

FORMULA NEGOTIATED RULEMAKING COMMITTEE
MEETING MINUTES
April 29 – May 1, 2003
Denver, Colorado

The first meeting of the Formula Negotiated Rulemaking Committee was held on April 29 – May 1, 2003, at the Adams Mark Hotel in Denver Colorado.

Committee Members in Attendance

Governor Bill Annotated	Dr. Blake Kazama
Ms. Virginia Brings Yellow	Mr. Bruce LaPointe
Mr. Robert Carlile	Mr. Michael Liu (Mr. Michael Gerber, alternate)
Mr. Larry Coyle	Ms. Judith Marasco
Vice Chief Beasley Denson	Mr. Johnny Naize
Mr. Wayne Ducheneaux	Mr. Michael Reed
Mr. Joel Frank	Mr. Jack Sawyers
Mr. Robert Gauthier	Mr. Marty Shuravloff
Ms. Carol Gore	Mr. Russell Sossamon
Mr. Ray Gorynski	Ms. Darlene Tooley
Mr. Ron Hoffman	Chairman Eddie Tullis
Mr. Terry Hudson	Chairman Brian Wallace (Phil Bush, alternate)
Mr. Marvin Jones	

Over the course of the three-day meeting, approximately 75 observers attended the public sessions. An attendee list is included (Attachment 1).

TUESDAY MORNING, APRIL 29, 2003

FULL COMMITTEE

Rodger Boyd opened the meeting, welcomed everyone and introduced the Colorado Intertribal Color Guard and Denver Singers Drum Group. Following the opening ceremony, Mr. Boyd expressed his appreciation mentioning the importance of honoring veterans and those who are serving the in military today as well as all who are in attendance. He also stated his appreciation for the time the committee members have invested and will invest in the committee.

Boyd continued, stating that he was new in the process having been Deputy Assistant Secretary for about 6 months. DAS Boyd mentioned that he has met with some of the members of the committee and looks forward to working with all the members. He introduced some members of his staff that he had brought with him: Bob Kenison, Ariel Pereira, Deb Lalancette, and Jackie Kruszek. He pointed out that their job is to assist the committee as we go through the process. He proposed a round of introductions of the committee and then proposed that the members of the committee develop protocols and an agenda.

The members of the committee in attendance introduced themselves. Mr. Johnny Naize then gave the invocation

Mr. Boyd took the floor and provided background. He reminded the group that when the IHBG regulations included a requirement to revisit the formula within 5 years of implementation. The task of the committee is to recommend changes to the formula. He went on to say that we have all learned a great deal from the legislation. At this time, we are tasked again to come together. We have heard a lot of stories about the original process. We learned a lot and hope to move forward. He then introduced Peter Swanson and Julie Falkner who have been contracted to help facilitate this meeting. Mr. Boyd closed by stating his goals for the meeting: organize the committee, and set protocols and agenda. He asked if there were any comments. There were none.

Mr. Swanson provided some background on his and Julie's work with Negotiated Rulemaking in general and then spoke briefly on how committees typically move forward. He talked specifically about organization, including choosing co chairs who serve to expedite the communication between tribal and federal leadership. You can do what you want; setting protocols that are typically a 'rulebook' for how the committee works as a whole; and determining the scope of what you want to accomplish as a committee, i.e., what the product will look like and how to accomplish goals. He then asked for comments from the members.

Items brought up in discussion included:

Are the facilitators available for caucus as well as general sessions?

Yes, whatever works for the committee.

What is the timetable?

RB HUD would like to finish the committee work by end of fiscal year (September 30) so that rules could be published by the end of the calendar year.

At this point the tribal committee members decided to caucus. They requested the help of the facilitators and then decided to meet in caucus for one hour, break for lunch, and return as a full committee after lunch. Mr. Mike Gerber (as alternate for Mr. Liu) mentioned that staff is available to help the committee.

The Tribal caucus began and took a lunch break at noon. Following the break, the caucus met until 4:15 pm. At that time, an open forum was scheduled.

TUESDAY AFTERNOON, APRIL 29, 2003

OPEN FORUM

Mr. Russell Sossamon opened the session by stating that the tribal caucus decided to move out of caucus and into a public forum to give committee members and tribal leaders a chance to make remarks and address issues and comments. One hour is scheduled; the

tribal committee members will take a break and go back into tribal caucus. He then opened the floor for questions and comments.

During the forum, the following issues were raised:

Minimum funding and the inability for small tribes to meet housing need with limited funds.

Conveyance of old units and the impact of loss of 37 Act subsidies on small HAs.

Regional issues, such as the high cost of construction in Alaska and the impact of NAHASDA mandates e.g. environmental reviews.

The dilemma facing HAs between building adequate infrastructure and also providing maintenance for existing homes with limited funds.

Discrepancies between Census data and tribal data.

Meeting the needs of tribal members who qualify for subsidies and at the same time focusing on home ownership without sufficient resources.

The need to waive the Brooks Amendment which stipulates that you can't charge more than 30% of income, but you also can't provide a subsidy with the result that you cannot build for the poorest people under NAHASDA.

Conveyances, conveyance eligibility, repayments, Census challenges, and support documentation from BIA. There was a discussion on the legal authority regarding conveyances. Bob Kineson (HUD OGC) provided clarification.

There was then an ongoing discussion regarding the scope of the committee as well as compliance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act. Mr. Ariel Pereira (HUD OGC) provided clarification. He stated that the Neg Reg Act governs the Committee. In the interest of streamlining the process, however, FACA does not apply, although HUD has adopted a lot of the FACA requirements e.g., public participation, Federal Register announcements, etc. Mr. Pereira stated that the scope for the negotiations was set out in the Federal Register and encompasses changes in the formula, which would be the limit for these negotiations.

There was extensive discussion regarding the use of this Committee specifically for formula negotiations and setting up another Committee to address other consultation issues, recognizing that formula issues effect other regulations. Mr. Pereira indicated that OGC would look into the possibility of continuing this Committee for future work, but at this point he doesn't think it would be possible since the Neg Reg act specifies very carefully that the scope of the work must be stated in the Federal Register.

After further discussion on the time frame for the nominations and other procedures required to set up another Committee, DAS Boyd stated that his office would begin working on the new Committee the within the next two weeks.

There was then discussion on the charter. Mr. Gerber reiterated that there is no legal requirement for a charter. Mr. Pereira clarified that there's nothing that prohibits the committee from adopting a charter, but it's not required. The committee is free to adopt a charter if it so chooses.

Discussion came back to the issue of HUD having limited the scope of the Committee without input from the tribes. There was also specific reference to the requirements of Section 564a and 566a.

Before returning to Caucus, Mr. Gerber suggested that if there are tribal leaders selected, it might be advisable to meet with DAS Boyd and Mr. Gerber prior to the full session on Wednesday with A/S Liu. It was agreed to schedule a meeting at 7:30 am on Wednesday in the Columbine Room. The Committee will notify Mr. Gerber and DAS Boyd regarding the election of co-chairs.

[Note: The Committee went back into caucus during which time a charter was drafted, six tribal representatives selected, and two co-chairs were selected.]

WEDNESDAY MORNING, APRIL 30, 2003
FULL COMMITTEE

[Note: A/S Liu met with HUD staff at 8:15 am for briefing. At 9:00 am the six tribal representatives (see Attachment 2) were invited in to meet with A/S Liu. At 9:45 am, the tribal representatives left and A/S Liu continued to meet with HUD staff.]

The full committee convened at 10 am.

Mr. Russell Sossomon (Committee co-chair) called the meeting to order. The Invocation was provided by Joel Frank (Committee co-chair).

Mr. Sossomon welcomed A/S Liu and recapped that the tribal representatives met with HUD staff earlier this morning. It was agreed that A/S Liu and HUD would make their statements and then have an open discussion. He then turned to floor over to A/S Liu

A/S Liu greeted the Committee and stated that he was able to stay until approximately 4:30 pm today. A/S Liu praised the Committee's work that occurred on Tuesday and that went into the draft charter. A/S provided the Committee with further clarification and background that will help on this document as well as move forward on what the game plan will be on the Neg Reg. As a general matter, A/S Liu stated that (HUD) believes that the process should address the issues stated in the public notices that set up the committee and refer to the regulations that relate to the formula allocation. He added that he has no problem stating that there will be other committees for other parts of

NAHASDA that need to be addressed and that he doesn't think that it would be most constructive to create a blanket committee for all time. He supports focusing on the formula and other areas that are integrally linked to the formula, with a stated timeline, and with a commitment that for other areas, HUD intends to institute other Neg-Reg committees with processes and due notice. He suggested that for clarification, it might be useful to allow HUD staff to talk about the clearance process.

The Committee agreed.

Mr. Bob Kenison addressed the Committee and responded to the lack of clarity yesterday about scope. He reiterated that the formula refers to Subpart D of the regulations and therefore, anything in Subpart D is up for discussion as well as other areas – either specifically linked or generally linked.

Mr. Ariel Pereira gave his presentation on the regulation process (see Attachment 3).

A/S Liu expressed HUD's desire to gain agreement on subpart D and agree that this is the fundamental goal of this committee's work, and in addition, to discuss timeframes, and language that would indicate HUD's intention to set up additional committees.

Mr. Russell Sossamon asked for comments. The remainder of the morning session was comprised of open discussion between committee members and A/S Liu (and HUD staff) on several important issues. Comments included:

Concern over what seems to be a general misunderstanding from HUD's perspective on what the tribes want.

A/S Liu responded that in terms of negotiated rulemaking: we know that there are people we must respond to – those we work for, those we represent, etc. – there are still processes that need to be gone through to get approval. But that he will try to make sure that the people at this committee will have quick access to the people in the decision-making process so that there won't be artificial barriers.

The OMB report and HUD's response to it regarding monitoring.

The challenges and opportunities afforded by the government-to-government relationship.

Working with OMB to ensure that regulations are published as agreed upon and the processes surrounding OMB review.

A/S Liu commented that sometimes there is a stalemate and the rule does not get published. He pointed out that it is possible that OMB may come back with a change or recommendation that HUD does not agree with, or that this committee does not agree with. There would then be more

negotiations. In the end, the decision making process outlined earlier is the final word.

OMB report and subsequent HUD performance measures regarding overcrowding
Mr. Boyd clarified that the OMB evaluation was an evaluation of ONAP, and its purpose wasn't to set performance goals for the tribes, it was for ONAP to address the issue. He reiterated that OMB is not setting performance goals; ONAP is setting performance goals for ONAP. On a voluntary basis, ONAP is working with tribes to look at overcrowding, including looking at other funding sources to leverage funds we have to increase access to capital.

Limits on the scope of the Committee's work and setting a timetable for negotiating other issues as well utilizing the current Committee for input on the issues to be addressed.

A/S Liu stated that he would hope that we could have an assessment with in the next 90-120 days and develop another set of issues, specifically for another Neg-Reg process before the end of fiscal year. He committed to having another notice out (in the Federal Register) by the end of FY03.

Minimum funding

A/S Liu pointed out that HUD has no set position and is willing to listen to the group. He indicated that minimum funding would likely continue for this fiscal year. For the moment, based on their analyses, the impact is not significant one way or the other. In the end, there has to be some sense that there is a rational justification that this makes sense.

Consistency throughout regional ONAP offices and access to technical assistance.

A/S Liu stated the he and Boyd have had discussions on this subject with regional directors and they working on gaining a better understanding on where the differences are among the regions with the goal of trying to ensure a certain level of consistency. He suggested that having some flexibility among regions for certain specific concerns was necessary, but with clear justification. He added that there was also a need to balance performance of tribes and risk management. Specifically as regards to monitoring tribes.

Definition of family in the regulations and the effect on need challenges.

A/S Liu responded by saying that he looks at challenges and reviews closely and he is willing to look at how far the law permits tribes to define family with counsel.

Multi agency agreements with EPA, BIA, etc.

A/S Liu stated that the agencies are talking with each other, but there is still significant work that has to be done. He added that the tri-agency

agreement is being revisited and is hopeful that we can come up with something that can be effective.

Mr. Sossomon led the group in a discussion of the Committee's schedule and whether to continue to meet as a full committee or in caucus. Ms. Jackie Kruszek (HUD ONAP) stated that HUD is prepared with briefing presentations including the mechanics of the formula, development process, and issues as resources that are available to the committee.

There was some discussion on how to proceed with definition of scope (Subpart D), charter, and protocols. It was decided that there will be a brief tribal caucus, then break for lunch and reconvene at 1:30 pm. Mr. Russell Sossomon thanked A/S Liu and HUD staff for the open dialogue, indicating that the discussions build trust and enable the Committee to move forward.

A/S Liu thanked the committee and remarked about and appreciated the tone set in this morning's session. He stated his confidence in the Committee's ability accomplish a tremendous amount.

[Note: The tribal Committee went into caucus to work on developing protocols].

WEDNESDAY AFTERNOON, APRIL 30, 2003
FULL COMMITTEE

The group reconvened at approximately 1:30 pm. The discussion revolved around the revised charter. A/S Liu asked for approximately one hour until 2:30 to review the proposed document. He suggested that he would then be prepared to go through the document with the HUD response together as a group.

Mr. Sossomon asked the committee for agreement, which they granted.

The full committee reconvened at 2:30 pm and proceeded to walk through the proposed charter. There was discussion on several points. At approximately 4:00 pm the Committee reached agreement on all points. A/S Liu signed the final document prior to his leaving. A copy of the signed Charter is provided in Attachment 4.

The tribal committee returned to caucus and then decided to adjourn for the day.

THURSDAY MORNING, MAY 1, 2003
FULL COMMITTEE

Mr. Russell Sossomon called to order at 8:30 am. Governor Anoatubby gave the invocation.

The chair recognized a letter from Chairman Brian Wallace, designating of Mr. Phil Bush as alternate.

Mr. Sossomon opened up the floor for comments. There was general recognition and appreciation for the work that had been accomplished thus far, as well as appreciation for A/S Liu's participation on Wednesday.

The session then focused on the protocols. A draft had been developed by the tribal committee members on Wednesday evening and reviewed by HUD. The goal of the full committee was to finalize the protocols.

There was extensive discussion on media releases, NAIHC summary minutes, and detailed minutes. There was a suggestion that summaries of the meeting could be posted on the ONAP web site. This led to a discussion on allowing for Executive Session, without the public, during future meetings. The committee agreed on language in the protocols.

There was an extensive discussion on consensus. This included possibly defining different levels of consensus, the mechanisms for allowing tribal committee members to review items reached by consensus with their constituency and reserving the right to reverse their decision, and subsequently engage in further discussion at the committee level.

THURSDAY AFTERNOON, MAY 1, 2003 FULL COMMITTEE

The committee reconvened after lunch with the full committee finalizing work on the protocols. The protocols were agreed upon by consensus at 2:00 pm.

There was a clarification regarding whether the formal negotiations had begun. The co-chair pointed out that this meeting was for background, protocols, charter, etc., and that negotiation had not officially begun.

HUD staff members delivered a PowerPoint presentation (see Attachment 5) on the formula. The presentation contained a general overview, the development process, outcomes of last Neg-Reg, and implementation issues. Presenters were Ms. Jackie Kruszek (overview), Mr. Todd Richardson (concepts and formulas), and Mr. Jim Anderson (formula mechanics).

At the conclusion of the presentation, Mr. Sossomon opened up the floor for questions. The following issues were raised:

Will HUD be able to run numbers for us this time like last time?

Yes, HUD staff will be available to run the numbers; scenarios; programming, and provide statistical analysis

Will tribes be able to address their own issues?

To the extent possible, yes. Additionally, Ms. Kruszek requested that committee members should feel free to provide HUD staff with any information they have that may be pertinent.

Reduction in 1996-level subsidies when houses are conveyed.

The base subsidy level was set in 1996, when tribes' operation and modernization was calculated, however, those figures will appreciate with inflation. It was pointed out that the number of tribes that get the 1996 subsidy varies each year.

Census 200 data and special tabs.

Mr. Richardson pointed out that Standard tabs are available from Census, but don't adequately address formula needs. There are special tabs from Census that we are still waiting for and that should be available by June. The special tabs will be roughly the same as those for 1990 Census, except for the addition of mixed race, in which case you can chose AIAN only or AIAN with one or more races. Ms. Kruszek added that HUD had also requested tabs at census tract levels for 2000 data. Due to the unavailability of special tabs, for the FY 2003 allocation the decision was made to use the AIAN variable only, both alone and in combination with other races. The decision was based on an analysis on national level. However, HUD seeks the committee's advice on any policy on the issue.

What about sec. 302 (other factors for consideration) such as administrative capacity, performance, etc.

It was pointed out that there had been discussion during the last negotiated rulemaking (at the sub work group level) and it was agreed that a tribe was either eligible or ineligible, and funding was not tied to performance.

Calculation of total development cost (TDC) data doesn't adequately take into consideration increases in labor costs

Ms. Kruszek said that currently the TDC information is simply plugged into the formula. However, she indicated that this information could be gathered and provided to future work groups. In the meantime, TDCs can be challenged through the regional ONAP offices.

Pipeline issues.

Ms. Kruszek stated that there is a provision (sec. 314) that talks about what happens when 37 Act units are in pipeline, and that as soon as they come in, they are included in CAS. She added that this year HUD has made an effort to track down the pipeline issues. In addition, HUD would provide information on undispersed 37 Act funds to committee members through development unit counts (not funding amount).

The next discussions were on the agenda and meeting schedule. Mr. Sossomon opened the discussion by saying that we have an approved charter and final protocols. He then proceeded to call the roll and established that there was a quorum (Attachment 6). He clarified that the committee agreed to use facilitators. The question to the committee at this time is whether to continue with the current facilitators. (Swanson and Falkner left the room during discussion.) Following a brief discussion, there was a motion to retain Swanson and Falkner [motion offered by Mr. Shuravloff]. Being no objections, there was consensus and the motion passes. DAS Boyd was charged with working out the details of the contract.

Last item is the agenda. Mr. Sossomon asked DAS Boyd to present preliminary ideas to the full committee. DAS Boyd continued that based on preliminary discussion with Sossomon and reviewing the protocols on agenda, he suggests that the best course of action would be to formulate the agenda with regional representatives working with the PTO in developing a draft that would then be distributed to the committee within a timeframe that would enable input on the agenda. Then draft agenda could then be presented at the next meeting with the first order of business to be to approve the draft agenda. The committee could then decide what work groups will be formed based on the agenda.

There was a question regarding the Federal Register publication requirements for the next meeting.

It is required to publish the date and location of the meeting. To that end, DAS Boyd said that he would like to set the date for the next meeting, and perhaps the next three meetings. This would allow for timely publication (15 days). Mr. Pereira added that the Federal Register does not need to address the agenda. That's a charter issue. However, if the agenda is known, it can be published in the Federal Register.

There was then a discussion on meeting dates. At the outset, it was recommended that certain blocks of time be available for organizational items at each meeting and for workgroups to report to the full committee. The sense of the committee was that the first meeting or two, the workgroups take up the majority of the time, perhaps the 1st and 2nd day, and that the full committee would use the third day for review and discussion. It was further agreed that although caucuses could be called at any time, it would be advisable for the co chairs and PFO to identify some set time for caucus as well.

There was discussion on dates and availability. It was decided that the next meeting would be held on May 28, 29, and 30 in Denver. The third meeting was scheduled for June 17, 18, and 19 in Seattle. Finally, tentative dates for the following meeting are July 14, 15, and 16 in Denver. Mr. Michael Gerber requested that he be able to take a few days to go back to DC and see if those days can work.

After further discussion, the committee decided to resume scheduling at next meeting

It was generally agreed that the committee would convene at 9:00 am on the first meeting day, and adjourn at 4:00 pm on the last meeting day. Other times will be set during the meetings. It was further agreed that the current location was acceptable and staff was charged with negotiating meeting rooms for the next meeting.

Mr. Sossomon reiterated that the draft agenda would be sent to all committee members for review and comment prior to the next meeting. Comments will be incorporated into a final draft agenda that will be the first item of business at the next meeting.

DAS Boyd commented that the committee endorsed the protocols had been sent to A/S Liu (via fax) and that he has signed the document, and that with the signatures of the two co- chairs, the protocols will be final (Attachment 7).

Mr. Sossomon announced that the six tribal representatives and the federal representatives would decide when they would meet to work on agenda. Then he asked for consensus to adjourn.

The meeting was adjourned at 4:00 pm.

Submitted by C. J. Gardstein
Steven Winter Associates, Inc.
May 13, 2003