:

(a) records relating to the investigation of possible criminal offenses committed by the employee;

(b) letters of reference for the employee;

(c) materials used by employers for staff management, including judgments and recommendations concerning future salary changes, promotions or job assignments or other comments on ratings used for planning purposes;

(d) information that would invade another person's privacy; or

(e) records relevant to a pending claim between the employer and the employee which are discoverable in a judicial proceeding.

(4) Except in the case of employees whose previous drug test has produced a positive finding or is under suspicion of drug use, no employee shall be subjected to random drug testing more than three (3) times in any twelve (12) month period, consistent with Tribal drug testing policy.

(K) The Stockbridge-Munsee Tribe ordains that any Employees Assistance Policy ("EAP") in effect at the time of employment will be enforced. Employees failing related testing procedures, including those for medical problems, will be provided treatment pursuant to the EAP, provided the employee has not been guilty of conduct which merits termination.

(L) Tribal employees are not to be retaliated against, harassed or dismissed by supervisors or any other person when they report to the tribal government, violations of any rules, regulations, laws, ordinances, policies at any level of government or employment.

(M) Employees may not be terminated from employment without just cause.

(N) Established personnel policies and procedures shall reflect the above listed rights ordained by this Employment Rights Ordinance.

Section 53.35 Other Rights

The rights under this section are listed as employee rights, but are not subject to grievances under Section 53.4.

(A) Employees shall be subject to the Tribal Fair Labor and Standards Ordinance.

(B) Employees shall be covered under existing rules and regulations concerning Workers Compensation and Disabilities as adopted by the Stockbridge-Munsee Tribe.

(C) The Stockbridge-Munsee Tribe ordains a safe work place including buildings, environment, equipment, safe work practices safety education and training.

(D) The Tribe will enforce policies in the workplace to protect its employees from harassment and sexual harassment such as: threats, intimidation, physical or verbal abuse, from co-workers or non-employees during working hours.

Section 53.4 Employee Appeals to Tribal Court

(A) As a part of the Stockbridge-Munsee Community's commitment to protect the rights of its employees and promote a stable working environment, the following appeal process is made available to each employee:

(1) Only violations of those employee rights enumerated in Section 53.3 of this Ordinance are appealable to the Tribal Court. All other issues must be handled through an internal grievance process as provided for in the Employee Information Handbook. The internal grievance process shall be the final recourse for all issues not expressly enumerated in Section 53.3.

(2) The employee must exhaust the internal grievance process before the Tribal Court appeal process will be available to him or her.

(a) In cases of employee terminations, the employee may choose to waive the internal grievance process and file a claim directly with the Tribal Court.

(b) In all other cases, where the employee can demonstrate to the Human Resources Director or his or her designee, that exhaustion of the internal grievance process would not further the process of resolving the problem, for whatever reason, then the requirement may be waived by the Human Resource Director and the appeal may be taken directly to Tribal Court.

Section 53.45 Statute of Limitations

The employee must initiate the internal grievance process or court action, whichever applies, within 30 calendar days of the event or events that gave rise to the employee's claim.

Section 53.5 Court Procedures

(A) The petition filed in tribal court under this Ordinance may be in any written format, but shall include at least the following information:

(1) The name and address of the petitioner.

(2) A statement identifying which of the enumerated rights under Section 53.3 has been violated.

(3) A brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner's supervisor, if applicable.

(4) A specific request stating the required relief. Relief is governed by subsection (F) below.

(B) After the filing of the petition, the employer shall file a written answer within 20 days.

(C) After the filing of the answer, the Court shall schedule an initial informal conference with the parties to discuss preliminary matters, including but not limited to, scheduling, motions, discovery and whether there is any possibility of the parties reaching a settlement.

(D) If the parties are unable to settle the matter, the Court shall schedule the matter for a trial no later than 30 days after the initial conference.

(E) At the trial, the petitioner shall carry the burden of showing by a preponderance of the evidence that a violation of the rights enumerated in Section 53.3 occurred.

(F) Upon a finding by the Court based upon credible evidence that a violation has occurred, the Court may order any of the following remedies:

(1) Back pay not to exceed one (1) year's wages.

(2) Reinstatement.

(3) Any other non-monetary remedy which is narrowly tailored to remedy the violation.

(G) The Stockbridge-Munsee Community provides a limited waiver of sovereign immunity for the purposes of permitting claims arising under Section 53.3 and allowing only those remedies identified in subsection (F) above.

(H) Any settlement agreement reached by the parties shall be presented in writing to the Court.

(I) Peacemaking is permitted for employee disputes. Any peacemaking shall be in accordance with the Tribal Peacemaker Ordinance.

LEGISLATIVE HISTORY

Employee Rights Ordinance approved by Tribal Council June 28, 1995, by Resolution No. 1505-95.

Employee Rights Ordinance amended by Tribal Council, January 6, 1998, by Resolution # 01-98.

CHAPTER 54

STOCKBRIDGE-MUNSEE TRIBAL LAW

EMPLOYEE PREFERENCE POLICY ORDINANCE

Purpose: Optimum employment of Indian people in the Stockbridge-Munsee Community, as well as those who live in the Community as spouses or related family members, is a critical element to building self-sufficiency, sovereignty and an economy that combats poverty and social ills, and assures that the Stockbridge-Munsee Community receives the maximum benefits generated by its entities and enterprises.

The discriminatory employment practices that Indian people often confront in society must not be tolerated within the jurisdiction of the Stockbridge-Munsee Band of Mohicans.

The purpose of this ordinance therefore is to provide maximum employment opportunity and preference in hiring, promotion, transfer, training, lay-offs, interim appointments and all other aspects of employment to the people of the Stockbridge-Munsee Community.

Section 54.1 Definitions

(A) "Employee" means any person paid wages, salary, or stipend by the Stockbridge-Munsee Community or any of its entities and enterprises.

(B) "Employer" means the Stockbridge-Munsee Community, its subdivisions, entities and enterprises. The definition of employer also includes the Mohican Housing Authority.

(C) "Preference" means people will be employed according to a priority listing as long as they meet qualifications of the job description or job announcement.

(D) "Meet Qualifications" means that the applicant or employee possesses the skills, education, experience or other job-related requirements in the job description or job announcement.

(E) "Enrolled Member" means a person who is officially enrolled as a member of the Stockbridge-Munsee Band of Mohican Indians.

(F) "Direct Descendant" for purposes of this ordinance means any person whose biological father or biological mother is an enrolled member of the Stockbridge-Munsee Band of Mohican Indians.

(G) "Spouse" means legally married spouse of an enrolled member of the Stockbridge-Munsee Band of Mohican Indians.

(H) "Other Indian" means any person who is enrolled as a member of a federally recognized or state recognized Indian tribe or any other Tribe recognized by the Stockbridge-Munsee Tribal Council.

Section 54.2 Establishing Preference

(A) Preference shall be given according to Section 3 below when it is established that the employee or applicant meets qualifications as stated in the job description or the job announcement. If the person has the qualifications as stated, he or she is eligible for the position and shall not be denied if another person at a lower preference has higher qualifications than are necessary for the position. If more than one person at the same preference level meets qualifications the decision-makers shall have discretionary power. Accordingly, when preparing job descriptions or job announcements care should be taken to establish qualifications that fit the desired needs of the position.

(B) It shall be prohibited to use job qualifications or personnel requirements which are not necessary to

the position and which act as barriers to employment preference.

Section 54.3 Order of Preference

(A) The following order of preference shall be given when offering employment opportunities of any kind including hiring, promotions, transfers, training, lay-offs, interim appointments, and all other aspects of employment:

- (1) Enrolled member.
- (2) Direct Descendant.
- (3) Spouse.
- (4) Other Indian.

Section 54.4 Coverage

This ordinance shall be binding on all entities, enterprises, and organizations operating under the Stockbridge-Munsee Community, and shall supersede all previous actions and policies regarding Indian preference in employment.

Section 54.5 Enforcement

(A) The Human Resources Department and/or hiring entities shall have the responsibility and authority to assure that the provisions of this ordinance are implemented.

(B) In addition, before any employee is hired, the hiring committee or hiring official must complete an Employment Preference Compliance Report which is included at the end of this Ordinance as Appendix A.

(C) The Employment Preference Compliance Report must be completed and signed by the appropriate Human Resources Director.

COMMENT: Section 5 (C); this section is intended to take into account the different tribal entities. The Tribe already has more than one Human Resources Director; non-Casino and Casino.

Section 54.6 Effect of Stockbridge-Munsee Employee Rights Ordinance

When interpreting any section of this ordinance, this ordinance and the employee rights ordinance shall be read as working together to give the employee or applicant the maximum benefits of both ordinances. Furthermore, if there is any dispute or conflict between the language and provisions of this ordinance and the employee rights' ordinance, those disputes shall be resolved in favor of the employee or applicant.

Section 54.7 Effective Date and Amendments

(A) This ordinance shall be effective upon the approval of a resolution adopting same by the Stockbridge-Munsee Tribal Council.

(B) This ordinance may be amended by resolution of the Stockbridge-Munsee Tribal Council.

Section 54.8 Remedies; Limited Waiver of Sovereign Immunity for Purposes of Enforcement

(A) In order to enforce the provisions of this ordinance, the Stockbridge-Munsee Community shall be subject to suit in the Stockbridge-Munsee Tribal Courts by employees or applicants in accordance with the limitations of this section.

(B) Money damages shall not be available in any suit brought under this ordinance. The sole remedy available to the aggrieved party shall be the appointment to the job, promotion, transfer, or interim appointment that was denied as a result of a violation of this ordinance. The complainant may also be awarded a similar unfilled position if one is available.

(C) Any complaint brought under this Ordinance must be filed in Tribal Court within 5 business days of receipt of notice that the complaining applicant did not receive the position. Complaints brought more than 5 days after notification shall not be heard.

LEGISLATIVE HISTORY

Ordinance to establish Employment Preference Policy adopted by Resolution