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FAULTY FOUNDATIONS:

AN INVESTIGATION INTO TOXIC HOMES IN THE BLACKFEET NATION

By

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Professional Paper

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Faulty Foundations: An Investigation into Toxic Homes in the Blackfeet Nation

Chairperson: Jule Banville

In 2002, a class action lawsuit came out of the Blackfeet Nation. The plaintiffs were residents of a federally-funded housing project called Glacier Homes, and they were suing Blackfeet Housing and the Department of Housing and Urban Development because their homes were making them sick. The case got some local media coverage for a couple years. But it was ultimately forgotten and the plaintiffs never got a remedy.

This long-form audio project revives this story and asks listeners to think about these plaintiffs' arguments in a modern light. The Glacier Homes offer a lens through which to think about several social justice issues that are overlooked in Indian country: housing policy past and present, decades-old public health issues, poor construction practices and materials, Indian law at multiple levels of the court system, sovereign immunity, tribal sovereignty, and treaty responsibilities.

Following is a transcription of the full audio story.

NB: Narration is indicated by "KS." "Kathleen Shannon" indicates voice on tape.

—

Martin Marceau: The wind blows 70, 90 miles an hour up there, and the whole west wall would like, breathe: actually move.

KS: Martin Marceau is talking about a house he owns and wishes he didn't.

Martin Marceau: So I had a friend, he was a carpenter. I was having him put paneling on my walls. And he said, 'Martin,' he said, 'I can't find studs in your walls.'

KS: It became his house in the late 1970s. The federal government funded a program that put up 210 houses in the Blackfeet Nation, on the tribe's reservation in Montana next to Glacier National Park. And, yeah, it's a brutally windy place.

Martin Marceau: A lot of times my wife would hang pictures there and they'd just fall off the wall when the wind blew. And, uh, so that's how I knew that, you know, they were inferior.

KS: Marceau's house was among 48 of these houses known as the Glacier Homes. They're just outside Browning, the tribal seat. The rest of the 210 houses were spread out in other places on the reservation. It was a rent-to-own setup called the Mutual Help Homeownership Program. It's funded by the U.S. Department of Housing and Urban Development or HUD—the money's left to the tribe to manage. These houses were built with wood foundations instead of concrete. And, in most cases, the wood was treated with chemicals, later linked to cancer. Researchers eventually found black mold. Problems with the houses' construction have been talked about and, in some cases, documented – for decades. In the late '70s, when Martin moved his family out of a trailer and into their new house...

Martin Marceau: We're all just happy. We all have new houses and everybody was all excited and got into the neighborhoods and there was no problem, and then...

KS: They were happy enough to look beyond the wood foundations. Wood's cheaper than concrete, but it doesn't make sense in Montana's extreme climate. You know how wood doors tend to stick when it's humid out? That's because wood expands with moisture and shrinks again when it dries. Now imagine that same phenomenon—but on the very support system that holds up your house. And it turns out, those foundations were just the tip of the iceberg.

Martin Marceau: But when we did move into our new houses, we noticed a different smell. It didn't smell like a new house should. It had a different chemical-type smell to it.

KS: Those smells probably came from chemicals used to reinforce the wood foundations: like chromated copper arsenate, which contains arsenic. And other more common – and very problematic – materials used in that era: asbestos and lead paint, to name a couple.

Robin Saha: And I dunno if you've seen any of those types of homes, Kathleen, but there's, there's walls and basements that are completely black with mold.

KS: Robin Saha teaches environmental justice at the University of Montana. In the early 2000s, he led a study of these homes and the health of people living in them. His team's work uncovered alarming rates of toxic molds, among other problems. And the health effects of those are ubiquitous. Exposure can worsen symptoms for people who are already suffering from other illnesses, like pulmonary heart disease. That's what Martin Marceau's wife, June, suffered from, while he cared for her in their house.

Martin Marceau: But I know it affected my wife because, uh, I watched her. I took care of her for 10 years, 24/7 until she died and I watched her. The military gave her a hospital bed, so I put it in my living room so it had more, more room there. And that's—I'd sleep on a couch and she'd sleep on her bed. I'd get up and go, you know, kind of touch her forehead and kind of listen, make sure she was breathing, you know. That's what he told me, he said she could die in her sleep. I took care of her. I took care of her and, and, uh, was with her right to her last breath.

KS: Almost 10 years have passed since June's death. And 20 years have passed since Robin Saha was running his studies. A lot of these houses still have people living in them. And the problems have only become worse.

Robin Saha: You know, this type of situation, uh, really should not be allowed to continue. That there's really people in unhealthy conditions living in these homes. Many of these homes just simply should, should be razed and, and other homes found for people.

[fade in music]

KS: I'm Kathleen Shannon and this is "Faulty Foundations," an investigation into what happened when Blackfeet people who lived in these houses tried to hold institutions accountable. It's a fight that pulsed in the background – quietly but incessantly – for years, through a massive shift in federal policy on Indian housing, through years of suffering for families with health conditions, and through multiple courts that fumbled around with Indian law.

It all started a while ago now, when Martin Marceau still had energy to fight.

Martin Marceau: I got cheated. We got cheated. That's how we feel, you know? We just got taken for our money and we got a piece of junk.

[music fade out]

KS: He tried for years to get people to pay attention. That's how I found him: Martin Marceau's name is on dozens of court documents. He was the lead plaintiff in a class action suit with four of his neighbors "on behalf of themselves and others similarly situated" regarding the problems with these houses. The original 2002 complaint named several Goliaths they were up against: the federal government in the form of HUD, which I mentioned, plus the plaintiffs' own tribal housing agency. The case bounced from tribal court, to federal court, to the Ninth Circuit Court of Appeals. It stopped for a minute at the U.S. Supreme Court, before being remanded and winding its way back down the same legal chain. While all these questions of jurisdiction were dragged back and forth, there was Martin, living his life in a house he knew wasn't right. And it wore him out.

Martin Marceau: After trying my best to get it done and everything, working with the people, with the attorneys, putting my all into it and, you know: Nothing. Nowhere.

KS: Now, Martin lives about 40 miles away in a town called Cut Bank. He pays rent for an apartment there with his military veteran's pay. And that's where I first met him in spring 2022. He put out his cigarette, cracked a window in his kitchen, and told me about his neighborhood's long fight for justice. This year, I asked him to visit his old neighborhood with me—several times. He wasn't interested, but he told me how to get there.

Martin Marceau: And there's a turn off going west. Take that turn right there and then up that road you'll see the project on the right hand side of the road... [fade under]

KS: I went there alone to get a better sense of the place. The neighborhood makes a loop off the main road, where the remaining houses sit in varying degrees of disrepair. Some seem loved – there's a few fences around yards; additions built; a couple with modern, metal roofs. Several are abandoned, with boarded up windows. Or burned out: from the hole where the front window used to be, you can see through a charred frame, and right out the back.

Almost a year later, on another visit to the neighborhood, I met up with Martin's son, also Martin Marceau. But he goes by Chief. He pointed me to a few of the occupied houses.

'Chief' Marceau: Julie Rattler lives there.

Kathleen Shannon: Rattler?

‘Chief’ Marceau: Yeah, her husband had died. And they’re one of the originals That pink house across is Smith, but he won't get there until, um, after he works at the hospital.
[fade under]

KS: Chief left town at 17, joined the Marines, moved to California and worked in the film industry for a while. Now, he’s back in Browning. Runs a mechanic’s shop with his wife, Caroline. And he’s in charge of the Marceau house. He’s trying to unload it and, in the meantime, people are staying there, friends of his. Because no one in his own family wants to live in it: there’s still too many difficult memories there.

‘Chief’ Marceau: That's my house.

Kathleen Shannon: The brown one?

‘Chief’ Marceau: Yeah.

Kathleen Shannon: Can we go look at it?

‘Chief’ Marceau: I don't wanna go over there.

Kathleen Shannon: No? Why not?

‘Chief’ Marceau: I haven't been there since my mom died.

Kathleen Shannon: Oh. Uhhuh.

‘Chief’ Marceau: And umm...

KS: It seems painful for him to be here. But he brings me to a neighbor’s house: Kayo and Melvin Bear Medicine. Their home shakes, just like Chief remembers his doing.

Kayo Bear Medicine: And then there must be a nail close to our, uh, board, you know, that goes up and down cuz it just scrapes from our house. [rubs hands together to imitate]

Melvin Bear Medicine: When the wind blows, you hear noise in walls like something's rubbing.

‘Chief’ Marceau: Does your guys’ floor shift around and...? See? We, we, we get used to it.

Everyone: Yeah!

‘Chief’ Marceau: It’s something we don’t think about anymore.

KS: The linoleum flooring in their kitchen is cracked where it’s raised up—pressure pushing up from below. Their windows and doors don’t shut properly because the house settled unevenly over time. When a new furnace began shooting a fine substance into the air throughout the house, Melvin covered their heat vents with panty hose.

Melvin Bear Medicine: But that real fine stuff that comes through - like, it looks like talcum powder. It’s so fine.

KS: Years ago, they tried to replace their crumbling ceiling by scraping off the existing one— it’s called a ‘popcorn’ ceiling. They were told to stop. Because of the asbestos.

The houses here were funded by the Department of Housing and Urban Development, which is charged with providing safe, sanitary and decent homes to low-income Americans – the goal of the U.S. Housing Act of 1937. Tribal communities were left out entirely until HUD and the Bureau of Indian Affairs reworked the law in 1961, when it was amended to include them. It wasn’t until 1988 that the Indian Housing Act was passed: the first housing program designed specifically for tribes. And that timeline is related to how these houses got built: in the cracks between legislation.

Kayo and Melvin have known Chief since he was a kid in the late ‘70s.

Kayo Bear Medicine: We have the ceilings are original and that lint and stuff just comes down and we breathe it in [coughs] and he's has a lot of, lot of health problems. It's just kind of been one thing after another. And they're saying that he has tumors in his stomach. Um, they're saying he's got stomach cancer. And, um, I have a lot of health issues.

‘Chief’ Marceau: I want you guys to remember all of the health stuff.

Kayo Bear Medicine: Yeah.

‘Chief’ Marceau: Stuff that you forget about over the years.

Kayo Bear Medicine: It’s bringing back so many memories now.

KS: Kayo and others were surprised that I turned up asking about their health after all these years. Not many people have. Some of the few were in a group of university students led by the professor I mentioned earlier, Robin Saha. In the early 2000s, that group—some of them from Browning—took an interest in these homes. And got back some alarming data.

Robin Saha: They found, um, this toxic form of mold *Stachybotrys* in about 30% of the homes.

KS: And they found high levels of mycotoxins—the toxic compounds produced by some molds—in 75% of the homes.

Robin Saha: So that was, um, pretty shocking. And they also found out that, um, there were—that a high percentage of residents were experiencing respiratory symptoms and so that raised a lot of concerns that: Wow, it seems like there's something going on here.

KS: Exposure to black mold can cause shortness of breath, coughing, wheezing. And it can worsen symptoms for people who are already dealing with health issues. Asthma is a big one. At the time of these studies, the average rate of asthma diagnoses in American adults across the country was 6%. Across Indian Country, that number was 7.4%. In these homes? 17%.

Robin Saha: You know, that's quite a bit more, it's about two and a half times more, so it raises questions. But this is a population, this is a community, this is a housing development that needs remediation. The need for remediation has been known for a long time.

KS: I met someone whose whole career lives in these questions: Brian Crawford. He's a Blackfeet tribal member and he was working for the Indian Health Service, or IHS, in Browning when Saha's students were doing their surveys. He helped them get in there and get data. He now works as a public health specialist for the Confederated Salish and Kootenai Tribes, about 170 miles from Browning. The day I met him there, he'd spent the whole morning reviewing old paperwork—inspection checklists and homeowner surveys—to refresh his memory. He's familiar with structural issues in multiple reservations.

Brian Crawford: Any reservation that I've worked in, there are no building standards, no plumbing codes, no electric codes. They're not followed.

KS: That's because tribal nations are sovereign and aren't legally required to follow building codes laid out by other governments—say, states or counties. One of Crawford's big concerns is a product used on the wood foundations. You can actually still see the greenish tint it leaves behind. It's called Chromated Copper Arsenate, or CCA.

Brian Crawford: ...which seems to me a little contrary because CCA is a sealant product to prevent moisture buildup in these homes.

KS: Crawford says it's kind of ironic that construction companies used a chemical sealant to try to prevent mold growth.

Brian Crawford: So if there were to be, was to be any danger, it would be off-gassing from these chemicals, or so. Uh, but to promote and inhibit mold growth...I, I don't see it.

Kathleen Shannon: You don't see it working?

Brian Crawford: No.

KS: CCA contains arsenic. But it was widely used to build decks and playsets in the 1940s. Now, the Environmental Protection Agency says the material poses “cancer and non-cancer health risks.” In 2003, manufacturers voluntarily stopped using the chemicals on wood destined for home construction. But the EPA didn't actually mandate that any structures treated with CCA be torn down. On its website, the EPA says applying a quote “protective coating on a regular basis may reduce the leaching of chemicals” end quote. So the agency is suggesting that a regular coating of other chemicals might contain the CCA—keep it from leaching or off-gassing.

Crawford says construction in the late '70s was also focused on energy efficiency. To keep heat from leaking out, ventilation has to be limited. But less ventilation means more moisture buildup, which can mean more mold.

So, shoddy construction—like Martin Marceau's breathing walls—combined with since-discontinued chemical sealants, and a great habitat for mold: that's what these homeowners are dealing with. And they're dealing with the associated health problems, too.

Brian Crawford: Uh, in my experience, I ran into a lot of different types of molds. And now with those molds, I've also run into a large, large array of symptoms, um, whether it be respiratory, headaches, lethargy. In a few cases, it seems like it has exacerbated the symptoms that they experience, or so.

KS: The health issues are very real, but they're stickier to pin down. Data can establish patterns of mold in these homes and patterns of health problems in people living there. But, at the time of the lawsuit, it was too big of a leap to say the homes caused the health problems.

Brian Crawford: And it's really hard to make a correlation, uh, between a certain type of mold and a certain illness. So A plus B doesn't equal D in that case.

KS: The IHS is a federal agency that operates in Indian country. So Crawford was a tribal citizen working for the feds. His role was limited: he was allowed to make recommendations, but that was it. It was up to the tribe to take action. But when the tribe doesn't have the resources to follow through on recommendations, Crawford says, it's hard.

Brian Crawford: As a professional, I want to stay, uh, as objective as possible. Even though I'm probably related to a lot of these people, that was still my standpoint, was just from the basis of recommendations. That's the best I can do.

KS: He knew more needed to be done, but his hands were tied. Crawford is still frustrated that the tribe didn't pick up where he and Saha left off. This study, led by a couple university students, is still the only organized study that's been done in these homes.

Brian Crawford: I really believe that, uh, there should be follow up to these issues. Because it's been over a certain period of time. There may be a correlation by now or a commonality between these individuals. And if there were mitigation efforts, it, it may have shown improvement.

KS: There's little argument that these houses have problems. So why were they built in the first place? One instigator for a wave of new construction on the Blackfeet reservation in the '70s was rain: the worst flood in the history of Northwest Montana. In June 1964, multiple dams failed. 31 people died – all but one of them on the Blackfeet reservation. The water damaged almost 2,000 homes. A lot of houses on the reservation—the ones spread out along the river beds—just washed away. And the people who'd been living in them had to go somewhere. A guy named John McGill – the editor of Browning's newspaper, the Glacier Reporter – summed that up for me.

John McGill [sarcastically]: You want to live in houses instead of being out there in the dirt? Fine. Well these are them. Too bad you can't live where you used to. Hope you like living in cities now.

KS: McGill leads a tiny newsroom in a small building on one of the main drags in Browning. He's got long gray hair and a bushy beard, but I can still sense the young reporter's energy that brought him here in the '70s. McGill's not a Blackfeet member, but he's got a good memory for what's happened here. He pointed me to the paper's archives and I found an article about the plans for one of the wood foundation projects, from April 21, 1977.

Kathleen Shannon [reading]: ...The homes will be built in 10 different styles with 11 being situated in Browning, six in Heart Butte, 48 at the Blackfeet Glacier Home site, west of Last Star, and 36 on individual sites throughout the reservation. The total cost will be \$5,000–nope. \$5,088,874 and 34 cents...

KS: To better understand how all this works, I visited the Blackfeet Housing office in Browning. That's the designated housing agency for the tribe, and the same one Martin Marceau brought to court. Its main goal is to “meet the housing needs of low-income families” on the reservation. I met Rhonda Michael. She retired just recently, and happened to be visiting the office that day.

Rhonda Michael: Here's something that you might be interested in. That there.

Kathleen Shannon: Thanks.

KS: Before retiring, Michael had been one of the longest-working staff members at Blackfeet Housing. So she knew exactly where to dig up 25-year-old paperwork for me. She has a sharp memory and clearly knew her work in Housing inside-out. She was a huge help, and I could also tell she didn't want to say too much. It felt like she brought me to the water and was hoping I would drink.

Kathleen Shannon: So this seems like an inspection...

Rhonda Michael: Inspection list. Yeah.

KS: This report is dated March 1998. It's handwritten—hard to make out in places. But it says this: quote “I have physically inspected all 210 wood foundation units and have found them all in need of repair or replacement. Following is a list of faults I have found to be consistent throughout units: Splitting, splintering, delamination, dry rot, wet rot, no moisture barrier, no frost barrier, 2x6 frame and sheeting disintegrating from stress and fatigue due to external changes in temperature, walls caving in, settling concrete slabs, radon readings three times higher than other types of foundations.”

This list didn't surprise me. These homes have *wooden foundations* – in a place that has the exact kind of weather that wood can't withstand: frozen winters that melt into warm summers.

I asked Rhonda Michael how the tribe at the time chose the families who would get to move into what they thought were sturdy, lovely new homes.

Rhonda Michael: Gonna say this: it might have been pretty political. [laughs]

KS: There's no system of checks and balances there. And that's a pretty common story across a lot of Indian Country. Because there's not enough funding to build the amount of housing needed. HUD funded projects like these, but it was never enough. It made sense for tribes to stretch that money as far as it would go. Because that's how the system worked—for decades.

Jacqueline Pata is the president and CEO for Tlingit Haida Regional Housing Authority and the Haa Yakaawu Financial Corporation in Juneau, Alaska. But in the '90s, she worked for HUD as the deputy assistant secretary of Native American Programs. We spoke on the phone in February.

Jackie Pata: The old program was: ‘we're giving you a dollar so you can buy this And even if it cost you a dollar twenty-five, you still have to buy it for the dollar I gave you.’

KS: Before Pata [Payda] worked for HUD, she worked in D.C. to change the feds’ approach to Indian Housing, which was historically...paternalistic. She said it contradicts how the U.S. gives aid to other countries.

Jackie Pata: ...they usually don't dictate the terms of the aid. They usually, you know, they give aid and, and the country decides what's the best use of that.

KS: But that’s not what happened with the aid given to tribes. With that money, the federal government attached a lot more strings. And Pata’s saying the strings have a name – the 1961 U.S. Housing Act. That was the one in place when these homes were built. She says that HUD had a lot of control in determining what went where, combined with not a lot of knowledge around construction in rural and remote places with extreme weather.

About 20 years *after* these houses went up, in 1996, this whole approach to Indian housing was overhauled. Pata was the chair of the National American Indian Housing Council at the time, when HUD came out with a “blueprint for change” for Indian Housing. And she was like: ‘No way.’ Pata knew the only good housing program for Native people had to be written by Native people. So she and other tribal leaders came up with an alternative and passed it along to Congress. It became the Native American Housing Assistance and Self Determination Act, or NAHASDA.

Jackie Pata: Self-determination was key. It was the first time those words were really being used by HUD. And so that kind of took HUD outta the picture. They don't approve our plans anymore. Um, we design our own houses. We're responsible for getting the construction done, and we're responsible for making sure that they're sustainable.

KS: She’s saying “we” because Pata is also Native. She’s a member of the Tlingit Tribe in Southeast Alaska. Which put her in a weird place: A Native person working with the federal government. It was a make-change-from-the-inside approach. And with NAHASDA in place, she did see recognition that Native people were left out. But then she had to watch the government’s rollout of the program – which was a tour of patting itself on the back in Indian Country, like it did on C-SPAN in 1999. This was during President Bill Clinton’s quote “poverty tour.” Yeah: it’s cringey.

[fade in fanfare]

C-SPAN announcer: “The president is on a 6-state tour to focus attention on economically-distressed areas and how they might benefit from government and corporate investment. Joined by housing secretary Cuomo and others. The event’s about 50 minutes.” [applause, cheers, etc.]

KS: This stop was at the Pine Ridge Indian reservation in South Dakota. The agriculture secretary was there. Reverend Jesse Jackson was there. And so was Andrew Cuomo, who is probably better known as New York state's disgraced former governor. But at the time, he was the secretary of HUD, making the rounds with Clinton.

Andrew Cuomo: This is not about charity, this is about investment! Not only is it good for the nation's wallet, but it is good for the nation's soul. This nation has a moral obligation to bring its people who are not yet sharing the American dream into that great American success story. It is a question of our national identity.”

[cheering, clapping audio bed fade out]

KS: When the tour stopped at the Blackfeet Nation a month later, the residents of Martin Marceau's neighborhood were ready. They tried to talk to Cuomo, but only got as far as his aide.

Martin Marceau: And we told her our concerns and gave her some documentation and everything, which I believe that they already had copies of it anyway, but.

KS: Martin says Cuomo did speak to tribal leaders, though, and he told them to turn the houses over to the homeowners for a dollar.

Martin Marceau: Let 'em buy 'em for a dollar. And that never did take place. That was the only, uh, commitment we had of any kind from the government.

KS: Meanwhile, Blackfeet Housing had been working the problem from a different angle. Back in the Housing office, Rhonda Michael passed me a letter dated about a year before Cuomo's visit to the reservation—March, 1998.

Rhonda Michael: Looks like they were requesting funding.

KS: The Housing Authority had written to Jacqueline Pata, explaining the increasing urgency of the problems with the wood foundation homes. The letter pointed out that HUD required the use of the wood foundations and now that they were deteriorating, it said “soon some [residents] will be without a home.” The letter traced two decades' worth of responses Blackfeet Housing received from HUD, dodging responsibility. At the time, Housing estimated the cost of improving the homes could run between 3 and 4 million dollars. They were asking for assistance of any kind. The same day Blackfeet Housing sent that letter...

Rhonda Michael: And that went to Conrad Burns, didn't it?

KS: It did. A nearly identical letter went to Conrad Burns, then a U.S. Senator for Montana. I saw a version with choice lines highlighted in fading yellow. One read, quote: “Our homebuyers can no longer wait for resolution to address the health and safety issues of their homes. They have gathered together with legal assistance and a class action lawsuit is imminent.”

Harry Pregerson: [fade in] and that’s submitted. Now we come to Marceau versus Blackfeet Housing Authority and others.

KS: Marceau versus Blackfeet Housing Authority and those infamous others. It all started when Martin’s daughter, Marlla, went to work for a lawyer in Billings: Jeff Simkovic. This situation her dad was so worked up about? Well, her boss decided to take it up, pro bono.

In 2002, Simkovic filed the class action lawsuit against Blackfeet Housing, its board and the Secretary of HUD. At that time, Martin had been living in his home for almost 25 years. And he’d never seen any significant effort from the Blackfeet tribe or from HUD to make his home safer. U.S. District Judge Sam E. Haddon denied the plaintiffs' claim against HUD in 2004. So they appealed to the Ninth Circuit Court of Appeals: a much bigger stage. That court hears cases that come out of district courts from nine states, plus Guam and the Mariana Islands. Presiding was Judge Harry Pregerson, who died in 2017. The New York Times obit noted his 50 years of using his “bully pulpit” on that court – calling him a social engineer who often ruled according to his conscience. This recording is from 2006.

Harry Pregerson: Lift that microphone up a little. See, we're just recording you. You're, you're gonna be on disks into perpetuity.

KS: It’s hard to summarize ten years of court proceedings, but I’ll try to hit the highlights. Essentially, the courts didn’t know how to approach Indian law. They were ultimately battling not with the housing issue, itself, but with how exactly to proceed on ruling a lawsuit coming out of a sovereign nation. And that brought up a few big questions.

First, what were the federal government’s responsibilities to the tribe around housing? Here’s Timothy Cavan—the assistant U.S. attorney, defending HUD—trying to explain it to judge Pregerson.

Timothy Cavan: Well, your Honor, I—

Harry Pregerson: They have to give the money out for safe, sanitary, and decent housing, right?

Timothy Cavan: That's correct.

Harry Pregerson: And let's say that, let's say that HUD gives money for safe, sanitary, and decent housing. And the housing is not safe, sanitary, and decent. What, what's HUD's obligation?

Timothy Cavan: Well, HUD—none, your honor. Uh, the obligation to construct decent, safe and sanitary housing is, is the obligation of the housing authority. HUD provides the funds to the housing authority for the construction of the project. But nowhere in any of the statutes is it, is, is HUD imposed with the duty to build safe and sanitary housing or to repair or to remediate housing so it is safe, uh, decent and sanitary. [fade under]

KS: They're basically trying to clarify what HUD owes tribes. The other big questions the courts had to wrestle with were laid out to me by a guy named Steve Doherty. He defended Blackfeet Housing in this case—his voice actually comes up in this recording. Doherty is a whip-smart lawyer and former Montana state senator who spent a lot of his career thinking hard about Indian law.

Steve Doherty: So it was a case of tribal members suing the tribe and there were questions of sovereign immunity, of sovereignty, and of where they had to go first.

KS: So the question of sovereign immunity is basically this: Is Blackfeet Housing legally able to be sued by members of the tribe? Or, did the housing agency at any point sign anything making it “immune from suit”?

But in answering that question, the judges were like, ‘wait, who should even be making this decision? Like, what court should this discussion be happening in?’ That’s a question of tribal sovereignty. Meaning: because the tribe is self-governing, should it also be the institution that fields this case?

At first, the Ninth Circuit court said “no.” And there was total uproar. Amicus briefs came in from other tribes—ones in Montana and beyond its border, including the Navajo Nation—and the National American Indian Housing Council. Everyone was worried about a decision that said a federal district court could make a ruling on a case between tribal people and their governing tribe.

Doherty says if that decision was left standing, D.C. law firms would’ve brought it to the U.S. Supreme Court—which would have risked setting a precedent that creeps up on tribal sovereignty. But instead, the Ninth Circuit made a super rare unanimous decision a few months later:

Steve Doherty: They reconsidered their opinion, withdrew the initial Ninth Circuit opinion, said it was null and void, and ruled completely in favor of the Indian Housing Authority that they had to exhaust their tribal court remedies first. Because tribal members who are suing a tribal entity, that's the essence of government, is that's where you need to go.

KS: The case had to be heard in tribal court first. And that essentially pushed aside Marceau's claims against HUD and the federal government. The plaintiffs couldn't sue two different governments at the same time: those are different systems.

In 2008, plaintiffs petitioned the U.S. Supreme Court to review that part of the Ninth Circuit's decision. The petition was denied. So they petitioned again in 2012. Can you guess? Also denied.

So, after going through district court, the Court of Appeals, and almost to the Supreme Court—the case was ultimately decided a half mile from where it all began – at the Blackfeet tribal court. Blackfeet Housing ended up suing its insurance provider, called AMERIND. It's a tribally sovereign federal corporation, and a cooperative that started when 400 tribes pooled their resources to create it in 1986. Its website says its vision is “tribes protecting tribes.”

Steve Doherty: And they got insurance coverage denied on the basis that it was immune from suit by one of its members in the co-op, which was just an absolute terrible decision.

KS: Doherty said that in this case, AMERIND was acting like other insurance companies – by fighting payouts. And there's an added layer here. AMERIND used the concept of 'sovereign immunity' to argue it couldn't be sued by one of its members. That was a familiar loophole to Blackfeet Housing, which argued it could not be sued by members of the Blackfeet tribe.

So AMERIND didn't pay Blackfeet Housing. And Blackfeet Housing didn't pay Glacier homeowners. And the real meat of the case—beyond the questions involving tribal sovereignty—well, the feds never had to deal with that at all.

Steve Doherty: And the reason it's screwed up is, I mean, that HUD was gonna be able to sidestep its obligations. I mean, you know, what, what good is it suing Blackfeet Housing? They don't have a pot of money somewhere that you can go get the money, fix the houses, and make it, make it good, you know? The pot of money is with HUD, it's with the federal government, or it should have been with an insurance company, an insurance entity. Um, it isn't. So it can't be made good until you get the money. And it's a complicated maze. It's another example in the long history of the United States, um, not fulfilling its treaty obligations.

KS: So, those treaty obligations come from the mid-1800s, when the feds forced tribes to sign away most of their lands. The treaties signed—fraught for all kinds of reasons—basically said: 'This tribe agrees to share this land in exchange for future protections from the feds.' Legal duties around those treaties are mushy, but the U.S. Supreme Court in 1942 said the federal government holds quote “moral obligations of the highest responsibility and trust.” That was later interpreted to include services like health and education.

But there's debate among Indian law scholars around whether it also includes housing. Steve Doherty thinks it does. I asked him if he thought there was any way the outcome of this could have been different. He said there was some talk about the tribe and the tribal plaintiffs joining forces to sue HUD together.

Steve Doherty: And I'm pretty sure my clients would've gone for it. I know they would've gone for it.

KS: So after decades of judicial back-and-forths, the homeowners got catch-22ed: The federal government, Blackfeet Housing and its insurance company were all more or less pointing at each other as the ones to blame. And the homeowners ended up empty-handed.

Back in the Ninth Circuit Court, Judge Pregerson was upset about this outcome. In July 2006, he penned the official opinion of the court, saying that according to law, the court had to dismiss the claims against HUD and remand the claims against Blackfeet Housing. But Pregerson also wrote a concurring opinion, making it clear his conscience differed from the law. So just one paragraph after his conclusion that plaintiffs couldn't sue the federal government, he wrote quote:

PREGERSON IN WRITING [KS reads]: "I write separately to point out the manifest injustice of releasing the federal government from responsibility in this suit. The relationship between the federal government and the tribes has been one of promises carelessly made and callously broken. Here we see that in the area of tribal housing, as in so many other areas, we as a nation have ignored the collateral consequences of our conduct toward American Indians and have utterly failed to live up to our promises. We have a moral duty, if not a legal duty, to remedy the harm caused to these Plaintiffs."

Here's the judge again from the recording.

Harry Pregerson: Well, I mean, uh, you know, look, I'm worried about the health of these people. I mean, you know, you have all these nice little technicalities, but you got a hundred and whatever it is, uh, families of, uh, poor people that need help. And from what we hear, you know, they're living in pretty, pretty dangerous conditions—unhealthy conditions.

KS: On the bench with Pregerson was Judge Ronald M. Gould. He asked about the health of the homeowners during court proceedings.

Judge Gould: And so these people are still living in the houses, right?

Steve Doherty: Yes.

KS: That's a younger Steve Doherty.

Judge Gould: And does the tribe have an agency other than the housing agency that would be examining if there are health problems?

Steve Doherty: Um, not that I'm aware of, your Honor.

[fade tape in]

Kathleen Shannon: Hey, there.

Child: Hello.

Kathleen Shannon: Does Candy live here?

Child: Yeah.

Kathleen Shannon: Is she home?

[fade out]

KS: Over decades, the plaintiffs exhausted their legal options. Like Martin Marceau, Candice LaMott was listed on the lawsuit from the very beginning. She never saw improvements to her home and she says no one's ever followed up with her family after the lawsuit.

[fade in]

Kathleen Shannon: I was wondering if you might be interested in talking with me.

Candice LaMott: Sure. Come in,

Kathleen Shannon: Okay, cool.

[fade out]

KS: LaMott's 59 now, and came to the door in a wheelchair when I met her in February. She's diabetic and also having issues with her lungs and kidneys.

Candice LaMott: It's a daily thing that I, I fight with every day. I, I get so upset because, um, we, we never did get no renovation. Never. And these are our own people that live here, that served on the housing board. They never did come back to check on us. Never.

KS: LaMott's lived here since she moved in with her mom when the house was brand new. And she inherited the house when her mom died of kidney failure. Now, her hallway floor is like a washboard road—the deepest ruts are covered in sheets of newspaper. In the living room, which is also currently being used as a bedroom, she's covered the original floor with maybe a dozen pieces of plywood. This house has seen a lot of people come through over the years.

Candice LaMott: [fade in] But it was Dorothy, her two daugh—or us three girls. And their two hus—their husbands. And then we had about maybe 3, 4, 5, probably about five. Oh, my brother Greg, um, sorry.... [fade under]

KS: I heard about this from a bunch of people living on the reservation. It's a cultural norm to take in cousins, nieces and nephews, or whoever needs a roof for a while. But overcrowding can exacerbate structural issues. More people using a bathroom means more moisture, which can mean more mold.

[sounds walking downstairs]

And that's what I found in LaMott's basement, directly below the bathroom.

Lynette Reevis: We really don't have a light down here. Was she talking about over here, or...?

Kathleen Shannon: Uh, I think...Oh, yeah, I think I see it on the wall there. All right, so you've got—this looks like the hot water tank.

Lynette Reevis: Yeah.

Kathleen Shannon: And oh, yeah. Like, a ton of moisture, huh? Okay. Yeah, that definitely looks like mold.

Lynette Reevis: And it leaks like right here...

[fade under]

KS: LaMott can't make it downstairs any more, so she had Lynette Reevis show me around. Reevis just moved back to Montana from Washington state to be with her partner, LaMott's son. They're staying down here in the basement, sleeping on a mattress

on the floor. They've tried to make the space livable: covered the ceilings and walls with makeshift materials. But she's hoping they won't have to stay here long.

Lynette Reevis: 'Cause we're gonna be having a baby soon too, so.

Kathleen Shannon: Oh, wow.

Lynette Reevis: Yeah, I just, I don't think it's safe for a newborn to be in, you know—to bring the baby here.

Kathleen Shannon: Yeah.

Lynette Reevis: So we're...

Kathleen Shannon: Are you having luck finding anything else? It just seems like there's not enough housing here.

Lynette Reevis: No, there's not. It's kind of a struggle.

KS: The Blackfeet Nation is not alone in that struggle. Across all of Indian country, tribes are dealing with an aging stock of houses that weren't necessarily built to code. Any money coming from the federal government tends to first go to upkeep on those houses—usually rentals—and there isn't much leftover for new construction projects. On top of that, the amount of that federal aid has been nearly stagnant for almost 25 years. I spoke to Tony Walters about this. He's a member of the Cherokee Nation and the executive director of the National American Indian Housing Council, an advocacy group based in D.C. When NAHASDA was first passed in the mid-nineties, the amount of funding divvied among tribes for housing was \$600 million. Since then, that number has gone up only incrementally—to \$650 million.

Tony Walters: If you think about level funding and inflation, it's definitely a giant cut. I think it's about two-thirds purchasing power. We made a little bit of a gain in the last two appropriation cycles to get tribes a little bit more money. But really they're struggling to be able to do anything, right?

KS: Walters points out the current housing shortage across the U.S.

Tony Walters: I think some people even kind of rise it to the level of being a crisis for the whole country. Certainly it's a crisis in Indian country.

KS: A 2017 HUD report estimated the number of housing units needed in tribal communities across the U.S. at 68,000. So, in the Glacier Homes neighborhood, even though people know the homes may be contributing to their health issues, even though

many of their homes would be condemned if the tribe had someone to condemn them, they can't leave. They have nowhere else to go. Again, former Indian Health Service employee, Brian Crawford.

Brian Crawford: There's no choice. And, and that's when it becomes an environmental social justice issue, um, because it's not addressed. It needs to be addressed. And people want to, to address it, even the leaders. But the downside of that is that you identified a problem that you can't fix. So you can create a lot of mental stress issues on these people.

Kathleen Shannon: Sorry, you mean, um...?

Brian Crawford: They know, they know the problem and there's nobody to fix it, which makes it harder.

KS: In Montana, I'm Kathleen Shannon.