

January 28, 2010

Mr. William Zachares
Administrator
Alaska Office of Native American Programs
HUD
3000 'C' Street
Anchorage, AK

RE: HUD's Government to Government Tribal Consultation Policy

Dear Bill:

Thank you for attending the Association of Alaska Housing Authorities' (AAHA) recent board meeting. As you know, AAHA membership includes the executive directors of fourteen Alaska Native regional housing authorities and the executive director of the Alaska Housing Finance Corporation.

At the current time, AAHA has the following comments on HUD's Tribal Consultation Policy.

We recommend:

- 1) The convening of a national task force to determine changes to HUD's Government to Government Tribal Consultation Policy. The task force should consist of tribal representatives and HUD. The guidelines for the task force should clearly state that a tribe is free to designate any individual or organizational entity representative of its choosing.
- 2) The national convening could be preceded by a tribal consultation in Alaska, which would provide recommendations on changes to HUD's Tribal Consultation Policy.

Mr. William Zachares

January 26, 2010

Page Two

- 3) While the Policy itself may be subject to some level of substantive improvement, AAHA is also of the opinion that Consultation Policy *implementation issues* are really at the heart of most tribal concerns or complaints regarding the Policy. AAHA would recommend that HUD seriously research the possibility of setting up a standing HUD-Tribal Consultation Advisory Committee consisting of at least 1-2 representatives from each region, to function along the lines of the model set up by DOI and HHS in regards to P.L. 93-638 BIA and IHS Self-Governance Compacting policy implementation. Both BIA and IHS have set up high level Advisory Committees to facilitate program implementation and policy development. HUD could have a similar Committee which could work closely with the Department and act as a conduit for tribal advice on NAHASDA program implementation issues, particularly as to decisions on when issues are resolved by tribal consultation and the form this consultation may take. The committee could also advise on the appropriateness and content of the issuance of NAHASDA Notices or Guidance Bulletins, which currently often have had little or no tribal input. Such a Committee would be an effective way to ensure the Consultation Policy is implemented in a practical, meaningful manner.

Thank you for the opportunity to comment.

Sincerely,



Ron Hoffman

President

Association of Alaska Housing Authorities



January 27, 2010

William Zachares III
Administrator
United States Department of Housing and Urban Development
Alaska Office of Native American Programs
3000 "C" Street, Suite 401
Anchorage, Alaska 99503

RE: HUD's Government-to-Government Tribal Consultation Policy

Dear Mr. Zachares:

At the request of HUD's Alaska Office of Native American Programs, I am pleased to submit the following comments and recommendations regarding HUD's Government-to-Government Tribal Consultation Policy on behalf of Cook Inlet Housing Authority (CIHA).

- **Comment #1:** In 2000, President Clinton issued Executive Order 13175 "in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." Executive Order 13175 defined the term "tribal officials" to mean "elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations." However, HUD's Government-to-Government Tribal Consultation Policy does not clearly indicate that the representative of a duly authorized Tribally Designated Housing Entity (TDHE) is a "tribal official" for consultations pertaining to Federal policies impacting tribal matters within the scope of the authority granted to the TDHE by the tribe.

Recommendation: HUD's Government-to-Government Tribal Consultation Policy should be modified to provide that the consultation process will include "tribal officials" of Indian tribes. The term "tribal officials" should have the same definition as it is given in Executive Order 13175, with the exception that HUD's Government-to-Government Tribal Consultation Policy should add clarity by providing that the representative of a duly authorized TDHE is a "tribal official" for consultations within the scope of the authority granted to the TDHE by the tribe.

- **Comment #2:** "Consultation" is defined in HUD's Government-to-Government Tribal Consultation Policy to mean the direct and interactive involvement of tribes in the development of *regulatory policies* on matters that have *tribal implications*. However, neither the term "regulatory policies" nor the term "tribal implications" are defined, and the result is an inconsistent and unproductive application of HUD's Government-to-Government Tribal Consultation Policy. With respect to NAHASDA and the Native American Housing Block Grant (NAHBG) program, HUD has often made decisions that substantially impact tribes by issuing Public and Indian Housing (PIH) notices and/or program guidance documents. In this way, HUD has sometimes precluded tribes from providing any degree of meaningful consultation on policy issues that have substantially impacted them. The terms

"regulatory policies" and "tribal implications" need to be clarified in the Consultation Policy. **Recommendation:** HUD's Tribal Consultation Policy should clarify when a regulatory policy has "tribal implications." One sensible definition for a regulatory policy with "tribal implications" would be "any regulatory policy that is not routine or purely administrative in nature and will impact a tribe's rights or obligations with respect to any Federal program."

Additionally, the term "regulatory policies" should be defined to include PIH notices and program guidance documents that involve issues that have tribal implications. For example, if HUD releases a PIH notice to notify tribes and TDHEs that they must begin using a new form for a particular grant report, that notice should not be considered a regulatory policy because it is routine and administrative in nature. However, if HUD were to issue a PIH notice directing tribes to change their practices for accounting for program income, that would constitute a regulatory policy subject to tribal consultation because it would involve an issue having tribal implications (as defined above).

- **Comment #3:** HUD's current process for Tribal Consultation is too heavily reliant on Negotiated Rulemaking. Being both expensive and time-consuming, Negotiated Rulemaking is an inefficient consultation process for many issues that simply require clarification or other minor action. HUD and tribal governments should strive to reduce both the frequency of Negotiated Rulemaking and the number of issues that are subject to the Negotiated Rulemaking process by employing a more nimble, efficient consultation process for issues that do not rise to the level of Negotiated Rulemaking.

HUD's current Government to Government Tribal Consultation Policy permits such a process, which would include notice and opportunity for comment from tribal governments, consultation with regional and national organizations, and the use of national committees and/or task forces. The product of this condensed consultation process would be a PIH notice or program guidance document.

Recommendations:

- Form a standing National Tribal Consultation Committee for NAHASDA. All Consultation committees and task forces should be program specific. Tribal representatives who have a strong background in NAHASDA may have little or no experience with the CDBG program, HUD multifamily programs like the 202 and 811 programs, or Public Housing. Thus, committees and task forces should be program specific if they are to enhance the consultation process. The creation of a single HUD tribal consultation committee to consult with HUD regarding all HUD programs would not provide significant value.
- The standing committee should be charged with the following tasks:
 - Advise HUD regarding whether tribal consultation is needed for specific NAHASDA-related issues, including amendments to NAHASDA and matters that will be addressed through PIH notices and program guidance documents. If consultation is needed, advise HUD regarding the form the consultation should take (condensed or Negotiated Rulemaking) and what the corresponding HUD action should be (PIH notice, program guidance, regulatory revision, etc.).
 - When consultation is determined to be necessary, consult with HUD regarding specific NAHASDA-related issues. Consultation by the National Tribal Consultation Committee for NAHASDA should not take the place of

consultation with individual tribal governments through notice and opportunity to comment, but rather would provide an additional layer of consultation through which tribal officials could provide clear and well-articulated consultation regarding NAHASDA-related matters.

The National Tribal Consultation Committee for NAHASDA should be comprised of two Tribal Officials (including representatives of duly authorized TDHEs) from each of HUD's six ONAP regions and one or more HUD representatives. It should be a standing committee with members serving staggered multi-year terms. The Committee should meet quarterly and consult directly with HUD headquarters.

On behalf of Cook Inlet Housing Authority, I appreciate the opportunity to submit comment to HUD regarding its Government-to-Government Tribal Consultation Policy. HUD's efforts to identify opportunities to improve the efficiency and effectiveness of the Tribal Consultation process, both for tribal governments and for HUD, are appreciated.

Respectfully submitted,

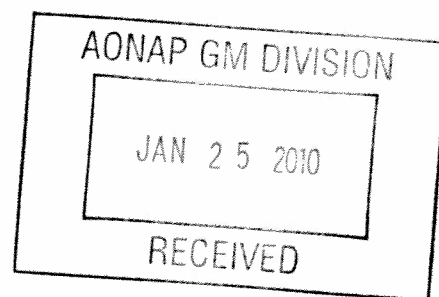


Carol Gore
President/CEO



Tlingit-Haida Regional Housing Authority

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January 21, 2010

Mr. William Zachares, III
Administrator
United States Department of Housing and Urban Development
Alaska Office of Native American Programs
3000 "C" Street, Suite 401
Anchorage, AK 99503

Re: HUD's Government-to-Government Tribal Consultation

Dear Mr. Zachares:

The Tlingit-Haida Regional Housing Authority ("THRHA") welcomes your invitation to comment on HUD's plan of action to implement Executive Order 13175. As the Tribally-Designated Housing Entity for the federally-recognized Central Council of the Tlingit and Haida Indian Tribes of Alaska, and also for 19 federally-recognized village tribes in Southeast Alaska, THRHA is deeply committed to preserving the sovereignty of the Tribes that we represent and to ensure meaningful consultation in which sister governments – that is, Tribes and the United States – administer federal programs benefitting Indians by mutual consent.

In that respect, we are fortunate to have a uniquely powerful consultation process already engrained in NAHASDA through Section 106's requirement that "all regulations required under this Act . . . shall be issued according to a negotiated rule-making procedure under subchapter III of Chapter 5 of Title V, United States Code." Section 106(B)(2)(a). This Neg Reg process is far more protective of Tribal sovereignty than is either Executive Order 13175, HUD's existing consultation policy, or any general consultation policy likely to emerge from HUD's "plan of action."

To begin with, under HUD's existing consultation policy, consultation merely involves the "opportunity for comment," and requires only that HUD "consider [] [Tribal] interest[s]" in making its decisions. Conversely, with the consensus-based system of negotiated rulemaking, Tribal consent is required to take any rulemaking action.

Additionally, the negotiated rulemaking process has always assured not only equal regional representation among the Tribes, but the practical ability of the regions to choose their own representatives. It would be difficult to ask Tribes to compromise these guarantees in favor of the uncertain administration of a "consultation" process. This is particularly true given the confusion that has arisen in the past as to when, whether and how consultation has occurred on sometimes very controversial issues for which HUD has bypassed the required Neg Reg process. HUD's unilateral decision to base needs-based funding on multi-racial census counts is an example that comes immediately to mind.

Most importantly, the negotiated rulemaking process is mandatory — Congress has demanded that "all regulations" under NAHASDA "shall" be adopted through the negotiated rulemaking process. THRHA, and many others, are already concerned over HUD's apparent willingness to avoid the Neg Reg process for certain issues through the issuance of PIH notices. We would hope that HUD would not employ its "plan of action" to attempt to supplant, oversee or narrow the statutory mandate of Section 106.

In our minds, the question is simple: If, under accepted principles of the federal Administrative Procedures Act, a requirement or standard constitutes rulemaking, then the negotiated rulemaking process is both exclusive and mandatory. If there are other minor issues that relate primarily to the internal functioning of the agency (*i.e.*, matters that would not be considered rulemaking under the APA), or which only affect one Tribe, THRHA would, of course, support a strong consultation process with the affected Tribes.

What THRHA would hope emerges from HUD's plan of action is a strengthening of the Neg Reg process by a strong commitment from HUD to meet the statutory and regulatory deadlines for periodic review of NAHASDA's regulations. We would also urge HUD to retain the regional co-chairs of a Neg Reg Committee after their Neg Reg process is complete to serve as an interim committee to consult with HUD on the scheduling and agenda of the next Neg Reg process. This will assure that future controversial issues that do arise between scheduled sessions are handling through Neg Reg, rather than through PIH notices or a weaker, advisory form of "consultation."

Thank you for your consideration of these comments, and we look forward to working with you and HUD in the future on this issue.

Sincerely,

A handwritten signature in black ink, reading "Blake Y. Kazama". The signature is fluid and cursive, with the first name "Blake" and last name "Kazama" clearly legible.

Dr. Blake Y. Kazama
President and Chief Executive Officer
Tlingit-Haida Regional Housing Authority

Cc:

Mr. Rodger Boyd, Deputy Assistant Secretary for Native American Programs
Mr. William Zachares, Administrator, AONAP
Mr. Mellor Willie, Executive Director, NAIHC
Mr. Marty Shruvaloff, Chairman, NAIHC