

NAHASDA Reauthorization Act of 2008
Negotiated Rulemaking Session

July 22, 2010

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF NATIVE AMERICAN PROGRAMS

NAHASDA Reauthorization Act of 2008
Negotiated Rulemaking Session
July 22, 2010, Day 3

Taken at 1113 Sixth Avenue
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REPORTED BY: Kristin M. Vickery, CCR, 3125

A P P E A R A N C E S

Committee Members Present: JASON ADAMS
MARGUARITE BECENTI
RODGER BOYD
PHIL BUSH
HENRY CAGEY
LARRY COYLE
MARK BUTTERFIELD
ROBERT DURANT
TIM FOSTER
CAROL GORE
LAFE HAUGEN
SANDRA HENRIQUEZ
RETHA HERNE
LEON JACOBS
MARVIN JONES
BLAKE KAZAMA
MARLENE LYNCH
JUDITH MARASCO
THOMAS MCGEISEY
SHAROL MCDADE
REBECCA PHELPS
S. JACK SAWYERS
MARTY SHURAVLOFF
RUSSELL SOSSAMON
SUSAN WICKER
JAMES VOLLENTINE

1 SEATTLE, WASHINGTON; THURSDAY, JULY 22, 2010

2 8:04 A.M.

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5 MR. JACOBS: Good morning. If everyone can take
6 your seats. Let me remind everyone that we're going into a
7 caucus first thing this morning. Okay. We are five minutes
8 late. So if we can get all of the committee members to come
9 to the -- take your seats, we would appreciate it very much
10 so we can have the opening prayer and get started.

11 We've asked Jason to give us the opening prayer.
12 If we could all stand, please.

13 (Opening prayer.)

14 (Tribal caucus.)

15 MR. JACOBS: We need to get started. If all the
16 committee members would take a seat, please. Okay. Has
17 anyone seen HUD? Randy? Are you filling in for the
18 others --

19 NONCOMMITTEE MEMBER: No. I think Roger Boyd will
20 be here momentarily (Inaudible).

21 MR. JACOBS: All right. Could I have consensus to
22 move on without HUD's presence?

23 While we're waiting, Karin Foster could not join
24 us this morning, but she sent an able tribal member. And
25 this is her father Tim Foster.

1 So Tim will -- raise your hand and let's welcome
2 him, okay.

3 Marvin?

4 MR. JONES: From some conversation that I had last
5 night, it appears that Phil Bush could easily stand for
6 these HUD people since he's so closely aligned with them
7 now.

8 MR. BUSH: At this point I'll agree to anything.

9 MR. JACOBS: Tim, would you like to make any
10 comments?

11 MR. FOSTER: It's really a pleasure to come back
12 here this morning. Old friends, like Bob, friends of people
13 that I've known a long time. It's interesting to sit down
14 and listen to the arguments that some people have. And
15 James, here, we were talking about NAHASDA, early language
16 of NAHASDA, and how it changed, just a moment ago.

17 It's a good thing -- it's a good thing for Karin.
18 She allowed me -- made it possible for me to come back. You
19 know, and Karin is a wonderful person. She's a good friend
20 and really a great daughter, and a very bright person. I'm
21 really pleased so many people have come to me and said, Gee,
22 Karin is doing a great job. Karin is a talented person.
23 We're all lucky to have her.

24 Of course, our family is her No. 1 client, and we
25 all live within ten miles of each other. Our grandkids --

1 we're very blessed. Very blessed. I don't travel much
2 anymore. I go away from home two nights is my extent and --
3 I'll be gone. But Karin now is taking a trip with her
4 mother, one that they planned for some time, or she would
5 have been here.

6 I appreciate being here. I could say things about
7 our program, which you usually do when you stand up. We
8 have a good program, and Yakama Nation has a good program
9 Jim Berg is our executive director.

10 Before I forget someone else that I should
11 recognize, and there are many, I would like to just end it
12 by leaving someone out that I might. I appreciate being
13 here, and I like the discussion. I doubt that I'll make any
14 statements, but I'll try and ask some pretty good questions.
15 Thank you very much.

16 MR. JACOBS: Okay. I don't see HUD at the table.
17 Jan, are you ready?

18 FACILTATOR: Yes.

19 MR. COYLE: Jan, could you -- who would be -- give
20 us all the information and our hotel and our services in
21 St. Paul, next trip? Do we have that ready? We could get
22 that over with right now, so we can get out of here earlier
23 this afternoon.

24 FACILTATOR: Mr. Chairman, that will be on the
25 screen in just a few minutes. They can put that on the

1 screen in just a minute.

2 MR. JACOBS: While we're waiting for HUD, are
3 there any other housekeeping items that any of the committee
4 members would like to raise at this time? No?

5 Blake?

6 MR. KAZAMA: While we're waiting, I guess, it's a
7 good time to talk about the preamble committee and drafts
8 and things of that nature. Are we keeping up?

9 MR. JACOBS: Yeah. The drafting committee, we
10 want to meet this afternoon to talk a little bit about the
11 time frame that the drafting committee will be looking at at
12 our next meeting. So if you could be prepared to address
13 that, hopefully we'll get to that this afternoon.

14 Now that HUD is here -- oh, okay. On the board is
15 the hotel that we're using in St. Paul, Minnesota. And
16 that's August the -- what's the date again?

17 MR. COYLE: 18th to the 20th.

18 MR. JACOBS: 18th through the 20th. Okay. It's
19 on the board.

20 Okay. We're ready to start negotiations now that
21 everybody's here. And Workgroup F is on the agenda.

22 So, Lafe?

23 MR. HAUGEN: Thank you. Thank you, Leon. Lafe
24 Haugen, Northern Cheyenne. As noted yesterday, F group
25 requested a caucus with the committee, a tribal caucus.

1 There was some issues that we wanted to make clear to the
2 committee that we could probably get passed. And there also
3 was some that probably wouldn't reach consensus, and we were
4 okay with that.

5 We talked a little bit this morning, and we
6 reviewed them again. And I think we're ready to negotiate.
7 So at this time, Mr. Chair, I request to start negotiations
8 on our issues.

9 First item that we have up, if you look at your
10 documents as passed out, is C-177. On the matrix it will
11 take care of Issue 26, 29, and 30. Does everyone have that?
12 On top it says 1000.26(a)(5) What are the administrative
13 requirements under NAHASDA? It's a revised rule. At the
14 bottom you'll note that under section -- excuse me, amend
15 CFR 24 1000.26(a)(5) to read, Section 85.21, "Payment,"
16 Except that HUD shall not require recipient to expend and
17 retain program income before drawing down or expending IHBG
18 funds.

19 Are there any questions? This was a consensus
20 item in our workgroup.

21 FACILTATOR: Okay.

22 MR. HAUGEN: Okay. We're asking for consensus on
23 this.

24 FACILTATOR: Any questions or concerns? Let's see
25 a vote for consensus. All in favor? All opposed? Thank

1 you. Passes.

2 Thank you, Lafe.

3 MR. HAUGEN: The next item we want to look at is
4 Document No. C-181. Get that on the board. And as noted,
5 this is Issue 79, but Issue 79 was broken into several
6 different subparts, I guess. We had (c), (d), and (e), and
7 this will deal with No. 79E, as noted, C-181.

8 And I just wanted to make note that those of us
9 that received this 181, if you look, the numerical order is
10 a little bit off. We've got (a) and then if you go to the
11 second page, it's just a correction that the drafting
12 committee can take care of. It goes (a) and then there's
13 (a) (b) on the second page under where starts out with
14 "subsequent" (d), (e), (b) -- I'm going to blame John for
15 this. Not you, Ed.

16 We did have this issue tabled in our workgroup.
17 However, Jad did provide some language, and I do believe
18 that the language in 181 is what was provided. Is that
19 correct, Jad?

20 At this time we're going to ask for negotiations.
21 We have a majority consensus in our workgroup, and HUD has
22 noted that they have a minority. They're asking to put that
23 up on the screen on the right.

24 FACILTATOR: Lafe, are you going to present a
25 majority and minority position on this thing here for the

1 committee?

2 MR. HAUGEN: We're going to represent the
3 majority. Just C-181.

4 Okay. The majority is on the right, and the
5 minority is on the left.

6 MR. JACOBS: Could I ask the attorneys share with
7 us what the concerns are so we can participate?

8 MR. TILLINGHAST: The majority position on the
9 right, the document on the left is an old, outdated
10 document. I think that HUD proposed the actual wording. We
11 also had other changes to other sections to the consensus.

12 FACILTATOR: Lafe?

13 MR. HAUGEN: Well, again, this is with Jad. We
14 noted who put the language on the screen; is that correct
15 Jad? On the had left side. So I apologize for holding up
16 the show here. But we -- we're under the assumption we
17 would have both proposals.

18 FACILTATOR: Perhaps for the benefit of everybody
19 here, Lafe, could you kind of summarize what the main issue
20 was here, and then where the points of disagreement were so
21 we can with discuss that.

22 MR. HAUGEN: 79E is what is the appropriate extent
23 of HUD monitoring, and it comes under 10005.03 [sic]. And
24 the majority in our group noted that we provided the
25 information that you'll see on 181. And we listed the items

1 that we felt would be appropriate -- appropriate extent of
2 HUD monitoring. And, if I recall, when we went into caucus,
3 we agreed that the majority would go with what's written in
4 181, and the minority would provide some language as well.

5 MR. TILLINGHAST: At the last workgroup meeting
6 HUD sent out language that indicated that they would put the
7 current risk factors that they use in the preamble to the
8 regulations and would publish changes and provide a comment
9 period as those factors changed. That's different language
10 from what I see on the minority position there. So perhaps
11 Jad could explain why that minority position doesn't reflect
12 the minority position that they took at the last workgroup
13 session.

14 FACILTATOR: I think the cleanest way to deal with
15 this would be that we understand what the position is of the
16 majority, and then we just -- and then if there's any
17 objections, they can be cited. And any --

18 (Discussion off the record.)

19 MR. TILLINGHAST: If you will now scroll down to
20 (b), you'll see -- stop. Just go back to. (b), okay. What
21 this says is that as HUD changes these risk factors in the
22 future, they will do so through tribal consultation process
23 that will allow us to comment on proposed changes and
24 hopefully influence their content.

25 Now, (c) -- and I will tell you that there's much

1 less disagreement on (c) and (d) then there is on (a) and
2 (b) -- (c) talks about once we pick somebody out, here's how
3 intensive the monitoring is going to be. And they put
4 limits and limits I believe we've agreed to, we and HUD,
5 that generally speaking they'll do on-site inspections of no
6 more than ten flowing units or 10 percent of the units, ten
7 client files or 10 percent of your client files, provided
8 that if they find something is amiss, they can do more
9 intensive monitoring of you.

10 And then (d) is a catchall to allow HUD to do
11 additional monitoring if they find that -- if a basis for
12 noncompliance.

13 And then, finally, (e) authorizes recipients
14 and ONAP to enter into a self-monitoring agreement, which I
15 gather, there are currently several.

16 So the big disagreement between the minority
17 position and the majority position is whether the current
18 risk factors are going to be put in the regulation or
19 whether it's going to be put in the preamble or whether it's
20 going to be put in a PIH notice.

21 MR. MCGEISEY: Tom McGeisey, Seminole Nation. I
22 just have a question regarding (d). Does that mean that
23 there's no time limitation regarding how far back it can go
24 regarding the review? And that was a majority opinion?

25 MR. TILLINGHAST: The time limitations are I think

1 in (c)(1), if they find something.

2 MR. COYLE: Lafe, do you want to address these one
3 at a time and have HUD agree to them or disagree on them, or
4 how are you going to work that?

5 FACILTATOR: Yeah. Marvin?

6 MR. MCGEISEY: I don't think I got an answer on
7 that there. I need to know if there's a particular time
8 frame on that regarding how far back you're going to go
9 regarding the review.

10 FACILTATOR: Yes, Lafe?

11 MR. MCGEISEY: I know you said that in (c)(1) that
12 that would cover it, but there it says prior years. It
13 doesn't specify what you mean by prior years.

14 MR. HAUGEN: Thomas, I think what it notes is
15 that -- yes, it would monitor the current program year and
16 the two prior program years, three years.

17 MR. TILLINGHAST: (Inaudible.) that you guys
18 passed yesterday.

19 If the question is: Does that necessarily imply
20 the two immediately proceeding program years? I think the
21 answer is "yes."

22 FACILTATOR: Tom?

23 MR. MCGEISEY: Is the wording then, therefore, to
24 everyone's satisfaction clear that should someone read that
25 who's not here would understand that to be so by

1 another ONAP office?

2 MR. TILLINGHAST: If it's the committee preference
3 to put in the phrase, The two immediately preceding prior
4 program years, that's certainly within the prerogative.

5 MR. HAUGEN: Is that your proposal, Thomas, to add
6 some language?

7 MR. MCGEISEY: I know we're not in negotiations
8 right now. I just want clarification as to what the intent
9 of that wording is now.

10 FACILTATOR: Are you talking about (c)(1), Thomas?

11 MR. MCGEISEY: I'm talking about in (d) referring
12 to prior program years. There's no definition in (d)
13 stating that review -- it doesn't limit the prior program
14 years.

15 If (c)(1) covers it, and it should refer back to
16 (c)(1) saying current and two prior years, and I think it
17 should state that. Otherwise, it says, notwithstanding
18 Subsection (b) above, HUD may, at any time, undertake
19 additional sampling. It doesn't say anything there
20 regarding that the (c)(1) covers that.

21 MR. GOODMAN: The limitation that we agreed on in
22 Subsection (d) is that if HUD does find credible evidence
23 for -- or credible information suggesting noncompliance,
24 they can go back only so far as the prior year that they did
25 monitoring. So for example, if they're doing a monitoring

1 in 2010 and the last one in 2005, they can only go back so
2 far as 2005, which was the prior date of review. That's the
3 limit that's included in (d).

4 Is that correct? I remember we had that
5 discussion of whether HUD could go all the way back as far
6 as they wanted or should it be limited to: They already did
7 a review in 2005 and shouldn't be allowed to go back past
8 the prior review.

9 FACILTATOR: Thomas?

10 MR. MCGEISEY: Let me be sure I understand, then.
11 As I read this, if (c)(1) says to review recipient program
12 compliance with the current program year and two prior
13 years, then and if you're saying (d) says that they can go
14 back to the last monitoring year, then how does that apply?
15 Because if the last monitoring year was six years ago, then
16 that means they can go back six years.

17 MR. GOODMAN: The provision in (d) is if, after
18 that initial sampling, HUD finds credible information that
19 there's been information that there's been program
20 noncompliance then they would be able to go back to the
21 prior review. But their initial review would be only up to
22 the past three program years.

23 If there's additional evidence -- or if there's
24 evidence of noncompliance, Subsection (d) would allow them
25 to go as far back as the last review that they did.

1 MR. JACOBS: Okay. Okay, Thomas. When we get
2 into negotiations, you can offer some substitute or -- okay.

3 FACILTATOR: Lafe and John, can you just do the
4 presentation of the majority view, in its entirety. And I
5 would ask that any committee members who have questions of
6 clarification, why don't we hold that until you're finished
7 with that so we can just kind of get a picture first. We'll
8 take questions of clarification and then we can take the
9 response from the minority perspective.

10 I think -- so do you have anything else to
11 present, or is that it?

12 MR. ATALLAH: Jad Atallah. Maybe we can get some
13 clarification if we go line by line, step by step because --
14 I apologize if there's some confusion.

15 The idea here is to -- where circumstances don't
16 demonstrate that there are serious concerns and HUD is doing
17 it's regular monitoring process, there was some expression
18 and thought in terms of limiting HUD's scope of review. So
19 what we talked about at workgroup was to sort of break up
20 HUD monitoring into two tiers, two steps: An initial step
21 and a possible broader monitoring step.

22 If you look at (c) it really governs the -- once
23 we do decide to review a particular recipient, the scope of
24 the review itself. It says, the level of HUD monitoring
25 once that recipient has been selected, and then it lists

1 more limited initial review.

2 The initial review limits it to the current
3 program year, and then you go back two years from that
4 program year, from the time you go out to monitor, that
5 program year, and then you go back two years from that
6 period.

7 The scope of the monitoring is also limited in
8 terms of inspection of dwelling units and client files,
9 tenant files, homebuyer files, and so forth.

10 Now, the idea is -- if you look at (c)(4) up
11 there, the idea is in this initial limited sampling if HUD,
12 when doing monitoring, finds noncompliance or the potential
13 for noncompliance, at that point, HUD would be authorized to
14 do a broader review in order to ensure, or to discover, any
15 noncompliance that may have appeared during the initial more
16 limited sampling. That's why it says, Provided, however, if
17 this monitoring indicates noncompliance or the potential for
18 noncompliance, HUD may undertake additional sampling and
19 review.

20 What that means is HUD can be beyond the current
21 year and two years back, and HUD can go beyond the ten
22 client files or 10 percent client files, whichever is
23 greater. The same with the dwelling units too.

24 Subsection (d) says, notwithstanding that initial
25 standard process, where you don't have anything that

1 indicates noncompliance. You're doing your standard
2 reviews, and you go, you do your initial limited monitoring.
3 If HUD receives information or has discovered somehow the
4 potential for noncompliance, it says, Noncompliance or the
5 potential for noncompliance, HUD initially can go out and do
6 the broader scope review as initial matter.

7 That's currently how it works right now, so this
8 is imposing some limitation on HUD's monitoring ability as
9 it stands now. It gives us a more limited initial review,
10 and if something comes up, we basically go back to our
11 status quo now.

12 The standard for that, however, is that beyond the
13 initial tier monitoring and the second tier, if you look at
14 Subsection (d), it says, Notwithstanding Subsection (b) --
15 that should be (c), actually. That's a small typo because
16 the lettering has changed -- but not notwithstanding
17 Subsection (c) above, HUD may at any time undertake
18 additional sampling and review of prior program years.

19 What that means is that, without going through
20 that two-tier process, the initial tier and the second
21 broader tier if needed, if we have information that
22 indicates that -- credible information suggesting the
23 potential for noncompliance, we can do the broader
24 monitoring as an initial matter.

25 I think we have a couple of tweaks that we want to

1 make to (d) because we caught something yesterday that may
2 be somewhat problematic. But, essentially, that's what
3 this -- these two subsections of the majority proposal says.
4 With a couple of tweaks, I think we can probably arrive at
5 consensus, at least on this portion of the regulation.

6 And we can get to the minority proposal when we're
7 looking at Subsection (a) and the majority and then the
8 minority proposal.

9 FACILTATOR: Jack?

10 MR. SAWYERS: I hear "potential" all the time.
11 That's -- that's a little disturbing you either have --
12 you've seen something that's compliance or noncompliance.
13 If you say "potential," you're actually saying you can check
14 any time you want to because potentially we all have some
15 things we could look at. I -- I don't like the word
16 "potential."

17 If it's noncompliance or you have evidence of
18 noncompliance or any of those kinds of things but
19 "potential" is really a bad word because that means you can
20 do just about -- potentially you could do whatever you want
21 to do.

22 FACILTATOR: So are you suggesting you knock that
23 word out there, Jack?

24 MR. SAWYERS: Yes.

25 MS. HENRIQUEZ: So could I ask, what you

1 substitute in its place?

2 FACILTATOR: He wants to take out the word
3 "potential." Jack? You're suggesting then to kill the word
4 "potential" from that sentence that HUD has -- just to say
5 that HUD has credible information suggesting noncompliance?

6 MR. SAWYERS: We're probably not negotiating yet,
7 according to my friend here. But, yes, now or later I would
8 like to remove that.

9 MR. ATALLAH: Jack, if I could address that. We
10 discussed this in workgroup, and I think we agreed that we
11 would put the language -- the term "potential" in order to
12 capture situations where we have information; we don't know
13 for sure if there is noncompliance. There's potential for
14 noncompliance, but we have to do additional monitoring in
15 order to confirm that there is noncompliance. So it leaves
16 enough flexibility for ONAP staff to determine if there's an
17 indication that maybe there may be a problem, they could go
18 further and do the broader monitoring in order to determine
19 whether it is noncompliance. So I think that's where that's
20 coming from.

21 But essentially that's where we were coming from.
22 We can talk about the language when we start negotiating.

23 FACILTATOR: Okay. Do you want to go through the
24 rest of the -- are there any other objections or concerns
25 that you wanted to raise, Jad?

1 MR. ATALLAH: I'm sorry. Objections?

2 FACILTATOR: Were there any other areas where you
3 hit a snag with the majority position?

4 MR. ATALLAH: No. There's is a Subsection (e)
5 that we haven't addressed too. We could probably address
6 (c), (d), and (e) together, but that's not up on the screen.
7 It's a little down. I don't know if we want to go through
8 that now. I can go through that right now if the committee
9 would like.

10 FACILTATOR: Jad, can you finish doing the
11 presentation, and then we'll go back to hit them one by one
12 and go through negotiations?

13 MR. ATALLAH: Okay.

14 Subsection (e) -- Subsection (e) addresses
15 self-monitoring mutual agreements. We do these now
16 specifically for certain recipients that have a good record.
17 What these agreements are is contracts or agreements between
18 ONAP and recipients where if a certain recipient is a good
19 performer, we allow them a certain period of time where we
20 agree not to go out and do onsite monitoring. Obviously,
21 recipients are still required to submit APRs and so forth,
22 but we don't go out and actually do onsite monitoring for a
23 certain period of time.

24 What we're doing here is simply codifying what we
25 already have in practice. We've been doing these more and

1 more often. You know, they're available in all the regions.

2 It says, "A recipient may request ONAP to enter
3 into a self-monitoring mutual agreement or other
4 self-monitoring arrangements with recipients. ONAP will not
5 monitor the recipient within the effective period of such
6 agreement."

7 So the agreements say, for instance, a period of
8 five years. ONAP agrees not to go out and do an onsite
9 monitoring period for that agreement.

10 "Unless ONAP finds reasonable evidence of fraud, a
11 pattern of noncompliance, or the significant unlawful
12 expenditure of IHBG funds."

13 So through other mechanisms like your APRs, if
14 there are questions about noncompliance that satisfy that
15 last sentence in there, "reasonable evidence of fraud, a
16 pattern of noncompliance, or the significant unlawful
17 expenditure of IHBG funds." In that circumstance, we can go
18 ahead and monitoring even though you have mutual -- a
19 mutual -- a self-monitoring mutual agreement. So,
20 basically, this is just codifying what we already do, and I
21 think that provision, that subsection, we're agreeing to
22 too.

23 Finally, the Subsection (a) is really the tricky
24 one that we did not have consensus on in the workgroup. If
25 you look at the left part of the screen, that's our minority

1 proposal. I can go through the majority proposal, but John
2 if you want to, you can, and then I can do the minority
3 proposal real quick. Do you want to?

4 MR. TILLINGHAST: Well, I think I already have.
5 The majority proposal is to list the current risk factors
6 that HUD uses to determine who to monitor and how often to
7 monitor them, the ones that exist today.

8 Subsection (b) allows HUD to change those, and
9 they don't have to go through the negotiated rulemaking
10 process to do it. They'll do it through a more informal
11 consultation process which they can do in a shorter period
12 of time. They'll solicit comments on proposed changes and,
13 presumably, take those comments into consideration when
14 making future changes.

15 FACILTATOR: Okay. So the main conflict there?

16 MR. TILLINGHAST: And I'll say that was -- there
17 were two -- there were two compromises built into that. One
18 was there were a lot of tribal members who felt that if
19 there were going to be changes to the risk factors, those
20 should be in the regulations and subject to negotiated
21 rulemaking because the law says all regulations have to be
22 through negotiated rulemaking.

23 And the other is, as critical as the factors are,
24 at least as critical, is the weight that HUD assigns to
25 those factors. And the tribes agreed that HUD neither had

1 to publish those weights in the regulations or even in a PIH
2 notice which will ultimately have the changes in them. So
3 the tribes felt as though they went quite a ways in trying
4 to compromise this issue.

5 FACILTATOR: Okay. Thank you.

6 MR. ATALLAH: Sorry. And our minority proposal
7 simply states, HUD shall determine the appropriate extent
8 and level of recipient monitoring based on HUD risk
9 assessment factors.

10 Basically, again, that codifies what we have.
11 Risk assessment factors are factors that we have. We've
12 provided that list. There's 12 factors that are currently
13 in place. The weights change. We adjust those weights as
14 things like the Recovery Act comes along. There's new
15 reporting requirements. There's additional money and so
16 forth.

17 So I think our concern with codifying with
18 specific 12 factors and then, you know, requiring any sort
19 of rulemaking to revise them is the time period that it
20 takes and the flexibility we need to retain in order to
21 ensure that we maintain the integrity of the program. So
22 that's sort of where we're coming from in terms of just
23 codifying and saying, Well, we'll follow our current risk
24 factors, basically as determined by HUD.

25 FACILTATOR: Okay.

1 MR. TILLINGHAST: I would say that -- I'll ask
2 anybody from the workgroup to correct me if I'm wrong --
3 that HUD has gone backwards on its proposal because it
4 had -- it's original -- it's most -- it's latest minority
5 proposal would have agreed to put the current risk factors
6 in the preamble so, at least, we had notice of what they
7 were and had agreed to publish and solicit comments on any
8 proposed changes. And now those two elements now appear to
9 be gone from the minority proposal leaving just -- well,
10 leaving just that one sentence.

11 MR. ATALLAH: If I can address that. Something we
12 discussed in workgroup also was specifically on that point.
13 The level of feedback and so forth that our recipients would
14 have into these risk assessment factors, I don't think we
15 have any opposition, still, now to publish these factors in
16 the preamble of the rule.

17 The concern, again, was that we want to retain
18 some flexibility to change these factors or adjust the
19 weights of these factors and putting them in the rule would
20 force us to go through negotiated rulemaking, which could
21 take years. That really ties our hands in terms of
22 flexibility to adjust the risk factors. That's sort of
23 where we were coming from.

24 I don't think we have any opposition to publishing
25 the risk factors in the preamble of this rule rather than in

1 the rule itself simply stating these are the current risk
2 factors. And then moving forward from there.

3 FACILTATOR: Are there any other questions for
4 clarification before we move into negotiations? I think
5 this first part has mainly been to clarify what the
6 situation is, what the different people's positions are. If
7 there's any other clarification that needs to be done then
8 let's do that and then let's move into negotiation.

9 Jason?

10 MR. ADAMS: That was essentially my question. I
11 had to step out to take a call, but it sounded like we were
12 negotiating now and so I was wondering why the negotiation
13 clock isn't running and why the noncommittee speaker clock
14 isn't running when these gentlemen are speaking. Just
15 wondering when we're going to begin that process.

16 FACILTATOR: Okay. I think we've kind of accepted
17 that when an issue is being introduced to the committee the
18 clock doesn't run. And we don't clock if the committee
19 wants to use noncommittee people to introduce that topic,
20 the clock doesn't run for them.

21 Once we enter negotiations, the clock runs. The
22 noncommittee speakers have four minute limitations. Okay.
23 Yes.

24 MR. GOODMAN: I just wanted to clarify one point
25 on what Jad had mentioned. Jad stated that HUD's concerns

1 with listing the factors in the regulation would prevent
2 them from changing those factors without going through
3 negotiated -- would require them to go through negotiated
4 rulemaking to change those factors.

5 The Subpart B we have included in this draft
6 specifically addresses that concern. It allows HUD to
7 change the factors without going through negotiated
8 rulemaking. It says that they can make those proposed
9 changes and change them through the process of tribal
10 consultation without going through a federal register and
11 negotiated rulemaking process.

12 So we did include language to address that very
13 concern. I just wanted to clarify why that Subsection (b)
14 is in there.

15 FACILTATOR: Yes, Dan?

16 MR. BROWN: If I could just explain one concern
17 we'd have with that. That is a consideration of the
18 Administrative Procedure Act. And the issue is that
19 Paragraph B purports to allow us to change an exhaustive
20 list of factors outside of rulemaking. So to do that we
21 would have to have, I guess, "A" say something like, "And 13
22 other factors as determined HUD persaunt to B," otherwise...

23 FACILTATOR: Okay. I think we're starting to
24 cross that line into negotiations here. So why don't we
25 start running the clock.

1 All right. Anybody have a proposal for how to
2 move this thing forward?

3 Lafe?

4 MR. HAUGEN: With that noted, I guess we'll start
5 negotiations and work our way back up to "A" on the
6 majority. And I guess we'll open it up.

7 Okay. Let's look at C of the majority. If there
8 are no questions or concerns, comments for C, D, and E, I
9 would ask that we request consensus on that part, C, D, and
10 E.

11 FACILTATOR: C, D, and E. Okay.
12 Thomas?

13 MR. MCGEISEY: Yes. I just want to be certain on
14 D that, again, if the record retention regarding what we
15 approved already is three years, and it says it can go back
16 prior years to the most recent review -- or up to the most
17 recent review, the interpretation of that could be two ways.

18 If the records are retained for three years, and
19 they close that out, and the last review, let's say, started
20 Year 1 and that started their retention or they closed out,
21 and then the next review is six years later, then if you go
22 back to the last review, then all those records are then up
23 for grabs, or how do you go back to review those records if
24 they don't exist anymore?

25 And then, again, if you read that it says, Up to

1 the most recent review. Then you could look at it coming
2 from the one before, coming up to the most recent review.

3 So the wording is not real clear as to what we're
4 talking about in Section D. I don't have a recommended
5 wording, but I'd like to yield some time to Amanda Proctor
6 and let her speak if I may. Chair?

7 FACILTATOR: I'm sorry, Tom?

8 MR. MCGEISEY: I'd like to yield some time to
9 Amanda Proctor.

10 MS. PROCTOR: Hello. My name is Amanda Proctor,
11 and I'm here with the Seminole Nation Housing Authority.
12 I'm also a member of the Osage Nation. I'm an attorney to
13 multiple Indian housing authorities throughout the state of
14 Oklahoma. And I'm also a former housing director for two
15 programs in two different states.

16 One of our greatest defenses to a negative onsite
17 monitoring evaluation is the extent of the research period.
18 And that three-year requirement that applies to record
19 retention and the duty of housing programs to keep those
20 records for a period of three years, that limits the
21 research period when HUD is there at your community doing
22 their -- excuse me -- onsite evaluation. And that
23 three-year limit is very crucial to the housing authority's
24 explanation of those audit findings because when you go back
25 longer than a period of three years, you may or may not have

1 the records, and you may or may not have the institutional
2 memory to justify that finding.

3 And it's my belief in looking at Subsection (d)
4 that that expands that research period and may expand that
5 research period to infinity. I think that that Subsection
6 (d) could be construed to allow HUD to go back, perhaps, to
7 the inception of NAHASDA with its onsite reviews and would
8 open up the housing authority to exposure for findings that
9 relate to that period of time.

10 I also believe, as this gentleman on the committee
11 stated earlier, that the phrase "potential for
12 noncompliance" is a subjective standard. And again, it
13 really opens up the housing programs to exposure for
14 findings that you may or may not remember or may or may not
15 have the institutional know-how to explain or justify. And
16 as an attorney, I can tell you that that takes away my
17 greatest hammer to defend you when we're going through the
18 performance improvement plan and an explanation and remedial
19 process.

20 So I just wanted to make that clear. And I've
21 recommended to my client they withhold consensus pending an
22 amendment to Subsection (d). And I think that we might
23 offer an amendment to either strike that language or build
24 in a limitation that the research period be limited to those
25 three years.

1 So thank you for your time.

2 FACILTATOR: Thank you.

3 Jack?

4 MR. SAWYERS: It says that if you have credible --
5 it says if you just take out "potential" in (c) it says,
6 Suggested -- just suggesting the potential, you have
7 credible information. You're not suggesting it. You're --
8 you have credible information. That's not suggesting a
9 potential. It should be credible, and that's my -- that's
10 my point is that I -- if you can substitute a -- Karin's not
11 here to substitute for me -- but I'm saying that if you can
12 substitute something more, that's more exacting than
13 "potential" because that's, to me, that's a really tough
14 word to get around.

15 FACILTATOR: All right. So you're --

16 MR. SAWYERS: Yeah. I suggest just strike that
17 out and -- on both places -- two places up above and below.

18 FACILTATOR: So Jack's proposal is to strike the
19 word "potential."

20 MR. SAWYERS: "Suggesting the potential" that is
21 really, really tough. I can get by with, perhaps -- but I
22 think that's a word we don't want to put in here.

23 FACILTATOR: Sharol, do want to comment on that?

24 MS. MCDADE: Yes. I agree with the comments that
25 have been made. My concern is, is, again, the time frame.

1 And I thought I heard Jad say that they were not going to go
2 back more than three years. Maybe I didn't hear him
3 correctly.

4 But my concern is the word "noncompliance," again.
5 We talked about this yesterday with "substantial" being the
6 definition. And we talked about this yesterday and I think
7 that "substantial" makes a huge difference. That it should
8 be "substantial noncompliance," not just "noncompliance" but
9 "substantial" because we're going in the realm of allowing
10 them to come in and say, Okay. Well, you know, you can be
11 noncompliant here with anything.

12 And as we all know, each region is different, and
13 I don't see us -- not making the change could give any of
14 the regions -- who are -- some are better than others,
15 unfortunately, to come in and say something else.

16 So for me, I would like to see the word
17 "substantial" come in before each "noncompliance" so that
18 we're consistent with what we've been discussing in the last
19 few days.

20 FACILTATOR: So how's everybody else feel about
21 that one? So the suggestion was made that in front of
22 "noncompliance" also put "substantial" in four.

23 Okay. Sandra?

24 MS. HENRIQUEZ: Substantial -- I'm not an
25 attorney, but I understand words like "willful,"

1 "substantial" you begin to have to figure there's a
2 different standard and what's substantial versus
3 nonsubstantial. How -- and so if you're getting credible
4 information suggesting noncompliance, you don't know if it's
5 substantial or not until you investigate it.

6 So I would recommend deleting the word
7 "substantial."

8 FACILTATOR: How does HUD feel about deleting the
9 word "potential."

10 MS. HENRIQUEZ: Fine.

11 FACILTATOR: So HUD can agree to deleting
12 "potential," but they don't want to put in "substantial."
13 Judith?

14 MS. HENRIQUEZ: Can I also? We would try to
15 address Amanda's position about -- she raised about how far
16 back she could go in (d), and she said we could go back to
17 NAHASDA. I asked the question, isn't there a statute of
18 limitations and so we would like to say, offer up that HUD
19 may at any time undertake additional sampling and review of
20 prior program years up to the most recent review or five
21 years, whichever is greater, if HUD has credible information
22 suggesting noncompliance. And limit it to that period of
23 time.

24 MS. MARASCO: Would you go for three, Sandra?

25 MS. HENRIQUEZ: No. I would go for five. You're

1 holding records for three years beyond the expenditure of
2 that program year's money. So if you spend all of your 2010
3 in 2010, that's right. But if you're spending 2010 money in
4 2010 and 11 and 12, you've got to go three years beyond 2012
5 to 2015. So I think --

6 MS. MARASCO: Can we compromise on four.

7 FACILTATOR: Jason?

8 MS. HENRIQUEZ: So I should negotiate with you
9 like I do with my kids for curfew. They say one; I'd say
10 10. They'd say one; I'd say 9:30...

11 FACILTATOR: Let's stay on the subject here.

12 Jason?

13 MR. ADAMS: I just want to clarify the records
14 retention issue that we talked about because as I understood
15 what was passed by the committee was that it was the program
16 year -- the expenditures of the program year. So it -- it
17 doesn't tie to the grant anymore.

18 In 2011 program year money -- or 2010 money, if
19 you're on a calendar year, the last date of expenditure of
20 those funds is December 31, then you're closed, that
21 expenditure, that program year, and the clock starts. You
22 can't spend that program year money on January 1. You start
23 a new program year.

24 FACILTATOR: So Jason -- Jason, what would be the
25 appropriate time frame based on that comment?

1 MR. ADAMS: The idea was that the program year, if
2 you're on a calendar year, again for 2010, December 31 is
3 the last day you spend program money for that year, then the
4 clock starts on that date, three years from that date.

5 FACILTATOR: I see. So you think the three years
6 is actually the appropriate time frame.

7 MR. ADAMS: Yeah. I mean, that was the idea
8 coming out of the workgroup is that's when that clock
9 starts.

10 FACILTATOR: Sharol.

11 MS. MCDADE: Okay. I'm going to go back to my
12 "substantial noncompliance" again.

13 In reviewing the regulation, 1000.534, it has a
14 definition for substantial noncompliance. And so, again, I
15 would like to emphasize that I think "substantial" still
16 needs to there because we have the two, as Jad has been
17 talking, tiers. We have two tests that you have to go
18 through for substantial noncompliance.

19 Again, it's not that I'm -- I want to come here
20 and bash HUD, but historically each region has been
21 different in the way they apply regulations and program
22 requirements. So for me, I would like the consistency with
23 "substantial" being there because we have already defined it
24 in the regulations.

25 The second part is, is that I think we should be

1 consistent with the three years. We've approved the
2 three-year record retention, and we need to maintain that
3 for the programs because if we approved something yesterday,
4 that programs are leaving here and the tribes are thinking
5 that, okay, three years record retention. If we allow this
6 section, then we're not holding up what we've already
7 approved to the tribes.

8 FACILTATOR: Sir, I -- I don't know your name.
9 Tim?

10 MR. FOSTER: Why the vagueness and lack of clarity
11 in a legal document that impacts so many people's lives?
12 Let me -- let me -- you know, in 1973 in Phoenix, Arizona,
13 we met to draft a handbook. They called it the Handbook for
14 the HUD Program. There was probably 200-and-some people
15 there. Okay. And the book -- and we tried to manage the
16 '37 Act Housing with this handbook. It was vague. There
17 was [sic] a lot of clarity. It could be misinterpreted in
18 different ways. There was an unfairness there, but we
19 did -- this is a process here where it's supposed to be
20 clear.

21 This is a legal document that we have to manage
22 our programs with day by day. It has to be fair. It should
23 not be vague. It should be clear. I can't imagine not
24 coming -- because if you don't do this -- if you don't do
25 this -- having been a chairman of a housing program and

1 involved with one for nearly 40 years -- okay. It's really
2 difficult to manage a program and depend on things. The
3 actual audit and findings, if they're repeated, something
4 should be done. They definitely -- they definitely record a
5 record of misaction and -- this isn't difficult.

6 We all have to be responsible. And the
7 responsibility of this program, the success is dependent
8 upon it.

9 We do get funding. We have to politically go out
10 and do something with what we're doing here. The
11 ramifications of arguing three years -- if you want to say
12 three years, you should clearly define three years, not
13 something that we have to go back to Subpart (7) of XE to
14 make sure it's supported.

15 So just sitting here and watching this roll on and
16 on, I think about that. Thank you.

17 FACILTATOR: Thank you. I think -- yeah, it's
18 let's try to keep us on track here, Lafe.

19 There's two items that are here under discussion.
20 One I would like to just finish up and see where we can end
21 up on that.

22 There's been some clarification from Jason about
23 why three years, what it means, the definition of when three
24 years rules. I would like to know if that has any bearing
25 on HUD's thinking.

1 So I don't know if -- Sandra, if you had a chance
2 to think about that or if that makes any difference in terms
3 of the why five years was offered.

4 And then we also have the issue about the word
5 "substantive."

6 Okay. Lafe?

7 MR. HAUGEN: Well, we're looking at some language
8 that there might fit.

9 Under (d) it says, notwithstanding Subsection --
10 which is now (c) -- above, HUD may, at any time, undertake
11 additional sampling and review of prior program years.

12 After "years" we want to insert "subject to the
13 records retention limitations of 1000.552 -- to the records
14 retention limitations of 1000.552.

15 MS. MARASCO: Or up to.

16 MR. HAUGEN: Or up to, yeah. So this would strike
17 the five years because this now answers Jason's question of
18 limitations.

19 MS. HENRIQUEZ: I would ask, can we just see what
20 552 is, again, as we approved it? Thank you.

21 MR. HAUGEN: Jan, would also request that after
22 that language to delete "or up to the most recent review,
23 whichever is greater." We would like that language struck.

24 FACILTATOR: Just end at 552?

25 MR. HAUGEN: Yes.

1 FACILTATOR: Okay. So erase everything up to and
2 then end it where it says "552."

3 MR. HAUGEN: Yes. Oh, put a comma there. I'm
4 sorry. Comma.

5 FACILTATOR: "552," comma.

6 MR. HAUGEN: Yeah.

7 FACILTATOR: If HUD has credible information for
8 noncompliance.

9 Okay. This -- I see a little bit of caucusing
10 going on. This might be a good time to take a break. Some
11 people have to check out. And we -- we normally take a
12 break -- okay.

13 We'll take a 15-minute break now, and then we'll
14 come back.

15 (Recess taken.)

16 FACILTATOR: Okay. I saw a flurry of activity
17 over there in this corner. Was there anything that came out
18 of that break?

19 MS. HENRIQUEZ: Yes. First, I just want to ask a
20 question. On (c)(4), Provided, however, that as this
21 monitoring indicates, I thought -- there's a -- I thought it
22 was going to read: Indicates noncompliance or potential for
23 noncompliance -- I'm sorry. I lied. I'm on the wrong spot.
24 It's (d). Is -- it's the -- it's the (d). I'm sorry.
25 Forgive me. Four is fine.

1 So in (d), we will -- we're the -- "subject to the
2 records retention limitations of 1000.552" is acceptable.
3 We'll agree to that.

4 But I thought it was supposed to read also if HUD
5 has credible information suggesting noncompliance. Right?

6 FACILTATOR: Was that the language on (d)?

7 MS. HENRIQUEZ: This is the language we're
8 prepared to accept. There might be a discussion on amending
9 some of that.

10 FACILTATOR: Jason and then Sharol.

11 MR. ADAMS: Well, my friend Jack is not in the
12 room but he was the one that made that recommendation
13 that -- suggesting the "potential" be eliminated. So I just
14 wanted to make sure that that's where it came from, for the
15 record.

16 FACILTATOR: Right. That's where it came from.
17 That was Jack's suggestion. Okay.

18 Sharol and then Mark. Okay. Mark.

19 MR. BUTTERFIELD: But, unfortunately, I feel the
20 need to add clarification on the word -- on the phrase
21 "credible information."

22 It troubles me because I've been in a few
23 situations where any suggestion, through any source, is HUD
24 take -- deems as necessary to investigate, to find out
25 whether it is or isn't credible. And you end spending

1 thousands of dollars defending yourself even when it is not
2 credible.

3 So there's no definition to "credible
4 information," and so I would like some sort of definition to
5 that; otherwise, you end up chasing smoke.

6 MS. HENRIQUEZ: Do you want us to delete the word
7 "credible." "But if HUD has information" --

8 MR. BUTTERFIELD: I think that's what the standard
9 is right now, and that's what bothers me is somebody makes
10 some vague charge; it's investigated.

11 What does "credible" mean?

12 MS. HENRIQUEZ: I'm being told, in the workgroup,
13 that the HUD language in that section was to delete
14 "credible" and that the tribal members at the table in the
15 workgroup wanted that word in.

16 You know, I have to tell you, when this
17 operationalizes in any other HUD program, you know, HUD has
18 hotlines that people can call anonymously and file a
19 complaint, level an allegation. A person could be just
20 ticked, got up on the wrong side of the bed. It could be
21 legit, maybe not. But it's our obligation, then, to
22 investigate -- at least to try and figure out if there's any
23 merit to the allegation.

24 This would operate in the same way. That's a
25 standard that happens across federal government in general

1 and in most public agencies. I had it at the housing
2 authority as well.

3 FACILTATOR: Sharol.

4 MS. MCDADE: Okay. With all due respect, again,
5 I'm going to have to push again for the word "substantial"
6 because we have a definition for "substantial." It has a
7 two-tier process. If we're not going to be able to do that,
8 then what is the alternative?

9 Are we are going to have a definition for just
10 "noncompliance"?

11 Because, again, just like the Secretary said, you
12 get complaints about directors, board of commissioners,
13 tribal council on a regular basis, how do you determine what
14 is just noncompliance and substantial noncompliance, because
15 you could be dealing with complaints all day/all night?

16 And I agree. I know you do. But for us and for
17 my region, their concern, again, is following up on Mark's
18 "credible information" but not even just that. It has to be
19 substantial, and that's why we have the definition.

20 FACILTATOR: Any other comments from the committee
21 regarding what Sharol said or any responses?

22 MS. HENRIQUEZ: So if I go to 538 and 540, it
23 looks like what are the remedies for substantial
24 noncompliance. And 540 is that there have to be hearing
25 procedures, which is a really much more drawn-out process.

1 I mean, I'm not sure you want us to do -- go through all of
2 that to determine substantial versus not. I mean, because
3 most of these probably are not.

4 Generally, "substantial noncompliance" is a term
5 of art. It's a legal term. We're just trying to figure out
6 if there's something going on or not. And the fact is, we
7 will always share that information with you.

8 I understand what you're saying. I just think
9 it's more burdensome on both parties to put "substantial"
10 in. Maybe it's something the attorneys ought to hash out.
11 I just...

12 FACILTATOR: Yes, Lafe?

13 MR. HAUGEN: I'm going to give some time to John.

14 MR. TILLINGHAST: Just a commentary on "credible"
15 and the fact that it's not self-defining -- or
16 "substantial," is that there are two legal phrases which
17 courts and police use as thresholds for arresting somebody
18 or stopping somebody in their car. One is "reasonable
19 basis" and the other is "probable cause."

20 But I just have a feeling that if we were to
21 substitute "probable cause" or "reasonable basis," nobody's
22 comfort level would go up here; that the law just has to be
23 written with -- subject to phrases like that. And you just
24 have to trust people to administer them reasonably; that you
25 can't -- you can't define every circumstance which

1 constitutes probable cause or reasonable basis or
2 substantially.

3 You've just got to -- you've got to have faith in
4 the system because after 200 years, that's the best the law
5 can come up with.

6 MS. HENRIQUEZ: And we're going to share that --
7 if we get something, we're going to share it with you. The
8 things that I would say probably don't get shared is when
9 there is an investigation of fraud or waste or abuse, and it
10 might be ongoing. And until we run it to ground, that might
11 not be shared. But the fact that there's something that
12 we've been asked to look at, we will share with you. Right.

13 FACILTATOR: Okay. Yes, Marlene?

14 MS. LYNCH: Marlene Lynch Navajo Housing
15 Authority. I would like to suggest that for the last
16 sentence that we're discussing, "HUD will share with the
17 recipient." Scratch out "as appropriate."

18 FACILTATOR: Why?

19 MS. LYNCH: I think each and every housing
20 authority that's being charged with a noncompliance matter
21 should know where the source is coming from, and so we're
22 aware of the content of that discussion piece. And without
23 our knowledge, there's no way for the housing authority to
24 defend themselves.

25 MS. HENRIQUEZ: And I would ask that "as

1 appropriate" be left in because there may be times when we
2 get information we might be asked to protect someone's
3 privacy. But when those issues move forward and if they end
4 up being credible, then the requirement clearly is that
5 either the person making the charge or the proof of the
6 charge has to be made public and comes to the housing
7 authority before any action can be taken so we're then in a
8 position to be able to defend against the charge, if that's
9 where it goes.

10 If it is an anonymous tip that comes in, and we
11 look at it and it's not credible, it's not anything except
12 someone who just wants to grouse about something, it's not
13 going to -- it's doesn't rise to the occasion. It gets
14 dismissed. It's gets forgotten, and we move forward.

15 And so we need the flexibility to protect
16 someone's confidentiality in those situations.

17 FACILTATOR: Does that answer your question,
18 Marlene?

19 MR. JACOBS: I have a question on that. Because
20 of the government-to-government relationship, isn't they --
21 isn't there a requirement or -- to at least inform the tribe
22 that there is a complaint or an allegation or what have you?

23 MS. HENRIQUEZ: I think, yes. Mostly I would say
24 yes. As I said earlier though, if there's an ongoing
25 investigation that is significant because it's fraud, waste,

1 and abuse and it's ongoing and it may lead other places, at
2 some point, during the course of that, that may go forward.
3 But again, when the -- it's sort of all finalized that it
4 all comes into the public realm.

5 FACILTATOR: Any other questions on this, on (d)?
6 Okay. Yes, Lafe?

7 MR. HAUGEN: If there are no other questions, I
8 would ask for questions on (c) and (d).

9 FACILTATOR: And (e).

10 MR. BUSH: I have a question.

11 FACILTATOR: Phil?

12 MR. BUSH: Okay. My question goes back to
13 Sharol's concern, and the concern that the Madame Secretary
14 brought up in regards to -- to substantial noncompliance and
15 as it relates to 538, I believe, was the citation you gave
16 us.

17 Well, to me this is after the substantial
18 noncompliance. It's after HUD's already made that
19 determination. And then, my concern is if you go back and
20 read -- you know, when HUD does an onsite review, or any
21 type of review, it could even be a remote, you can go back
22 and refer back to Section 508, 1000.508, that just merely
23 covers the concerns, which doesn't even say "noncompliance."
24 It just says "concerns."

25 So, I mean, we're understanding what this fine

1 gentleman said that what statutes do, we have noncompliance,
2 substantial noncompliance, and then we also have, now, if
3 you look at 508, the actual from monitoring review. It
4 doesn't talk about noncompliance. So I guess I'm trying to
5 understand the -- the issue of -- I mean, we have to address
6 the concerns, obviously, and the noncompliance concerns and
7 that's what I'm guessing what 508 does.

8 And then -- I think.

9 MS. HENRIQUEZ: So are you suggesting that we
10 should change the language in (d) -- wait. Is it just in
11 (d), that the -- oh, I see -- what I'm -- what's being
12 suggested to me is 508 is self-monitoring so that if the
13 tribes find that there's a problem in their own particular
14 operation, you could get this -- 508 addresses the action
15 you could take.

16 534, is when HUD reviews and finds, as I
17 understand by the language. But if you like "concerns"
18 better than "substantial" that's great.

19 MR. BUSH: Actually, I think you got it backwards.
20 I really like the term "substantial noncompliance." And if
21 I -- if that argument came out wrong, it came out backwards,
22 then I apologize.

23 FACILTATOR: Where are we on this?
24 Lafe?

25 MR. HAUGEN: I think we're close, but, you know,

1 just -- just for the committee to make note of is, if we
2 don't get this passed, it will go back to the way it is.
3 And we're pretty close, in my opinion. We do have some good
4 language in there that I think we can all benefit from. And
5 I'm just -- you know, I just want to make note that it will
6 go back to the way it is if we don't get this passed.

7 MS. HENRIQUEZ: Can I just take one more, sort of,
8 shot at this?

9 I'm going to start where Phil started and maybe
10 this is where he wanted to end up. I don't know, so bare
11 with me.

12 If, indeed -- the section of self-monitoring says
13 if you find some concerns, this is -- these are the steps
14 the tribe can take to correct -- okay -- including getting
15 technical assistance and all that stuff. So this talks
16 about HUD's monitoring and what we find or may or may not
17 find.

18 And we may or may not find either things that are
19 what, under self-monitoring, would be a concern, a
20 nonsubstantial compliance issue where we may want to offer
21 technical assistance, et cetera, because it's not full
22 blown, or we may find substantial noncompliance.

23 But until we get into understanding better what
24 the noncompliance is, we don't know if it's substantial or
25 not. And if we're only looking for -- if we're limited to

1 look only for substantial, for some tribes, we won't be able
2 to provide the technical assistance, that kind of stuff,
3 because it puts it into a whole nother realm of operation.
4 So it elevates what might be a relatively easy technical
5 assistance, more training, kind of solution into another
6 realm.

7 And so, by saying "noncompliance," it's a broad
8 enough definition to encompass, from a concern, to
9 substantial, and we won't know that until there's the
10 investigation and look-see to try and figure out what's
11 going on.

12 So that's why I would like not have to the
13 "substantial" in there.

14 MR. TILLINGHAST: This is to underscore Lafe's
15 point. The statutory standard that we're implemented here
16 is that HUD gets to determine what level and intensity and
17 frequency of monitoring is appropriate. And that's all
18 that's in the statute.

19 And that if for want of a word this fails, then
20 that's the only thing you're going to have to hang your hat
21 on is that HUD can do whatever they feel is appropriate.

22 So those are really the choices that the committee
23 is faced with here.

24 FACILTATOR: Did you want to take a show of hands
25 on this one?

1 MR. HAUGEN: It's a Nevada/California connection
2 right now so...

3 FACILTATOR: Okay. And, again, you know, we're
4 getting now down to issues where there's a certain level of
5 disagreement or people feeling like they're compromising
6 with each other. I just want to remind you of the
7 definition that we have for consensus.

8 And you don't have to love it a hundred percent.
9 You can love it 60 or 70 percent or if you think you are
10 better than what you had before, as long you don't find it
11 offensive and you don't oppose it, then that would be
12 consensus.

13 But I think we have to remind ourselves of that
14 because I know we're getting down to issues that are very
15 sensitive for people right now.

16 Sharol?

17 MS. MCDADE: Of course I agree with what the
18 Secretary is saying. But, again, performance measures have
19 to do with a tribe's right to monitor themselves. That's
20 what we talked about earlier. Noncompliance and substantial
21 noncompliance, in my opinion, are different because under
22 the definition that we've already been provided under 534,
23 it somewhat defines it already, "noncompliance,"
24 noncompliance with NAHASDA and the regulations -- so bear
25 with me because I'm kind of all over the place right now.

1 The reason why I think "substantial" is so
2 important is because of the fact that, again, each HUD
3 region is different. If I could go and say, Well, you know,
4 Sandra said this is how it should be applied, then that
5 would be different. But that's not what happens in the
6 programmatic function.

7 When you have a region who applies regulations
8 differently, than it's problematic. So how do we get around
9 the definition for just "noncompliance"? That's what I'd
10 like to know, because if you don't put "substantial" that
11 opens the threshold for the smallest things to be
12 noncompliant. That's my question.

13 MS. HENRIQUEZ: I understand your point. I'm not
14 sure even if we had the word "substantial," I think you'd
15 still find the same issue. So I don't know if there's a way
16 for us to legislate a resolution, because what you're trying
17 to do is legislate consistency. And I think that even in
18 the best of legislative language, it's not going to happen,
19 just because it's -- we're all human beings.

20 So do we -- we can train staff to be more
21 consistent. Even looking at NAHASDA rules and regulations,
22 I'm sure not all tribes implement them the same way. I
23 mean, so it's a little bit of a give an take, I think. And
24 I think it's incumbent on both sides, on both of us, to try
25 to work through those issues when there seems to be great

1 inconsistency among applications from various ONAP offices.

2 FACILTATOR: Judy?

3 MS. MARASCO: Coming from an administrative
4 standpoint, when you have inconsistency like that, you begin
5 to funnel down the authority. And maybe if the regions'
6 authorities were funneled through the Secretary or the
7 Deputy Secretary, we would get a more uniform application at
8 the regional offices. And I don't know if language of that
9 nature would help. But I know in other sections where we've
10 taken it back to the Secretary's authority, we have felt
11 comfortable with that. And I don't know how you would apply
12 that here.

13 But I understand what's being said. And, again, I
14 have to say that I've been really lucky with the HUD folks
15 that work with us and that we work with. But I hear all the
16 stories that come to this table, and uniformity and
17 application of the regulations is a big issue with the
18 tribes.

19 And, again, accountability on our side is
20 important, and it's also important on the HUD side. So if
21 we can't legislate uniformity, then why can't we set up a
22 system that funnels it through one or two doors that may
23 impact how it's applied?

24 Did I say that correctly? Do you understand my
25 thought process?

1 MS. HENRIQUEZ: Sort of.

2 MS. MARASCO: We just want to -- we just -- we
3 want a general understanding of the regulations, not only on
4 the tribe side, but on HUD's side and we want application to
5 be equal across the board. And that's what I'm hearing from
6 some of the tribal people here is, if you allow such a
7 large door for the regional offices to walk through at any
8 time they choose to walk through for any reason they
9 choose to walk through for, that we feel that we're not
10 being treated fairly. So how do you strengthen your system
11 to make sure that the regional offices aren't applying the
12 regulation inappropriately?

13 So is there a system where we could count on
14 that's -- you know, like some of the other areas that we
15 were talking about when we -- when we said just like with
16 the waiver. The Secretary was the one that had to revoke
17 the waiver. So if we could funnel down who's going to be
18 responsible, maybe that would alleviate some of the fears.

19 MS. HENRIQUEZ: Operationally right now in, sort
20 of, all things, it would be that if there's a feeling by a
21 tribe that a regional office is not applying standards
22 consistently. The first -- the first -- where it goes next
23 then is, beyond that regional office administrator, to Roger
24 who is the Deputy Assistant Secretary. And so that's
25 always -- we've always got that to come to.

1 And he has done -- been asked to intervene in a
2 couple of instances over time where listening to the tribe's
3 presentation and listening to staff, he's had to, then,
4 decide the outcome. And sometimes that has resulted in
5 overturning where the HUD staff had come -- had landed on an
6 issue.

7 So, you know, that -- so Roger is sort of the
8 first line of appeal, if you will. And then I'm the next
9 one, by position I should say, as opposed to people and
10 names and personality. That's working with the chain
11 normally any way, which is always available.

12 FACILTATOR: I think this issue of HUD monitoring
13 has triggered a lot of bigger issues for us. But I'd still
14 like to just kind of get a sense -- Lafe had asked
15 earlier -- a sense of the committee's approval of this --
16 what is it? -- (b, (d, (e)?

17 MR. HAUGEN: (c), and (d) and (e) rolls right into
18 it as well.

19 FACILTATOR: Okay. Sorry?

20 MR. HAUGEN: (c, (d), and (e).

21 FACILTATOR: (c, (d), and (e). So can we get a
22 sense of the committee -- ask for consensus on that to see
23 if we're okay with that part of it?

24 So all in favor of (c, (d), and (e) indicate that.
25 Anybody opposed?

1 Is there any opposition? It passes. Next?

2 Yes, Tim?

3 MR. FOSTER: Well, fresh on my mind before I
4 forget, what you're discussing about the appeal process
5 either to Roger or Assistant Secretary has a natural effect
6 of reducing minor problems. I mean, it does keep your
7 original area -- your offices, ONAP, if you're having a
8 problem with them, they really to respect that you have the
9 opportunity to appeal it elsewhere. So I think that might
10 make life a little simpler for a lot of people if they learn
11 it's an accepted practice.

12 MR. HAUGEN: With that there noted, we wanted to
13 look at "A," A and B. I know that Jad did have some
14 recommendations for some changes we could take a look at.

15 Let's start with negotiations on A and B.

16 FACILTATOR: What is an appropriate extent of HUD
17 monitoring? So the majority text is on the right, there.

18 MR. HAUGEN: Yes, the majority is on the right.
19 Again, HUD has it changed on the left.

20 FACILTATOR: What is an appropriate extent of HUD
21 monitoring?

22 Subject to any conflicting or supplementary
23 requirement of a specific legislation, and upon the
24 effective date of this regulation, the frequency of HUD
25 monitoring of a particular recipient will be determined by

1 application of the HUD standard risk assessment factors,
2 which are -- and listed them all. And you listed 12
3 factors.

4 Provided, that when a recipient requests to be
5 monitored, HUD shall conduct each monitoring as soon as
6 applicable [sic].

7 Subsequent to the effective date of this
8 regulation, HUD shall make available any proposed risk
9 factor change to tribal leaders, and shall decide upon any
10 such change through the tribal consultation process.
11 Nothing in this section implies that a PIH notice or program
12 guidance has the force of law.

13 So that's a sticking point there, right?

14 MS. HENRIQUEZ: So, first, I just want to make
15 sure under the "provided" the next thing it says (a) and
16 (b), it really is just (b) is that there, correct?

17 MR. HAUGEN: Yes, yes.

18 MS. HENRIQUEZ: Okay. That's what I thought.
19 And if I might?

20 FACILITATOR: Please.

21 MS. HENRIQUEZ: HUD would offer the following:
22 That the standard risk assessment factors that are
23 enumerated here, the current ones in use, 1 through 12,
24 would be put in a preamble; and that -- and then we would
25 offer some -- and then I would offer that the -- the rest of

1 the section -- all of (a) goes in the preamble.

2 That (b) the -- is something that is an internal
3 HUD process. We do it across programs, not just with
4 NAHASDA. And because it's a process internal to HUD, I'm
5 not prepared to negotiate other than making them available
6 online, as they are now, putting them in a notice, providing
7 guidance, et cetera, et cetera.

8 FACILTATOR: Jack?

9 MR. SAWYERS: Why wouldn't you want to put the
10 factors in -- in the rules, rather than the preamble? And
11 then if you wanted to change the weights and so on, you
12 could do that at a later time. You don't have to have --
13 you wouldn't have to convene a neg reg or anything like
14 that.

15 But I'm just saying, why not put those factors in,
16 instead of putting it in the preamble?

17 MS. HENRIQUEZ: Because as I interpret, by putting
18 them in the body of the rule, it is, therefore, statutory,
19 and, therefore, requires negotiating rulemaking to make a
20 change.

21 FACILTATOR: Jack?

22 MR. SAWYERS: What if it said, May include factors
23 such as -- and these 12 -- and list the 12 -- and say that
24 it would appear in a notice?

25 In other words, rather than if you don't like to,

1 you know, negotiate it, then let's make so. But let's not
2 just put it in the preamble. I think it should be part of
3 the rules so everybody knows what the factors are and --
4 because most people don't read preambles, but they -- they
5 are obligated to read the rule.

6 MS. HENRIQUEZ: Because it gets to the same point.
7 Listing what may be, at this point, and fairly exhaustive
8 list of these 12, "may," "shall," "could be," "would be," it
9 still comes to the same sort of legal entity.

10 And if people -- I guess I'm not convinced that
11 putting them in the body of the rule makes people read them.
12 If it's the rules of the road and it's out in a notice, a
13 letter, or something, and -- and you know, then, in advance,
14 putting them in here doesn't mean you're more inclined to
15 read them than not. And it's still the legal position then
16 we then have to negotiate all the time, both the weight,
17 what each of these is. And it doesn't allow the
18 flexibility. And we're prepared to be transparent. You
19 know what they are. We -- if we need to change them because
20 something has happened, we will tell you that in advance and
21 be as transparent and accountable as possible, but then not
22 have to negotiate and reconvene because we want to change
23 something because we need to.

24 More importantly is an underlying philosophical
25 issue. HUD does risk assessments for every single program,

1 elected officials and CDBG and mayors, governors, formula
2 driven, programs, to city entitlement, jurisdictions, to
3 public housing authorities across the board. And sometimes
4 the risk assessments are tied because you've got more money,
5 you're larger, or because something else is going on in the
6 moment. And those are subject to change.

7 And so I'm philosophically saying, I'm not
8 prepared to agree to have to negotiate a process that,
9 heretofore, is internal to HUD. It's how we look at our
10 programs and decide how monitoring happens. I'm not
11 prepared to give that away to any program that's operated by
12 the department.

13 FACILTATOR: Yes, Phil?

14 MR. BUSH: I just needed to clarify a little bit.

15 So you're proposal is to strike (a) and (b) in its
16 entirety, and then (c) becomes (a)? That's what I thought I
17 heard.

18 MS. HENRIQUEZ: I'm assuming we would have to
19 renumber or reletter the section.

20 MR. BUSH: And (a) and (b) would disappear? Well,
21 (a) would go into the preamble?

22 MS. HENRIQUEZ: Correct and (b) would disappear.

23 MR. BUSH: Okay.

24 FACILTATOR: Is there a consensus on this last
25 proposal that Sandra just mentioned? All in favor?

1 MS. MARASCO: No. I have a question.

2 FACILTATOR: Okay. Question, Judy?

3 MS. MARASCO: Would you be opposed to making a
4 reference in here that they are stated in the preamble?

5 MS. HENRIQUEZ: Obviously, nobody wanted me to
6 talk anymore. I kept pushing.

7 Help me understand why.

8 MS. MARASCO: Just because I think we need to
9 reference it. I feel like that I'm not making this
10 information available if it's stricken from the regulations
11 and moved to the preamble. I don't have any objection to
12 moving it in the preamble, but I certainly want to make it
13 clear to the tribes that the language does exist.

14 FACILTATOR: Jack?

15 MR. SAWYERS: Dave.

16 MR. HEISTERKAMP: If we have a proposal that we
17 were discussing with HUD to the effect that the language
18 would be redrafted to say, These -- which these factors may
19 include things like these 12, and then anything else as
20 far -- that HUD comes up in a written PIH notice. So it
21 accomplishes -- we're trying to accomplish keeping these in
22 the regulation where they can be referenced, not lost in the
23 preamble but addressing HUD's concern that they not limit
24 themselves in their internal processes. If they're not --
25 if they want to keep that to -- keep that to a PIH notice

1 process, at least list what the current ones are plus
2 continue the flexibility of allowing them to change that by
3 PIH notice, that would also be provided to the tribes.

4 MS. MARASCO: I like that better.

5 MS. HENRIQUEZ: And then does (b) go away?

6 MR. HEISTERKAMP: I'm sorry?

7 MS. HENRIQUEZ: And (b) also is removed?

8 MR. HEISTERKAMP: Right. It would change -- yes.
9 The proposal would change (b) to disappear but, at least,
10 note that there's these 12-plus other things that HUD may
11 come up with in the future, to be announced with a PIH
12 notice.

13 I think, in reality, 90 percent of the time you're
14 always going to have something like those 12. I mean,
15 there's a limited amount of stuff that can be monitored, but
16 at least this way, you get those 12 down where people can
17 reference them, and HUD would still commit to the PIH notice
18 process of keeping the tribes up-to-date on anything else it
19 comes up with.

20 FACILTATOR: Okay. Lafe?

21 MR. HAUGEN: Before I give a little time to Ed, I
22 just want to note that the Secretary is going nuts. So...

23 MR. GOODMAN: I've got some proposed language
24 that's along the lines of what Dave is talking about in
25 talking with HUD's attorneys.

1 It doesn't get rid of (b) entirely. I think there
2 has to be some process in (b) that recognizes a tribal
3 input. But the proposed change to the language on the board
4 which would simply add to that list of 12 factors under
5 Subpart (A), a No. 13. And that would read, And such other
6 factors as may be determined by HUD pursuant to Subsection
7 (b) .

8 And then in Subsection (b) we want some kind of
9 language that would provide the opportunity for the tribes
10 to get notice and provide comment back to HUD, whatever that
11 would be. So we would have -- the main concern that we had
12 talked about in the workgroup was: How do we have -- from
13 HUD's side -- how do they have the flexibility to make the
14 change? And from the tribal side: How do we get notice and
15 opportunity to at least have some ability to comment on the
16 proposed change?

17 FACILTATOR: Okay. I think we're getting flooded
18 by proposals here. So can we back up to where we were and
19 let's move from there because we had -- I first want to get
20 the Secretary's response to the first proposal, and then we
21 had your proposal and now we have your proposal.

22 MR. GOODMAN: This is the same proposal that
23 Dave's making. This is just the language for the
24 proposal --

25 FACILTATOR: No. Dave didn't have Section (b) --

1 I think we need to back up here. Where we left
2 off, the Secretary had proposed to put it in -- to put these
3 risk factors into the preamble, to delete Section (b) and
4 then something else, but I forget what it was. Why don't we
5 start there and add from there, point by point, where you
6 started, Dave?

7 MR. HEISTERKAMP: The first part of the proposal
8 is just to see if we can get them listed in the regulations
9 so that we preserve them for reference. And there are
10 other -- Ed's correct -- there are other tribal concerns
11 maybe about how the PIH process is handled, and I think
12 that's a separate issue. The first issue is to see if we
13 can list them in such a way that they get included in the
14 regulation and that's the limit of my proposal.

15 FACILTATOR: Okay. So I think, Dave, your
16 proposal was the one where I saw HUD kind of responded to,
17 so let me see where we take it from there. And if that
18 doesn't work, we can move on to yours.

19 MS. HENRIQUEZ: I appreciate the suggestion, and
20 I'm prepared to, with a tweaking, such that, for example,
21 before "annual amount," at the top of the list, we just say
22 that the assessment factors which may be but are not limited
23 to list the 12, and then you go one through 12, pickup 13 as
24 proposed.

25 FACILTATOR: 13 is...?

1 MS. HENRIQUEZ: Any other additional factors as
2 may be determined by HUD -- right. I'm just trying to put
3 it up here -- would add "such additional factors may be
4 provided in a PIH notice," and we would be good to go.

5 FACILTATOR: Say any other factors as may be
6 HUD -- may be determined by HUD --

7 MS. HENRIQUEZ: Period.

8 FACILTATOR: -- period.

9 MS. HENRIQUEZ: And "such additional factors shall
10 be provided in a PIH notice," which says we then have to
11 tell you about what they are. So they're in, there's
12 flexibility, and there's feedback or publication.

13 FACILTATOR: Mark?

14 MR. BUTTERFIELD: That would trigger my concern
15 that part of (b) remain, which is that disclaimer that a PIH
16 notice does not have the force of effect of law must remain.
17 Because if you just do it that way, you're elevating a PIH
18 notice to the force and effect of law which I cannot agree
19 with under.

20 MS. HENRIQUEZ: Well, then you're coming back to
21 my point because then you're elevating -- if that's true,
22 you're elevating all of these to the force of law, which
23 puts us back into having them -- why they should be in the
24 preamble and not here.

25 So I was just trying to split it a little bit,

1 with some flexibility. PIH notices are -- are guidance any
2 way...

3 FACILTATOR: Sandra?

4 MS. HENRIQUEZ: So are we discussing (b)? Is that
5 what we're doing?

6 FACILTATOR: I guess Mark had the last comment
7 about that.

8 MS. HENRIQUEZ: So, Mark, would you just repeat
9 your comment, please? I'm just a little confused here.

10 MR. BUTTERFIELD: Well, I'm -- if you're going to
11 put the PIH notice in there and it allows unilateral
12 determination by the Secretary and it elevates it to a
13 regulation, which isn't -- administrative law says that that
14 may guide you but it doesn't -- it leaves it open for the
15 tribes to challenge whatever is in that PIH notice. That's
16 all it does.

17 So it -- the PIH notice gives the people an
18 opportunity to have notice and to determine whether or
19 not -- it still leaves it open to challenges, my point.
20 It's just like the BIA manual. It doesn't have any force
21 and effect of law, but it guides their practice. And that's
22 been long established.

23 So if you just leave that last sentence, nothing
24 in this section implies that PIH or program guidance has the
25 force of law, I'm okay with it.

1 MS. HENRIQUEZ: But legally, you're -- what, so
2 it's just a statement of the obvious. Neither program
3 guidance nor PIH notices have the force of law any way.

4 MR. BUTTERFIELD: Correct. So why is there a
5 problem with you agreeing to that?

6 MS. HENRIQUEZ: Because what I'm objecting to is
7 the need to -- because the language that's been proposed at
8 (a) now makes it not subject to, necessarily,
9 consultation -- or how do I want to say this? -- I'm trying
10 to figure out words that are -- that don't get people all
11 ticked off, but there's no -- putting this language in here
12 at (b), seems -- would suggest, I think, that there's a duty
13 on HUD to negotiate what's in (a) and gets back -- so
14 it's -- it raises an expectation that is not true. And,
15 again, gives the implication that an internal -- HUD's
16 internal process is subject to an external negotiation.

17 MR. BUTTERFIELD: You misinterpreted what I said.
18 I believe I said I would strike everything but the last
19 sentence. So the whole thing having to negotiate with
20 tribal leaders --

21 MS. HENRIQUEZ: So you're striking all of that?

22 MR. BUTTERFIELD: All except the last sentence.

23 MS. HENRIQUEZ: I see.

24 MR. JACOBS: I understand they're close to
25 consent. They want to wait just a minute while HUD

1 continues.

2 FACILTATOR: Do you want a caucus, HUD? Five
3 minutes?

4 MS. HENRIQUEZ: Five minutes.

5 (Recess taken.)

6 FACILTATOR: Committee, please take your seats.
7 We do have a short waiting line of people waiting to speak,
8 but I think we want to hear first from the Assistant
9 Secretary.

10 MS. HENRIQUEZ: Let me just go back.

11 I want to thank Mark for his rework of Section
12 (b). His proposal was just to leave the last sentence in
13 (b), as on the screen.

14 So forgive me, I'm not a lawyer, but let me try
15 and get my head around this and try to explain it in a way
16 that I hope makes sense.

17 The statement that nothing in this section implies
18 that a PIH notice or program guidance has the force of law
19 is a correct statement in and of itself. However, it is
20 clear that program guidance is simply what it is. In the
21 HUD speak, if you will, a PIH notice could be program
22 guidance, it could also contain statutory and regulatory
23 information.

24 And, therefore, while it doesn't in and of itself
25 have the force of law, it may, indeed, contain issues that

1 do have the force of law and to then, therefore, have a
2 statement like this here, which negates what may be
3 contained in a notice that includes statutory or regulatory
4 information puts us in a position -- a slippery slope
5 legally that then undermines what, indeed, may be in any
6 other PIH notice. It will have, for me, unintended
7 consequences not just in NAHASDA but more broadly in any
8 notice issued by the department.

9 And for that reason, I'm going to go back to
10 proposing that (b) -- the section be struck. And if it
11 makes it clearer, having struck all of (b), to go back to
12 modify 13 so that the last sentence is "such additional
13 factors shall be provided by program guidance" if that is --
14 makes it better, I think, then that -- I would offer that
15 change as well.

16 FACILTATOR: Yes? Questions on this, Marlene?

17 MS. LYNCH: I would like to add to No. 13 if that
18 is HUD's recommendation and that it is by program incomes
19 and consultation with tribes. I think that the consultation
20 process really does need to remain in the regulation. We do
21 have executive order on government-to-government
22 relationship with tribes. And also, we have the
23 government-to-government policy which was just recently
24 implemented by HUD in 2001. So that definitely needs to be
25 included in there. I think any and all program changes that

1 are being recommended by HUD needs to be consulted in
2 consultation with tribes.

3 And that is my recommendation.

4 FACILTATOR: Rusty -- I see that Marlene is also
5 suggesting that you also put in there "to be determined
6 through tribal consultation."

7 MS. LYNCH: Yes.

8 FACILTATOR: Yes, Rusty, you had a comment on that
9 also?

10 MR. SOSSAMON: Yeah. This is -- this on the same
11 subject. Could we -- right there where it says "determined
12 by HUD," maybe after that say "consistent with HUD's tribal
13 consultation policy" or something like that?

14 FACILTATOR: -- herein by HUD's -- consistent with
15 HUD's tribal consultation policy.

16 MR. SOSSAMON: Because, basically, all we want to
17 know is, kind of, have a heads up of what you're looking at
18 and just have an opportunity to comment on it and say what
19 concerns us or maybe how would could tighten or how it would
20 impact us before you actually issue that notice.

21 MS. HENRIQUEZ: So that would be fine, if we can
22 agree what that tribal consultation means. If it means what
23 Rusty said, and we can somehow codify that, that's fine.

24 FACILTATOR: Okay. So we just want to make sure
25 that consultation doesn't necessarily mean neg reg but it

1 means consultation as you have in the past like IHP and that
2 kind of thing.

3 So how would we word that? I think everybody can
4 agree with that.

5 MS. MARASCO: Say it again, Rusty.

6 FACILTATOR: Say it again, Rusty.

7 MR. SOSSAMON: By referring to HUD's own
8 consultation policy, and maybe after it reads, "Any other
9 additional factors as may be determined by HUD," perhaps it
10 could read, "Consistent with HUD's tribal consultation
11 policy."

12 FACILTATOR: Okay. Sandra, is this okay? Is this
13 okay with the rest of the tribal folks here?

14 Does that do it for you, Sandra?

15 MS. HENRIQUEZ: I think we're really close. My
16 hesitancy comes from the following: Our tribal consultation
17 policy can be beginning with as prescribed as, "Dear tribal
18 leaders, this is what we're going to do, period." It could
19 be "Dear tribal leaders, we're going to do this and please
20 comment and give us your feedback" and, you know, all the
21 way up. I mean, it's a whole range of things. And I want
22 to make sure that we just prescribed it in a way that we all
23 understand what that phrase means in this context.

24 And I don't think you just want us to say, Oh, by
25 the way, we're going to change the weights. But I also

1 don't want to get the point of, No, you have to negotiate
2 around the table to consensus either because, again, it's
3 affecting an internal process at HUD that, heretofore, has
4 not been available to any other recipient of HUD funds.

5 MS. MARASCO: You love us.

6 FACILTATOR: Mark?

7 MR. BUTTERFIELD: I think that most of, maybe not
8 all of us, but most of us went through a round of
9 consultation on your consultation policy this January. I
10 remember quite distinctly. And one of the good things about
11 it is that there periodically are time limits in your
12 consultation policy that you must -- are supposed to meet
13 with the tribes. And I think if you brought up anything
14 like this in one of those, I think that would be a long way
15 towards satisfying tribal concerns, that they're aware of
16 what's going on internally that they are going to be asked
17 to comply with.

18 So I think that's what Rusty is talking about.
19 But maybe he can clarify that. But that is something that
20 we in the Eastern ONAP region went through. And I think it
21 was done in all six regions.

22 FACILTATOR: Sandy?

23 MS. HENRIQUEZ: So this begins the slippery slope
24 for me.

25 What I thought I heard was -- from Rusty was that

1 the consultation would be we would notify and provide an
2 opportunity for comment.

3 FACILTATOR: Yes.

4 MS. HENRIQUEZ: As opposed to a meeting because
5 you can't just have one meeting. You have to do regional
6 meetings. And again, I keep coming back to the -- to
7 underscore this is huge sea change to get -- for what has
8 been an internal, totally controlled process by HUD across
9 all of its programs.

10 So if it's -- so I would rather say that the
11 language is consistent with our tribal consultation policy
12 by which we will send written notification and provide a
13 comment period or something, but...

14 FACILTATOR: Let's see how that looks.
15 Marvin?

16 MR. JONES: Marvin Jones. What we could do is get
17 the tribal consultation policy out and refer to the specific
18 provision in there that is the notice and comment period,
19 that way.

20 But my other more general point just to emphasize
21 that what NAHASDA talks about is a unique relationship of
22 the government -- the government-to-government relationship,
23 the reliance upon Indian self-determination, tribal
24 self-governance and Section II.

25 And I just wanted to make the point that I think

1 it's critical and important that we are not public housing.
2 We are not public housing authority entities.

3 FACILTATOR: Thank you.

4 MS. HENRIQUEZ: And I totally respect that and
5 agree with you. I would offer, however, that to use the
6 same sort of analogy, in some ways, that the policies and
7 the internal policies and workings of HUD, then, are not up
8 for negotiations. So I think we've gone -- I feel like
9 we've gone an incredibly far pace to get to 13.

10 FACILTATOR: Yes, Rusty?

11 MR. SOSSAMON: Yeah. And I appreciate that, and I
12 recognize that. And I believe, for me anyway, this language
13 does it. You know, it recognizes HUD's authority to make
14 its internal decisions, but it also recognizes the unique
15 status of the tribes' government-to-government relationship
16 by at least giving an opportunity to comment on those.

17 So I think for me that's a good compromise, and I
18 could leave with it.

19 FACILTATOR: Ready to vote on this one?

20 Okay. Call for consensus. All in favor?

21 All of (a) and all of (b).

22 MR. HAUGEN: No, the deletion of (b).

23 FACILTATOR: No (b), just (a).

24 All opposed?

25 MR. ADAMS: Just 13.

1 FACILTATOR: Okay. Passes.

2 MR. HAUGEN: Now, there's just one last sentence
3 at the end of this, as we noted, it's this part here -- that
4 concludes it. And as noted -- I'm going to use Jason's
5 word -- this was the easy one.

6 MR. TILLINGHAST: Ready for the next one,
7 Mr. Chairman.

8 FACILTATOR: Sorry. Before you start, John,
9 Marvin?

10 MR. JONES: It's my understanding now, just
11 technically so we get it on record, we have to change the
12 (a) and (b) because (b) is eliminated.

13 FACILTATOR: Of course.

14 Carol, did you want to make a comment?

15 MS. GORE: No, thank you. My comments were most
16 eloquently said by Marvin.

17 I want to thank you for that, Marvin.

18 FACILTATOR: We have 15 minutes before lunch.
19 What can we get done?

20 MR. TILLINGHAST: We can certainly explain 187.
21 When the committee -- Working Group F met, one of the first
22 things we confronted was that we had two overlapping
23 enforcement sections. We have 532 and we have 538. Those
24 two sections were redundant. In places they were
25 contradictory.

1 And a consensus decision was made, and it was one
2 of the easier decisions for us to make, is to take those two
3 and consolidate them. And you could see visually how we
4 consolidate them with this map that we handed out that
5 you've all been enjoying over the past couple of days. All
6 of the language that you see here that's in red or mauve --
7 and there's a bit of a dispute what which is -- were taken
8 verbatim, or virtually verbatim, from either 538 or 532 and
9 added into a new consolidated 532 in the middle.

10 So the issue we have before you -- oh, we also
11 added some -- there's also some controversial provisions in
12 the consolidated 532. We're not talking about those at the
13 moment. All we're talking about is the issue -- the
14 decision to consolidate the two enforcement regs into one
15 enforcement reg and to adopt the old provisions from 532 and
16 538 that are verbatim from 532 and 538 and, therefore,
17 should create no controversy.

18 Now, you could identify those in one of two ways.
19 If you're into colors and charts, they're the mauve-colored
20 ones in 538. If you like using the numbers, they're
21 Subsections (c), as in cat, (d) as in dog, (e) as in
22 elephant, and (g) as in goat, in the consolidated 532.

23 Okay. Now, we went through this yesterday in
24 tribal caucus, and I think folks understand it. I think
25 some of the HUD folks are still kind of grinning at it.

1 Did you guys figure it out on your own? I think
2 they figured it out on their own.

3 So that's the issue. And, again, it's just -- the
4 only issue is: Do we consolidate the two old ones into one
5 consolidated new ones, and do we adopt the noncontroversial
6 language that we took verbatim from the two that we pirated
7 from and put in 532?

8 FACILTATOR: Was there a consensus within the
9 workgroup on this?

10 MR. TILLINGHAST: Was this what?

11 FACILTATOR: Was there consensus within the
12 workgroup?

13 MR. TILLINGHAST: Yes. There's consensus in the
14 working group, both on the issue of consolidation and
15 adoption of the mauve-colored -- well, red, mauve -- well, I
16 thought it was red, but...

17 FACILTATOR: It's kind of passion pink.

18 MR. TILLINGHAST: My client called it mauve, and
19 the client is always right.

20 Which takes care of Issue 74 -- no. It takes care
21 of most of Issue 74 not all but most of it. That's it.

22 FACILTATOR: During the tribal caucus, was there
23 any objection to this at all?

24 MR. TILLINGHAST: No. None whatsoever.

25 FACILTATOR: Okay. And then the -- HUD has had a

1 chance to look at this as well. Do you have any objection
2 to this or any questions?

3 MS. HENRIQUEZ: We are fine with the
4 consolidation, and there was consensus on a number of these
5 issues in the mauve but not the pink at the bottom or
6 something.

7 MR. TILLINGHAST: Right, right.

8 MR. HAUGEN: Calling for consensus to combine
9 these two regulations. It would take care of part of 74,
10 the issues that are in mauve only -- or red. So I'm calling
11 for consensus on that.

12 FACILTATOR: Calling for consensus on the
13 combining and on all the issues in the mauve area.

14 MS. MARASCO: Could you repeat, again, the letters
15 on the mauve issues so that it's clear on the record.

16 MR. TILLINGHAST: I'll repeat the mauve letters
17 for the record based on Document 187 and those are
18 Subsection (c) as in cat, (d) as in dog, (e) is elephant,
19 and (g) as in goat.

20 FACILTATOR: All right. All in favor -- sorry.
21 Question, Jason?

22 MR. ADAMS: One more time. Off of 187, what was
23 that again?

24 FACILTATOR: Can you repeat the sections, again?

25 MR. TILLINGHAST: I've got it memorized now. (c)

1 as in cat, (d) as in dog, (e) as in elephant, (g) as in
2 goat.

3 FACILTATOR: So the ones we're not voting on are
4 (a), (b), and (f). So we'll negotiate those after lunch.

5 MR. HAUGEN: Yep.

6 FACILTATOR: Okay. Everybody clear on what we're
7 voting of on? All in favor? Any objection? Okay. That
8 passes. And we have an early lunch. Everybody come back at
9 1:30.

10 (A luncheon recess was taken at
11 11:51 a.m.)

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1 SEATTLE, WASHINGTON; THURSDAY, JULY 22, 2010

2 1:33 P.M.

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5 MR. COYLE: Oh, Marvin is here so we can get
6 started I guess. Okay.

7 Go ahead and start. Where's your chairman at?

8 MR. TILLINGHAST: I'm not my chairman's keeper.

9 MR. COYLE: Go ahead and get the next item up.

10 MR. TILLINGHAST: Okay. The next item, if you
11 would keep on the screen 187 -- 187 being in red and
12 underlined -- and go to Subsection (f), as in fraud. This
13 is the section which, by and large is taken from existing
14 regulation which says that if you've messed up and it's not
15 really your fault, it's not a pattern of willful
16 noncompliance, then HUD can provide you with technical
17 assistance. Congress amended this provision to say that
18 they will provide you technical assistance only if you agree
19 to enter into a performance agreement with HUD.

20 And so all this regulation does is add at the end
21 a proviso that the recipient's eligibility for technical
22 assistance under the subsection is contingent upon the
23 recipients execution of and compliance with a performance
24 agreement pursuant to Section 401(b) of NAHASDA.

25 And ask for questions or explanations at this

1 point, if there are any.

2 FACILTATOR: Any questions? Yes, Lafe?

3 MR. HAUGEN: Consensus on taking a nap? Oh, wait.
4 Wrong story.

5 FACILTATOR: Okay. What are we voting on here,
6 Lafe?

7 MR. HAUGEN: Looking at (f), that paragraph there
8 takes care of Issue 75. I'm asking for that.

9 FACILTATOR: On Section (f), yes.

10 Judith?

11 MS. MARASCO: I thought earlier in our discussions
12 when we put in, "shall provide technical assistance" I
13 thought we had discussed "at the request of the recipient."

14 Am I wrong about that?

15 Oh, mine doesn't say that. Okay. I take it all
16 back.

17 FACILTATOR: Any other questions on Section (f)?
18 Call the question. All in favor? Question?

19 Sandra?

20 MS. HENRIQUEZ: I just want to ask a question for
21 clarification.

22 So what does it mean -- what happens if the
23 recipient doesn't ask for technical assistance? I'm just
24 curious. What do you see happening?

25 MS. MARASCO: Fix it on our own.

1 MS. HENRIQUEZ: Okay. All right.

2 FACILTATOR: Are we ready to vote on that one now?

3 MR. TILLINGHAST: The tribal caucus changed "may"
4 to "shall" as their proposal yesterday.

5 MS. HENRIQUEZ: Was this (f) originally -- the
6 change in (f) was originally just to make it conforming? Is
7 that right or not?

8 MR. TILLINGHAST: No. The change to (f)
9 originally was to make it conform to the amendment to
10 NAHASDA that said you had to enter into a performance
11 agreement.

12 MS. HENRIQUEZ: Right. So the committee wanted to
13 go further than just that, then?

14 MR. TILLINGHAST: That's correct.

15 MS. HENRIQUEZ: Okay. Okay.

16 FACILTATOR: Would you like to take a caucus for
17 that?

18 MS. HENRIQUEZ: No.

19 FACILTATOR: No. All right. All issues resolved?
20 Can we vote on that now?

21 MR. JACOBS: If the attorney has a concern that he
22 would like to share with the whole group into negotiations,
23 please do so. We're into negotiations.

24 MS. HENRIQUEZ: I yield.

25 MR. ATALLAH: I guess, these were changes that

1 were made. The thinking behind removing the word
2 "substantially" because, again, that's -- it's a term of
3 art, "substantial noncompliance" in all of this context, and
4 if we could just get a quick explanation as to what the
5 thinking was behind removing that word.

6 FACILTATOR: Judy, do you want to explain it?

7 MR. TILLINGHAST: The rationale, as I understood
8 it, is that a recipient may want technical assistance, even
9 though the noncompliance that it is guilty of may not
10 qualify as "substantial." They may want the technical
11 assistance any way.

12 MS. MARASCO: Well, if Sandra wants to look at
13 everything, we think she ought to have to help to fix
14 everything.

15 MS. HENRIQUEZ: That's fine. I'll help you fix
16 everything. Although, you may not want my fixes.

17 Here's the conversation: So, initially, as I
18 understand it, the language in committee -- in the working
19 group was just to add the last -- the highlighted in yellow
20 portion at the end of -- I'm sorry -- the first two words at
21 the beginning of (f) that's in yellow and the last series of
22 words in yellow at the back of (f).

23 And then through discussion, "substantially" was
24 deleted and "may" was changed to "shall."

25 And I have to tell you, honestly, I don't --

1 personally, I don't understand why or what difference it
2 makes whether those two words are in or out. The "shall"
3 means that we have to provide technical assistance when you
4 as ask. And I can't image you asked, and we would say, No,
5 we're not going to do it. So I can live with "shall."

6 I don't understand the "substantially" whether
7 it's in or out. This seems to suggest that we might provide
8 technical assistance at your request, regardless of the
9 scope the issue, correct? So it doesn't have to be a major
10 "oh, my gosh, we messed up big this time," "just help us
11 think through a better procurement strategy" or something
12 like that.

13 So that's the impetus for this? Okay.

14 FACILTATOR: Go ahead, Sandra.

15 MS. MARASCO: Phil is thinking.

16 FACILTATOR: Okay. Phil, do you want to add
17 something?

18 MR. BUSH: Yeah. Yesterday late in the day, I
19 can't remember how or whom -- it doesn't matter -- if I'm
20 reading this correctly, by striking out the word
21 "substantially," that means even for any -- even minor
22 noncompliance, and if the recipient requests technical
23 assistance they'd still have to enter into a performance
24 agreement, is that the way I read it?

25 If I read it that way, then I would really like to

1 have "substantially" put back.

2 MS. MARASCO: Phil, I fought all day to put
3 "substantially" back. Nobody would listen to me.

4 FACILTATOR: You won't get an argument out of HUD.

5 MR. BUSH: Put "substantially" back.

6 FACILTATOR: Okay. Put "substantially" back and
7 then we'll vote.

8 MS. MARASCO: Don't thank him. I argued all damn
9 day.

10 MS. HENRIQUEZ: Thank you, Judith.

11 FACILTATOR: Okay. So "substantially" comes back,
12 "shall" will stay, and everything else stays. All right.

13 MS. MARASCO: Just now got it.

14 FACILTATOR: All in favor? Any opposed? Okay.
15 We pass, thank you.

16 Next? (Inaudible.)

17 MR. TILLINGHAST: The next issue is, if you would
18 again stay with the same document, which is 187, and creep
19 up to Subsection (a), and Ed Goodman -- oh, Ed where did you
20 go? Ed, you're up.

21 MR. GOODMAN: This Ed Goodman. The language that
22 you've got up on the board for proposed 532(a) is the
23 majority proposal from the workgroup. There was a minority
24 proposal from HUD. I believe it's going to be put on the
25 right-hand screen in a moment. But while that's happening,

1 I'll just explain the context and the issues that are -- or
2 the one issue that's in dispute over 532(a).

3 When NAHASDA was first adopted there, if you look
4 at Section 401(a)(1) of the statute, it authorizes the
5 Secretary to take certain actions after notice and
6 opportunity for a hearing and a finding of substantial
7 noncompliance. And those actions are:

8 Terminating payments, reducing payments, limiting
9 availability of payments, all of your grant amounts, or
10 replacing the TDHE.

11 Prior the amendments in 2000 to NAHASDA, there was
12 some ambiguity about whether HUD could take some action with
13 regard to your grant amount if there was something that was
14 noncompliance, but it was not substantial noncompliance.

15 In 2000, 405 was amended, the Section 405(c) which
16 would have allowed the Secretary to adjust, reduce, or
17 withdraw grant amounts possibly for things that were
18 nonsubstantial noncompliance was deleted, and 405(d) was
19 added which referenced back to 401(a), so basically put a
20 limit on the Secretary's ability to reduce, terminate, or
21 limit the availability of grant funds to the substantial
22 noncompliance notice and hearing process.

23 So we have in the workgroup proposed a
24 Subsection (a) now to 532 which would address that
25 regular -- that statutory change, although we have a

1 difference of opinion on the language.

2 The language that the majority is proposing which
3 is on -- it's on the left screen -- basically states that
4 HUD cannot restrict their access to funds in any way if
5 there's nonsubstantial noncompliance, including but not
6 limited to, the factors that are -- or the types of
7 compliance issues that are listed in 405(a)(1) of the
8 statute which are, again, terminate, reduce, or limit.

9 The issue that we came across in the workgroup and
10 which is the issue that's the stumbling block is HUD has a
11 process called a LOCCs edit, in which HUD will restrict your
12 ability to take money out of LOCCs account if there is some
13 issue that HUD wants you to comply with that you have not
14 complied with that is not necessarily a substantial
15 noncompliance.

16 And the dispute was whether LOCCs edit can be done
17 under the statutory amendment in 2000. The language that
18 the majority has proposed in 532(a) would make clear that
19 HUD cannot restrict your access to any of your grant funds
20 in any way, shape, or form if the issue is a nonsubstantial
21 noncompliance.

22 And the HUD minority proposal, which I believe is
23 on the right screen -- it's not up. You're still looking
24 for it? Okay.

25 MR. BUSH: He's still writing it.

1 MR. GOODMAN: I'll let Jad explain it when it gets
2 up there but, essentially, the goal of the language that HUD
3 would be proposing would be to preserve their ability to do
4 a LOCCs edit.

5 And so we basically have a disagreement over the
6 reading of the statutory language in 401 and 405 as to
7 whether a LOCCs edit is permitted or not under the those
8 circumstances. And that's the one issue that prevented us
9 from having a consensus recommendation out of the workgroup.

10 So you'll see two different proposals up there.
11 The one that we propose, which is on the left. The intent
12 is to prevent any kind of restriction or limit on access to
13 funds if there's nonsubstantial noncompliance.

14 And the HUD minority proposal would be to allow or
15 preserve HUD's ability to do what's called a LOCCs edit.

16 Does that sound about right?

17 FACILTATOR: Jad, do you want to comment on that?
18 Need a mic? Jad, HUD's proposal is the one on the left
19 screen here?

20 MR. ATALLAH: Jad Attalah with HUD. I think Ed
21 pretty much summarized it pretty well. I'll just make the
22 point that this really is an issue of legal interpretation
23 of what a LOCCs edit is, whether it amounts to a limitation
24 of the availability of funds, as that term is used in
25 NAHASDA.

1 Since the beginning of the program and since we
2 started using LOCCs edits, we haven't viewed a LOCCs edit as
3 a limitation on the availability of funds. We make a
4 distinction between suspending a recipient from LOCCs and
5 placing a LOCCs edit.

6 For us, a LOCCs edit is simply just an
7 administrative flag that goes up in our LOCCs system when
8 there are, under certain categories of circumstances, where,
9 basically, before a recipient can draw down funds, there is
10 a flag that comes up and just says you need to provide
11 additional documentation before the drawdown can take place.

12 So it's not like it's a denial of access to your
13 funds outright from the system. It's simply a flag that
14 goes up that requires additional documentation before funds
15 can be drawn down. The distinction there is that if a
16 recipient is suspended from LOCCs that would be a limitation
17 of the availability of funds and that would trigger the
18 enforcement process and so forth.

19 FACILTATOR: Okay. And that could take place
20 anytime when there was something detected on HUD's part?

21 MR. ATALLAH: We have a PIH notice that
22 specifically addresses LOCCs edits and LOCCs, and there are
23 three or four circumstances where we use them. Usually for
24 late APRs, environmental reviews that aren't done, and I
25 think audits and so forth.

1 FACILTATOR: Judith?

2 MS. MARASCO: And correct me if I'm wrong, but
3 even if you draw down more than 10 percent of your grant
4 that flag goes up. We've had edits when we've drawn down
5 more than 10 percent at one time. So it's not as simple as
6 those three items.

7 MS. BULLOUGH: That is correct that there is a --
8 an edit in LOCCs that simply, if you draw in one month more
9 than 10 percent of your grant amount, then it automatically
10 sends it to the same process, where the area office reviews
11 the request. And my understanding is, nine times out of ten
12 when it's that, it's automatically -- they don't even ask
13 for additional information. It's automatically just
14 granted, so that's a little bit different from what we're
15 talking about which is --

16 MS. MARASCO: No. It's not different because it
17 comes into play also. And I'm going to add to that
18 statement, when we're drawing down LOCCs and everything is
19 so time sensitive, that's not the time to hold up the funds.

20 You know, we've got three days to expend our
21 funds, and if you're running a down payment assistance
22 program where you have deadlines for close of escrow and
23 those types of issues, and those edits come up on LOCCs and
24 it ties up our funds, we get penalized in those escrows
25 because we time them so that we're paying the least amount

1 of money in fees that we can possibly pay. If it throws us
2 off three or four or even a week, all that has to be
3 readjusted and recalculated.

4 So even though you say it's a simple edit, on our
5 end it causes a great deal of consternation.

6 FACILTATOR: Phil?

7 MR. BUSH: I know what the PIH notice reads, and
8 you're -- you're almost right. And I say that because this
9 is actually something that I personally have been working on
10 with our region, and I've had many conversations with our
11 administrator pertaining to LOCCs edits especially when it
12 comes to the letter of warnings, the LOWs, and whatnot.

13 When you read your proposed language up there,
14 it's for anything but substantial noncompliance. And that's
15 everything. So you can decide to put an edit on it.

16 And I'll give you some really good examples. And
17 these are true stories, and they've happened within the last
18 month and a half. I won't tell the tribe's name. But in
19 HUD's efforts to close previous year's findings -- and I
20 mean previous year whether it's a monitoring finding or
21 audit finding -- they went back nine years and found this
22 nine-year-old relocation finding. And based of that
23 relocation finding, they issued an LOW, even though the
24 tribe was able to document to HUD every quarter they were in
25 dispute with HUD's determination that, you know, that

1 actually they actually relocated the families -- and this is
2 the first I've ever seen this -- and HUD said, Well, it
3 wasn't eligible. Well -- total reverse. But that's a whole
4 nother story.

5 At any rate, I mean, this dispute was going on for
6 nine years. So finally the -- the ONAP says, Well, you know
7 what? We're tired of it. The only way this is going to get
8 resolved, we're going to issue a letter of warning, put the
9 LOCCs edit on.

10 And if you read the PIH notice, the way a LOCCs
11 edit is supposed to go on is if that tribe or that housing
12 authority, TDHE, doesn't have the capacity. It turns into a
13 capacity question. And when you read it -- and I wish I had
14 it, and I think we should get it and let everybody read it
15 today, right now, because this is what we're talking about
16 on these LOCCs edits and this is what gives HUD the current
17 authority to put the edits on -- that I don't know what a
18 nine-year-old finding had to do with that tribe's
19 current-to-date capacity, as we speak. It was -- I mean,
20 we're talking nine years of a dispute, which by the way, the
21 HUD hammer worked, you know. They went ahead and fixed it
22 and said, Okay. We're done arguing. I guess we're going to
23 fix it. Because, you know, when you go through the edit
24 process, you have to submit everything whether it's payroll
25 backup, it doesn't matter. I mean, if you ever had a LOCCs

1 edit, you know what I'm talking about. And so it creates
2 this bigger administrative burden.

3 But currently, I believe the system is abused,
4 because it's easy to say, Well, we're going to issue a
5 letter of warning. You don't have the capacity.

6 There was no way for that tribe -- and this is one
7 instance, and I can name you five more that's happened
8 within the last six weeks that this has taken place. And
9 it's a hammer that they've used. And I believe that's why
10 you want to retain it maybe. I don't know. I'm hoping it's
11 not. But it's a system that I currently believe that's
12 abused. Because think about it, what's a nine-year-old
13 finding have to do with the current capacity of that tribe?

14 MS. HENRIQUEZ: I was going to make a wiseguy
15 remark like, you know, that's why we want the hammer. But,
16 you know, just so we can go after nine-year-old findings,
17 because I agree with you, that was wholly inappropriate.
18 And how it was used in that instance -- if that's always --
19 Paul Harvey used to say, And now the rest of the story.

20 But taking what you said on face value, I think
21 that that was not necessarily an appropriate action to take.
22 There must have been other ways to get to resolution and
23 closeout on that issue.

24 Having said that, sometimes there is a need for
25 people to pay attention, you know, and how do I get your

1 attention sometimes. I don't want us to abuse this at all.
2 I don't want to stymie people's ability to get their money,
3 to get access to be able to do the work you all are
4 committed to do. And we need to support you in that. We
5 should just continue to try and let's talk some more about
6 how we get to a place.

7 LOCCs edits are used in -- across HUD as well. We
8 use them in public housing. They are a useful tool when an
9 entity is spending money, taking action -- has taken action
10 that should not continue, won't come, won't have a
11 conversation to try and clean it up and rectify the
12 situation.

13 And the easiest way to get people to pay attention
14 is not through letter writing or initial letter writing and
15 letters of warning. It's to say, Okay. You've got to come
16 talk to us before you can draw down any more money. And
17 then people begin to say, Oh, yeah, well, I'll talk to you,
18 then.

19 We've got to figure out a way to preserve some of
20 that ability without it being a long drawn-out process so
21 people don't keep going down the wrong path, spending money,
22 and getting themselves deeper in a problem. But we also
23 have to figure out ways so that we are not being arbitrary
24 and capricious in our exercise use of it.

25 It's a struggle here. We need to figure out if

1 there's middle ground and how to get it.

2 FACILTATOR: Carol?

3 MS. GORE: I just want to make sure I understand.
4 I think I do. I've been looking at both the workgroup's
5 proposal and HUD's proposal. When I read the workgroup's
6 proposal they're very specific about what is excluded in
7 Subsection (c). So let me -- I want to make sure I
8 understand.

9 532 is about simple noncompliance, if there is
10 such a thing. Subsection (c) is about substantial
11 noncompliance. So it seems to me that both proposals
12 respond to excluding those actions that would be relevant to
13 substantial noncompliance -- both groups are nodding their
14 heads -- so I just want to make sure the only thing we're
15 talking about here is the only other option is the LOCCs
16 edit, which by the way, I've never heard of before today.

17 So I want to just make sure that I'm clear and
18 that that really from my reading of these two paragraphs is
19 the only difference of opinion between the two proposals,
20 unless I'm missing something.

21 And neither proposal really responds to the LOCCs
22 edit except that the workgroup's proposal is specific
23 about -- the only thing it's added is "restrict the
24 recipients access to IHBG funds."

25 I just want to be clear on where the disagreement

1 is. Everybody's nodding their heads. Thank you for letting
2 me say that out loud.

3 FACILTATOR: Ed?

4 MR. GOODMAN: I just wanted to respond to that,
5 Carol.

6 Yeah. The difference between the screen on the
7 right, which is the tribal workgroup proposal, and the
8 screen on the left, which is the HUD workgroup proposal, is
9 that the tribal proposal intends to prohibit HUD from doing
10 the LOCCs edit by adding that additional language right
11 before the reference to those four factors.

12 And that's -- I had never heard of a LOCCs edit
13 until we got into the workgroup either. And when we had
14 that discussion, that's where the difference of opinion is.
15 So that's the issue now.

16 The concern -- reason why we didn't say "just
17 LOCCs edit" is, well, what if HUD comes up with some other
18 mechanism that's called something else. So if you just
19 refer to a LOCCs edit, it could be something else. Again,
20 that's the difference of opinion.

21 FACILTATOR: Jad?

22 MR. ATALLAH: If I can also clarify.

23 The reason why the minority proposal uses that
24 language which says -- the last sentence, "Other than the
25 actions for substantial noncompliance provided in Subsection

1 (c)" is just to simply track the statutory language that
2 lists those four actions that we have to find substantial
3 noncompliance and go through the enforcement process before
4 we can impose those.

5 So we're simply saying, when it's something small,
6 when it's something that's nonsubstantial noncompliance, we
7 can provide TA, we can provide recommendations in terms of
8 clearing issues up, but can not do any of the four things
9 that we can do in serious cases of substantial
10 noncompliance.

11 And I think the purpose of the language on the
12 right was to capture LOCCs edits. That's what we were
13 trying to -- the majority was trying to achieve. I don't
14 know if it does, but I assume it does. We can be more
15 specific and say "LOCCs edits" in the regulations, but
16 that's your call.

17 FACILTATOR: Carol?

18 MS. GORE: I just want to ask one follow-up
19 question, and thanks for response.

20 Then, how is the LOCCs edit any different from
21 No. 3 under (c) which says, "limit the availability of
22 funds"? Isn't that in effect the same thing?

23 MR. ATALLAH: And our position has been that a
24 suspension from LOCCs amounts to the limitation of the
25 availability of funds. The purpose of LOCCs edits is not to

1 limit the availability of funds. It's simply an
2 administrative means in which to request additional
3 documents before drawdown can happen.

4 And I think you identified the distinction right
5 on. That's where we disagree.

6 FACILTATOR: Yes, Phil?

7 MR. BUSH: And I appreciate that, but that's not
8 practice. And I'll let you know that is not the practice.

9 Now, I hope there's not a disconnect from
10 headquarters to the field offices, but that is not the
11 practice that you were talking about.

12 MS. HENRIQUEZ: I will just be candid. I see head
13 shaking from everybody whose in one office, one region.

14 So I see why it's an issue because of how you all
15 have been effected by it directly. And so if you hadn't
16 been effected by it so directly, we wouldn't have this
17 problem, right? We wouldn't be having this discussion.

18 So let me just -- so what I would ask is, we need
19 to fix the issue in the office as opposed to changing the
20 statute. That's what I would propose. I understand the
21 hesitancy, but I just -- you know, if this was a rampant
22 issue, then I -- but it's -- this for me focuses like a
23 laser where the problem and what the problem is -- or where
24 the problem is. And it's applicability. And it's not
25 nationwide; it's officewide. A single officewide.

1 Well, you don't have to say yes or no. You don't
2 have to say yes or no. Although, I will say those two are
3 going (Inaudible).

4 FACILTATOR: Basically, Sandra, what you're
5 saying --

6 MS. MARASCO: (Inaudible.)

7 FACILTATOR: Phil?

8 MR. BUSH: I still believe that somewhere in the
9 regulatory requirements that there would need to be
10 clarification that should be codified in the regulatory
11 requirements rather than relying on the interpretation of a
12 PIH notice and maybe one or two offices.

13 But I would like to question -- pardon me? I said
14 one or two. I don't know --

15 MS. HENRIQUEZ: One Phil.

16 MR. BUSH: I know that's what you're saying. But
17 I would like the audience to raise their hand if they've
18 ever had a problem with LOCCs edit. Oh, look. There's
19 some more, and they're not in our region.

20 MS. HENRIQUEZ: What was the reason for LOCCs edit
21 and how (Inaudible).

22 MR. BUSH: Okay.

23 MS. HENRIQUEZ: We could debate that a lot.

24 FACILTATOR: Okay. I think we have a clear
25 picture now. We have a clear picture of this issue. And we

1 have two different proposals on the screens.

2 So how would people like to proceed on this? I
3 think it's clear as -- Sandra, you're laying out that the --
4 yes, Sharol?

5 MS. MCDADE: Madame Secretary, I guess, again,
6 that's why I'm going to go back to my concern with the
7 definition of what noncompliance is. As somebody said
8 earlier, "simple noncompliance," what is that? What is
9 "simple noncompliance"? Because when I read the definition
10 for "substantial," it says, right out the gate, if you're in
11 noncompliance with NAHASDA or these regulations. To me,
12 that's what the program is.

13 So how can you say "simple noncompliance"? That
14 is our concern.

15 FACILTATOR: Yes, Sandra?

16 MS. HENRIQUEZ: Let me propose at least a
17 strategy. I don't have language. But the strategy would be
18 to, in Section (a) to actually codify what's in the PIH
19 notice, which says, Under certain circumstances -- about
20 LOCCs edits -- under certain circumstances, principally for
21 failure to comply with environmental review requirements;
22 failure to submit an acceptable APR; failure to submit an
23 audit complaint with a single audit, the -- to submit that
24 in the way you're supposed to; and for documented concerns.

25 And then the next part talks about the documented

1 concerns have got to do with your grant funds, and you've
2 got to have monitoring for it, a management decision letter
3 for an audit report, a letter of warning or other document
4 to the recipient that clearly conveys HUD's concern about
5 the expenditure of IHBG funds.

6 So it narrows the window for which LOCCs edits
7 could be taken. And, therefore, the relocation issue nine
8 years ago doesn't -- well, could fall into this if it were a
9 documented issue prior, giving notice to the tribe or the
10 TDHE.

11 MS. MARASCO: Or drawing down more than
12 10 percent.

13 MS. HENRIQUEZ: Well, we can fix that one as well.
14 Because with closings and all that stuff, we could figure
15 out how to fix that LOCCs flag anyway.

16 MS. MARASCO: I've got my assistant trying to
17 figure out how to not draw down 10 percent.

18 MS. HENRIQUEZ: Well, see, that's the other one.
19 That's the quid pro quo. If we don't tell you or if we do
20 tell you far enough in advance that we're going shut you out
21 of LOCCs until some compliance things happen, and we lift
22 the 10 percent flag, you could empty out your bank account.
23 Now, maybe that's okay in some instances but there's no
24 balance there.

25 MS. MARASCO: (Inaudible.)

1 MS. HENRIQUEZ: We could fix the 10 percent edit,
2 but we (Inaudible.)

3 MS. MARASCO: Close it out.

4 FACILTATOR: So that's your counter proposal?

5 MS. HENRIQUEZ: We don't have language at this
6 point. But if that conceptually works, is that helpful?

7 FACILTATOR: Can I get some tribal response to
8 that?

9 Larry?

10 MR. COYLE: Is there some way to tie in a written
11 notification to the flag that pops up for the LOCCs drawn
12 down prior to the...?

13 MS. HENRIQUEZ: It's required.

14 MR. COYLE: It never happens.

15 MS. HENRIQUEZ: It should be.

16 MR. COYLE: I --

17 MS. HENRIQUEZ: Are you responding -- it never
18 happens because you have experienced it that way?

19 MR. COYLE: The 10 percent or if you we,
20 particularly, draw down all of it because we're capable of
21 it. But even then we get our numbers from LOCCs and all
22 that for draw down, and we go in and we got to call HUD
23 first because there's a flag there.

24 MS. HENRIQUEZ: Right, right. On the 10 percent,
25 it's just an automatic flag. We can change that. We could

1 go up to 15 percent. It could get lifted all together. We
2 can fix that.

3 Yeah. Give me the language I want, and we can
4 fix -- we're negotiating. You know, we can get to "yes" a
5 thousand different ways.

6 But so we could fix that, but sort of unfettered
7 is another, you know. So does that...

8 FACILTATOR: Yes, Judy?

9 MS. MARASCO: I think some of the discussion is
10 just the interpretation of the law, and we're not sure
11 putting the verbiage from the PIN [sic] notice into the
12 regulation is going to do it for us, to the point that we'd
13 almost acquiesce to the HUD version before we did that.
14 That's what I'm hearing here.

15 I don't know -- I don't see that big a difference
16 in what we're discussing, but I don't think we've got all
17 the tribal people on board with adding the PIN notice
18 language into the regulation. I think -- I think it's still
19 fairly basic, is how we're interpreting the law. And that's
20 completely different.

21 FACILTATOR: You have a suggestion, Judy?

22 MS. MARASCO: You know, I don't have a suggestion.
23 Give us all our money.

24 FACILTATOR: Phil and then Tim.

25 MR. BUSH: You know, understanding the proposal of

1 taking the PIH notice language and inserting that into a
2 regulatory requirement sounds like an easy fix, but there's
3 even problems with that there language. I mean, that brings
4 us right back around to where, obviously, if -- I think if
5 the PIH notice was really clear, we wouldn't be having these
6 issues and problems that we currently do.

7 So I think alls we're doing -- we're not solving
8 the problem or the issue. We're just -- am I making sense
9 there?

10 MS. HENRIQUEZ: No, I understand. Yeah. No.
11 You're -- I understand. I really do.

12 But what I'm struggling with is, I keep coming
13 back to what's driving it, in large part for you, I think,
14 is an implementation issue not -- it's an implementation
15 issue, not a language/statutory issue.

16 And I -- so it's incumbent upon us to fix the
17 implementation issue. You could write all the stuff you
18 want. And if someone is still implementing it badly, you're
19 no better off. So it's incumbent upon us to fix the
20 consistency or lack thereof and how it's applied.

21 MR. BUSH: I would agree with that so long as to
22 understand it's also an interpretation issue on how --

23 MS. HENRIQUEZ: Right, right.

24 MR. BUSH: Okay. I do agree with, yes.

25 MS. HENRIQUEZ: If you have a hangnail, do I shut

1 I don't say those words to people.

2 FACILTATOR: Phil.

3 MS. MARASCO: Okay. Let's look at it.

4 MR. BUSH: I would -- I know -- I'm going to say
5 I'm almost going to agree with you, but based off of legal
6 counsel, you know, obviously, there's two different
7 interpretations of how -- whether or not HUD even has the
8 legal authority to place a LOCCs edit on -- under the
9 current statute the way we read it -- or the way I read it.

10 So because it actually talks about that it can't
11 restrict, and so -- and I know that this was the impasse
12 that the workgroup had -- is it possible that we could
13 get -- hold on. I just lost what I was going to stay.

14 Ed just reminded me, so I'm going to turn this
15 over to Ed.

16 MR. GOODMAN: I was reminding Phil that to bring
17 back the good ole days, the formula negotiated rulemaking.

18 There was an issue -- and I can't remember the
19 specific issue now -- there was an issue that we had a
20 similar disagreement over statutory interpretation, and we
21 had HUD to come back with a formal legal opinion supporting
22 their position.

23 And what Phil and I had talked about was the
24 possibility of tabling this issue until we get to
25 Minneapolis and having HUD provide a formal legal opinion as

1 to HUD's authority to do a LOCCs edit, not generally, but
2 under the specific NAHASDA statutory scheme where 405 and
3 401 interrelate. And then I think we'd have a clearer
4 picture of what HUD's legal position -- where the
5 justification is.

6 Because from our perspective, at least from how I
7 look at it, if you're -- no matter what you call it, if you
8 put an edit on someone's ability to draw down their funds,
9 that's a restriction or a limitation on their ability. So
10 if there's a legal analysis that supports that, I would like
11 to see it. I think that might help us move forward at the
12 next meeting.

13 So that's the proposal that Phil had.

14 MR. BUSH: Thanks. What a heck of a proposal.

15 FACILTATOR: That's what you wanted to say, Phil.
16 Sandra?

17 MS. HENRIQUEZ: Thank you. We will do that. And
18 I would ask that we get that prepared in advance of our next
19 meeting and get it to people so that you've got time to look
20 at it before we convene again. Okay. Thank you very much.
21 We appreciate that.

22 MR. TILLINGHAST: Now, to clarify that, if I
23 could, we know that they can do a LOCCs edit if it's
24 substantial noncompliance because they can do that -- they
25 can do anything to you for substantial noncompliance. We're

1 talking about situations where it's not substantial
2 compliance. The situation covered by (a).

3 MS. HENRIQUEZ: Okay.

4 FACILTATOR: Is that the group's pleasure, then,
5 to wait until Minnesota on this one?

6 Can we note that we've spent 26 minutes on this,
7 and we'll take up again when we get to Minnesota.

8 Lafe, let's go on to the next issue. This one
9 we'll table to Minnesota.

10 MR. TILLINGHAST: The next one requires you to,
11 again, stick with 187, and scroll down to (b). Now, this is
12 a two-parter. There's two bits of regulatory language that
13 go together. The other part is C-180. So they both need to
14 go on the screen.

15 Now, let me explain the issue. HUD has
16 interpreted a 2008 amendment to NAHASDA as saying that a CAS
17 overcount in itself is not substantial compliance, which
18 means -- is not substantial noncompliance. I'm sorry. I
19 always get that wrong -- which means that regardless --
20 under HUD's interpretation -- regardless of the size of the
21 overcount, you do not get a hearing. You are relegated to
22 what's called the Subdivision D process, which is basically
23 you have to write a letter to the same person who just took
24 your money in the first place.

25 We take a different view. The tribes take the

1 view that the words "in itself" have meaning and that just
2 because a CAS overcount -- just the existence of a CAS
3 overcount doesn't make it substantial compliance --
4 substantial noncompliance, but if the amount or the impact
5 on your program is sufficiently great, we would like to be
6 able to at least make the argument that, at that point, it
7 becomes substantial noncompliance.

8 And we don't want the regulations to be written to
9 take that argument away from us. We're not asking HUD to
10 agree with that argument. We're just asking HUD to not take
11 the argument away from us. So we have written language that
12 allows us to say that already.

13 We have one more bit of history on this. The
14 Senate Indian Affairs Committee, when it was explaining this
15 amendment, says that what this amendment does is that it
16 means that a CAS overcount doesn't automatically give you a
17 hearing. They use the word "automatically." I think that's
18 consistent with our argument of the law that if you're over
19 by one unit, that doesn't automatically get you a hearing.
20 But if you're over by 50 units, that's half your CAS, maybe
21 you get a hearing.

22 But the way our language -- I need a movable mic I
23 guess -- the way our language does it, is it says that
24 basically you're relegated to Subpart (D), which was
25 affectionately referred to as the kangaroo court yesterday,

1 if your CAS overcount does not constitute substantial
2 noncompliance under 534(e), that forces you to go over to
3 534(e), which we also amend. And it retains this critical
4 language, saying that a CAS overcount, in itself, isn't
5 considered substantial noncompliance. This key phrase
6 enables us to keep the argument.

7 We had -- I had a candid discussion with Jad. Jad
8 was speaking from his cellphone for himself on the minority
9 proposal, but he acknowledged that their language was
10 designed to take this argument away from us and prevent us
11 from making this argument in court. And Jad could show you
12 how that -- how his language accomplishes that.

13 So you have to take one of those off I guess, Jad.

14 Where's our proposal? Where's 187? That's the
15 problem. We have three things to show and only two screens.
16 Yeah. Okay. That is our proposal, the majority proposal.

17 Now we'll switch. I'll give the microphone to
18 Jad, and you can put up the minority proposal.

19 So that is what the majority is proposing, these
20 two sections.

21 MR. ATALLAH: That's it. So the language that we
22 are proposing, in our opinion, is to -- really codifies what
23 the 2008 amendment sought to achieve, which was that prior
24 to the 2008 NAHASDA reauthorization, there were disputes
25 that obviously arose about procedures that HUD had to follow

1 before adjusting recipients' grants due to FCAS overcounts.

2 A lot of litigation was spurred as a result of
3 that. And in order to fix the problem moving forward, HUD
4 proposed this specific statutory amendment to resolve that
5 issue. We proposed this language and this language was
6 enacted specifically to make it clear that when --
7 generally, substantial noncompliance in order for us to
8 adjust -- make any adjustments to recipients' grants, we
9 have to find substantial noncompliance, and we have to allow
10 recipients through the entire enforcement process. Meaning,
11 you have a letter of warning, the notice of intent, the
12 imposition of remedies, the right to hearing, and then
13 finally agency action.

14 Prior to this, we had been following, and we still
15 follow, the formula challenge process for FCAS overcounts.
16 Under Subpart (D), we have a totally separate process for
17 when you challenge formula determinations. And our position
18 has always been that that is the process that governs FCAS
19 overcounts.

20 In 2008 in order to clarify that issue, we
21 proposed and this provision was enacted into the statute to
22 make it clear that FCAS overcounts -- the process that
23 applies really is the formula Subpart (D) process. The
24 language we're proposing simply states that.

25 I can go through it, but essentially, that's what

1 it says. So generally, before we affect grants, we have to
2 find substantial noncompliance, and we have to allow you the
3 right to a hearing and going through the Subpart (F)
4 enforcement process.

5 The one exception to that is FCAS overcounts under
6 this statutory amendment which is governed by formula
7 challenge procedures. Again, it's an issue of how we've
8 read the amendment, but again, this is language that we
9 propose for the purpose of resolving this moving forward.

10 So that's our position.

11 FACILTATOR: Are there any questions of
12 clarification? We're not into negotiation yet. Are there
13 any questions of clarifications of either of the positions
14 put forth by the tribes or by HUD?

15 Okay. We can start the clock and start
16 negotiations.

17 Do we have -- does this have the hard copy of the
18 HUD proposal on it as well? People were asking for some
19 hard copies of the HUD proposal that was given out at the
20 end of the meeting in Seattle last month. No? It's
21 Document No. 184. I'm sorry. It was given out today and
22 yesterday. Who needs copies of the HUD position on this?
23 Raise your hand if you need a copy of HUD's. 184, most of
24 you probably have it. C-184.

25 MR. JACOBS: Are we ready for consensus?

1 FACILTATOR: We're comparing the two versions and
2 waiting for somebody from the committee to make a proposal
3 about how to narrow the gap.

4 MS. MARASCO: So, Sandra, the argument are the
5 words "in itself" --

6 FACILTATOR: Can we have order, please?

7 MS. MARASCO: -- that's the argument.

8 MS. HENRIQUEZ: I understand the real argument to
9 be the process by which --

10 MR. JACOBS: Your attention, please, we're still
11 in negotiations.

12 MS. HENRIQUEZ: (Inaudible.) one is the hearing
13 process, and one is more administrative. It's the section
14 pursuant to section 534(e) versus --

15 FACILTATOR: Can we have some quiet in the room,
16 please. The court reporter can't hear what's going on, so
17 if you have conversations, please take them outside.

18 Okay. Go ahead now. I think, Sandra, you were
19 making a comment.

20 MS. HENRIQUEZ: Judith was asking what the
21 differences were between the two. I had asked the same
22 question. As I understand it, it's the issue of process by
23 which the repayment or adjustments, based on an
24 overfunding -- based on overfunding as a result of -- of
25 sort of wrong reporting, if you will. So one is through an

1 administrative process, and one is through sort of a more
2 elaborate, more -- substantially longer hearing process, as
3 I understand the two. Otherwise they're exactly the same --
4 or virtually the same.

5 Somebody should correct me if I've overstated or
6 understated.

7 MR. TILLINGHAST: Yeah. I would phrase it a bit
8 differently because the statute does say that an overcount,
9 in itself, is not substantial compliance -- noncompliance,
10 which means that you don't get the hearing. You get the
11 briefs section -- Subpart (D) procedure.

12 We -- we want is the ability to argue that if you
13 have a CAS overcount that counts for half your budget, that
14 the very magnitude of it makes the -- makes the overcount
15 substantial, therefore, entitling you to a hearing before
16 they take that amount of money away from you.

17 Okay. It's -- and what makes it different, the
18 key sentence is the second sentence of the HUD proposal
19 where it says, Where recipient fails to comply -- where the
20 recipient has a CAS overcount, the recipient shall repay any
21 HUD funds overpaid in accordance with Subpart (D).

22 That's in every case. Even if you had a
23 \$10 million overcount, you would be required to use what
24 we've affectionately referred to as the kangaroo court in
25 Subpart (D).

1 I'm sorry? Well, no the problem is, is they've
2 taken out half of our -- they've removed half of our
3 proposal from the board. If you put our proposal back on
4 the board, I can show you why ours doesn't do that.

5 MS. HENRIQUEZ: It's on the right.

6 FACILTATOR: It's on the right.

7 MR. TILLINGHAST: Only half of it is. Where's the
8 number? C-180. Yeah. Okay. There you go.

9 Our proposal says that -- that if your -- if your
10 overcount does not constitute substantial noncompliance --
11 if your overcount does not constitute substantial
12 noncompliance under 534, you have to go to (D).

13 But to find out whether it's substantial
14 noncompliance or not, you have to go 534, which is the part
15 that was taken off the board.

16 Now I'm going to go over to the other part where
17 it says that -- that an overcount, in itself, is not
18 substantial noncompliance. That, therefore, leaves us free
19 to argue that the words "in itself," means that a large
20 overcount is substantial noncompliance.

21 Now, if you go -- if you put HUD's proposal back
22 on -- can you do that over here? This just repeats the
23 statute. So the operative sentence is this one. This one
24 takes out -- you won't see any reference to the phrase "in
25 itself" in this sentence.

1 It says that all CAS overcounts are going to be
2 handle under (D) no matter how big they are, no matter how
3 much impact they have on your program.

4 Does that explain the difference?

5 MS. MARASCO: "In itself."

6 MR. TILLINGHAST: "In itself" is the key phrase,
7 yeah. That's -- those are the two keywords that our
8 position is the Congress gave us to entitle us to make this
9 argument. And there's a doctrine that every word in a
10 statute means something. And why would Congress put the
11 words "in itself" in there if not for a reason? If they
12 meant that every CAS overcount was going to be handled under
13 Subpart (D), why didn't they just say that? Well, they
14 didn't. They put in words "in itself."

15 Again, we're not asking HUD to agree with this.
16 We're just asking HUD not to deny us the right to make that
17 argument in court when we get hit with a huge CAS overcount.

18

19 FACILTATOR: Sandra?

20 MS. HENRIQUEZ: Okay. I'm on a slippery slope
21 here. And the slippery slope is I want to negotiate in good
22 faith. So I need to tell you that the slippery slope I'm on
23 now makes me very nervous. And I'm going to ask that you
24 table this because you all know that there is litigation out
25 there. Some of you would contend that this postdates that

1 litigation.

2 But I've had conversation, not with my HUD
3 counsel, but with the Department of Justice counsel that
4 represents us on this issue. And I'm very wary without
5 having met -- about coming to the table and trying to
6 negotiate something that will have unintended consequences
7 in the settlement of that litigation because I'm not a
8 lawyer and I need to be represented by someone who's got the
9 court case going forward. And I would rather not go
10 forward. And I need to tell you that because it's making me
11 very uncomfortable because I think getting to "yes" may
12 have, for me, unintended consequences on the litigation.

13 FACILTATOR: I think --

14 MS. HENRIQUEZ: And I don't know what to do.

15 MR. JONES: Trust us. It won't happen.

16 FACILTATOR: Lafe?

17 MS. HENRIQUEZ: So, Marvin, when people say -- I'm
18 sure you're just like me -- when people say "trust me," you
19 know, not just the hairs of the back my neck go up, but it's
20 like I have these huge antenna that go "warning, warning,
21 warning." So appreciate it, thank you.

22 FACILTATOR: Lafe?

23 MR. HAUGEN: Well, Jan, we discussed it at our
24 tribal caucus yesterday and a little this morning, and I
25 don't think taking this to Minneapolis is going to change

1 anything. You know what I mean? I mean, I think we need to
2 take it to a vote. And if HUD votes no, it will be noted in
3 the record and we can move on. That's my thought.

4 FACILTATOR: I see other heads nodding. Okay. So
5 let's go ahead.

6 All in favor of the majority -- I guess majority
7 language as noted? I see your indication that's the one on
8 the right.

9 All opposed. So noted.

10 (Consensus not reached.)

11 FACILTATOR: Thank you, Lafe.

12 I think it's good time to take a break. Our
13 food's back there. Why don't we take a break, get some
14 coffee, and come back.

15 And don't forget we will have, at 4:00 o'clock,
16 public comment.

17 (Recess taken.)

18 MR. JACOBS: We're going to go ahead and start.
19 Jan?

20 FACILTATOR: Okay. Lafe, I turn it over to you
21 here. What have we got left?

22 MR. TILLINGHAST: Ready for the next one?

23 FACILTATOR: Please.

24 MR. TILLINGHAST: If you would stick with 187 and
25 if you would go to (h). And, to explain this proposal,

1 there was, as originally enacted -- as originally enacted,
2 NAHASDA provided that if you'd already spent your grant
3 money on affordable housing activities, HUD could not
4 recapture it. That statute was repealed. But in the
5 meantime, the negotiated rulemaking committee had written a
6 regulation that I believe appeared in old, now abolished,
7 532 that repeated that. It said that if you'd spent the
8 money on affordable housing, you couldn't have it
9 recaptured.

10 And the question is whether to continue the
11 regulation. HUD's position -- they can explain their
12 position -- but it is that the underlying statute is gone,
13 the regulation should go.

14 Our position is that if even though there's no
15 statute that compels this result, HUD, in its discretion,
16 can still say, no, if you spent the money on affordable
17 housing activities, we're not going to get it back from you.

18 The majority position here is to put this
19 regulation in the new 532. If it is not put into the new
20 532, it will go the way of old 532 and be repealed and not
21 exist anymore.

22 Questions?

23 Let me, in the interest of disclosure, as the
24 Secretary did last time, this is to some extent, implicated
25 in the Fort Peck litigation.

1 FACILTATOR: Lafe?

2 MR. HAUGEN: So with that noted, we're going to
3 ask for consensus. We know the outcome, so it doesn't make
4 any sense to table this.

5 MS. HENRIQUEZ: But you're asking for consensus to
6 strike this? I'm sorry.

7 MR. TILLINGHAST: The consensus move would be to
8 keep it. A "no" vote would be to remove it.

9 FACILTATOR: Okay. Any further comment on that?

10 MR. HAUGEN: Just the consensus to keep the
11 language, (h), that represents Issue 79C in the regulation.

12 FACILTATOR: Okay. Do you want to take a vote on
13 that now, everybody? You ready?

14 All in favor? All opposed? No consensus reached.

15 Next, Lafe?

16 MR. TILLINGHAST: Go down one subsection to (i).
17 It creates a straight three-year statute of limitations for
18 initiating administrative enforcement action, running from
19 the occurrence of the alleged noncompliance.

20 The tribes and HUD have been in disagreement on
21 this.

22 FACILTATOR: So you think you spent adequate
23 enough time on that?

24 MR. TILLINGHAST: I'm sorry?

25 FACILTATOR: Have you spent enough time to go

1 through the questions and concerns about that, or do you
2 want to spend more time here?

3 MR. TILLINGHAST: Me personally?

4 FACILTATOR: No. Well, you personally, John.

5 MR. TILLINGHAST: The only thing I would suggest
6 is that there was some discussion that we would -- that we,
7 meaning us and HUD, would revisit this issue once the
8 records retention regulation had been enacted.

9 It has now been enacted, but I guess there's some
10 disagreement about where that three years begins to run
11 from. And so I'm not sure that added a lot of light to the
12 subject. So I guess the answer is no. I don't have -- I
13 have nothing more to say on this.

14 FACILTATOR: All right. Any comments? Is
15 there -- if there's -- yes, Sandra?

16 MS. HENRIQUEZ: We would propose that this
17 language be eliminated now that you've got the -- what
18 essentially is a statute of limitation on what can be
19 reviewed and how far back it can be reviewed. So we don't
20 think that this is necessary.

21 FACILTATOR: So does anybody see any middle road,
22 or should we just go ahead and vote on it?

23 Lafe?

24 MR. HAUGEN: Okay. Jan, we're going to call for
25 consensus on this as well.

1 FACILTATOR: Are there any additional questions or
2 concerns before we vote?

3 MS. MCDADE: I need clarification.

4 FACILTATOR: Yes.

5 MS. MCDADE: Are we voting on removing Section (i)
6 or leaving it in? And is it HUD's position that you would
7 like it removed still?

8 FACILTATOR: Right.

9 MS. MCDADE: And because we've already made the
10 programmatic approval with regard to the records retention;
11 is that correct?

12 MS. HENRIQUEZ: (Inaudible) and the monitoring.

13 MS. MCDADE: Okay. So if we approve it as it is,
14 what is, what would the rationale be? I definitely am just
15 confused by what it is the group is asking for.

16 MR. TILLINGHAST: The rationale for having (i) in
17 is simply to prevent stale claims, to have HUD initiate
18 enforcement action against you ten years from now over
19 something that happened ten years ago.

20 FACILTATOR: Yes, James?

21 MR. VOLLENTINE: Jim Vollentine. This is a lot
22 different then monitoring or the other issue, the retention
23 of records. This has to do with HUD penalizing a recipient
24 for substantial noncompliance.

25 So I don't think it's really connected to the

1 monitoring -- it's connected somewhat. I think we need this
2 in addition to the monitoring thing and the records
3 retention.

4 MS. HENRIQUEZ: So if I might, if the records
5 retention is, at most, we think, about three or four years
6 at most, depending on when you finished spending an
7 allocation, and if indeed, there's a statute -- we've talked
8 about how long you have to hold records, except for the ones
9 that are under some sort of audit or finding already that
10 need to be held until resolution -- I don't understand how
11 you could -- how anyone could bring, whether it's HUD or
12 anybody else, a claim when, one, records aren't around; and
13 No. 2, the discussion I had with my staff earlier around the
14 retention issue was if a tribe destroyed records
15 appropriately at the end of the right program cycle three
16 years out and so on, and another tribe did not, and we were
17 looking at the tribe's records who did not destroy them and
18 found something beyond the retention period, were we able to
19 bring an action or not?

20 And the issue is, no, we can't bring the action.
21 It's our misfortune that we didn't take the action earlier
22 but because the records sat out there past the statute of
23 limitation doesn't mean we should be able to bring an action
24 because otherwise they would have been destroyed and we
25 would not know about it. Lost opportunity. And it's gone.

1 So with that -- those constructs in mind, I
2 don't -- I don't know, again, why this language is even
3 needed.

4 MR. VOLLENTINE: That's why we should have this
5 language because the records are destroyed so we should have
6 a statute of limitations. Theoretically, you could still
7 bring an action under (c).

8 MS. HENRIQUEZ: How?

9 MR. VOLLENTINE: For substantial noncompliance. I
10 mean, just because the fact that we destroyed the records
11 doesn't prevent you from bringing the action.

12 MS. HENRIQUEZ: How do you bring a claim?

13 MR. VOLLENTINE: You can't because there's no
14 records so that's why we should have a statute of
15 limitations.

16 MS. HENRIQUEZ: You've already got that there.
17 You've already got that in another part of this. We just
18 did that work this morning. You've got a statute of
19 limitations.

20 FACILTATOR: Microphone.

21 MS. HENRIQUEZ: So without the records in place
22 because they've been --

23 FACILTATOR: Microphone, Sandy.

24 MS. HENRIQUEZ: Without the records in place,
25 they've already been appropriately destroyed, you've got a

1 statute, how do we bring a claim with no records to
2 substantiate our claim?

3 MR. VOLLENTINE: You should not bring one. That's
4 why we need the statute of limitations.

5 MS. HENRIQUEZ: You've got it. But we've got
6 it --

7 MR. VOLLENTINE: No. You can still bring the
8 claim, but the records are not there. See?

9 FACILTATOR: Marty, did you want to comment on
10 this?

11 MR. SHURAVLOFF: Well, I don't know that's going
12 to make much difference --

13 FACILTATOR: Microphone.

14 MR. SHURAVLOFF: -- just first consistency
15 purposes -- just for consistency purposes, I would propose
16 that this be four years rather than three. That way it
17 would be in line with everything else that we passed today.

18 FACILTATOR: Sharol?

19 MS. MCDADE: I understand what you're saying. I
20 understand, of course, what Mr. Vollentine is saying. But
21 is there any way that we can maybe refer to the records
22 retention section that was already approved so that it is
23 consistent?

24 I mean, again, I understand where both parties are
25 coming from because, I mean, one does have to do with HUD

1 coming in and saying, Okay, we're going to make a claim.
2 And if we don't have the records to defend, it's two
3 different things as I view it.

4 MS. HENRIQUEZ: Or, conversely, it would force us
5 to make a claim so we're in this window so we then provide
6 less TA because we're going to want to preserve our rights
7 to see if there's anything going on. So it's a double-edged
8 sword, I think, in both ways.

9 And I'm still trying to get my head around if
10 you've got a statute of limitations how this works, but
11 anyway...

12 FACILTATOR: Judy?

13 MS. MARASCO: I was waiting for Dave to get --
14 I -- I just think it needs to be tied. One of the
15 discussions we were having over here is just because we're
16 destroying our records after three years, it doesn't mean
17 that HUD is, so...

18 MS. HENRIQUEZ: If we could find our records after
19 three years, I'd be really happy.

20 FACILTATOR: Yes, John?

21 NONCOMMITTEE MEMBER: Would anybody be interested
22 in a compromise that said, HUD may not initiate an action
23 against a recipient under (c) of this section that is
24 inconsistent with the records retention requirement of
25 blank.

1 MR. HEISTERKAMP: 1000.552.

2 MR. TILLINGHAST: That would draw an express link
3 between the two that we've all admitted exists.

4 MS. MARASCO: Which is what Sandra says we already
5 have, so I don't see any reason why that's not agreeable to
6 both sides. We're stating the obvious.

7 MR. HAUGEN: Dave, can you put it on here?

8 MR. HEISTERKAMP: So from what John had said and
9 suggested it would say, HUD may not initiate an action
10 against a recipient under Section -- under (c) of this
11 section. And I guess that -- that is inconsistent --
12 okay -- of this section that is inconsistent with the
13 records retention limitations of 1000.552, which is how we
14 worded it in the monitoring section -- retention
15 limitation -- yeah -- records retention limitations of
16 1000.552.

17 FACILTATOR: Then take the rest out? Take out
18 "more than three years"? Okay.

19 Okay. HUD, how does that look?

20 Yes, Phil? Let's let Sandra respond first.

21 MR. BUSH: I'm trying to figure out a tactful way
22 to ask this question to HUD.

23 MS. HENRIQUEZ: Oh, just ask it.

24 MR. BUSH: "Just ask it," I like that. Would this
25 entice HUD to increase monitoring, to increase oversight, to

1 increase --

2 MS. HENRIQUEZ: Yes.

3 MR. BUSH: Okay.

4 MS. HENRIQUEZ: Yes. I don't mean to be facetious
5 in answering that question, Phil, because I don't -- how do
6 I put this? -- we would need them to step up our monitoring
7 frequency et cetera, et cetera, still within the scope that
8 we've talked about here today. So we're not going to go
9 outside that scope. But, indeed, we would.

10 So if someone was being monitored, you know, once
11 every five or six years, you might see them once every three
12 because we want to be within this window. I'm not saying
13 that that will happen, but it -- this is incents us to want
14 to do that just so we don't lose track of something, you
15 know, that something doesn't get away. It's egregious
16 enough that we should have taken some action, and we didn't
17 because we got caught in the time factor.

18 And understand, it's not just us. Our monitoring
19 work, or lack thereof, is always scrutinized by the IG and
20 by GAO, the general accounting office, and on and on and on.
21 And so we're going to have to figure out how to thread this
22 particular needle in this way.

23 FACILTATOR: Yeah, Phil?

24 MR. BUSH: So just one more quick question.

25 The -- and I appreciate your honesty there because it's one

1 of the first things I saw, that said, Geez, I think we're
2 asking for something here, and I don't know that we're
3 asking for this.

4 There's always consequences to action on
5 everything we do here. There's going to be a net effect
6 that a lot of us aren't going to see until two or three
7 years down the road. And knowing that and knowing that
8 earlier we discussed about the risk assessment, to me that
9 would even change their weighting factors in the risk
10 assessment of how often you've been monitored or not.

11 Now, I'm just talking and thinking out loud that
12 was my last comment -- or question I'm going to assume that
13 would be the next step, is not only are we going to try and
14 increase, HUD is going to try to increase monitoring. But
15 now they're going to change the risk assessment factors to
16 say, wait a minute, we have to make sure the higher the
17 risk, the more often they're going visit.

18 MS. HENRIQUEZ: I want to be clear. I don't --
19 I'm not into -- we are not into the "gotcha," you know, and
20 nickel and diming people for every little "you didn't cross
21 this T or dot that I." I don't want to go there. It's a
22 waste of all of our time. That's not what this is about,
23 but it's an issue of due diligence now that we've got to
24 sort of speed up and how often we do that, based on this new
25 proposed language.

1 FACILTATOR: John?

2 MR. TILLINGHAST: Two thoughts, one is just an
3 observation that the rationale for not having a three-year
4 statute of limitation was that the records retention
5 requirement gave you a statute of a limitations. That was
6 HUD's position. And now when we offer writing that says
7 that, they're critical of it. So that may tell you how
8 reliable the records retention limitation may be as a
9 statute of limitations.

10 The other thing is that the IRS, how they handle
11 having to get things done in three years, is they enter into
12 tolling agreements that stops the running of the statute of
13 limitations so they can take however long a period of time
14 they need to complete their monitoring. And they're able to
15 function.

16 FACILTATOR: James and then Tim. James, you had a
17 question?

18 MR. VOLLENTINE: I was basically going to say the
19 same thing that John said is that with the records retention
20 for only three years, and wouldn't HUD step up its oversight
21 because it's going to destroy the records?

22 So what's the difference between that and putting
23 a limitation on bringing action under (c)? That was my
24 point.

25 FACILTATOR: Tim?

1 MR. FOSTER: Yeah. It's not only that. It's not
2 only that. Being redundant won't only step up our
3 monitoring system, but also we're doing this assuming that
4 everything that we recommend is going to be accepted. And
5 when we do something that is foolish, I think we might
6 not -- it might not happen, John.

7 I mean, you're giving a lot of excuse. I don't
8 think it's wise. We got -- we got what we want to begin
9 with the shortness of the records. Okay. And that might
10 pass. Okay. But if you take the same subject and just
11 drive it in the ground, it might not pass. You're assuming
12 that everything we recommend is going to be in the
13 regulations. And it's like funding and everything else,
14 you've got to do it with a little temperance.

15 FACILTATOR: Okay. Any further questions on this?
16 Yes?

17 MS. HENRIQUEZ: I'm just trying -- for my own
18 edification, what are people really trying to get to?
19 What's caused this agita about this issue that brings (h) --
20 to the new (i) -- I'm sorry -- to (i)? Can we -- I'm just
21 curious?

22 FACILTATOR: Somebody give Sandra an answer? Lafe
23 is calling on Dave.

24 MR. HEISTERKAMP: You've already referred to it.
25 Most of tribes that came as plaintiffs in the current

1 litigation that HUD's involved with were hit with claims for
2 repayment that went back five years or more when they were
3 hit and so --

4 MS. HENRIQUEZ: Gotcha. Okay. I got it.
5 Slippery slope. Slippery slope. I got it. Okay.

6 Can I just say one other thing behind that,
7 though?

8 FACILTATOR: Please.

9 MS. HENRIQUEZ: I'm going to adopt Phil's lead in.
10 Let me just say this straight out. Let me just think out
11 loud for a second.

12 So with this in place, and a tribe was
13 significantly overfunded, for whatever reason, and it came
14 to light after the proposed three years, for some reason,
15 this says there's no ability -- that's just lost. It's that
16 they get to keep the money. And even though we all know
17 it's at the expense of other folks, because otherwise you
18 want to recapture and reallocate.

19 So whatever the mistake is that's out there that
20 effects the larger community gets to stay in place. That's
21 what this ultimately says. If we -- correct? Okay. Just
22 want to be clear.

23 FACILTATOR: Sharol?

24 MS. MCDADE: And just for clarification, is it
25 still your position that you would still like to see this

1 language stricken?

2 And the reason why I'm asking is because if it's
3 already your position that you're going to step up
4 monitoring anyway because we have the three-year record
5 retention as you described it, a statute of limitations
6 already, which is what you kept referring to, why would we
7 restrict ourselves even more by beefing up the regulation?
8 I'm not sure that I understand that rationale, which was the
9 reason why I asked initially is because I wanted to see why
10 HUD felt that the language should be gone and why we felt
11 like we needed to be more restrictive.

12 And I understand coming back five years because of
13 the litigation and what have you, but we've already approved
14 a records retention. So how do the two play together, and
15 are we going to create a bigger problem for tribes now
16 because we're subjecting them to more onsite monitoring
17 reviews?

18 FACILTATOR: Okay. Jim?

19 MR. VOLLENTINE: The answer is that even though
20 you destroyed your records, HUD could still bring an action
21 under (c) and that's what this provision would prevent.
22 See? So it works in our favor. It's not redundant.

23 FACILTATOR: Yes, Tim?

24 MR. FOSTER: The language is redundant. The
25 action -- the action itself -- you're -- what you've done is

1 you obviously allowed them to go through the process that --
2 their already-established process and the kinds of things
3 that we were discussing earlier about the nine year -- the
4 nine year late penalty. You've obviously done away -- we've
5 done away with -- we've obviously done away with that and
6 the abuse of those kinds of things.

7 But I doubt very much if they're -- if they're
8 going to go to court too much without any evidence. I mean,
9 after we've run this way -- after you've had this three-year
10 limit and if a wrongdoing happened on the third year and
11 there's no evidence of it in the past, most people don't
12 want to go to court unless they have the evidence to really
13 do something, and they're not going to have it. You've just
14 taken it away from them.

15 So my thought about being redundant, see, wasn't
16 just the language. It was the practice. I mean, you've
17 already taken the action that did that already. It's
18 obvious. Why do it again?

19 FACILTATOR: Do any of the committee want to
20 recognize David? For Lafe.

21 MR. HEISTERKAMP: Just to draw, again, the
22 language that exists and remains in 552(c), Patterson was
23 pointing out, Part (c) of 552 says, If any litigation,
24 claim, negotiation, audit, or other action involving the
25 records has been started before the expiration of three-year

1 period, the records must be retained until completion of
2 action, and resolution of all issues which arise from it or
3 until the end of regular the three-year period, whichever is
4 later.

5 So there is some value -- I think that starts to
6 address some of the issues that have been discussed around
7 the table. And again, to refer back to what's already built
8 in to 552(c), it's not an absolute limit. If something
9 starts or an issue arises, then the records can't be
10 destroyed. You've already taken care of that by reapproving
11 the language that you did this morning.

12 So, again, tieing it back in to the same
13 system of existing regulations may be helpful to create one
14 standard across the board.

15 MR. HAUGEN: With that noted, I guess we're going
16 to ask for consensus.

17 FACILTATOR: Okay. So all in favor? Can I see a
18 show of hands of all those who are in favor of this
19 addition? All opposed? Okay. Does not pass.

20 MR. TILLINGHAST: We have a housekeeping issue.
21 We've already combined 532 and 538 into a new 532. So 538
22 doesn't exist anymore. So we need to have the committee to
23 direct the drafting committee to officially repeal and bury
24 538 and to remove three cross references to 538 that appear,
25 if you look at bottom of 187, at 1000.60, 1000.530, and

1 1000.536.

2 FACILTATOR: Any questions or concerns on that?

3 MR. HAUGEN: Ask for consensus on it.

4 FACILTATOR: Ask for consensus? All in favor?

5 Any opposed? Passes.

6 MR. TILLINGHAST: One last item, which is
7 yesterday when we had a tribal caucus, we actually removed a
8 proposal that had been proposed by HUD and for which there
9 is no white sheet. It's the pink thing on your chart. So
10 if you thought you were done with your chart, you're not.

11 If you go to Issue 74 it's "A" -- H on
12 consolidated 532.

13 And I think, Jad, I think I'll hand this over to
14 you and do with it as you may.

15 MR. ATALLAH: This particular item, we are
16 proposing language really to codify what is already in place
17 due to some prior administrative proceedings that have
18 clarified this particular issue. And this specifically
19 deals -- really what this is getting at is situations where
20 a particular tribe uses a TDHE as its recipient and problems
21 occur with the TDHE, particularly umbrella TDHEs, as an
22 example, where a TDHE because a defunct entity or fails.

23 And if we are in the process of carrying out
24 enforcement, we've monitored. We're carrying out
25 enforcement against a particular TDHE, and the TDHE is a

1 defunct entity, we ran up against the situation in one case
2 where there was no entity that was responsible because the
3 tribe -- the tribes that were involved in this umbrella TDHE
4 had basically said, Well, this TDHE is now a defunct entity.
5 The TDHE was defunct and it was a very difficult process to
6 determine who should be held responsible for a couple of
7 million dollars of ineligible activity -- ineligible
8 expenses.

9 This particular situation went to a hearing, went
10 to the hearing process, and there was clarification from the
11 administrative court, the administrative judge, that
12 ultimately under NAHASDA the beneficiary tribes using the
13 TDHE, designating the TDHEs are ultimately responsible.

14 What this regulation that we're proposing would
15 basically just codify what we already understand about what
16 entity is responsible.

17 So what it says is, if a TDHE is a recipient, HUD
18 may take actions described in this section against the
19 Indian tribe as the grant beneficiary. If HUD determines
20 that the grant beneficiary has failed to comply with any
21 provision of NAHASDA or these regulations or HUD determines
22 that these actions described in this section are unavailable
23 or inappropriate against the TDHE. Again, what that's
24 geared towards is situations where a TDHE after the fact
25 becomes a defunct, nonexisting entity and there's no

1 agreement between HUD and the tribe itself.

2 And then finally, any action described in this
3 section that HUD takes against a grant beneficiary, which is
4 a tribe using the TDHE, shall follow all applicable
5 procedures just to clarify that the usual procedures would
6 apply for the tribe as they would against the TDHE, if the
7 TDHE was still in existence.

8 FACILTATOR: Okay. Tim and then Judy.

9 MR. FOSTER: That is purpose -- that was the
10 original purpose of the tribes having TDHEs. I mean, in
11 reality this program began on selling notes, and the money
12 that changed hands, the TDHEs were the people who dealt with
13 the financing of the program and they didn't want to be
14 involved with or have any liability or responsibility. And
15 even today, the tribe is -- our tribe, as a rule, and I
16 imagine many others believe that the housing authority,
17 okay, is kind of an insulated -- it's not -- you're not
18 dealing directly with tribal government. You're dealing
19 with the housing authority. Okay. And -- and I don't -- I
20 definitely do not support what you just read.

21 I mean, this would go against years and history of
22 having housing authorities. It wouldn't work. It's not an
23 acceptable thing. I'm -- it wouldn't be at home. And I'm
24 sure it might not be for others where they come from.

25 So that's one thing I would really -- I don't need

1 to freshen my background on that subject.

2 FACILTATOR: Judy?

3 MS. MARASCO: I found it interesting. The
4 explanation was interesting, but that's not what the words
5 say up there. And I could never agree with this. And I'm
6 going to harken back to Sandra's thing, you know, where she
7 said the Secretary had the authority. I wouldn't have a job
8 if I voted for this, when I got home. I simply wouldn't
9 have a job.

10 So, you know, I can't -- I can't vote for this.
11 We're going to have to agree to disagree on this one.

12 FACILTATOR: Carol and Phil.

13 MS. GORE: I'm in agreement with Judy. I think,
14 with all due respect, while this might make your job easier,
15 this is a very sensitive issue. I'm here as a TDHE
16 representing a tribe. I cannot vote in favor of a rule that
17 further burdens and gives legal access to the very tribe I'm
18 here to represent.

19 So I just want to be clear that I will be opposing
20 it and not voting in favor of it. Thank you.

21 FACILTATOR: Phil?

22 MR. BUSH: Can we have the number or at least the
23 name of the TDHE or even the decision that this was based
24 off of? I mean, am I going to have to (Inaudible), or is
25 it -- I think I know who it is already. So from --

1 FACILTATOR: I don't think it's on. You're going
2 to have to come back to the table, Sandra.

3 MS. HENRIQUEZ: So I don't want to call for
4 consensus, but I would like to know how many folks are not
5 happy with this? The folks in the back, you don't have
6 to -- I get it.

7 We withdraw it.

8 FACILTATOR: Thank you.

9 MR. BUSH: Curiosity is going to eat me up here.

10 MS. HENRIQUEZ: I'm telling because I don't know
11 who it is and I haven't asked, so can I honestly tell you I
12 don't know.

13 FACILTATOR: John?

14 MR. TILLINGHAST: Yeah. With the exception of the
15 legal opinion that we're waiting for in Minneapolis on
16 532(a), Workgroup 4 is done.

17 MR. HAUGEN: F.

18 MR. TILLINGHAST: Workgroup F. If you would leave
19 me your business card, I can send you another copy of the
20 chart suitable for framing.

21 MR. HAUGEN: Or starting a fire.

22 FACILTATOR: Good job. We didn't think it was
23 going to be that easy. So I'll turn the meeting back over
24 to your chairmen.

25 MR. JACOBS: Okay. Thank you, Workgroup F.

1 If we could put the notice for the St. Paul
2 meeting on the screen again, please. And in just a few
3 moments, we will be asking for public comments from
4 everyone, but we've got, I think, a few moments. So there's
5 a question about the -- I think we clarified it. There was
6 a question about the dates. So the travel day is on Monday
7 the 16th and, of course, Friday the 20th. Okay. And we'll
8 be in meetings, the 17th, 18th, and 19th. Minnesota.

9 MR. COYLE: Yeah, Marvin?

10 MR. JONES: Might I make an inquiry? Since we
11 have 13 minutes, can't we complete the IHP/APR?

12 MS. MARASCO: If you would leave the room, Marvin.

13 MR. JACOBS: We can have negotiations on it or
14 consensus, either one.

15 Yes, Lafe?

16 MR. HAUGEN: Is that Minneapolis, Maryland? Is
17 that where we're staying?

18 MR. JACOBS: I'm sorry?

19 MR. HAUGEN: Is that Minneapolis, Maryland?

20 MR. JACOBS: Okay. We'll go ahead with the public
21 comments at this time so anyone that would like to make any
22 comments to the Assistant Secretary or to the committee,
23 please come up to the mic and state your name, if you will
24 and what tribe or organization you represent.

25 AUDIENCE MEMBER: I have a question. My name is

1 Cielo Gibson, executive director for the Coeur d'Alene
2 Tribal Housing Authority. And I have a very simple
3 question. When are we going to get the IHP/APR issue
4 resolved? Thank you.

5 MR. JACOBS: Are you asking if it's going to be
6 this year or next year or the next ten years?

7 AUDIENCE MEMBER: Is it going to be next month in
8 Minneapolis? It's a very critical, important issue in terms
9 of the form, and I thought we spent a lot of time the last
10 meeting and put forth a great deal of effort and energy.
11 And we didn't see -- we actually did get pretty far but a
12 lot of us were really hoping that it would be resolved so
13 that we could start using the form. And it's been going for
14 four, five years.

15 And so I'm asking the committee and HUD, you know,
16 when we are going to get this done?

17 MR. JACOBS: I would like to ask the committee, do
18 you want this as one of the first issues on the agenda in
19 St. Paul?

20 Jason?

21 MR. ADAMS: Yeah, Mr. Chairman, thank you. I
22 guess, I know of one other issue, other than this issue,
23 that this committee has to address, other than parking lot
24 issues if we choose to go there. But this committee hasn't
25 acted whether we are going or not going to go to parking lot

1 issues.

2 So I believe Carol has one issue that
3 was overlooked that has to be addressed. Other than that, I
4 would ask that -- excuse me -- that every committee member
5 sitting at this table takes time between now and our next
6 meeting to take a look at the format and fill it out, use it
7 like you were going to submit it this year, and put your
8 thoughts into it as you fill it out, so that you can dissect
9 the thing and get comfortable with it and get to know it and
10 what issues you have with it, then bring back to the
11 committee table next meeting.

12 There has been folks that have done that. I
13 speak, again, not as a committee member necessarily, but as
14 somebody that's spent five years developing the thing and
15 working on it. And so I would hope that -- that there would
16 be some -- some opportunity for that work to have some
17 finishing to it and not just dismissed, or that it would be
18 dissected to the point that, you know, the work is
19 irrelevant.

20 So I just -- I ask that of the committee members,
21 to please, please, take a look at the form. Please dissect
22 it and come up with comments specific to the form. Thank
23 you.

24 MR. JACOBS: Marvin?

25 MR. JONES: And I would ask the committee members,

1 as it relates to the law regarding the Indian Housing Plan
2 and reauthorization.

3 MR. JACOBS: Okay. I would like to ask the
4 working group chairs and also HUD, can we have a conference
5 call on the agenda next week? I think the last conference
6 call was held immediately after the meeting, so it gave us a
7 lot of time to get everything prepared for this meeting so
8 is that -- Carol? Blake? Jason? Okay.

9 If your office, Roger, could set it up for next
10 week, we would appreciate it very much. Is there a day
11 that's best for everybody, or you want to -- Blake?

12 MR. KAZAMA: Yeah. I guess I wanted to emphasize
13 again to HUD and, whoever, drafting committee, regarding the
14 preambling. I know I keep harping on this, and it is
15 because it's a very important document. It memorializes
16 everything that we have done, and it is very critical in
17 terms of that language that we put in the preamble that goes
18 to the OMB and for their review, and it represents the
19 actual work, words, that we put together.

20 And so we need time to be able to -- thank you --
21 so, you know, I guess it's being handed out. It's very
22 important that we review this with regards to our notes so
23 it captures the things we need it to say.

24 I understood, in the past -- this past week there
25 are issues that were minority issues and majority issues,

1 and those kinds of issues I need also to be in here so
2 people understand what were minority issues and where people
3 are coming from.

4 So I don't want to pass this off as minutes of
5 sorts. This is more important than that because it's
6 significant to what we have done thus far. So please read
7 this carefully, and we need to take time to talk about this
8 maybe, you know, in Minnesota and actually go through some
9 of this, so...

10 MR. JACOBS: Thank you, Blake.

11 I'd like to answer the question from Cielo Gibson,
12 if I could. I think it's going to be on the agenda as one
13 of the first items in the Minnesota meeting.

14 Tim?

15 MR. FOSTER: I've got a long ways to go and a slow
16 horse to ride. I've really enjoyed myself today. It's
17 really been refreshing. It's really nice to be with people
18 who really give you a workout. You guys do a good job, and
19 I appreciate your kindness. Thank you very much for a good
20 day.

21 MR. JACOBS: Thank you. Are there other comments
22 from anyone else no comments. Yes, one? Okay.

23 AUDIENCE MEMBER: I didn't know if I broke it or
24 not.

25 (Statement in Native language.)

1 AUDIENCE MEMBER: My name is English is Ella
2 Bennett, and I'm of the Tlingit Tribe. My introduction was
3 in Tlingit. It tells my history. And I just wanted to come
4 up here and thank each one of you that there are around the
5 table for your hard work.

6 And you've come a long way. I was able to attend
7 the first one in Phoenix. And at that time I sat in the
8 audience and I thought, are we ever going to get the
9 protocol stuff going or whatever? I know it's a lot of hard
10 work, but you represent a lot of people. Just when I look
11 at you, I think it's nationwide.

12 And I'm chairman of Tlingit-Haida Housing
13 Authority. Blake is our main person for Tlingit-Haida. And
14 like I said, back in Phoenix, he was adopted by the Tlingit
15 tribe, so he represents us.

16 I especially wanted to thank the Assistant
17 Secretary for coming to join us. I can tell, you know, you
18 care so much about the people sitting around the table and
19 who they represent. And you know when people care about
20 you. It -- just you just feel it. I just want to thank you
21 from the bottom of my heart for being here for us. And I
22 would only ask, you know, that you continuously remember
23 those people you represent. You know, when we think about
24 it, it's not even about us. It's about them.

25 And I pray that God will bless you for the hard

1 work you've done. I just couldn't believe by looking at the
2 paperwork how much has already been accomplished. And I
3 know there's many of us, when we sat through the very first
4 meeting, I thought, this will never get done. There's too
5 much, too many issues there. But you've come a long way and
6 I just want to pray that God will bless you for all you've
7 done for the people you represent. Thank you.

8 MR. COYLE: Thank you very much your comments and
9 for your participation.

10 Any other comments from the audience? Okay. One,
11 two, three. All right.

12 One other thing, we had talked about the -- having
13 some time frames from the drafting committee.

14 So, Dave, could you give us a quick report?

15 While he's getting set up, is there anything else
16 from any of the committee members, is there anything you
17 would like to state?

18 Sharol?

19 MS. MCDADE: I would just like to take a quick
20 moment to thank the committee for indulging me this week.
21 Sometimes the Percocet was getting the better hand of me, so
22 thank you for enduring me this week.

23 MR. JACOBS: Marvin?

24 MR. JONES: Since hopefully the remaining couple
25 of issues will be resolved hopefully Monday -- or Tuesday,

1 when we when we're in Minnesota, I'd like to -- the parking
2 lot issues -- you know, if people have those and if we can
3 get to those, I'd like people thinking about those and
4 making sure they -- you know, they get those to us so
5 that -- if we can possibly get to some of those.

6 MR. JACOBS: I'll assure you that we'll talk about
7 those on the conference call. Okay.

8 Dave?

9 MR. HEISTERKAMP: And, again, the drafting
10 committee is -- and the preamble committee is open to
11 anybody who wants to participate. You have a hard copy of
12 what's been tracked so far. And what we are going to do as
13 a committee is -- and I encourage anybody else who wants to
14 see anything in the preamble to do it the same way, is to
15 take some time in the next week to collect comments and
16 proposals by e-mail.

17 And if we have enough material to discuss to
18 schedule a conference call to discuss the material, and then
19 with the committee's indulgence, probably set aside at least
20 a portion of the time to meet face-to-face on the preamble
21 as a group for whoever wants to participate. I think
22 especially after this session, it's going to be helpful to
23 get some thoughts down on paper.

24 I know everyone's been busy, but there's two
25 important features of reviewing these documents. One is to

1 go through and compare with our matrix and with what's been
2 agreed to and make sure we've captured everything correctly.
3 Dan's done a heck of a job trying to keep all the pieces
4 together. But he's one guy and one set of eyes, and we can
5 all be helpful in that regard.

6 Then the second is to be thinking about how you'd
7 like to describe especially the disagreements. And there's
8 probably some important agreements to describe too. But
9 that language is not -- the drafting committee will do the
10 same thing, but they will pick and choose issues each member
11 of the drafting committee has been involved with.

12 We don't necessarily have any mandate or any
13 ability to create language on every single issue that's been
14 voted upon. So if you think it's important to reflect
15 something in the preamble, we need to hear that from the
16 committee members and from whoever else needs to
17 participate.

18 All the drafting committee members who worked in
19 the various workgroups will kind of survey their issues and
20 make some suggestions there. But it is not -- please don't
21 misinterpret the drafting committee, the preamble committee,
22 is not going to go through issue by issue, as Blake said,
23 and try and make it some kind of summary notes of the
24 meetings. There may be some issues where nothing appears in
25 the preamble. There may be other issues where quite a bit

1 appears in the preamble.

2 And as Blake said, it's not -- the purpose of the
3 preamble is not to just create a running commentary on
4 everything, but to highlight those issues that may not be as
5 well reflected in the actual regulations that have been
6 adopted. For that, we need input from everybody.

7 So we'll circulate via the drafting committee and
8 the working group chairs, and it's -- there's no
9 restrictions on prosing language for that. And I assume the
10 committee, after we've met in Minneapolis or while we're
11 still in Minneapolis, that you'll want to sit down and talk
12 about the revised draft as well and how it reads. So,
13 again, maybe to plan some time for that on the agenda.

14 MR. JACOBS: Any questions of the drafting
15 committee? Okay.

16 Blake?

17 MR. KAZAMA: Yeah. Also another subject area, I'd
18 like to know basically what is the timeline and future of
19 this committee beyond Minnesota and what happens to the
20 preamble, the document, and when do we get -- do we meet
21 again? Is there public comment? What is the timeline
22 process so we can kind of understand whether or not -- are
23 we done after Minnesota, hopefully? What's the deal there?

24 MR. JACOBS: Roger, would you like to comment on
25 that?

1 MR. BOYD: What I would suggest is that we discuss
2 this at our conference call because I really don't know
3 right now. And I think that we can have that as an item for
4 our conference call this coming week, and then we will share
5 that with the rest of the committee and the public at large.

6 MR. JACOBS: Okay. Madame Secretary, any comments
7 that you would like to make?

8 MS. HENRIQUEZ: So I too recall Phoenix.

9 MS. MARASCO: You love us.

10 MS. HENRIQUEZ: I do love you all. I really do.
11 And I appreciate, truly, both the difficulty of getting
12 through this process, and I mean that in the spirit of
13 important issues, important to all us, and so that makes
14 them difficult. But I do appreciate the comradery. I
15 appreciate that we can agree to disagree and move on.

16 And as much as I've heard about previous
17 negotiated rulemaking sessions and as much as I've heard
18 about formula in 2012 and before, I won't say I'm looking
19 forward to 2012, but I think that this has been, for me, a
20 really powerful set of experiences. And so I want to thank
21 all of you for that as well.

22 And on to Minneapolis and onto finishing this bad
23 boy and putting it to rest in terms of all of process and so
24 it can be implemented and we can move forward. Thank you
25 all.

1 MR. JACOBS: Thank you. And thank you for
2 allowing us to come to Seattle. This has been two months of
3 enjoyable work. I love this city. And the seafood is
4 terrific. So as you said, on to Minnesota.

5 Robert, into your home territory. So can we
6 expect some wild rice? All right.

7 Before we adjourn, Larry had to leave. He just
8 told me that his wife is in the hospital, and I don't know
9 what the situation is and so forth. But just keep his wife
10 in your thoughts and prayers, if you don't mind.

11 There's nothing else. Thank you very much, and we
12 will see you next month in Minnesota. Thank you.

13 (Proceeding adjourned at 4:09 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, the undersigned officer of the Court and Washington Certified Court Reporter, hereby certify that the foregoing proceeding was taken stenographically before me and transcribed under my direction;

That the witness before the examination was first duly sworn by me pursuant to RCW 5.28.010 to testify truthfully; that the transcript of the deposition is a full, true and correct transcript of the testimony, including questions and answers and all objections, motions, and exceptions of counsel made and taken at the time of the foregoing examination;

That I am neither attorney for nor a relative or employee of any of the parties to the action; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of , 2010.

Kristin M. Vickery
Certified Court Reporter, 3125

July 22, 2010

25

Kristin M. Vickery, CCR, 3125

cc: File

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