

IHBG Formula

Negotiated Rulemaking Committee

Report of Consensus Items

January 22, 2004

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II INFLATION FACTOR DEFINITION

§ 1000.316 How is the Formula Current Assisted Stock (FCAS) Component developed?

(a) (1) The number of low-rent FCAS units multiplied by the ~~FY 1996~~ national per unit subsidy ~~(adjusted to full funding level)~~ multiplied by an adjustment factor for inflation;

§ 1000.302 What are the definitions applicable for the IHBG formula?

National per unit subsidy is the Fiscal Year 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.

Mr. Sossamon stated that the next issue is #1D, which deals with inflation terminology. He reiterated that there had been consensus on this out of the CAS workgroup (see Attachment 5). Ms. McFadden stated that this is a cosmetic change and does not affect the formula in any way. She went on to say that the change is to Sec. 316 (a) and the action would be to delete the reference to FY 96 and “adjusted to full...” In addition, a definition would be added to Sec.302 under ‘National per unit subsidy.’ The addition would be the language that was stricken from Sec. 316 and simply moved into definitions (Sec. 302).

Mr. Sossamon asked if there were any questions. There were none. He then asked what action is recommended? Dr. Kazama responded that the committee should vote for consensus. Mr. Sossamon noted that this could be our first consensus item. He then stated that there has been a call for consensus from Dr. Kazama. He asked if there were any objections. Hearing none, Mr. Sossamon stated that there was full committee consensus on this item. ¹

¹ Excerpted from the August 18 – 21, 2003 Neg-Reg meeting, Tuesday morning session – August 19, 2003:

BIRTH & DEATH RATE LANGUAGE

§ 1000.330 What are data sources for the need variables?

- (a) The sources of data for the need variables shall be data available that is collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area. Initially, the data used are U.S. Decennial Census data.
- (b) The data for the needs variables shall be adjusted annually beginning the year after the needs data is collected, using Indian Health Service projections based upon birth and death rate data as provided by the National Center for Health Statistics.
- (c) Tribes may challenge the data described in paragraphs (a) and (b) of this section pursuant to 1000.336.

SUBSTANTIAL HOUSING SERVICES DEFINITION

§ 1000.302 What are the definitions applicable for the IHBG formula?

Substantial housing services are:

(1) Affordable housing activities funded from any source provided to AIAN households with incomes 80% of the median income as defined in NAHASDA [25 U.S.C. 4104(14)] or lower, equivalent to **100% or more** of the increase in the IHBG formula allocation that the tribe would receive as a result of adding the proposed geography; or

(2) Affordable housing activities funded with IHBG funds provided to AIAN households with incomes 80% of the median income as defined in NAHASDA [25 U.S.C. 4104(14)] or lower, equivalent to **51% or more** of the tribe's current total IHBG grant; and

(i) **51% or more** of whose official tribal enrollment resides within the geographic area;
or

(ii) Whose official tribal enrollment constitutes **51% or more** of the total AIAN persons within the geography.

(3) HUD shall require that the tribe annually provide written verification, on a form approved by HUD, that the affordable housing activities it is providing meet the definition of substantial housing services.

REVISIT THE FORMULA IN FIVE YEARS

[Ms. Tooley] added that she doesn't know what's going to happen after this meeting, and at the very least, it might be a good idea to agree to revisit. She noted that this might be the only thing the committee can agree on. Mr. Sossamon pointed out that there is a pattern here and that it is clear that data was not available, and so informed decisions cannot be made. He asked if the committee could agree on that and then move on to some of the specific items. He asked if there was anyone who disagreed. There was no disagreement.

Mr. Gorynski suggested going back to minimum funding. Ms. Greene asked if the committee agreed to revisit the regulations 5 years. Mr. Sossamon stated that there was a request, but no action. Mr. Gorynski turned the floor back to Ms. Tooley and the discussion on revisiting the regulations in 5 years. Mr. Ducheneaux noted that if the committee agrees to revisit in 5 years, that he doesn't want to stop this current process. Ms. Tooley responded that it would not stop the process. She then called for consensus on revisiting the formula again within 5 years after the end of the current process. Mr. Gerber stated that HUD cannot give consensus at this time, but can agree to confer with the A/S when he returns this afternoon. Mr. Sossamon asked if the committee would like to vote now and then bring it up again later. Ms. Tooley requested that the vote go forward.

Mr. Sossamon stated that there was a call for consensus. There was one objection....

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...Mr. Sossamon announced that the committee has 25 minutes left. He added that A/S Liu had returned, and so he would like to go back to the question that Ms. Tooley brought up for consensus earlier, even though Ms. Tooley is absent at this time. Mr. Sossamon restated that the call for consensus was to have another Neg-Reg within 5 years of the conclusion of this rulemaking session for re-evaluation of the formula. He reported that the result of the call was non-consensus due to HUD's objection based on the absence of A/S Liu. Mr. Sossamon brought the question forward again, asking if the committee wishes to do this again in 5 years, or would it be reasonable to schedule it in conjunction with the next change in census data. Ms. Greene stated that the census has nothing to do with whether or not we meet again within this group process. Mr. Sossamon asked if there was any further discussion. He restated that he was calling for discussion on the revisit issue. Ms. Greene pointed out that the charter speaks to the duration of the committee, which states that the committee is to continue to work until negotiations are finished. Ms. Greene read from the Charter, which states, "the number of Committee meetings shall be at least six." Ms. Greene then asked about Ms. Tooley's call. Mr. Adams noted that they were waiting for HUD to discuss this further.

Mr. Sossamon called for consensus to revisit the formula within 5 years of the conclusion of this Neg-Reg. He asked if there were any opposed. There were none. He announced that the committee had reached consensus.²

² Excerpted from the September 22 - 25, 2003 Neg-Reg meeting, Thursday afternoon session – September 25, 2003.

COUNTING FCAS

§ 1000.315 Is a recipient required to report changes to the Formula Current Assisted Stock (FCAS) on the Formula Response Form?

A recipient shall report changes to the Formula related information on the Formula Response Form, including corrections to the number of Formula Current Assisted Stock (FCAS) identified in the HUD Formula Response Form, during the time period required by HUD which shall be not less than 60 days from the date the form is sent to the recipient. The Formula Response Form is the only mechanism that a recipient shall use to report or make changes to the number of FCAS.

§ 1000.319 What would happen if a recipient misreports or fails to correct Formula Current Assisted Stock (FCAS) information on the Formula Response Form?

A recipient is responsible for verifying and reporting changes to their Formula Current Assisted Stock (FCAS) on the Formula Response Form to ensure that data used for the formula are accurate. Reporting shall be completed in accordance with requirements in Subpart D and the Formula Response Form. If a recipient receives an overpayment of funds because it failed to report such changes on the Formula Response Form in a timely manner, the recipient shall be required to repay the funds within five Fiscal Years in order that the funds be subsequently distributed to all tribes by HUD in accordance with the next NAHASDA formula allocation. Recipients will not be provided back funding for any units that they fail to report on the Formula Response Form in a timely manner. HUD shall have three years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form. Review of FCAS will be accomplished by HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring or other reviews.

Mr. Adams clarified that the regulation on over/under, §315, was high on the priority list when the co-chairs met in December, and that HUD was in agreement to bring this up first. He added that there were some changes, and directed the committee to the language on the top of page 1. A/S Liu commented regarding drafting style and regulation writing, pointing out that the sentence in ¶1 beginning ‘they shall...’ is a restatement of what has already been stated and should be deleted; and that ‘they’ is not a term that is used in regulations. Mr. Adams stated that there was additional language on the proposal language, which was presented to the committee.

“With assurance and agreement made with the Negotiated Rule Making Committee that HUD will provide back-funding for any undercount of units which occurred and were reported or challenged prior to October 30, 2003, the Negotiated Rule Making Committee agrees that the following additional regulation provision shall be added to the NAHASDA regulations.”

He noted that these changes are conditioned upon a letter being sent by HUD upon finalization of the particular regulations summarizing this decision. A/S Liu confirmed for record that this is accurate and that HUD was addressing the points.³

³ Excerpted from the January 13 – 16, 2004 Neg-Reg meeting, Tuesday morning session – January 13, 2004.

CIAP AVERAGING

§ 1000.316 How is the Formula Current Assisted Stock (FCAS) Component Developed?

[skip to following section]

(b) *Modernization allocation.*

(1) For tribes with an Indian Housing Authority that owned 250 or more public housing units on October 1, 1997, the modernization allocation consists of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied the national per unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation.

(2) For tribes with an Indian Housing Authority that owned or operated fewer than 250 public housing units on October 1, 1997, the modernization allocation equals the average amount of funds received under the assistance program under Section 14 of the United States Housing Act of 1937 (other than funds provided as emergency assistance) for Fiscal Years 1992-1997.

§ 1000.340 What if an Indian tribe is allocated less funding under the block grant formula than it received in Fiscal Year 1996 for operating subsidy and modernization?

(a) If an Indian tribe is allocated less funding under the modernization allocation of the formula than the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied the national per unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation, its modernization allocation is increased to the amount received in Fiscal Year 1996 for operating subsidy and modernization. The remaining grants are adjusted to keep the allocation within available appropriations.

(b) If an Indian tribe is allocated less funding under the formula than an IHA received on its behalf in Fiscal Year 1996 for operating subsidy and modernization, its grant is increased to the amount received in Fiscal Year 1996 for operating subsidy and modernization. The remaining grants are adjusted to keep the allocation within available appropriations.

DATA CHALLENGE

§ 1000.336 How may an Indian Tribe, TDHE, or HUD challenge data or appeal HUD formula determinations?

- (a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG formula and the following HUD formula determinations: census data, tribal enrollment, formula area, FCAS, TDC, FMR, and I.H.S. birth and death rates, but excluding AEL and the Inflation factor. The challenge and the collection of data and the appeal of HUD formula determinations ~~and collection of data for this purpose~~ is an allowable cost for IHBG funds.
- (b) An Indian tribe or TDHE that (i) has data in its possession that it contends are more accurate than data contained in the U.S. Decennial Census and such data meets the requirements set forth in §1000.330, or that (ii) seek to appeal a HUD formula determination, and the data are acceptable to HUD, may submit the data and proper documentation to HUD. In order for a Census challenge to be considered for the upcoming Fiscal Year allocation, documentation must be submitted by March 30th. HUD shall respond to all census challenges or appeals not later than 45 days after receipt and either approve or deny the validity of such data or challenge to a HUD formula determination in writing, setting forth the reasons for its decision. Pursuant to HUD's action, the following shall apply:
- (1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in the formula allocation.
 - (2) Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy ~~by the date of the formula allocation, the dispute shall be carried forward to the next funding year and resolved in accordance with the dispute resolution procedures set forth in this part for model housing activities (§1000.118) within 30 calendar days of receipt of HUD's denial, the Indian tribe or TDHE may request reconsideration of HUD's denial in writing. The request shall set forth justification for reconsideration.~~
 - (3) Within twenty calendar days of receiving the request, HUD shall reconsider the Indian tribe or TDHE's submission and either affirm or reverse its initial decision in writing, setting forth HUD's reasons for the decision.
 - (4) Pursuant to resolution of the dispute:
 - (i) If the Indian tribe or TDHE prevails, an adjustment to the Indian tribe's or TDHE's subsequent allocation for the subsequent year shall be made retroactive to include only the disputed Fiscal Year(s); or
 - (ii) If HUD prevails, ~~further action shall be required~~ it shall issue a written decision denying the Indian tribe or TDHE's petition for reconsideration which constitutes final agency action.

- (c) In the event HUD questions the data contained in the formula does not accurately represent the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and provide a commitment to serve the population indicated in the geographic area.

OVERLAPPING AREA DEFINITION

Change §1000.326(b) to:

§ 1000.326 What if a formula area is served by more than one Indian tribe?

(a) If an Indian tribe's formula area overlaps with the formula area of one or more other Indian tribes, the funds allocated to that Indian tribe for the geographic area in which the formula areas overlap will be divided based on:

(1) The Indian tribe's proportional share of the population in the overlapping geographic area; and

(2) The Indian tribe's commitment to serve that proportional share of the population in such geographic area.

(3) In cases where a State recognized Indian tribe's formula area overlaps with a Federally recognized Indian tribe, the Federally recognized Indian tribe receives the allocation for the overlapping area.

(b) Tribal membership in the geographic area (not to include dually enrolled tribal members) will be based on data that all Indian tribes involved agree to use. Suggested data sources include tribal enrollment lists, the U.S. Decennial Census, Indian Health Service User Data, and Bureau of Indian Affairs data.

(c) If the Indian tribes involved cannot agree on what data source to use, HUD will make the decision on what data will be used to divide the funds between the Indian tribes by August 1.

FORMULA AREA DEFINITION

§ 1000.302 What are the definitions applicable to the IHBG formula?

[Amend the following definition]

Formula area. (1) Formula areas are:

- (i) Reservations for Federally recognized Tribes, as defined by the Census;
- (ii) Trust lands;
- (iii) Department of the Interior Near-Reservation Service Area;
- (iv) Former Indian Reservation Areas in Oklahoma Indian Areas, as defined by the Census as Oklahoma Tribal Statistical Areas (OTSAs);
- (v) Congressionally Mandated Service Areas;
- (vi) State Tribal Areas as defined by the Census as State Designated American Indian Statistical Areas (SDAISAs);
- (vii) tribal Designated Statistical Areas (TDSAs); and
- (viii) California Tribal Jurisdictional Areas established or reestablished by Federal court judgment.

(ix) Subject to a challenge by a tribe described under paragraph (iv), any *federally recognized* tribe assigned Formula Area geography in Fiscal Year 2003 not identified in paragraphs (1) and (2) of this definition, the Indian tribe shall continue to be assigned such Formula Area in subsequent Fiscal Years, provided that the tribe continues to provide an appropriate level of housing services within the Formula Area as monitored by HUD using the definition of substantial housing services as a guideline but not a requirement.

(2)(i) For geographic area definitions not identified in paragraph (1) of this definition, and for expansion or re-definition of a geographic area from the prior year, the Indian tribe must submit, on a form agreed to by HUD for this purpose, the geographic area it wishes to include in its Formula area, including proof that the Indian tribe:

- (A) Where applicable, has agreed to provide housing services pursuant to a Memorandum of Agreement (MOA) with the tribal and public governing entity or entities of the area, or have attempted to establish such an MOA; and
- (B) Could exercise court jurisdiction; or
- (C) Is providing substantial housing services and will continue to expend or obligate funds for substantial housing services as reflected in the form agreed to by HUD for this purpose.

(ii) Upon receipt of a request for recognition of a geographic area not identified in paragraph (1) of this definition, HUD shall make a preliminary determination. HUD shall notify all potentially affected tribes of the basis for its preliminary determination by certified mail and provide the tribes with the opportunity to comment for a period of not less than 90 days. After consideration of the comments, HUD shall announce its final determination through *Federal Register* notice. The geographic area into which a tribe may expand under 2(i)(C) shall be the smallest Census unit or units that encompasses the physical location of the substantial housing services that have been provided by the tribe.

(3) Alaska needs data shall be credited as set forth in § 1000.327 to the Alaska Native Village (ANV), the regional Indian tribe, or to the regional corporation established pursuant to the Alaska Native Claims Settlement Act. For purposes of § 1000.327 and this definition:

- (i) The formula area of the ANV shall be geographic area of the village or that area delineated by the Tribal Designated Statistical Area established for the ANV for purposes of the 1990 census or the Alaska Native Village Statistical Area (ANVSA) established for the ANV. To the extent the area encompassed by such designation may substantially exceed the actual geographic area of the village, such designation is subject to challenge pursuant to section

1000.336. If the NAVSA or the TDSA is determined pursuant to such challenge to substantially exceed the actual area of the village, then the geographic formula area of the ANV for purposes of § 1000.327 shall be such census designation as most closely approximates the actual geographic area of the village.

(ii) The geographic formula area of the regional corporation shall be the area established for the corporation by the Alaska Native Claims Settlement Act.

(iii) A tribe may seek to expand its Alaska formula area within its ANCSA region pursuant to the procedures set out in paragraph 2 of this section. Formula area added in this way shall be treated as overlapping pursuant to section 1000.326 unless the proportion of the tribe's members in the expanded area is less than 50% of the AIAN population. In cases where the tribe is not treated as overlapping, the tribe shall be credited with population and housing data only for its own tribal members resident within the new or added area. All other housing and population data for the area shall remain with the tribe or tribes previously credited with such data.

(4) In some cases the population data for an Indian tribe within its formula area is greater than its tribal enrollment. In general, for those cases to maintain fairness for all Federally recognized Indian tribes, the population data will not be allowed to exceed twice a Federally recognized Indian tribe's enrolled population. However, a Federally recognized Indian tribe subject to this cap may receive an allocation based on more than twice its total enrollment if it can show that it is providing substantial housing services to substantially more non-member Indians and Alaska Natives who are members of another Federally recognized Indian tribe than it is to members. [For state-recognized tribes, the population data and formula allocation shall be limited to their tribal enrollment figures as determined under enrollment criteria in effect in 1996.](#)

(5) In cases where an Indian tribe is seeking to receive an allocation more than twice its total enrollment, the tribal enrollment multiplier will be determined by the total number of Indians and Alaska Natives the Indian tribe is providing substantial housing services (on July 30 of the year before funding is sought) divided by the number of members the Indian tribe is providing housing assistance. For example, an Indian tribe which provides housing to 300 Indians and Alaska Natives, of which 100 are members, would then be able to receive an allocation for up to three times its tribal enrollment if the Indian and Alaska Native population in the area is three or more times the tribal enrollment.

[Also to be included TBD]

No tribe may expand or redefine its Formula Area without complying with the requirements of this subpart notwithstanding any changes recognized by the Census Bureau.

MINIMUM FUNDING

§ 1000.----What happens if data sources for the IHBG formula are not available for a Tribe?

§1000.328 What is the minimum IHBG amount that a Tribe may receive under the need component of the formula?

The minimum block grant allocation in any year to a Tribe under the need component of the NAHASDA allocation formula shall equal 0.004817% of the total block grant available for distribution for that year after set asides, provided that any Tribe receiving \$200,000.00 or more in FCAS funding shall not be eligible for this supplemental allocation, and provided further that a Tribe must demonstrate need of any households at or below 80% of median income to be eligible for this block grant minimum funding level.