

**AN ATTEMPTED REVOLUTION IN NATIVE
AMERICAN HOUSING: THE NATIVE AMERICAN
HOUSING ASSISTANCE AND SELF-
DETERMINATION ACT**

*George H. Cortelyou**

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I. Introduction

Home has a special place in all cultures, including Native American cultures.¹ To most Americans it does not seem unusual to

* Student at Seton Hall University School of Law, J.D. anticipated May 2002. Mr. Cortelyou has also authored the book *Along the Power Axis: A Journey through American Politics and Culture* (2001).

¹ Among the Navajo, for example, having a home is essential because it is where life begins and learning takes place. *Navajo Leader Cites Infrastructure Needs*, ALBUQUERQUE JOURNAL, May 16, 1996, at C1. One commentator delivers an encomium on home:

Home. The Hearth. Our homes provide the safe place where we share our lives, our struggles, our triumphs, our learning, our laughter and our tears. At our hearth we celebrate and acknowledge the joyous and tragic places we

live in a home that is structurally sound or has enough room for everyone, complete plumbing, electricity, and a telephone. On reservations these basic amenities are hard for Native Americans² to come by.³ Many reservations resemble Third World nations, because unemployment, economic depression, and inadequate housing produce conditions that few non-Indians experience.⁴ Almost a century and a half ago, the federal government compelled Native Americans to leave their homelands for reservations under treaties which promised that the United States would be their trustee and act in their benefit.⁵ Only five years ago, however, the federal government fulfilled its trust duty to find Native Americans new homes by passing the Native American Housing Assistance and Self-Determination Act of 1996⁶ (NAHASDA)

encounter upon our paths of life. The image of family and loved ones gathered for a meal, illuminated by a crackling fire, accompanied by the laughter and banter of the old and young, warms us, even on a windy winter night on the plains, far away from Florida.

Similar visions comfort the hearts of peoples of every culture. There is no place like home. Ideally, our home provides nurturing, shelter, spiritual grounding, and physical and emotional security. Just as nature's beauty blooms in many forms, people build homes in a myriad of styles, reflecting their individual lives, environment, and, above all, their traditions.

Susan J. Ferrell, *Indian Housing: The Fourth Decade*, 7 ST. THOMAS L. REV. 445, 445 (1995).

² Because the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) uses the term "Native American" in its title and provisions and treats Native Alaskans identically to the tribes of the contiguous states, the author uses the words "Native American" inclusive of Native Alaskans. "Native American" does not include Native Hawaiians, who are later addressed in relation to Title VIII of NAHASDA. *See infra* part VI.B.

³ *See infra* part I.

⁴ 138 CONG. REC. S3,425-26 (Mar. 12, 1992) (statement of Sen. McCain). According to Senator McCain:

Recent studies indicate that 28 percent of all American Indian and Alaska Native families live in substandard, overcrowded housing that lacks the basic amenities of indoor plumbing, electricity, or heating. By way of comparison, less than 5 1/2 percent of all Americans live in similar conditions. Additionally, more than 90,000 Native American families are estimated to be underhoused or homeless. The severe housing problems facing Indian people are compounded by poverty and unemployment levels in Native American communities that are of epidemic proportions. The number of Indian families with incomes below the poverty line is nearly three times the average rate for families throughout the rest of the Nation. The average income of Native Americans is less than \$4,500 per person per year.

142 CONG. REC. S12,405 (Oct. 3, 1996) (Sen. McCain).

⁵ *See infra* part II.

⁶ Pub. L. No. 104-330, 110 Stat. 4016, 25 U.S.C. §§ 4101-4195.

to assist tribes with affordable housing.⁷

NAHASDA attempts to remedy the acute housing problems that Native Americans face⁸ by severing them from non-Indian urban housing programs⁹ and recognizing that tribes are sovereign Nations with separate and unique needs.¹⁰ To do so, NAHASDA consolidates prior low-income housing programs into a single block grant that tribes spend where they see fit¹¹ and it empowers tribes to access private lenders through housing loan guarantees and increased leasehold terms for mortgages.¹²

This note inquires into whether NAHASDA overcomes the barriers to affordable housing for low-income Native Americans. Though NAHASDA broke the status quo of failed housing policies,¹³ Native Americans must still find “creative solutions” to meet their needs because NAHASDA was not a panacea for affordable housing.¹⁴ This note concludes that NAHASDA succeeded in part but failed overall because of inadequate funding, its inability to stimulate private

⁷ For the first time, Congress recognized that its trust obligations to Native Americans required providing decent homes. See *infra* part IV. Congress believed that providing Native Americans with affordable, safe homes in healthy environments was a crucial aspect of the special trust duty to help improve their socioeconomic status. NAHASDA § 2(5), 25 U.S.C.A. § 4101(5). Indeed, affordable housing advances Congress’ goal to promote self-determination and self-sufficiency in Native American communities. 142 CONG. REC. E503 (Mar. 29, 1996) (statement of Rep. Johnson).

⁸ NAHASDA broke away from the old policies under which Native Americans suffered some of the country’s worst housing conditions. 142 CONG. REC. H11,613 (Sept. 28, 1996) (statement of Rep. Lazio). The need to change the status quo in housing policies was overwhelming. 142 CONG. REC. S12,405 (Oct. 3, 1996) (statement of Sen. McCain). This is reflected in NAHASDA’s findings of fact, which state, “the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute.” NAHASDA § 2(6), 25 U.S.C.A. § 4101(6).

⁹ NAHASDA was a “revolutionary measure,” because it separated urban public housing from Native American housing, which is predominantly rural. 142 CONG. REC. H11,615 (Sept. 28, 1996) (statement of Rep. Bereuter).

¹⁰ See Denise Chee, *Unique Aspects of Housing Development on Tribal Lands*, 10 EXPERIENCE 7, 39 (2000).

¹¹ “We need local responsibility and flexibility that lets tribes decide how to spend money rather than asking a bureaucrat in Washington to solve problems for them. . . We also must recognize that the Federal government cannot be a paternalistic overseer.” 142 CONG. REC. H11,613 (Sept. 28, 1996) (statement of Rep. Lazio).

¹² See 142 CONG. REC. H11,614 (Sept. 28, 1996) (statement of Rep. Lazio) (“The new loan guaranty program that this bill provides to tribes. . . means there will be more involvement with private sector financial entities who are so crucial to long-term development in Indian country.”).

¹³ See *supra* note 8.

¹⁴ See *infra* part V.

lenders' participation, and its failure to address the economic crisis underlying the housing problem.¹⁵

II. *Reservation Economies and the Need for Affordable Housing*

Homeownership is valuable to economic development on reservations because home equity amounts to capital for business, investments, and education, but unfortunately those opportunities are limited.¹⁶ According to Senator John McCain, "Statistics do not reveal adequately the situations that exist on Indian reservations across the country today."¹⁷ Reservation economies are extremely depressed due to their placement on generally remote, marginal lands with few natural resources.¹⁸ To illustrate the absence of reservation infrastructure, the

¹⁵ See *infra* part VI.

¹⁶ *Hearings on F2000 Indian Programs Budget Before the Senate Comm. on Indian Affairs*, 106th Cong. (1999), available in 1999 WL 8086307 (statement of Christopher D. Boesen, Executive Director, National American Indian Housing Council) (hereinafter Hearing 8086307).

¹⁷ 138 CONG. REC. S3,425 (Mar. 12, 1992). Unemployment and poverty levels on reservations are incomprehensible to most Americans, even to those who lived through the Great Depression and suffered 25 to 30 percent unemployment during its heights. *Id.* at S3,426. In comparison, average unemployment in Indian country in 1989 was 52 percent and reaches 80 to 90 percent on the poorer reservations. *Id.* at S3,425-26. Poverty impacts Native American communities at many levels:

A lack of jobs and economic opportunity on reservations is a major contributor to the high levels of alcoholism, high suicide rates, sense of helplessness, and other deep social problems that afflict all too many tribes. The conditions on Indian reservations often more closely resemble a Third World underdeveloped nation than the mainstream economy in the society of the United States.

Id. In the most recent study, the jobless rate on the 30 reservations of 3,000 or more Native Americans was 46 percent. General Accounting Office, Pub. No. GAO/RCED-98-49, *Native American Housing—Homeownership Opportunities On Trust Lands Are Limited* (hereinafter GAO-98-49). For rural Native Americans, the poverty rate is 37 percent, which is the highest of any racial group and three times the rate for rural whites. Chris de Reza, *Native Americans to Bush: Show Us the Money*, REAL ESTATE FINANCE TODAY, Jan. 15, 2001, at 9, available in 2001 WL 8192467. According to the Bureau of Indian Affairs (BIA), in 1990 only 25 percent of employed Native Americans living in Indian country had an annual income of \$7,000 or more, but 75 percent of Americans overall did. GAO-98-49, *supra*. Indeed, having "8% unemployment would be a godsend for many tribes." 138 CONG. REC. S3,426 (Mar. 12, 1992) (statement of Sen. McCain).

¹⁸ Thomas J. Sugrue, *Expert Report: Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 261, 300 (1999). Fewer than one in eight tribes have mineral and energy reserves which can be developed. Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. on LEGIS. 335, 338 (1985). The basic principle of welfare reform, that some people choose not to work, is inapplicable to reservations because jobs do not exist. *Indian*

Navajo reservation is about the size of West Virginia, but it has 2,000 miles of paved roads while West Virginia has 18,000.¹⁹ As a stark example of reservation poverty, when President Clinton invited all 547 federally recognized tribes to a summit at the White House in 1994, over 40 percent of tribes could not afford to send a representative and some tribes spent half their annual tribal budgets to do so.²⁰ Contrary to the popular myth that Indian gaming made tribes wealthy, few tribes have tried it and fewer still succeeded.²¹ When President Clinton visited

Programs Budget Before the Senate Comm. on Indian Affairs, 106th Cong. (2000), available in 2000 WL 11068395 (statement of Christopher D. Boesen, Executive Director, National American Indian Housing Council) (hereinafter Hearing 11068395). One author commented that white Americans perceive harmony with mother nature through the windows of their comfortable office or from high tech kayaks as they paddle the Colorado, but Native Americans struggle to feed their children in cultures of poverty, desperation, and alcohol. James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 903 (1992).

¹⁹ Michael J. Kurman, *Indian Investment and Employment Tax Incentives: Building a New Highway to Indian Country for Private Sector Businesses and Jobs*, 41 FED. B. NEWS & J. 578, 583 (1994) (quoting *Administration's Tax Proposals: Hearings on Foreign Tax, Possessions Tax Credit, Investment Tax Credit, Business Meals and Entertainment, and Other Tax Matters Before the Senate Comm. on Finance*, 103d Cong., 1st Sess. 412 (1993)).

²⁰ Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 694 (1994).

²¹ U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, ASSESSMENT OF AMERICAN INDIAN HOUSING NEEDS AND PROGRAMS: FINAL REPORT 51 (1996) (hereinafter HUD Assessment). "Everybody thinks that tribes are getting rich from gaming and very few of them are." David Pace, *Casinos Failing Most Indians*, THE ARIZONA REPUBLIC, Sept. 1, 2000, at A1, available in 2000 WL 8062068. Only 91 tribes operate a high-stakes gaming facility. Stephanie Dean, *Getting a Piece of the Action: Should the Federal Government be able to Tax Native American Gambling Revenue?*, 32 COLUM. J.L. & SOC. PROBS. 157, 179 (1999). Merely having a casino is no guaranty of wealth, for only eight casinos generated 40 percent of Indian gaming revenues. *Id.* at 180 n.203 (1999). Reservations tend to be too distant from population centers for casinos to profit. HUD Assessment, *supra* at 51.

Even if a tribal casino is successful, members are not necessarily employed nor share the revenues. The San Carlos Apache Tribe has a casino and resort, but unemployment on the reservation rose from 42 percent in 1991 to 58 percent in 1997, and the number of tribal members on welfare rose 20 percent. Pace, *supra*. Tribal members complain that they receive no help from the casino and resort. *Id.* Non-Indians hold about three-quarters of the jobs at the casinos. *Id.* Native American casinos employ an estimated 15,900 total individuals, which is 8 percent of the Native American population, but that figure includes non-Indians. HUD Assessment, *supra* at 51-52.

Gaming changed Native American wealth little overall and did not remedy poverty. *Id.* at 51. The Pequot tribe, touted for their Connecticut Foxwoods casino and resort, are an example of enormous success, earning \$800 million in 1994. Dean, *supra* at 179. Every

these reservations five years later, little had changed.²²

Indeed, little has changed for Native American housing, which is 50 years behind its non-Indian counterparts.²³ About 20 percent of Native American homes lack complete plumbing facilities, which was the same level for non-Indian homes in the 1950s.²⁴ Native American amenities are also years behind. Eighteen percent of Native American homes lack complete kitchens, 53 percent lack a telephone, and one-third use wood for heat—the same levels for non-Indians before and during the 1950s.²⁵ Nearly 10 percent of Native Americans face the Census Bureau's "worst case scenario": both overcrowding and insufficient plumbing.²⁶ Native Americans need an estimated 200,000

member of the Pequot is guaranteed a house, a yearly salary between \$50,000 and \$60,000, and an education from preschool through a doctoral degree. *Id.* The Pequot alone account for 30 percent of all Indian gaming revenues. HUD Assessment, *supra* at 51. Nevertheless, the number of Native Americans on welfare still grows and even tribes with casinos experienced a slight rise in unemployment since 1991. Pace, *supra*.

²² President Clinton met Geraldine Blue Bird at the Oglala Sioux Pine Ridge reservation, whose neighborhood was littered with abandoned cars. Kevin Galvin, *Clinton Decries Reservation Poverty*, THE ASSOCIATED PRESS, July 7, 1999, available in 1999 WL 17821614. Eleven of her relatives lived inside her house, and seventeen slept in the trailer. *Id.* Next, President Clinton saw the "Igloo neighborhood" made of styrofoam rubbish shacks. *Id.* Igloo housing is typical of the vast Pine Ridge reservation. *Id.* Bitter South Dakota winters wreck extreme hardship on those in igloo homes. *Id.*

²³ BUREAU OF THE CENSUS, STATISTICAL BRIEF, HOUSING OF AMERICAN INDIANS ON RESERVATIONS—PLUMBING (1995) ("[V]isiting a reservation today is like going back in time.") (hereinafter Census Plumbing Report).

²⁴ Census Plumbing Report, *supra* note 23. "Complete plumbing facilities" include "hot and cold piped water, a flush toilet, and a bathtub or shower," and "Native American homes" are "all units where the householder has identified himself or herself as American Indian, Eskimo, or Aleut." *Id.* By comparison, under 1 percent of households nationwide today lack complete plumbing facilities. *Id.* Lacking complete plumbing facilities is "almost unknown nationally." *Id.* Even outside the metropolitan areas the rate is below 2 percent. *Id.* Nevertheless, the figures are averages that do not reveal the disparities between tribes, some of whom live very poorly. *Id.* ("[N]o one had it as tough as Navajo owners. Remarkably, about 6 in every 10 did not have complete plumbing!") (emphasis in original).

²⁵ BUREAU OF THE CENSUS, STATISTICAL BRIEF, HOUSING OF AMERICAN INDIANS ON RESERVATIONS—EQUIPMENT AND FUELS (1995). "Complete kitchen facilities" include "a sink with piped water, a range or cookstove, and a refrigerator." *Id.* Only 1 percent of kitchen facilities nationally were incomplete. *Id.* The average does not show, however, that 44 percent of Navajos lacked complete kitchens. *Id.* In addition, "phoneless households were the rule" on reservations. *Id.* Of households nationally, 5 percent lack telephones. *Id.* The Gila River, Navajo, and San Carlos Reservations shared the worst rates with over 75 percent of homes phoneless. *Id.*

²⁶ Census Plumbing Report, *supra* note 23. On reservations, 40 percent of Native Americans live in overcrowded homes compared with 6 percent of Americans overall. GAO-98-49, *supra* note 17. "Crowded" is more than one person per room; i.e., more people than rooms. Census Plumbing Report, *supra* note 23. In comparison, the figure for

housing units.²⁷

III. Background and Legal Concepts

*In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.*²⁸

The federal government stands in a trust relationship with Native Americans that has all the attributes of a traditional trust, including fiduciary duties.²⁹ Traditional property law principles like adverse possession, laches, statutes of limitation, and estoppel are inapplicable to land held in trust for Native Americans.³⁰ These legal limitations frighten away potential lenders and mortgagors who feel they cannot

U.S. households is only one-tenth of one percent. *Id.* Again, the figure is an average, hiding that 30 percent of Navajo households face the worst case scenario. *Id.*

²⁷ Mark Fogarty, *Housing Loan Program for Native Americans Begins Operation*, INDIAN COUNTRY TODAY, Sept. 5, 2000, available in 2000 WL 26268647. Some live in single-unit homes crowded by three or more families; others live in cars and tents. Candy Hamilton, *Indians to Tackle Housing Crisis on Their Own*, THE CHRISTIAN SCIENCE MONITOR, Aug. 8, 1997, available in 1997 WL 2803078.

²⁸ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (footnote omitted). The Court held that the trust obligations require "the most exacting fiduciary standards" of the federal government. *Id.* at 297.

²⁹ *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The existence of the federal government's trust relationship with Native Americans is "undisputed." *Id.* The elements of a trust are present: a trustee (the federal government), a beneficiary (Native Americans), and a trust corpus (lands and funds). *Id.* This relationship is long-established and arises from treaties promising Native Americans protection as consideration for land concessions. TASK FORCE SEVEN, AM. INDIAN POLICY REVIEW COMM'N, 95th CONG., 1st Sess., REPORT ON RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 1 (1976), quoted in Williams, *supra* note 18, at 337 n.4. Today there are almost 52.5 million acres of reservation land in the United States, Chee, *supra* note 10, at 7, about 45 million of which is tribal trust land, with the remainder in individual trust. GAO-98-49, *supra* note 17. Approximately 1.2 million of the estimated two million Native Americans in the United States live on trust land, which is held either for a tribe or an individual Native American. GAO-98-49, *supra* note 17.

³⁰ Chee, *supra* note 10, at 38. In general, trust land cannot be alienated, leased, or encumbered unless the tribe obtains permission from the Secretary of the Interior. John McGee Ingram, *Home Ownership Opportunities in Indian Country*, 7 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 164, 168 (1998). Encumbrances include any lien, claim, liability, or charge "attached to and binding real property." GAO-98-49, *supra* note 17.

use the land as collateral and are thus without legal recourse upon default.³¹ Lenders are also frightened away because the Bureau of Indian Affairs ("BIA") must certify a title status report evaluating the current ownership of any trust land before it can be encumbered.³²

Though trust status is meant to protect Native Americans, it strains their relationship with the federal government because they are treated as "domestic dependent nations;" i.e., sovereign wards of a guardian.³³ The federal government intended the reservation system to continue Native American possession of the lands held in trust for them, but reservations became a vehicle for "civilizing" tribes or worse.³⁴

³¹ GAO-98-49, *supra* note 17. Tribes are protected against suit unless they waive their sovereign immunity, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), which must be approved by the Secretary of the Interior, 25 U.S.C. § 81(d), and clearly allowed by tribal law. Ingram, *supra* note 30, at 170. The BIA must perform a consumer protection analysis of a loan to determine whether it is "in the best interest of the borrower" by looking for excessive interest rates and over-collateralization. *Id.* at 169.

Though land may be leased with the approval of the Secretary of the Interior, the leasehold is limited to 25 years. *Id.* at 168-69. This also played a major role in discouraging private lenders from financing leaseholds because they generally want leases longer than the mortgage so that there is substantial marketing potential in case of default. *Id.* at 169 & n.26. In addition, lenders are unwilling to finance activities on trust land because federal law requires lenders to foreclose in tribal courts under tribal law and jurisdiction. GAO-98-49, *supra* note 17. Since lenders are unfamiliar with tribal courts, they fear that these courts will rule in the tribal member's favor. *Id.*

³² GAO-98-49, *supra* note 17. Due to the complex history of Native American lands, title searches for determining the trust status of land are arduous because treaties, proclamations of the Secretary of the Interior, title records held by the BIA, statutes, Executive Orders, and county and tribal office records may bear on the title. Ingram, *supra* note 30, at 168. The BIA is reputed for significant delays in processing mortgage and loan applications. *Id.* at 169.

³³ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); Ingram, *supra* note 30, at 168. On one hand, tribes have long been separate governing entities that can enact and enforce legislation. Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 AM. INDIAN L. REV. 109, 117 (1988). On the other hand, tribal sovereignty is limited by treaties, Congress' power to nullify treaty rights unilaterally, statutes, and tribes' dependent status under the trust relationship. *Id.* at 117-18 & n.43 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

³⁴ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 19 (3d ed. 1998). Each reservation had an agent supervising their adaptation to non-Indian, often-Christian ways. *Id.* The reservation system arose from persuaded or coerced treaties with tribes. *Id.* at 18. Non-Indians demanded more land as their population grew, so they pushed tribes west of the Mississippi. *Id.* at 13, 18. Inevitably non-Indians moved to the West demanding more land, so the federal government restricted tribes to reservations. *Id.* at 18. In some treaties, the tribe yielded most of its land to the government, leaving a small portion for itself; in others, the tribe was resettled on a distant reservation. *Id.* In 1871, Congress banned recognition of tribes as nations with which the President could make treaties. *Id.* Though

Although the BIA administers the trust corpus lands for their benefit,³⁵ Native Americans doubt its practices due to a long history of financial mismanagement.³⁶ Even when trust management is delegated to states, millions of dollars in trust have disappeared.³⁷ Successful legislation for

the constitutionality of limiting the Presidents' power is questionable, the statute notified Presidents that Congress would not ratify such treaties. *Id.* Thereafter, statutes or executive orders created reservations. *Id.*

Alaska Natives do not share the history of the Native Americans in the contiguous states, because the United States purchased Alaska from Russia in 1867. HUD Assessment, *supra* note 21, at 23. Until the Alaska Native Claims Settlement Act of 1972 ("ANCSA"), Alaska Natives' sovereignty and territory were largely unaddressed. *Id.* ANCSA established tribal corporations in which Native Alaskans received corporate stock for enrollment and owned the land as shareholders. *Id.* Corporate bylaws protect tribal land against alienation. *Id.* In 1993, the Department of the Interior acknowledged that Alaskan tribes are like those of the contiguous states. *Id.*

³⁵ Chee, *supra* note 10, at 7.

³⁶ Native Americans criticize the BIA for negligent calculation of market rates, lack of expertise in local markets, and lack of skill and competence in negotiating fees in abrogation of the trust duties. Ronald E. Johnny, *Can Indian Tribes Afford to Let the Bureau of Indian Affairs Continue to Negotiate Permits & Leases of Their Resources?*, 16 AM. INDIAN L. REV. 203, 203-04 (1991). Great focus is on the BIA's billion-dollar mismanagement of Native Americans' oil, gas, and timber reserves. *Id.* at 203 & n.2 (quoting *Federal Trust Responsibility at Issue in Oil and Gas Cases*, NARF LEGAL REV., Summer 1988, at 1). Native Americans hold over 40 million acres of grazing land, *id.* at 203, but often the BIA negotiates leases "for pennies on the dollar," depriving Native Americans of significant income. Greg Overstreet, *Re-Empowering the Native American: A Conservative Proposal to Restore Tribal Sovereignty and Self-Reliance to Federal Indian Policy*, 14 HAMLIN J. PUB. L. & POL'Y 1, 24 (1993). For example, the BIA priced the Fort McDermott tribal council's land at \$1.60 per AUM (animal unit per month), but its market value was \$11.00. Johnny, *supra* at 206 n.13, 207. Similarly, in 1987, in Orovida, Nevada, a rancher leased land worth \$11.00 per AUM from the U.S. Bureau of Land Management ("BLM") for \$1.35. *Id.* at 207 n.16. Ronald Johnny, the chairman of his tribe, described the records of grazing permits for his tribe's land as "a dismal, negligent record of management of tribal resources. Apparently in many instances local BIA personnel merely telephoned the BLM and asked what it was charging in the same region." *Id.* at 206.

The BIA has also mishandled billions of dollars from Native Americans' land held in trust accounts. Matt Kelley, *Court to Hear Indian Accounts Case*, THE ASSOCIATED PRESS, Sept. 4, 2000, available in 2000 WL 25993779. So far, the federal government admitted to mishandling \$500 million. *Id.* The government collected proceeds from grazing, logging, mining, oil drilling, and other uses of the land to be held in trust for individual Native Americans. *Id.* The government admitted to mismanaging the accounts: records were never kept, documentation was lost or destroyed, some money was stolen, some was used in other federal programs, some was never collected, and thousands of accounts do not have names. *Id.* The plaintiffs allege that over \$10 billion dollars was mismanaged. *Id.* In February 1999, former Secretary of the Interior Bruce Babbitt, former Assistant Interior Secretary Kevin Gover, and former Treasury Secretary Robert Rubin were cited with contempt for destroying records and improperly withholding records in flagrant disregard of a court order. *Id.*; *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9, 28 (D.D.C. 1999).

³⁷ In 1933, for example, Congress annexed the Aneth Extension to the Navajo

Native Americans must include accountability to them or recognition of their sovereignty.³⁸

The policies the federal government adopted for Native Americans devastated their health, housing, and culture.³⁹ Congress believed that

reservation to quell tensions. Richard J. Ansson, Jr., *Protecting Profits Derived From Tribal Resources: Why the State Of Utah Should Not Have The Power to Tax Non-Indian Oil and Gas Lessees On the Navajo Nation's Aneth Extension*. Texaco, Exxon, and Union Oil v. San Juan County School District—*A Case Study*, 21 AM. INDIAN L. REV. 329, 344 (1997). Congress provided that if oil or gas were found on the extension, Utah would receive 37.5 percent of the royalties to educate Navajo children and build roads on the reservation. *Id.* Utah received \$61 million of royalties, but an audit discovered only \$9.5 million went to the Navajos, leaving \$51.5 million that the state admitted to squandering. *Id.* at 345. The funds were used for non-Indian projects like airports, roads, schools, and even a museum. *Id.* at 345 n.165. As a result of losing the money, housing and social conditions are appalling on the reservation. *Id.* at 344. Most reservation dwellers live in “ragtag” government tract housing or earthen hogan dwellings, 60 percent lack running water or electricity, and 95 percent have trouble reading and writing. *Id.*

³⁸ Williams, *supra* note 18, at 354-56.

³⁹ Ferrell, *supra* note 1, at 450-51. Allotment and termination played special roles in dispossessing tribes from their lands. The General Allotment Act of 1887, 25 U.S.C. §§ 331-34, 336, 339, 341-42, 348-49, 381 (also called the Dawes Act or the Indian General Allotment Act), divided reservation land held by tribes among individual members to be held in a 25-year trust, which then turned into a fee simple if they were found “competent and capable of managing” their affairs. Williams, *supra* note 18, at 345 (citing 25 U.S.C. §§ 331, 348, 349). Each allotment was 80 acres for agriculture or 160 for grazing. *Id.* Congress later amended the act to extend the trust status indefinitely. HUD Assessment, *supra* note 21, at 20 n.13. Under allotment, the so-called surplus land that had not been allotted reverted to the federal government, so Native American lands evaporated drastically. Williams, *supra* note 18, at 345. In addition, most of the allotments that matured into fee simple had been sold to non-Indians and are no longer in Native American possession. Canby, *supra* note 34, at 360.

During the McCarthy era in the early 1950s, Congress felt that tribal living exhibited “communistic traits,” Williams, *supra* note 18, at 354, and began the “Termination Era” when the federal government transferred the trust duties to states, Ferrell, *supra* note 1, at 452, terminated the trust relationship, and relocated Native Americans from reservations to urban centers, HUD Assessment, *supra* note 21, at 22. Between 1954 and 1962, Congress terminated 61 tribes. *Id.* Relocation consisted of grants to seek employment in cities. Canby, *supra* note 34, at 26. Other ideological and business factors culminated in termination as well; e.g., a dislike for Indian culture and communal institutions, the view of the Indian Reorganization Act as turning reservations into museums, and business interests which lost the use of Native American land and resources under reservation development programs. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.E.1 (1982). Congress believed that denial of federal assistance would encourage Native Americans to participate in democracy. Williams, *supra* note 18, at 353-54 & n.82 (quoting H.R. CONG. RES. 108, 67 Stat. B132 (1953)). Despite this hope, the states that acted in the federal government’s stead often neglected to recognize tribal sovereignty or provide housing to the Native Americans in their jurisdiction. Ferrell, *supra* note 1, at 452. Many states felt no responsibility toward their new Native American subjects. *Id.* States also resented tribes as a monetary drain. Canby, *supra* note 34, at 28. Relocation also failed because even though

Native Americans practiced “savagism” in their communal ownership of land⁴⁰ and that individual ownership would turn them into prosperous middle class farmers.⁴¹ The result was that by 1934 the Secretary of the Interior had sold two-thirds of all Native American lands to non-Indian homesteaders.⁴² Congressional policy also complicated leasing and title searches of Native American lands tremendously.⁴³

It was not until NAHASDA that Native Americans could apply to programs that were specifically designed for them, unavailable to non-Indians, and not extensions of existing programs.⁴⁴ There was, for

some Native Americans prospered, most joined the urban poor with the additional trauma of dislocation. *Id.* at 26-27. Tribes viewed the termination policy as inherently genocidal. Williams, *supra* note 18, at 354. The cultural and social disintegration was so apparent that Congress ended the policy in the early 1960s. *Id.*

⁴⁰ Williams, *supra* note 18, at 344.

⁴¹ Canby, *supra* note 34, at 20.

⁴² Williams, *supra* note 18, at 345. In 1887, Native Americans held a total of 138 million acres, but in 1934 only 48 million, 20 million of which were desert or semi-desert. Canby, *supra* note 34, at 22.

⁴³ See *supra* note 41 (describing the allotment policy). Sales of surplus land and alienation of fee simple allotments to non-Indians left a checkerboard pattern of non-Indian ownership where whole reservations once were. Williams, *supra* note 18, at 345. Allotments still in trust also complicated title searches, for they could be inherited. *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997). When the allottee passed away, his or her land descended under state law, and after 1910, allottees could devise their lands. *Id.* If there were multiple heirs, they could hold beneficial title to the same parcel simultaneously, and over time the number of title-holders proliferated, sometimes into dozens. *Id.* at 237-38. By 1967, the National Congress of American Indians reported that 48 percent of allotments in 12 studied reservations had six or more owners; 29 percent had over ten; and 14 percent had over 20. Williams, *supra* note 18, at 346 n.47. In 1983, Congress passed the Indian Land Consolidation Act to remedy fractionation by having land interests escheat to the tribe, *Youpee*, 519 U.S. at 238-39, but the Supreme Court struck down the escheat provision as a violation of the Takings Clause of the United States Constitution. *Id.* at 243-44 (citing U.S. CONST. amend. V). The consent of all owners of “fractionated land” is required to lease, transfer, mortgage, or otherwise encumber it. Ingram, *supra* note 30, at 168 n.19.

⁴⁴ Congress passed the Indian Housing Act in 1988 for a separate Indian housing program with its own specific regulations, but it was not until NAHASDA that Native American housing was completely separated from public housing. *Hearings on Challenges Facing HUD's Indian Housing Program Before the Comm. on Banking, Housing, and Urban Affairs and Indian Affairs*, 105th Cong. (1997), available in 1997 WL 8219856 (statement of Judy A. England-Joseph, Director, Housing and Community Development Issues, Resources, Community, and Economic Development Division) (hereinafter Hearing 8219856).

Before NAHASDA consolidated most of them, there were fourteen low-income housing programs under which Native Americans could acquire funding. General Accounting Office, Pub. No. GAO/RCED-99-16, *Native American Housing—Information on HUD's Funding of Indian Housing Programs* (hereinafter GAO-99-16). Five were non-competitive and distributed funds on a first-come-first-served basis; nine were competitive,

example, the United States Housing Act of 1937 (the 1937 Housing Act), which created the Low Rent Public Housing Program for low- and moderate-income families.⁴⁵ The 1937 Housing Act, however, created legal tensions and public planning disasters in Native American communities.⁴⁶ In 1964, HUD and the BIA developed the Mutual Help Homeownership Program.⁴⁷ Its 1976 replacement, the Mutual Help

requiring Indian housing authorities to submit housing proposals that HUD ranked and awarded by the highest score. *Id.* While NAHASDA is non-competitive, it did not replace Section 184 Home Loan Guarantees, Economic Development and Supportive Services, the Indian Community Development Block Grant, the Drug Elimination Technical Assistance Grant, or the Drug Elimination Grant. *Id.*

⁴⁵ Ulmer, *supra* note 33, at 110 (citing 42 U.S.C. §§ 1404a-1440). Congress' housing policy was to provide "decent homes and a suitable living environment for every American family." *Id.* at 110 n.3 (citing 42 U.S.C. § 1441). Nevertheless, the 1937 Housing Act did not help Native Americans until a quarter century later when the Public Housing Administration, which was the predecessor of HUD, *Hearings on Challenges Facing HUD's Indian Housing Program Before the Comm. on Banking, Housing and Urban Affairs and Indian Affairs*, 105th Cong. (1997) available in 1997 WL 8219955 (statement of W. Ron Allen, President, National Congress of American Indians) (hereinafter Hearing 8219955), determined that tribes could legally establish their own housing authorities to develop and operate low-rent projects, Ulmer, *supra* note 33, at 110-11.

⁴⁶ Under the 1937 Housing Act, tribes had to establish Indian housing authorities (IHAs), which were legal entities separate from the tribe, to which HUD could route funds. Chee, *supra* note 10, at 38-39. To receive funds, the tribe had to lease its own land to its IHA, a tortuous arrangement fortunately eliminated by NAHASDA. *Id.* at 39. Unsurprisingly, strife arose between tribes and their IHAs, leading to dangerous and dilapidated housing that vexes tribes today. *Id.* To lease its land to its IHA, tribes had to use HUD standard leases, which gave tribes no choice except 50-year terms. *Id.* The BIA often failed to understand this arrangement, so IHAs had to call in HUD representatives to explain it to them (as well as to the tribe), for they would not receive housing funds otherwise. *Id.* This created friction between tribes and their IHAs, so tribes gave their IHA land in flood zones or land which was comprised of poor soil or located in otherwise undesirable regions. *Id.* Today tribes are burdened with houses falling apart from being built on poor soil. *Id.* The land that tribes gave their IHAs was so bad that removal of overhanging boulders is an issue for some. *Id.* Further, neither the 1937 Housing Act nor its regulations required land use planning, so housing was built without infrastructure: "It is commonplace to see subdivisions on many New Mexico reservations without nearby stores, gas stations, and laundromats. The lack of zoning codes resulted in the development of housing near nonresidential buildings, resulting in haphazard-looking communities." *Id.* NAHASDA, however, requires land use planning and funds the tribe directly, not its IHA. *Id.* The Seattle Times won a Pulitzer prize for uncovering numerous examples of HUD's failure to monitor Indian housing authorities, who constructed lavish homes for themselves while neglecting homeless Native Americans on waiting lists. Chuck Taylor, *Times Wins Two Pulitzer Prizes*, THE SEATTLE TIMES, Apr. 7, 1997, at A1 available in 1997 WL 3227507. The 1937 Housing Act provided tribes the majority of their funding for development, operating, and modernization until fiscal year 1998 when NAHASDA went into effect. GAO 99-16, *supra* note 44.

⁴⁷ Ulmer, *supra* note 33, at 111. Under this program, the occupant's monthly

Homeownership and Opportunity Program,⁴⁸ was considered a success because it made homeownership possible for many Native American families.⁴⁹ HUD also developed the Modernization Program in 1968 to assist Native Americans replace or improve deteriorating housing⁵⁰ and established two block grant programs, the Indian Community Development Block Grant and the HOME Investment Partnership.⁵¹ In addition, a variety of federal mortgage programs served Native American housing needs.⁵² Nevertheless, lenders made a total of only

contribution went into an operation and maintenance account which would pay off the price of the unit if not fully used, so that the occupant could eventually obtain ownership. HUD Assessment, *supra* note 21, at 101. The 1937 Housing Act only assisted rentals. Ulmer, *supra* note 33, at 111. HUD viewed the pride of homeownership as an incentive for Native Americans to reduce costs through building and maintaining their own homes. Ulmer, *supra* note 33, at 111; HUD Assessment, *supra* note 21, at 101.

⁴⁸ Ulmer, *supra* note 33, at 112.

⁴⁹ Chee, *supra* note 10, at 39.

⁵⁰ Ulmer, *supra* note 33, at 111. The program was renamed Comprehensive Improvement Assistance Program in 1980. *Id.* at 112. In the same vein, the BIA developed the Housing Improvement Program in 1965 to provide grants to Native American families with extremely low income or no income to perform repairs, rehabilitate homes, make down payments, and afford new housing construction. *Id.* at 113.

⁵¹ HUD Assessment, *supra* note 21, at xxv. The Indian Community Development Block Grant (ICDBG) funded Native American community and economic development through community facilities, infrastructure, and housing. *Id.* HOME block grants began in 1990 and supported only local housing initiatives through down payments, housing development, and rehabilitation. *Id.* Though completely separate from public housing, Hearing 8219856, *supra* note 44, NAHASDA's block grants are modeled after the ICDBG program and HOME programs, Robert S. Kenison, *Implementing NAHASDA: Brave New World?*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 253, 254 (1999).

⁵² Ingram, *supra* note 30, at 171-73. For example, HUD created the Section 248 Program in 1985 for mortgage insurance, but it had limitations that made it unpopular and unworkable. *Id.* at 171. The program applied to leaseholds on trust land, communally held land, land assignments (land which the tribe licensed to individual members), and Alaska Native land, but not fee simple lands or allotments. *Id.* Moreover, tribes disliked the Section 248 Program because they were not consulted in its creation and application, it was not effectively marketed to them or lenders, foreclosure was not in tribal courts, foreclosed land went to non-Indians, and there was no provision for mortgage construction, which became sorely needed. *Id.*

In response came the Section 184 Program of the Housing and Community Development Act of 1992, which guaranteed loans. *Id.* at 172. Unlike the Section 248 Program, the guarantee applied to loans for individual allotments, tribal trust land, and fee simple land. *Id.* at 173 n.56. Section 184 loans could be used for acquisition, rehabilitation, or construction. Dustin Shepherd, *The Native American Housing Market*, THE JOURNAL OF LENDING & CREDIT RISK MANAGEMENT, Oct. 1, 1997, at 36, available in 1997 WL 9928238. HUD released a guidebook for the program to assist the lending process: borrower eligibility, foreclosure procedures, HUD's commitment to the program, and so on. Ingram, *supra* note 30, at 173. In tandem with the handbook, HUD marketed the program to lenders and tribes, achieving greater acceptance than the Section 248 Program did. *Id.*

ninety-one home purchase loans between 1992 and 1996 to Native Americans on reservations, eighty of which were to members of just two tribes.⁵³

IV. The Ingredients of a Successful Housing Program

The trust relationship between the federal government and Native Americans provides Congress with guidance in legislating for them.⁵⁴

Finally, tribes liked the Section 184 Program because it allowed them to act as developers, who rented property to members of the tribe. *Id.*

In guaranteeing a wider set of loans and allowing lenders to foreclose, the Section 184 Program was designed to increase the participation of private lending institutions, but few loans were ever made under the Section 184 Program. *Id.* at 172-73. By April, 2000, HUD reported 615 loans made under Section 184, amounting to \$61 million. Mark Fogarty, *American Indian Housing Fund Increase "Not Enough," Advocates Say*, INDIAN COUNTRY TODAY, April 17, 2000, available in 2000 WL 19316638 (hereinafter Fogarty 19316638). According to the 1997 data from the Home Mortgage Disclosure Act, Native Americans were the only minority group to register a decline in mortgage lending, by 1 percent in 1997. Mark Fogarty, *More Money for Indian Housing*, NATIONAL MORTGAGE NEWS, Oct. 19, 1998, at 71, available in 1998 WL 18767347 (hereinafter Fogarty 18767347). NAHASDA did not consolidate the Section 184 Program along with other funds available for Native American housing into its block grant program, so it still exists. Fogarty 18767347, *supra* note 52.

In addition to HUD programs, the Rural Housing Service of the Department of Agriculture extended section 502 of the Guaranteed Loan Program to Native Americans as a pilot program with the Federal National Mortgage Association ("Fannie Mae"). Ingram, *supra* note 30, at 174; GAO-98-49, *supra* note 17. Fannie Mae also committed \$1 trillion in "affordable and decent housing for low- and moderate-income" families, part of which is for a Native American lending initiatives program. *Id.* Fannie Mae also approved loans under HUD's guarantee and insurance programs. *Id.* Finally, the Department of Veterans Affairs has a direct lending mortgage program for Native American veterans to buy, build, or rehabilitate homes on trust land. Ingram, *supra* note 30, at 174.

⁵³ GAO-98-49, *supra* note 17 (the two tribes being the Tulalips in Marysville, Washington, and the Oneidas of Wisconsin). Only eight lenders made the ninety-one loans. *Id.* In comparison, lenders nationwide provided \$785 billion of single-family mortgages in 1996 alone. *Id.* The private loans made to Native Americans were the product of special programs, homeownership counseling services, and pre-existing relationships with tribes. *Id.* An additional twenty-two loans were made for manufactured homes, which are primarily financed with personal property as collateral. *Id.* Non-conventional loans were also scarce. Christy Wise, *Overcoming Reservations*, MORTGAGE BANKING, April 1, 1999, Vol. 59, Issue 7, available in 1999 WL 12029401. The Department of Justice filed claims against several lenders for discriminatory lending under the Equal Credit Opportunity Act and the Fair Housing Amendments Act of 1988. Ingram, *supra* note 30, at 167 n.15 (1998) (citing *United States v. Blackpipe State Bank*, No. 93-5115 (D.S.D. 1993) and *United States v. First National Bank of Gordon*, No. 96-5035 (D.S.D. 1997)). A federal court enjoined the discrimination, demanded damages, and, in one case, established a lending education program for Native Americans. *Id.*

⁵⁴ Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*,

At minimum, NAHASDA must include accountability to them in recognition of their sovereignty.⁵⁵ Moreover, NAHASDA must be flexible enough to accommodate the variety of climates Native Americans live in and their cultural values.⁵⁶ Traditional Native American home designs are particularly rich and are central to a tribe's identity.⁵⁷ Uniform public housing and building codes designed for

46 ADMIN. L. REV. 333, 334-35 (1994). Congress' actions under the trust relationship are not invidious racial discrimination against non-Indians because the trust is a relationship between two governments, not a racial classification, so there must only be a rational relationship to the trust duties. *Morton v. Mancari*, 417 U.S. 535, 553-54 & n.24 (1974) (upholding an employment preference in the BIA).

⁵⁵ Though done with good intentions, the most disastrous congressional policies for Native Americans—allotment and termination—were executed without their input or consent. Canby, *supra* note 34, at 21-22, 26-27. Federal law has largely controlled the events in tribal existence, so tribes have not had initiative or control in their own governance. N. Bruce Duthu, *Holding a Great Vision: Engaging the Jurisprudential Voice of Tribal Courts*, 71 N.D. L. REV. 1129, 1129 (1995) (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995)) (quoting Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 738 (1986)). Because tribal housing authorities must work through federal agencies at every juncture, housing programs are characterized by excessive delay and a lack of coordination. Ulmer, *supra* note 33, at 114 n.31. Many Native Americans rightly perceive that the very existence of their tribes is not in their hands, but instead controlled by federal bureaucrats who impose non-Indian laws on them. Duthu, *supra*, at 738. Furthermore, tribes tend to perform better in implementing their own development than government agencies do. HUD Assessment, *supra* note 21, at xxvii-xxviii. Unfortunately, there are not enough staffers at tribal housing authorities. Ulmer, *supra* note 33, at 114 n.31. Current staffers are underpaid and do not have the training or expertise to navigate invariably complex procedures and regulations. *Id.* Sovereignty allows tribes to tailor their programs to their particular needs and attend to problems long lacking funding. Hamilton, *supra* note 27. The American Indian Policy Review Commission, which Congress established in 1975, called for rejecting assimilationist policies and recognizing tribes as self-governing institutions. Canby, *supra* note 34, at 31.

⁵⁶ HUD has been criticized for applying the design it uses in cities and metropolitan areas to suit over 500 nations and tribes of Native Americans. Ferrell, *supra* note 1, at 447. Long before NAHASDA, HUD attempted to address this issue but did not have the resources to solve it. *Id.* HUD sought input from Native Americans to make homes more desirable and culturally relevant to them. *Id.* at 446. HUD collaborated with the National Endowment for the Arts and the American Indian Council of Architects and Engineers on a booklet of design concepts for Native American homes for use by architects working for Indian housing authorities. *Id.* HUD also sponsored the Cultural Design Award in 1995 to show its support. *Id.* at 448. HUD has managed, however, a few examples of adaptation to Native cultures: tribes built traditional log homes in Montana and North Dakota, and the Oneida of New York constructed houses with traditionally-designed wooden siding. *Id.* at 448.

⁵⁷ Ferrell, *supra* note 1, at 445. The following describes the variety of Native American housing designs:

cities fail on remote reservations because of their climate and geography.⁵⁸ Consequently, NAHASDA cannot apply cookie-cutter solutions to Native American housing.⁵⁹

NAHASDA must also overcome the traditional barriers to housing development on reservations in order to meet the needs of low-income Native Americans. Poverty impacts at all levels of the lending process and it is arguably the single most important factor in access to loans.⁶⁰

Some [Native Americans] envision a longhouse in the forest built of wood or bark; others picture chickees perched above tidewaters, river's edge or Everglades, tipis painted with sacred designs of stars, mountains and rain, or arbors and wickiups thatched with grass, hogans round as the eternal circle of life. Families together may build earthen homes tucked into the hills, white frame homes with the proverbial picket fences, or homes of adobe bricks the warm color of Mother Earth.

Id.

⁵⁸ Representative Don Young of Alaska supplied an anecdote:

I have watched the present program in housing not work. We have had housings [sic] in Alaska that were under Government control that had such audacity as to say you could not put a storm porch in Nome, AK, on federally built housing because it did not meet their code or did not meet their design.

I do not know how many have been to Nome, AK, but the wind blows about 84 miles an hour off the Bering Sea. It is an example to take into consideration of the native people up there and their needs or their designs and what should or should not be done.

142 CONG. REC. H11,616 (Sept. 28, 1996). On the White Earth Indian Reservation in northwest Minnesota, the force of the ground freezing from harsh winter storms broke the concrete foundations of several homes in a 43-home development. Eric Nalder, Deborah Nelson, and Alex Tizon, *Sending Good Money After Bad: HUD Missed Signs of Waste, Then Gave Tribe More Money*, THE SEATTLE TIMES, Dec. 4, 1996, at A11, available in 1996 WL 3695257. The high salt and mineral content of water clogs and corrodes pipes, water circulating fans, and water heaters on the Gila River reservation. Hearing 8219856, *supra* note 44. A \$300 water heater has an average life of six months under those conditions. *Id.* Remedying faulty construction and climate damage add to the costs of building homes for Native Americans. *Id.* The Rosebud Sioux Reservation in South Dakota experiences weather and remoteness troubles. Anne Flentgen Rich, *Rosebud Sioux: Innovative Use of NAHASDA Funds*, NATIVE AMERICAN HOUSING NEWS, June 2000, at 1. The weather narrows the time of year proper for building. *Id.* Remoteness creates problems that would not be experienced if closer to hospitable areas.

⁵⁹ Ferrell, *supra* note 1, at 445.

⁶⁰ Tribal members have enough trouble buying food and clothing and getting off welfare, much less affording a mortgage or loan. See Galvin, *supra* note 22. The down payment itself is a barrier to homeownership. Dana Simon, *Muscogee (Creek) Nation Joins Homeownership Initiative*, TULSA WORLD, June 10, 2000, available in 2000 WL 6788010. Poverty also frustrates mortgage applications due to unstable incomes, closing costs, problematic or nontraditional credit histories, and lender-required cash reserves. Ingram, *supra* note 30, at 164. Indeed, very often borrowers in Indian country have no credit history, and Native American incomes can fluctuate with the seasons and availability of work. *Id.* at 164, 166. Also, it is difficult to use reservation land as collateral because it

Native Americans lack homebuyer education and credit counseling, so they are unaware of financial resources;⁶¹ and for those who are aware, racial discrimination regularly stymies their attempts to obtain loans.⁶² Distance from lenders also impacts greatly on the lending process as to home-buyer education, language barriers, and the absence of infrastructure for development in tribal areas.⁶³ Tribal law is generally

tends to have little value due to remoteness. Morgan Lee, *Indian Housing on Front Burner*, ALBUQUERQUE JOURNAL, Oct. 14, 2000, at 1. Furthermore, the trust status diminishes the market value of the land. Ingram, *supra* note 30, at 165.

⁶¹ Often tribal members and leaders do not know whom to contact at a lending institution to apply for a loan because of the lack of communication between lenders and tribes. George Tibbits, *More Housing Loans Essential, Indians Say: Group Calls For Easing "Third World" Conditions*, THE NEWS TRIBUNE (Tacoma, WA), July 13, 1999, at B4 available in 1999 WL 3261841. In addition, many Native Americans currently obtaining loans are first-generation homeowners and have no experience obtaining home loans or negotiating with private lenders. GAO-98-49, *supra* note 17.

⁶² Williams, *supra* note 18, at 349-50. The paternalistic attitudes of policy makers at the national level impact significantly on Native Americans. *Id.* at 336. The BIA operated under the neocolonialist assumption that Native Americans were incompetent and unable to manage their own affairs. *Id.* at 349. Instead of hiring Native Americans to construct, manage, or operate projects for them, the BIA routinely hired non-Indians. *Id.* Consequently, Native Americans lost many opportunities for training, experience, and employment. *Id.* at 350. In turn, private businesses would then refuse Native Americans as potential employees citing a "lack of business traditions" among tribes, thus enhancing reservation poverty and unemployment. *Id.* at 349 n.65.

In the private sector, data on discrimination is largely unavailable for sales, rentals, and financing. HUD Assessment, *supra* note 21, at 232. However, in 1989 the Montana Human Rights Commission found discrimination in 57 percent of the tests they conducted, which was substantially higher than for other minorities. *Id.* The tests consisted of sending Indian and non-Indian applicants having the same wherewithal, housing needs, family size, etc. to rental agents, so that differences would be attributable to discrimination only. *Id.* at 232 n.80. In a HUD survey, 42 percent of Indian housing authority executive directors told HUD that discrimination was "very much a barrier" to obtaining housing while another 32 percent said it was "somewhat of a barrier." *Id.* at 232.

⁶³ Most lenders are located far from reservations and lack branches near tribal lands. Tibbits, *supra* note 61. Senator Ben Nighthorse Campbell stated, "Many opportunities and services most of America takes for granted are not available in Indian country. Native Americans can't simply walk into a local bank to open a checking account or get a loan for a new house because for the most part, these institutions are nowhere near Indian reservations." 143 CONG. REC. S5,133 (May 23, 1997).

Distance also adds to homebuilding costs. For example, it raises the costs of transporting materials to and from reservations. See GAO-98-49, *supra* note 17. Reservations are often distant from metropolitan areas, so they require a large capital investment to create basic infrastructure like sewers, landfills, electricity, and water supply. *Id.* Due to the heaving permafrost and vast distances of Alaska, Native Alaskan homes must be shipped on barges to rural locations. See Tony Hopfinger, *Challenges Hit Home in the Bush Housing: Two-Day Program Aims to Raise Awareness of Unique Needs in Rural Alaska Villages*, ANCHORAGE DAILY NEWS, Aug. 24, 2001, at E1 (quoting Tony Vaska,

inadequate to provide lenders with mortgage remedies upon default⁶⁴ and tribal land is held in trust, which prohibits alienation, complicates leases, and discourages lenders concerned about foreclosure.⁶⁵ Lastly, the BIA must approve any mortgage or title insurance before it can be issued on trust lands, thus creating processing delays.⁶⁶

V. NAHASDA and How It Works

A. Statutory Provisions

To accomplish affordable housing for low-income Native Americans, NAHASDA has two essential aims: to open the door to private lending and to merge federal Indian housing programs into a single flexible block grant, which tribes⁶⁷ may use according to their needs, thus recognizing tribal self-determination and sovereignty.⁶⁸ As

Executive Director, Association of Alaska Housing Authorities). A 600- to 800-square-foot home costs \$200,000, which frightens potential lenders. *Id.* Providing the infrastructure for these homes in the tundra, many miles from a city, for clusters of only several hundred people is frustratingly expensive for financiers. *Id.* Even in the contiguous states, each house requires approximately \$20,000 of infrastructure including septic tanks and cisterns on reservations with widely-scattered homes. GAO-98-49, *supra* note 17. Grouping homes in subdivisions reduces infrastructure costs. *Id.*

Distance also translates into cultural and linguistic differences, as tribal culture varies significantly from tribe to tribe. Wise, *supra* note 53 (“There are 556 tribes, and they are absolutely different in every way I could imagine”) (quoting Christopher D. Boesen, Executive Director, National American Indian Housing Council). Each lending program must be fitted to a specific tribe. *Id.*

⁶⁴ Tribal law and jurisdiction generally apply to foreclosures on trust land. Ingram, *supra* note 30, at 165. “Many tribes have limited practical experience or judicial precedents in carrying out adequate remedies for traditional mortgage lending. They generally have not developed a uniform commercial code (UCC) system or mortgage foreclosure and eviction laws that provide lenders with the same level of comfort as the related state laws.” *Id.*

⁶⁵ See *supra* part II. The number one factor that the General Accounting Office identified as a barrier to Native American’s access to loans is lenders’ uncertainty about recovering an outstanding balance for homes on trust land when the borrowers default. GAO-98-49, *supra* note 17.

⁶⁶ The need for accurate title searches on trust leaseholds performed in a timely manner is enormous. Hearing 11068395, *supra* note 18. The BIA estimates it has a backlog of title search requests to last the next 113 years, mostly due to the complexity fractionation brings to probate proceedings. GAO-98-49, *supra* note 17. Standard loan and mortgage approvals require between four and seven months in processing time. Wise, *supra* note 53.

⁶⁷ NAHASDA applies to federal- and state-recognized tribes. NAHASDA § 4(12)(A), 25 U.S.C.A. § 4103(12)(A).

⁶⁸ Ingram, *supra* note 30, at 164.

originally passed,⁶⁹ NAHASDA is organized into seven titles.⁷⁰

Under Title I, tribes design their own housing plan and send it to the Secretary of Housing and Urban Development (Secretary)⁷¹ whom NAHASDA authorizes to make block grants directly to tribes.⁷² Alternatively, a tribe may form a tribally designated housing entity (TDHE)⁷³ to submit plans and receive block grants on its behalf.⁷⁴ The housing plan consists of a one-year plan and a five-year plan which include the tribe's objectives, housing needs, an account of outside financial resources, and a certificate of compliance with federal non-discrimination statutes.⁷⁵ Upon the Secretary's approval, the housing funds are distributed.⁷⁶ The following year, tribes must submit another

⁶⁹ This Part addresses NAHASDA as originally passed but notes amendments where appropriate.

⁷⁰ Title I: block grants and grant requirements; Title II: eligible families and affordable housing activities; Title III: grant allocation amounts; Title IV: compliance, audits, and reports; Title V: termination of other housing assistance; Title VI: federal guarantees for financing tribal housing; and Title VII: other housing assistance provisions. See 25 U.S.C.A. §§ 4101-4195.

⁷¹ NAHASDA § 101(b)(1)(A), 25 U.S.C.A. § 4111(b)(1)(A).

⁷² NAHASDA § 101(a), 25 U.S.C.A. § 4111(a). NAHASDA specifies, however, that the Office of Native American Programs at HUD carries out NAHASDA and the Secretary acts through it. NAHASDA § 3, 25 U.S.C.A. § 4102.

⁷³ NAHASDA § 4(21)(C), 25 U.S.C.A. § 4103(21)(C).

⁷⁴ NAHASDA § 102(d), 25 U.S.C.A. § 4112(d).

⁷⁵ NAHASDA § 102, 25 U.S.C.A. § 4112. The five-year plan requirement is a statement of the tribe's commitment to serve its low-income families and how it will generally do so. NAHASDA § 102(b), 25 U.S.C.A. § 4112(b). The one-year plan is at the heart of the housing plan because it documents the tribe's objectives and goals for using the block grant money over the year. NAHASDA § 102(c)(1), 25 U.S.C.A. § 4112(c)(1). The one-year plan describes the housing needs of low-income tribal members, the location of the need on the reservation, and a description of how the assistance will be allocated where needed. NAHASDA § 102(c)(2), 25 U.S.C.A. § 4112(c)(2). The one-year plan also details how the tribe will provide members access to financial resources to obtain employment and achieve self-sufficiency as well as how it will provide for safety. NAHASDA §§ 102(c)(4)(I)-(J), 25 U.S.C.A. §§ 4112(c)(4)(I)-(J). Additionally, the tribe must describe how it will maintain housing developed under the Housing Act of 1937, which of the homes on the reservation will be demolished, which rental and homeownership programs will operate during the year, and any other housing assistance programs. NAHASDA §§ 102(c)(4)(D)-(H), 25 U.S.C.A. §§ 4112(c)(4)(D)-(H). Furthermore, the tribe must specify the administration responsible for implementing the housing plan, how it will carry that out, and key personnel. NAHASDA § 102(c)(4)(K), 25 U.S.C.A. § 4112(c)(4)(K). The one-year plan also details the local private and public housing market, available rental assistance or rehabilitation funds, or other funds "reasonably available" to the tribe and how it will use those. NAHASDA §§ 102(c)(3)-(4)(A), 25 U.S.C.A. § 4112(c)(3)-(4)(A).

⁷⁶ NAHASDA § 101(a), 25 U.S.C.A. § 4111(a). If the Secretary fails to respond after 60 days, the tribe may assume compliance with the Act and begin construction. NAHASDA

housing plan to obtain the next annual block grant.⁷⁷ Title I also describes the negotiated rulemaking committee of tribal and HUD representatives from “geographically diverse small, medium, and large Indian tribes” in recognition of Native American diversity,⁷⁸ who establish the regulations for implementing NAHASDA.⁷⁹

The Secretary must review housing plans for compliance,⁸⁰ and if a tribe or its TDHE has performed poorly under housing programs before NAHASDA, HUD monitors it more closely.⁸¹ If a tribe is “substantially noncompliant,” NAHASDA authorizes HUD to reduce or eliminate funding, replace the tribal housing entity,⁸² or render technical assistance.⁸³ NAHASDA originally had a compliance waiver relieving small tribes of technical burdens.⁸⁴ Title I also originally included a controversial provision⁸⁵ prohibiting block grants to tribes unless they submitted a certificate of compliance with the Davis-Bacon Act in their housing plan⁸⁶ and conducted an environmental review.⁸⁷ Another

§ 103(a)(2), 25 U.S.C.A. § 4113(a)(2).

⁷⁷ NAHASDA § 102(a)(1), 25 U.S.C.A. § 4112(a)(1). Though tribes submit a five-year plan, that does not guarantee five years of block grants. *See id.*

⁷⁸ NAHASDA § 106(b)(2)(B)(ii)(I), 25 U.S.C.A. § 4116(b)(2)(B)(ii)(I). Forty-eight tribal members worked with 10 HUD officials on the committee, a number which was much larger than usual to accommodate the diversity of tribal interests and the number and complexity of issues. Kenison, *supra* note 51, at 255. Approvals were made unanimously, which, though slow, accorded with traditional Native American negotiation methods and made for harmony. *Id.* at 256. The final regulations went into effect on April 13, 1998. GAO 99-16, *supra* note 44.

⁷⁹ NAHASDA § 106(a)(2), 25 U.S.C.A. 4116(a)(2).

⁸⁰ NAHASDA § 103(a)(1), 25 U.S.C. § 4113(a)(1).

⁸¹ GAO 99-16, *supra* note 44. The additional monitoring extends to scrutinizing expenditures of the block grant funds as well as requiring quarterly program and financial reports from the tribe. *Id.*

⁸² NAHASDA § 401(a), 25 U.S.C.A. § 4161(a). “Substantial noncompliance” is that which either materially effects the TDHE’s ability to meet its major goals and objectives, forms a pattern or practice of willful noncompliance with NAHASDA or its regulations, “involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted by the recipient for a material activity,” or risks fraud, waste, or abuse. 24 C.F.R. § 1000.534.

⁸³ GAO 99-16, *supra* note 44.

⁸⁴ NAHASDA, Pub. L. No. 104-330, § 102(f)(1), 110 Stat. 4016, 4026 (1996). The Secretary can define small tribes based on the number of assisted dwellings. *Id.* at § 102(f)(2). This waiver provision was rescinded. Omnibus Indian Advancement Act (hereinafter OIAA), Pub. L. No. 106-568, § 1003(c), 114 Stat. 2868, 2926 (2000).

⁸⁵ *See infra* part V.A.

⁸⁶ NAHASDA, Pub. L. No. 104-330, § 104(b)(1), 110 Stat. 4016, 4028 (1996). The Davis-Bacon Act (40 U.S.C. § 276a-276a-5) dictates that workers may not receive less than the prevailing wages in their locality. *Id.*

controversial provision denied block grants to recipients who paid taxes to any political body, including tribal governments, or who did not pay utilities under a local cooperation agreement.⁸⁸

Title II establishes basic qualifications for block grant funding and defines the funded activities,⁸⁹ the most significant of which include buying, building, or improving homes as well as funding services like counseling and crime prevention.⁹⁰ The grant recipient must assist low-income Native American families,⁹¹ defined as those earning 80 percent of the local median income or less.⁹² Housing units may only be sold or

⁸⁷ NAHASDA, Pub. L. No. 104-330, § 105(b), 110 Stat. 4016, 4029 (1996).

⁸⁸ NAHASDA, Pub. L. No. 104-330, §§ 101(c)-(d), 110 Stat. 4016, 4022 (1996). Congress amended the language of the provision in 1998, Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, § 595(e)(3)-(4), 112 Stat. 2461, 2656-57 (amending NAHASDA § 101(d), 25 U.S.C.A. § 4111(d)), but the requirements were the same. See *infra* part V.A.

⁸⁹ NAHASDA §§ 201-210, 25 U.S.C.A. §§ 4131-4140.

⁹⁰ NAHASDA §§ 202(1)-(6), 25 U.S.C.A. §§ 4132(1)-(6). NAHASDA's definition of affordable housing activities is rather inclusive:

[A]cquisition, new construction, reconstruction, or moderate or substantial rehabilitation of affordable housing, which may include a real property acquisition, site improvement, development of utilities and utility services, conversion, demolition, financing, administration and planning, and other related activities.

NAHASDA § 202(2), 25 U.S.C.A. § 4132(2). Funding also extends to operating and modernizing housing existing before NAHASDA. NAHASDA § 202(1), 25 U.S.C.A. § 4132(1). Block grants can be used for investments to fund affordable housing. NAHASDA § 204, 25 U.S.C.A. § 4134. NAHASDA funding for services is also very broad:

[H]ousing counseling in connection with rental or homeownership assistance, establishment and support of resident organizations and resident management corporations, energy auditing, activities related to the provision of self-sufficiency and other services, and other services related to assisting owners, tenants, contractors, and other entities, participating or seeking to participate in other housing activities assisted pursuant to this section. . . [t]he provision of management services for affordable housing, including preparation of work specifications, loan processing, inspections, tenant selection, management of tenant-based rental assistance, and management of affordable housing projects.

NAHASDA §§ 202(3)-(4), 25 U.S.C.A. §§ 4132(3)-(4). This includes security or law enforcement to protect residents in affordable housing from crime. NAHASDA § 202(5), 25 U.S.C.A. § 4132(5).

⁹¹ NAHASDA § 201(b)(1), 25 U.S.C.A. § 4131(b)(1).

⁹² NAHASDA § 4(13), 25 U.S.C.A. § 4103(13). The Secretary can adjust the income ceiling above or below 80 percent for family size, local construction costs, or "unusually" high or low family incomes in the area. *Id.* On the other hand, a tribal housing authority may assist non-low-income families if "there is a need for housing for such families that cannot reasonably be met without such assistance." NAHASDA § 201(b)(2), 25 U.S.C.A. § 4131(b)(2). Non-Indian families are eligible for NAHASDA funds if (1) they reside on the reservation, (2) they cannot reasonably afford housing without NAHASDA funding, and (3)

rented to low-income families for their entire useful life.⁹³ Title II also mandates rent ceilings, homebuyer payment caps,⁹⁴ insurance coverage,⁹⁵ and fair lease terms.⁹⁶

The negotiated rulemaking committee of HUD and tribal representatives draft the allocation formula governed by Title III,⁹⁷ which the Secretary uses to calculate the amount of the block grants.⁹⁸ The committee is required to consider a number of factors reflecting a tribe's needs including poverty, other available housing funds, the number of units it manages, and its ability to administer the plan,⁹⁹ but not a tribe's performance prior to NAHASDA.¹⁰⁰ A complex formula for determining the funding in each block grant resulted.¹⁰¹ Title III

"the presence of the family on the Indian reservation or other Indian area is essential to the well-being of Indian families." NAHASDA § 201(b)(3), 25 U.S.C.A. § 4131(b)(3).

⁹³ NAHASDA § 205(a)(2), 25 U.S.C.A. § 4135(a)(2). Housing must remain affordable for the useful life of the housing unit despite transfers and mortgages, but that does not apply to lenders' foreclosure sales or when the Secretary determines that the requirement does not comport with "sound economics and the purposes of this Act." *Id.* NAHASDA censures violations by allowing the Secretary to demand repayment for the unit in violation or to lower future grants by the cost of the unit. NAHASDA § 209, 25 U.S.C.A. § 4139.

⁹⁴ NAHASDA § 203(a), 25 U.S.C.A. § 4133(a). Monthly rent may not exceed 30 percent of the occupants' monthly income reduced by \$480 for each minor, disabled family member, or full-time student; \$400 for elderly members; necessary child care expenses; income earned by minor family members; commuting expenses no greater than \$25 per week per family; and amounts provided under the housing plan. NAHASDA §§ 4(1), 203(a)(2), 25 U.S.C.A. §§ 4103(1), 4133(a)(2).

⁹⁵ NAHASDA § 203(c), 25 U.S.C.A. § 4133(c).

⁹⁶ This includes notice of eviction, no evictions except for good cause, etc. NAHASDA §§ 207(a)(3)-(5), 25 U.S.C.A. §§ 4137(a)(3)-(5). In 1998, Congress amended § 207(b) to apply to homebuyers and owners as well. Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, § 595(b), 112 Stat. 2461, 2656 (amending NAHASDA § 207(b), 25 U.S.C.A. § 4137(b)).

⁹⁷ NAHASDA §§ 301-302, 25 U.S.C.A. §§ 4151-4152.

⁹⁸ NAHASDA § 302(a), 25 U.S.C.A. § 4152(a).

⁹⁹ NAHASDA §§ 302(b)-(c), 25 U.S.C.A. §§ 4152(b)-(c). The formula can include other objectively measurable factors. NAHASDA § 302(b)(3), 25 U.S.C.A. § 4152(b)(3).

¹⁰⁰ GAO 99-16, *supra* note 44.

¹⁰¹ See 24 C.F.R. appendices A & B to pt. 1000. The formula calculating the amount of the block grant incorporates two needs: providing affordable housing and maintaining and operating existing housing. GAO 99-16, *supra* note 44. In calculating the former, HUD relies on tribal population, income, local costs of housing, the extent of the housing shortage, and local housing conditions. *Id.* Each factor has different significance in the total formula. *Id.* For example, the tribe's share of the total Native American population counts as 11 percent of the formula. *Id.* In calculating the latter, HUD looks to the number of housing units, operation and maintenance costs, inflation since 1996, the difference between the tribal housing entity's costs for operating and modernizing as compared to the national average, and certain minimum levels of funding. *Id.* NAHASDA requires HUD to review

originally had a "safety net" provision to prevent allocating less funding than in 1996.¹⁰²

Title IV specifies the procedures for tribal compliance and reporting.¹⁰³ If a tribe fails to comply with NAHASDA, the Secretary can terminate the block grants, reduce them by the amount not expended, limit their permitted uses, or replace the TDHE.¹⁰⁴ If the Secretary feels that the tribe has not complied substantially, the Secretary may refer the matter to the Attorney General who may bring a civil action.¹⁰⁵ On the other hand, a tribe that wants to review the Secretary's funding limitation or termination must petition the federal appeals courts.¹⁰⁶ If the tribe could not comply merely for technical incapacity, the Secretary may assist the tribe to better comply.¹⁰⁷

Title V repeals housing assistance to Native Americans under the

the formula and revise it as necessary within five years. *Id.*

¹⁰² NAHASDA, Pub. L. No. 104-330, § 302(d), 110 Stat. 4016, 4036-37 (1996).

¹⁰³ NAHASDA §§ 401-407, 25 U.S.C.A. § 4161-4167. The grant recipient must conduct a compliance survey at least annually for performance measures the Secretary specifies, NAHASDA § 403(c), 25 U.S.C.A. § 4163(c), including onsite inspections, a report of the use of grant funds, a determination of whether the tribe met its goals, and a description of accomplishments and changes that need to be made, NAHASDA §§ 403(b), 404(b), 25 U.S.C.A. §§ 4163(b), 4164(b). Ninety days after the end of each fiscal year, the Secretary must submit to Congress a report of progress in accomplishing the goals of the Act, a summary of funds used, and a description of outstanding loan guarantees. NAHASDA § 407, 25 U.S.C.A. § 4167.

¹⁰⁴ NAHASDA § 401(a), 25 U.S.C.A. § 4161(a). To replace the TDHE, the Secretary must determine that there was a pattern indicating substantial or willful noncompliance. NAHASDA § 402(b), 25 U.S.C.A. § 4162(b); *supra* note 82 (defining substantial noncompliance and willful noncompliance). The tribe must approve of the Secretary's replacement. NAHASDA § 402(c)(1), 25 U.S.C.A. § 4162(c)(1).

¹⁰⁵ NAHASDA § 401(c), 25 U.S.C.A. § 4161(c); *supra* note 82. This includes recovery of the amount not expended as well as mandatory or injunctive relief. NAHASDA § 401(c)(2), 25 U.S.C.A. § 4161(c)(2).

¹⁰⁶ NAHASDA § 401(d), 25 U.S.C.A. § 4161(d). The court must uphold the Secretary's conclusion if it is supported by "substantial evidence on the record as a whole." NAHASDA § 401(d)(3)(A), 25 U.S.C.A. § 4161(d)(3)(A). Otherwise, the court may set aside the Secretary's conclusion partially or entirely. *Id.* This provision has been criticized as unfairly burdensome and unrealistic because it is difficult and expensive for tribes to prepare an appellate brief and there is no record for the appellate court to review because no trial was conducted. *Hearings on the Native American Housing Assistance and Self-Determination Act of 1996 Before the Comm. on Banking, Housing and Urban Affairs and Indian Affairs*, 104th Cong. (1996) available in 1996 WL 10165165 (statement of A. Brian Wallace, Vice-Chairman, Washoe Tribal Council). As of publication, no published circuit court opinions are available.

¹⁰⁷ NAHASDA § 401(b), 25 U.S.C.A. § 4161(b).

1937 Housing Act,¹⁰⁸ the Cranston-Gonzalez National Affordable Housing Act, the Housing and Community Development Act of 1974, and the Stewart B. McKinney Homeless Assistance Act.¹⁰⁹

Title VI allows grant recipients to apply for loan guarantees backed by the full faith and credit of the United States.¹¹⁰ The tribe or its TDHE may guarantee a loan up to five times the amount of its block grant.¹¹¹ Tribes may use NAHASDA grants to repay the loan.¹¹² The Secretary can guarantee up to \$400 million per year and \$2 billion total over five years.¹¹³ Title VI also requires the Secretary to educate Native Americans about the loan guarantees.¹¹⁴

Finally, Title VII increases leasehold terms up to 50 years to encourage private lending.¹¹⁵ Title VII also allows funds for a national organization to provide training and technical assistance to Native American housing authorities and housing entities.¹¹⁶

B. *NAHASDA's Success*

Of the 575 tribal housing entities, 97 percent met the first housing plan submission deadline of July 1, 1998,¹¹⁷ and by September 30th, HUD distributed nearly all of the NAHASDA block grants, totaling \$550 million.¹¹⁸ While the number of housing units developed or planned under the 1937 Housing Act was 2,000 annually, NAHASDA built 6,000 in its first year.¹¹⁹ By January 2001, 25,000 housing units

¹⁰⁸ See *supra* notes 45-46.

¹⁰⁹ NAHASDA, Pub. L. No. 104-330, §§ 501-506, 110 Stat. 4016, 4041-45 (codified in scattered sections of Titles 13, 25, and 42).

¹¹⁰ NAHASDA §§ 601(b), 602(c), 25 U.S.C.A. §§ 4191(b), 4192(c). The requirements include being unable to obtain financing without the guarantee, entering a contract acceptable to the Secretary for repaying the debt, pledging NAHASDA grants to the creditor, proving that the tribe is capable of repaying the debt without impairing the tribe's ability to use grant amounts, and furnishing security acceptable to the Secretary. NAHASDA §§ 601(b), 602(a), 25 U.S.C.A. §§ 4191(b), 4192(a).

¹¹¹ NAHASDA § 601(d), 25 U.S.C.A. § 4191(d).

¹¹² NAHASDA § 602(b)(2), 25 U.S.C.A. § 4192(b)(2).

¹¹³ NAHASDA §§ 605(a), (c), 25 U.S.C.A. §§ 4195(a), (c).

¹¹⁴ NAHASDA § 604, 25 U.S.C.A. § 4194.

¹¹⁵ NAHASDA § 702, 25 U.S.C.A. § 4211.

¹¹⁶ NAHASDA § 703, 25 U.S.C.A. § 4212.

¹¹⁷ GAO 99-16, *supra* note 44.

¹¹⁸ GAO 99-16, *supra* note 44.

¹¹⁹ Mark Fogarty, *Indian Tribes Endorse Housing Act before Congress*, INDIAN COUNTRY TODAY, Jan. 19, 2001.

were planned or produced under the Act.¹²⁰ Of the 77 tribes the National American Indian Housing Council surveyed, 84 percent said NAHASDA was an improvement over earlier housing programs.¹²¹ Interestingly, tribal housing entities performed better than HUD in accurately implementing NAHASDA.¹²²

NAHASDA also successfully marked the first time Congress recognized that HUD urban housing was inappropriate for tribes on reservations.¹²³ Congress promoted NAHASDA as an historic step in its relations with Native Americans by extending fundamental American rights to them.¹²⁴ Tribes are sovereigns, whom NAHASDA respects by allowing them to structure their own programs and take responsibility for the results.¹²⁵ The Act further anticipates the problem of friction

¹²⁰ Fogarty, *supra* note 119.

¹²¹ Reza, *supra* note 17.

¹²² Mark Fogarty, *Federal Audit Gives Decent Marks to Implementation of Tribal Housing Act*, INDIAN COUNTRY TODAY, Aug. 22, 2001, at A6. In an audit completed in August 2001, the Office of the Inspector General at HUD "passed" 15 of 17 studied tribal housing entities for administrative compliance with NAHASDA. *Id.* The audit also discovered that HUD improperly funded 300 tribal housing entities by miscalculating the number of housing units per tribe. *Id.* HUD recouped the \$1.6 million of overfunding and has solved the calculation problem. *Id.*

¹²³ "Indian communities are different than metropolitan communities[;] in fact Indian communities are often vastly different from one another." 142 CONG. REC. H11,613 (Sept. 28, 1996) (statement of Rep. Lazio). "[O]ne size does not fit all. Nowhere do we have greater evidence of this truth than when it comes to the challenge of housing for native Americans." 142 CONG. REC. H11,617 (Sept. 28, 1996) (statement of Rep. Hayworth).

¹²⁴ Representative Lazio introduced NAHASDA to the House of Representatives, stating: "This bill heralds a new era in the relations between Congress and Indian tribes." 142 CONG. REC. E507 (Mar. 29, 1996).

Most Americans probably have never heard of the bill, but for native Americans, this may be the most important bill this Congress has considered. The Native American Housing Assistance and Self-Determination Act of 1996 is a historic step to the promise we made to native Americans and that we make to every American... That promise is at the very foundation of our beliefs, in the Declaration of Independence: "we hold these truths to be self-evident, that all Men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness." Being able to pursue your own dreams, owning a home, having a decent place to live and a community that is empowered to heal itself when necessary, to succeed on its own and, ultimately, to be responsible for its own destiny—these are not gifts we grant to only a chosen few in this country. This promise is what America is about and it is this promise that leads us today to consider the Native American Housing Assistance and Self-Determination Act.

142 CONG. REC. H11,613 (Sept. 28, 1996) (statement of Rep. Lazio).

¹²⁵ "We say to the first Americans in this instance, 'You are not forgotten Americans, and moreover, you have the right to self-determination, to self-governance, to decide how

between tribes and their housing authorities by providing for tribal review of plans before submission.¹²⁶ Moreover, NAHASDA used community planning and development to ameliorate reservation economies.¹²⁷ Title VI loan guarantees are NAHASDA's most important provision, because tribes can use it to clear their waiting lists quickly.¹²⁸ NAHASDA also successfully simplified the process of acquiring housing funds by substituting a single block grant for numerous housing programs.¹²⁹ The trust relationship guided Congress to serve Native American needs better and to help them achieve self-sufficiency,¹³⁰ ultimately improving the relationship between the two

best to spend this money.” 142 CONG. REC. H11,617 (Sept. 28, 1996) (statement of Rep. Hayworth). The congressional findings state, “[f]ederal assistance to meet these [trust] responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities.” NAHASDA § 2(7), 25 U.S.C.A. § 4101(7).

¹²⁶ NAHASDA § 102(d)(1), 25 U.S.C.A. § 4112(d)(1).

¹²⁷ Representative Richard Lazio of New York stated: Tribal governments and housing authorities should also have the ability and responsibility to strategically plan their own communities' development, focusing on the long-term health of the community and the results of their work, not over-burdened by excessive regulation. Providing the maximum amount of flexibility in the use of housing dollars...allows for innovation and local problem-solving capabilities that are crucial to the success of any community-based strategy.

142 CONG. REC. E507 (March 29, 1996).

¹²⁸ Title VI loan guarantees are the “hidden jewel” of NAHASDA. Mark Fogarty, *HUD Will Guarantee Up to \$2 Billion of Indian Housing*, NATIONAL MORTGAGE NEWS, Dec. 16, 1996, at 14. They are “crucial” to NAHASDA's success. *Hearing on NAHASDA Implementations and S.400 Before the Senate Comm. on Indian Affairs*, 106th Cong. (March 17, 1999), available in 1999 WL 150158 (statement of Chester Carl, Chairman of the National American Indian Housing Council) (hereinafter Hearing 150158). Guarantees can back a variety of investments from bonds to bank loans worth five times the block grant. Fogarty, *supra*, at 14. Through them, tribes can finance the large-scale housing development they need to clear their waiting lists. *Id.*; but see *infra* notes 137 & 200 and accompanying text.

¹²⁹ GAO 99-16, *supra* note 44. No longer would tribes have to compete for program money awards. *Id.* NAHASDA ended the bewildering, ambiguous array of housing programs, Hearing 8219955, *supra* note 45, and prevented the abuses which confusion allows because NAHASDA monitors all tribes and TDHEs, Hearing 8219856, *supra* note 44. NAHASDA was also good for the federal government because it was simpler to implement. GAO 99-16, *supra* note 44.

¹³⁰ NAHASDA's findings state that Congress “assumed a trust responsibility for the protection and preservation of Indian tribes” and that “providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status.” NAHASDA §§ (2), (4)-(5), 25 U.S.C.A. §§ 4101(2), (4)-(5).

governments.¹³¹ NAHASDA's success is key to congressional reauthorization of the Act in 2001, which would cement its place in the landscape of Native American housing.¹³²

VI. *The Implementation of NAHASDA Shows Its Shortcomings*

Unfortunately a General Accounting Office study found that the most significant barriers to Native American home lending still existed after NAHASDA.¹³³ Housing is inextricably tied to poverty, desolation,

¹³¹ According to Senator John McCain of Arizona, "Tribal block grants are consistent with long-standing principles of Indian self-determination and tribal self-governance and should enhance the long-standing trust relationship between the United States and Indian tribal governments." 142 CONG. REC. S12,405 (Oct. 3, 1996).

¹³² Congress authorized the Secretary to distribute NAHASDA funds until fiscal year 2001 when he must be reauthorized to continue. NAHASDA § 108, 25 U.S.C.A. § 4117. Both the Senate and House of Representatives are considering bills that would extend NAHASDA until 2006. H.R. 1873, 107th Cong. § 2 (2001); S. 1210, 107th Cong. § 2(a) (2001). Upon introducing the Senate reauthorization bill on July 20, 2001, Senator Ben Nighthorse Campbell spoke in favor of NAHASDA reauthorization. See 147 CONG. REC. S8,015 (July 20, 2001) (statement of Sen. Campbell). Senator Campbell described NAHASDA's success in erecting a large number of housing units and in placing tribes "in the driver's seat" to decide how to implement their own housing plan. *Id.* Despite NAHASDA's success, the Senator expressed his reservations that NAHASDA has not resolved crucial problems in Native American housing:

Even with all the success of NAHASDA, Indian communities continue to live in the worst housing conditions in the United States. . . These statistics illustrate that there is still much work to be done. NAHASDA has been a good first step in improving living conditions in Indian and Alaska Native Communities, however there is still a tremendous need for adequate housing in these communities.

Id.; see also *infra* part IV (discussing NAHASDA's technical and policy oversights). Neither the House nor the Senate reauthorization bills would amend NAHASDA to correct the Act's deficiencies. See H.R. 1873, 107th Cong. § 2 (2001); S. 1210, 107th Cong. § 2(a) (2001). Senator Campbell nonetheless supports NAHASDA because it is an improvement over prior housing programs and allows tribes to better meet their housing needs. See 147 CONG. REC. S8,015 (July 20, 2001) (statement of Sen. Campbell). Eighty-one percent of tribes that the National American Indian Housing Council surveyed also supported NAHASDA reauthorization because they noticed improvements in their housing conditions. See Reza, *supra* note 17.

¹³³ GAO-98-49, *supra* note 17. Even when federally guaranteed against loss, private lenders still made few loans. *Id.* Only 128 loans were made under HUD guarantee programs by October 1997. *Id.* Lenders were still unsure whether they could foreclose on trust lands; they did not understand the complex and varied status of land ownership in Indian country; they were unfamiliar with tribal courts where foreclosure is litigated; and they worried about tribes that did not have foreclosure ordinances or procedures. *Id.* The impact of expanded leaseholds was uncertain even before the Act's passage, for some reservation leaseholds far exceeded 25 years but financing was difficult regardless. *Id.* Even when the barriers to Native Americans' access to conventional loans were lowered,

and the absence of infrastructure, which NAHASDA does not improve.¹³⁴ In implementing NAHASDA, HUD also restricted some provisions and added terms.¹³⁵ One very significant implementation failure was a lack of publicity or regulations for its guaranteed loan provisions.¹³⁶ Three years passed before HUD issued regulations for Title VI guarantees, and HUD refused to consult tribes under negotiated rulemaking after the initial 1998 regulations.¹³⁷ In addition, Congress

poverty still prohibited qualifying for loans. *Id.* Furthermore, the demand for accurate title searches of trust leaseholds performed in a timely manner was still enormous. Hearing 11068395, *supra* note 18. For mortgages to become a reality for Native Americans, NAHASDA must improve title searches. *Id.* Congress recently established a commission to analyze the title searching system and recommend how to improve or replace the system. OIAA, Pub. L. No. 106-568, §§ 1001(a), (d), 114 Stat. 2868, 2923-24 (2000). It is uncertain how much the committee can do without more funding or staffers for title searches.

¹³⁴ According to the Rosebud Sioux Tribal Court:

Lack of electric service to [public housing] will have a direct effect on the economic security of the tribe and its members since the lack of that kind of service will reduce the productive use of the homes by tribal members. In addition, the homes were built to provide shelter to eligible members of the tribe, and therefore, there can be no logical argument otherwise that the health and welfare of tribal members will be directly affected by the lack of electric service to these homes.

Rosebud Hous. Auth. v. LaCreek Power Coop., Inc., No. CIV-85-375, 13 INDIAN L. REP. 6029, 6031 (Rbd. Sx. Tr. Ct. 1986), *quoted in* Ulmer, *supra* note 33, at 172 n.302.

¹³⁵ Hearing 150158, *supra* note 128. Under the direction of the Office of Management and Budget, for example, HUD would guarantee only 80 percent of loans under Title VI. *Id.*; Fogarty 18767347, *supra* note 52. Furthermore, though NAHASDA allows HUD to require additional security for guarantees if necessary, HUD instead required additional security for every guarantee. Hearing 150158, *supra* note 128. Lastly, HUD requires tribes to demonstrate that they have “experience with complex financial transactions” to receive guarantees, though that is not in NAHASDA’s language. *Id.* This is particularly hard on many small tribes or their tribal housing entities because they have never borrowed money before or lack expertise in lending. *Id.*

¹³⁶ Fogarty, *supra* note 27. “Training and knowledge of resources is an essential element” of self-determination. *HUD Conference to Address Native American Housing Needs*, PR NEWSWIRE, April 13, 2000. Because Native Americans were not aware of this resource, they did not apply for it. Fogarty, *supra* note 27.

¹³⁷ By February 24, 1999, no regulations had been published. Hearing 8086307, *supra* note 16. It was not until four years after NAHASDA’s enactment, that the first loan federally guaranteed under Title VI was closed. Fogarty, *supra* note 27.

Recently, two hundred tribal representatives walked out of a four-day meeting with HUD because HUD would not consult with them in the rulemaking process. Brian Stockes, *Tribes Reject HUD Consultation Policy*, INDIAN COUNTRY TODAY, Aug. 1, 2001, available in <<http://www.indiancountry.com/articles/headline-2001-08-01-04.shtml>>. HUD interprets NAHASDA to require negotiated rulemaking only for the initial implementing regulations. *Id.* This is contrary to NAHASDA’s language which states, “all regulations required under this Act shall be issued according to a negotiated rulemaking procedure.”

did not adequately fund NAHASDA to meet tribes' needs though it increased the number of tribes receiving funds.¹³⁸ Even before NAHASDA was enacted, it was called a "Band-Aid solution," because without increases in funding, it changes nothing.¹³⁹ Welfare reform further strains NAHASDA funding by removing funds Native Americans relied on and forcing some back onto reservations.¹⁴⁰ Though NAHASDA built 25,000 housing units with \$650 million in the last fiscal year 2001, tribes need 200,000 housing units and an additional \$450 million annually just to meet current demand.¹⁴¹ For

NAHASDA § 106, 25 U.S.C.A. § 4116(b). HUD's policy also counters President Clinton's second executive order requiring each federal agency to consult with tribal governments before changing a regulatory scheme. Stokes, *supra*. Tribes are concerned that NAHASDA and the executive order afford no appeal to HUD's actions. *Id.*

¹³⁸ Fogarty 19316638, *supra* note 52. Because NAHASDA enabled tribes to create new housing entities, revive old ones, or designate themselves as a housing entity, the number of tribal housing authorities more than doubled, increasing from 217 housing authorities to 575. GAO 99-16, *supra* note 44. This strained HUD's staffers to provide technical assistance, so tribes must compete with each other for it. *Id.* HUD had 178 staffers in 1998, who needed 221 staff years to fully implement the active Native American housing programs, including NAHASDA. *Id.* Block grants now go to more than 500 TDHEs and tribes, which effectively means "more slices out of the same pie." Hamilton, *supra* note 27. Finally, smaller tribes simply do not have the money to administer housing plans and train staffers. Alex Tizon and Eric Nalder, *Well-Run Housing Has a Higher Price: Tribes Say They need Millions More to Take New Role as Watchdog*, THE SEATTLE TIMES, June 12, 1997, available in 1997 WL 3238419. The paralyzing question for smaller tribes is, "How are we going to pay for all this?" *Id.* Two-thirds of tribal housing entities depleted their reserve accounts just to operate until NAHASDA took effect. Hearing 150158, *supra* note 128.

¹³⁹ According to Representative Kennedy:

We can do all sorts of things and make block grants and do all sorts of Band-Aid solutions to the problem, but until we start funding Indian housing to a point where we actually provide people with shelter that is decent, affordable, and works, then none of these Band-Aid solutions are going to make the slightest bit of real difference. . . . So let us not pretend in any way that the legislation that we have today will significantly change the lives and housing concerns of the vast majority of Indians.

142 CONG. REC. H11,614 (Sept. 28, 1996) (statement of Rep. Kennedy).

¹⁴⁰ Hearing 11068395, *supra* note 18. Because some Native Americans living off-reservation rely on welfare, welfare reform may goad them to return to their reservation. *Id.* It is estimated that 50,000 of the 250,000 off-reservation Native Americans will return. *Id.* The additional burden to construct houses for the returning Native Americans on NAHASDA funding is estimated to be over \$122 million per year. *Id.* The loss of welfare may also impact the tribe's block grant because welfare may count as income under NAHASDA's formula. *Id.* Since NAHASDA limits housing authorities to charge only one-third of the tenant's income as rent, and welfare reform decreases the tenant's income, less funding will be allocated under NAHASDA. *Id.*

¹⁴¹ Reza, *supra* note 17. "It will take a decade to catch up with current demand, but not

now, tribal housing authorities seek “creative” solutions, like partnerships with private lenders or using the proceeds of tax-exempt bonds financed by the block grant.¹⁴²

A. *An Amendment for Taxes, Wages, and other Technical Oversights*

One major roadblock was the environmental survey requirement, which deprived some tribes of millions of dollars and forced others to abandon housing construction without an actual environmental problem.¹⁴³ Another roadblock was the requirement that Native American recipients could not receive a block grant if they paid taxes to any political body, including tribes.¹⁴⁴ Congress also included the

enough to meet growing demand. . . In other words, it's hopeless without greater funding.” *Id.* (quoting Chester Carl, Chairman, National American Indian Housing Council). Last year tribes requested \$975 million to fund basic housing needs like infrastructure, low-rent housing, and counseling services without factoring in the rapid growth of the Native American population. Hearing 11068395, *supra* note 18. In fiscal year 1999, however, block grant assistance totaled \$620 million, Fogarty 18767347, *supra* note 52, and in 1998 it was \$590 million, GAO 99-16, *supra* note 44.

¹⁴² The Rosebud Reservation looks to the “innovative” solution of a partnership with the Sicangu Enterprise Center (“SEC”) which prepares new homeowners and helps them apply for loans. Flentgen, *supra* note 58, at 1. The SEC has four people on its staff working 12 to 14 hour-days, six or seven days a week, for 217 clients. *Id.* Two to three hundred Sioux are waiting for homeownership units, however, and over four hundred await housing. *Id.* The tribe has also acquired 20 homes which were built by inmates at the state penitentiary and several homes through Operation Walking Shield which transported former military housing to the reservation. *Id.* at 3.

The White Mountain Apache tribe used \$7 million from Title VI to finance tax-exempt bonds leveraging \$25 million for housing. Mark Fogarty, *Homes Going Up on Southwest's Fort Apache Reservation*, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS: INDIAN COUNTRY TODAY, April 17, 2000, available in 2000 WL 19316628. The bond financed construction of 250 homes, but there is a waiting list of 1,000 families in the tribe. *Id.*

¹⁴³ *Cuomo Announces Plan to Remove Roadblock to Housing Development on Reservations*, U.S. NEWSWIRE, May 11, 1999, available in 1999 WL 4638328. Tribes were denied NAHASDA funding entirely because of minor, technical errors or inability to complete the surveys, and not actual environmental problems. *Id.* The Coeur d'Alene Tribe, the Yakima Tribe, and the Lower Elwha Klallam Tribe were denied \$3.3 million, \$969,000, and \$1.4 million, respectively. *Id.* While tribes may perform the assessment themselves or ask HUD to do it, HUD's resources are limited, so it cannot meet the demand. Hearing 8086307, *supra* note 16. The environment is an area in which Native Americans feel over-regulated and wish the federal government would avoid, so environmental reviews are a critical, and sometimes offensive, requirement for Native Americans. Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 418 (1998).

¹⁴⁴ NAHASDA, Pub. L. No. 104-330, § 101(d), 110 Stat. 4016, 4022 (1996).

Davis-Bacon wage requirement, which upset Senator McCain and the tribes who testified against it, because it forced Native Americans “to pay Cadillac prices for Volkswagens.”¹⁴⁵

The Omnibus Indian Advancement Act (“OIAA”)¹⁴⁶ attempted to correct these technical problems, but merely enacted provisions in the Code of Federal Regulations and it actually restricted other provisions in NAHASDA, especially against smaller tribes.¹⁴⁷ For example, the

NAHASDA additionally requires the prospective block grant recipient to pay “user fees” for services provided by state or local governments. *Id.* Some states do not exempt tribal housing authorities from state and local property taxes, leaving many Native Americans without housing funds. *Tribal Public Housing Deserves Simple Parity*, THE NEWS TRIBUNE (Tacoma, WA), Feb. 11, 2000, at A12, available in 2000 WL 5326290. In Washington State, for instance, the tax exemption provision effectively rendered all Native American housing authorities without housing assistance, because the State taxed tribal housing authorities. *Id.* The impact of the tax qualification bears disproportionately on smaller tribes which do not have large amounts of tax-exempt trust lands. *Id.*

¹⁴⁵ 142 CONG. REC. S12,406 (Oct. 3, 1996) (statement of Sen. McCain). HUD applies the Davis-Bacon Act requirements under the “one dollar” test if even one dollar of NAHASDA funding is used. Hearing 150158, *supra* note 128; but see 24 C.F.R. § 1000.16(a)(3) (excepting from the Davis-Bacon wage requirements prime contracts of \$2,000 or less). Senator John McCain of Arizona voiced his distress:

I am particularly disturbed by provisions adopted by the House regarding the application of the Davis-Bacon wage requirements. . . .As long as I have worked with Indian affairs, I have heard from Indian tribes, time and time again, overwhelming opposition to the application of Davis-Bacon wage requirements on Indian reservations. As chairman of the Committee on Indian Affairs, I have an obligation to protect tribal sovereignty and fight the age-old paternalism of the Federal Government to impose policies on Indian tribes that are not appropriate and that undermine the ability of tribal governments to make their own decisions about how to protect their people and manage their own affairs.

142 CONG. REC. S12,405 (Oct. 3, 1996). The wage requirements inordinately impact on reservations because they are typically rural and there is little unionization. *Id.* at S12,406. The requirement raises wages at most \$10 per hour higher than the regional rate. Hearing 8219856, *supra* note 44. Aside from wasting critically needed funds, the wage requirements also undermine tribal governments’ authority because they are less able to provide affordable housing. 142 CONG. REC. S12,405-06 (Oct. 3, 1996) (statement of Sen. McCain).

¹⁴⁶ OIAA, Pub. L. No. 106-568, § 1003, 114 Stat. 2868, 2925-30 (2000). President Clinton signed it into law on December 27, 2000. *Clinton Statement: Signing of the “Omnibus Indian Advancement Act”*, U.S. NEWSWIRE, Dec. 27, 2000, available in 2000 WL 26852457 (hereinafter Statement 26852457).

¹⁴⁷ *Hearing on NAHASDA Implementations and S.400 Before the Senate Comm. on Indian Affairs*, 106th Cong. (March 17, 1999) available in 1999 WL 150147 (statement of Jacqueline Johnson, Deputy Assistant Secretary, Native American Programs) (stating that much of the legislation is similar or identical to the final regulations for NAHASDA in 24 C.F.R. Part 1000) (hereinafter Hearing 150147). For example, NAHASDA is amended to allow non-low-income families to qualify for housing under certain conditions, OIAA, Pub. L. No. 106-568, § 1003(b), 114 Stat. 2868, 2926 (2000), but the Act and regulations already

amendment repeated de facto review and audit procedures.¹⁴⁸ The OIAA limited the Secretary's compliance waiver to three months for tribes that had circumstances beyond their control;¹⁴⁹ the Secretary could no longer waive compliance standards for small tribes,¹⁵⁰ and the Secretary could waive the environmental survey requirement under a narrow 4-prong test that hurts smaller tribes.¹⁵¹ The allocation formula no longer had a floor of the amount received in 1996 and limited modernization assistance to smaller tribes.¹⁵² The OIAA also gave tribes a hearing for noncompliance¹⁵³ and narrowed the time for better

allowed them to participate under the same conditions, NAHASDA, Pub. L. No. 104-330, § 201(b)(2), 110 Stat. 4016, 4031 (1996).

¹⁴⁸ OIAA, Pub. L. No. 106-568, § 1003(f)(2), 114 Stat. 2868, 2927-28 (2000) (amending § 405). The amendment is unnecessary, because NAHASDA is already covered under the Single Audit Act. Hearing 150147, *supra* note 147. The amendment, however, gives the Secretary unlimited authority to audit. Hearing 150158, *supra* note 128. This may force tribes to compromise their time and staff for auditing rather than providing tribal members with housing. *Id.*

¹⁴⁹ OIAA, Pub. L. No. 106-568, § 1003(a)(1), 114 Stat. 2868, 2925-26 (2000) (amending § 101(b)(2)). The Secretary had not waived the submission requirements for any tribe as of March 17, 1999. Hearing 150147, *supra* note 147.

¹⁵⁰ OIAA, Pub. L. No. 106-568, § 1003(c), 114 Stat. 2868, 2926 (2000) (deleting § 102(f)). The regulations in the C.F.R. treat small and large tribes identically anyway. Hearing 150147, *supra* note 147 (citing 24 C.F.R. § 1000.222).

¹⁵¹ OIAA, Pub. L. No. 106-568, § 1003(d), 114 Stat. 2868, 2926 (2000) (amending § 105). The Secretary may waive the environmental survey requirement if (1) that will not frustrate national environmental policy, (2) no one's health or safety is threatened, (3) inability to comply is through inadvertent error, and (4) the recipient can correct the error by their own action. *Id.* This provision does not make clear whether the burden is on the tribe to produce the evidence to satisfy the test. In addition, the fourth prong allows waiver only for minor errors that the tribe can correct. Waiver is thus not available for tribes that do not have the technical ability to correct the errors. This will impact disproportionately on small tribes that do not have or cannot afford the training to survey appropriately.

¹⁵² The original § 302(d), which provided that tribes were not to receive less in their block grant than in 1996, NAHASDA, Pub. L. No. 104-330, § 302(d)(1), 110 Stat. 4016, 4036-37 (1996), was deleted, OIAA, Pub. L. No. 106-568, § 1003(g), 114 Stat. 2868, 2928 (2000) (amending NAHASDA § 309(d)(1), 25 U.S.C.A. § 4152(d)(1)). This provision applies to tribes operating fewer than 250 public housing units. OIAA, Pub. L. No. 106-568, § 1003(g)(2), 114 Stat. 2868, 2928 (2000) (amending § 301(d)(1)). If the allocation formula yields an amount greater than they received in 1996 for operation and modernization assistance, their modernization assistance is then limited to the average of what they received annually for modernization between fiscal years 1992 and 1997 from the 1937 Housing Act (42 U.S.C. § 14371). *Id.* Nevertheless, the provision is actually fair because the block grant appropriations are insufficient. Hearing 150158, *supra* note 128.

¹⁵³ OIAA, Pub. L. No. 106-568, § 1003(h), 114 Stat. 2868, 2928-29 (2000) (amending § 401(a)). The Secretary must conduct a hearing within 60 days of finding noncompliance before taking further action. *Id.* at § 1003(h)(4), 114 Stat. 2929. In 24 C.F.R. § 1000.538, there is already a hearing provision for NAHASDA, but the time frame is 90 days under 24

performance.¹⁵⁴ The tax exemption requirement was not eliminated, but the Secretary could waive it if the tribe made good faith efforts to comply.¹⁵⁵ The Davis-Bacon wage requirement was not eliminated either, but did not apply if tribes had laws requiring wages above the prevailing rate.¹⁵⁶

B. *Title VIII for Native Hawaiians at Last*

Even though the federal government stands in a fiduciary relationship with Native Hawaiians,¹⁵⁷ NAHASDA did not assist them,¹⁵⁸ so they went unnoticed for federal housing funds despite 40 years of Hawaiian statehood.¹⁵⁹ The Hawaiian Homelands Homeownership Act

C.F.R. § 26.44. Hearing 150147, *supra* note 147. Closing the window may give HUD and tribes less time to perform discovery and other actions before the hearing. *Id.*

¹⁵⁴ OIAA, Pub. L. No. 106-568, § 1003(i), 114 Stat. 2868, 2929-30 (2000) (amending § 401(b)). The performance agreement lasts for one year, after which the Secretary reviews the tribe's performance and decides to take further action or enter another year-long performance agreement if there is a good faith effort to comply. *Id.* The performance agreement may allow federal control to continue ad infinitum. Hearing 150158, *supra* note 128.

¹⁵⁵ OIAA, Pub. L. No. 106-568, § 1003(a)(2), 114 Stat. 2868, 2926 (2000) (amending § 101(c)).

¹⁵⁶ OIAA, Pub. L. No. 106-568, § 1003(j), 114 Stat. 2868, 2930 (2000) (amending § 104(b)).

¹⁵⁷ OIAA, Pub. L. No. 106-568, § 202(13)(B), 114 Stat. 2868, 2874 (2000). The Supreme Court questioned whether legislating for Native Hawaiians could be done without invidious racial discrimination in *Rice v. Cayetano*, 528 U.S. 495 (2000) (striking down a state provision prohibiting non-Native Hawaiians from voting for the board of trustees of the Office of Hawaiian Affairs of the State of Hawaii to which Congress delegated administration of the trust corpus), but the Court distinguished *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding an employment preference for Native Americans at the BIA) because there the federal government did not delegate its administration authority to a state and because the federal government's relationship with Native Americans is a political, not racial, classification. The provision classifying Native Hawaiians by ancestry, however, was a proxy for racial, not political affiliation. *Rice*, 528 U.S. at 514. This distinction may prove troublesome for Title VIII because it classifies Native Hawaiians by ancestry. *See infra* note 158.

¹⁵⁸ Under Title VIII, "Native Hawaiians" are United States citizens descended from the aboriginal people that occupied Hawaii and exercised sovereignty prior to 1778 as demonstrated by genealogical records, kupuna elders, kama'aina long-term community residents, or state birth records. NAHASDA § 801(9), 25 U.S.C.A. § 4221(9).

The native people of Hawaii refer to themselves as "Kanaka Maoli," "Native Hawaiians," or simply "Hawaiians." Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 97 (1998). This note refers to the native people of Hawaii as "Native Hawaiians," because the Hawaiian Homelands Homeownership Act of 2000 refers to them by that name.

¹⁵⁹ Native Hawaiians were eligible for general housing assistance, but not targeted.

of 2000 finally corrected this oversight by adding Title VIII to NAHASDA.¹⁶⁰

The housing dilemma for Native Hawaiians is more critical than for Native Americans.¹⁶¹ Over 80 years ago, the federal government placed 200,000 acres in trust for Native Hawaiians but the revenues from the land were insufficient for infrastructure and housing.¹⁶² Native Hawaiians today have the highest overcrowding rates in the country at 36 percent compared to three percent nationally.¹⁶³ Of Native Hawaiians, 49 percent have housing problems as compared with 44 percent of Native Americans and with 27 percent of United States citizens overall.¹⁶⁴ Of Native Hawaiians eligible to live on the trust land, 95 percent need housing,¹⁶⁵ one-third spend more than 30 percent of their income for shelter alone, and half fall below 30 percent of the median family income.¹⁶⁶ The findings of fact for Title VIII conclude that Native Hawaiian housing needs are “extraordinarily severe.”¹⁶⁷

Title VIII duplicates NAHASDA’s¹⁶⁸ block grants and guarantees but has substantial differences.¹⁶⁹ Instead of a tribally designated housing entity or the tribe itself, the Department of Hawaiian Home Lands (HHL-Dept.), a state-run agency established under the Hawaiian

Mark Fogarty, *Native Hawaiians Likely to Become Eligible for Housing Assistance*, INDIAN COUNTRY TODAY, Dec. 29, 2000, available in 2000 WL 31021679.

¹⁶⁰ OIAA, Pub. L. No. 106-568, § 203, 114 Stat. 2868, 2876 (2000).

¹⁶¹ OIAA, Pub. L. No. 106-568, §§ 202(5)-(6), 114 Stat. 2868, 2873 (2000).

¹⁶² 146 CONG. REC. E775 (May 19, 2000) (statement of Rep. Abercrombie). The Hawaiian Homes Commission Act of 1920 placed the land in trust for Native Hawaiians. *Id.* Title was transferred to the State of Hawaii in 1959 upon statehood with the requirement that the land would be held in public trust for bettering Native Hawaiians. *Id.* Hawaii thus assumed the federal trust responsibility and administered it through its state agency, the Department of Hawaiian Home Lands. *Id.*

¹⁶³ OIAA, Pub. L. No. 106-568, §§ 202(5), 202(6)(B), 114 Stat. 2868, 2873 (2000).

¹⁶⁴ OIAA, Pub. L. No. 106-568, § 202(6)(A), 114 Stat. 2868, 2873 (2000).

¹⁶⁵ OIAA, Pub. L. No. 106-568, § 202(7)(B), 114 Stat. 2868, 2873 (2000). *I.e.*, 13,000 need housing. *Id.*

¹⁶⁶ OIAA, Pub. L. No. 106-568, §§ 202(8)(B), 202(9), 114 Stat. 2868, 2873 (2000). Below the median family income are 70.8 percent of Native Hawaiians. *Id.* at § 202(8)(A), 114 Stat. 2868, 2873. Rent over 30 percent of income is harsh, for the amount remaining is insufficient for basic levels of food, clothing, and other necessities. HUD Assessment, *supra* note 21, at 72.

¹⁶⁷ OIAA, Pub. L. No. 106-568, § 202(10), 114 Stat. 2868, 2873-74 (2000).

¹⁶⁸ For convenience, “NAHASDA” in this Part refers to the Native American Housing Assistance Act of 1996 before the addition of Title VIII.

¹⁶⁹ Fogarty, *supra* note 159.

Homes Commission Act of 1920,¹⁷⁰ develops and submits the housing plan.¹⁷¹ HUD then sends the block grant to the HHL-Dept.,¹⁷² which administers the plan for Native Hawaiian families eligible to live on the Hawaiian trust lands.¹⁷³ The Secretary first performs a compliance review of the grant application,¹⁷⁴ which must have a one-year plan, a five-year plan,¹⁷⁵ and certificates of compliance for the same issues under Title I.¹⁷⁶ Title VIII includes the controversial Davis-Bacon wage requirement¹⁷⁷ and environmental review,¹⁷⁸ but does not require tax-exemption to receive funds.¹⁷⁹ Like NAHASDA, Title VIII requires the HHL-Dept. to bring in outside capital through partnerships with the private sector.¹⁸⁰ Finally, instead of replicating Title VI, Title VIII extends to Native Hawaiians the Section 184 program, which guaranteed loans for low-income families before NAHASDA.¹⁸¹

The omission of Native Hawaiian sovereignty from Title VIII is a serious concern because NAHASDA took pains to incorporate Native

¹⁷⁰ 146 CONG. REC. E775 (May 19, 2000) (statement of Rep. Abercrombie).

¹⁷¹ NAHASDA §§ 801(1), 801(6)-801(7), 802(b)(1)(A), 25 U.S.C.A. §§ 4221(1), 4221(6)-(7), 4222(b)(1)(A).

¹⁷² NAHASDA § 802(a), 25 U.S.C.A. § 4222(a).

¹⁷³ NAHASDA § 802(a), 25 U.S.C.A. § 4222(a). Block grants may be used to purchase or improve lands and housing for lease or ownership as well as develop infrastructure and other activities. NAHASDA §§ 810(a)-(b), 25 U.S.C.A. §§ 4229(a)-(b). The block grant may also be used for financing, demolition, and counseling inter alia. NAHASDA § 802(b), 25 U.S.C.A. § 4229(b).

¹⁷⁴ NAHASDA § 802(b)(1)(B), 25 U.S.C.A. § 4222(b)(1)(B).

¹⁷⁵ NAHASDA §§ 803(b)-(c), 25 U.S.C.A. § 4223(b)-(c). The five-year plan must include a statement of goals and objectives for serving low-income families as well as an activities plan, mirroring Title I requirements. NAHASDA §§ 102(b), 803(b)(2), 25 U.S.C.A. §§ 4112(b), 4223(b)(2). The one-year plan must include statements of goals and objectives, low-income families' housing needs, and financial and affordable housing resources available to the HHL-Dept as required under Title I. NAHASDA §§ 102(c), 803(c), 25 U.S.C.A. §§ 4112(c), 4223(c).

¹⁷⁶ NAHASDA § 803(c)(E), 25 U.S.C.A. § 4223(c)(E). There is a compliance waiver provision in Title VIII. NAHASDA § 802(b)(2), 25 U.S.C.A. § 4222(b)(2). As under Title I, the certificate of compliance is for federal civil rights legislation, HUD regulations, and other federal laws and regulations. NAHASDA §§ 102(c)(5), 803(c)(E), 25 U.S.C.A. §§ 4112(c)(5), 4223(c)(E).

¹⁷⁷ NAHASDA § 805(b)(1)(B), 25 U.S.C.A. § 4225(b)(1)(B).

¹⁷⁸ NAHASDA § 806, 25 U.S.C.A. § 4226.

¹⁷⁹ Title VIII has no provision similar to the local cooperation agreement for utilities or payments in lieu of tax under § 101(c) or tax-exemption under § 101(d).

¹⁸⁰ NAHASDA §§ 802(e), 809(a)(1)(B), 25 U.S.C.A. §§ 4222(e), 4228(a)(1)(B); *c.f.* NAHASDA § 101(i).

¹⁸¹ OIAA, Pub. L. No. 106-568, § 204, 114 Stat. 2868, 2895-2903 (2000) (codified in 12 U.S.C.A. § 1715z-13b).

American sovereignty.¹⁸² Another concern is that no date is set for the Secretary to promulgate regulations for Title VIII, which allows for a long delay as seen with Title VI loan guarantees.¹⁸³ The significant limits to section 184A guarantees for Native Hawaiians are also a major concern because they deprive Native Hawaiians of the same ability to finance large-scale developments needed to clear their waiting lists.¹⁸⁴

¹⁸² The findings of fact recognize that Native Hawaiians have “an ongoing right of self-determination,” OIAA, Pub. L. No. 106-568, § 202(13)(E)(ii), 114 Stat. 2868, 2874 (2000), but Title VIII does not require their approval or input for housing plans that the HHL-Dept. submits for them. NAHASDA allows TDHEs to submit housing plans for tribes, but only if the tribal government has first reviewed the plan and authorized its submission, or if the tribe delegated its authority to the TDHE. NAHASDA § 102(d), 25 U.S.C.A. § 4112(d). The nearest Title VIII comes to tribal review is buried in § 803(c)(2)(D)(x)(III) requiring a description of how the HHL-Dept. will “allow resident input and involvement, including the establishment of resident organizations,” yet Native Hawaiian approval is not required. 25 U.S.C.A. § 4223(c)(2)(D)(x)(III). The Secretary makes the regulations for Native Hawaiians, because there is no negotiated rulemaking committee of tribal representatives. Compare NAHASDA § 807, 25 U.S.C.A. § 4227 with NAHASDA § 106(b), 25 U.S.C.A. § 4116(b). Native Hawaiians are unable to make suggestions in the block grant formula, whereas Native Americans can. Compare NAHASDA § 817(b)(3), 25 U.S.C.A. § 4236(b)(3) (“The formula. . . shall be based on factors. . . including. . . any other objectively measurable conditions that the Secretary and the Director [of the HHL-Dept.] may specify”) with NAHASDA § 302(b)(3), 25 U.S.C.A. § 4152(b)(3) (“. . . [o]ther objectively measurable conditions as the Secretary and the Indian tribes may specify”).

¹⁸³ “The Secretary shall issue final regulations necessary to carry out this title not later than October 1, 2000,” NAHASDA § 807, 25 U.S.C.A. § 4227, but President Clinton signed the OIAA into law on December 27, 2000, Statement 26852457, *supra* note 146. The allocation formula, however, must be established within six months of enactment. NAHASDA § 817(a), 25 U.S.C.A. § 4236(a).

¹⁸⁴ First, Native Hawaiian guarantees under Section 184A are restricted to 97.75 or 98.75 percent of the property value on which the loan is taken out, 12 U.S.C.A. § 1715z-13b(c)(5)(C)(i), not up to five times the block grant under NAHASDA and the loan cannot be used to finance dwellings larger than four families, 12 U.S.C.A. § 1715z-13b(c)(2)(A). To guarantee a loan with a larger principal, the applicant must ask permission from the Secretary. 12 U.S.C.A. § 1715z-13b(c)(5)(C)(ii). This provision is rather limiting because much of the land put in trust for Native Hawaiians has low market value. Fogarty, *supra* note 159. Though Native Hawaiian families may take out the guaranteed loan, 12 U.S.C.A. § 1715z-13b(c)(1)(A), there is no provision for public training or information as in NAHASDA, NAHASDA § 604, 25 U.S.C.A. § 4194. The Secretary will issue a guarantee only if he believes there is a reasonable chance the loan will be repaid, but there is no similar provision in NAHASDA. 12 U.S.C.A. § 1715z-13b(d)(2)). Under NAHASDA, the Secretary may deny guarantees if he determines it is “an unacceptable financial risk,” require the tribe to demonstrate that the loan is within their financial capacity, or require more security. NAHASDA §§ 601(c), 602(a)(3)-(4), 25 U.S.C.A. §§ 4191(c), 4192(a)(3)-(4). The Title VI guarantees under NAHASDA were regarded as the jewel of the Act because tribes could undertake large developments to address their long waiting lists. See *supra* note 128 and accompanying text. Section 184A guarantees for Native Hawaiians, however, are substantially limited.

VII. Conclusion

Some would agree that NAHASDA was the most important and beneficial housing legislation ever for Native Americans.¹⁸⁵ NAHASDA revolutionized federal housing assistance for Native Americans by separating them from city-based public housing, making a place for them at the negotiated rulemaking committee where the implementation rules were established, and enabling them to craft their own communities.¹⁸⁶ NAHASDA simplified the process for federal housing money and reduced friction with housing authorities seen in earlier programs, thus successfully harmonizing Native Americans' relationship with the federal government.¹⁸⁷ In its first year, it tripled housing production.¹⁸⁸

Nevertheless, NAHASDA needs almost twice its current funding and it will take a decade just to house present homeless families not counting growing demand.¹⁸⁹ In addition, Title VIII is unfinished because it needs authorization of \$30 million, without which it will not be ready to implement in fiscal year 2002.¹⁹⁰ Though NAHASDA was supposed to make program administration simpler for HUD, it actually strained HUD's ability to assist tribes.¹⁹¹ Before NAHASDA, tribes competed with each other for housing program awards, but after NAHASDA they competed for housing funds that were inadequate to meet their needs and for scarce HUD personnel resources.¹⁹² NAHASDA sent Native Americans a mixed message, for it was a sign of shrinking federal funds and HUD personnel resources in its calls to tribal self-sufficiency and simplification by consolidation.¹⁹³

Furthermore, the subsequent technical amendments to NAHASDA were symbolic gestures that left the federal trust duties unfulfilled.

¹⁸⁵ "There has never been a better time for Native American tribes to improve housing in Indian Country. . . [NAHASDA] has been called the most significant Indian housing legislation since the creation of the federal Indian housing program." Ingram, *supra* note 30, at 164.

¹⁸⁶ See *supra* notes 78, 123 & 125 and accompanying text; *but see* note 137 (noting that HUD refused to consult with tribes after the initial implementation, despite explicit language in NAHASDA).

¹⁸⁷ See *supra* note 126.

¹⁸⁸ See *supra* note 119.

¹⁸⁹ See *supra* note 141 and accompanying text.

¹⁹⁰ Fogarty, *supra* note 159.

¹⁹¹ See *supra* note 138.

¹⁹² See *supra* notes 44 & 138.

¹⁹³ Ingram, *supra* note 30, at 181.

Congress did not ameliorate the Davis-Bacon, environmental survey, and tax-exemption requirements burdening tribes.¹⁹⁴ In fact, the technical amendments substantially duplicated provisions already in the Act and the Code of Federal Regulations.¹⁹⁵ Though the trust duty applies to small tribes as well, Congress narrowed or eliminated some provisions for them.¹⁹⁶ Congress did not follow its obligations as trustee of Native American peoples to act fairly in their benefit.

Title VIII is the most substantial amendment to NAHASDA, but it too lacked attention to the federal fiduciary responsibilities. Title VIII recites the need to recognize Native Hawaiian sovereignty but fails to require their input at any point in the process.¹⁹⁷ Instead, a state agency makes decisions and suggestions for them and even plans their own communities for them.¹⁹⁸

Lastly but most importantly, NAHASDA did not address economic distress on reservations, title search delays, the lack of homebuyer counseling, lenders' fear of foreclosure proceedings, remoteness, and racial discrimination, all of which traditionally plagued private assistance.¹⁹⁹ As of publication, HUD guaranteed only five loans under Title VI totaling \$10 million, which is about a seventieth of just one fiscal year of block grant funding.²⁰⁰ Clearly Title VI was not the

¹⁹⁴ See *supra* part V.A..

¹⁹⁵ See *supra* part V.A..

¹⁹⁶ See *supra* part V.A..

¹⁹⁷ See *supra* note 182 and accompanying text; see also *supra* note 137 (noting that HUD refused to consult with tribes after the initial implementation, despite explicit language in NAHASDA).

¹⁹⁸ See *supra* note 182.

¹⁹⁹ See *supra* notes 133-134 and accompanying text.

²⁰⁰ Mark Fogarty, *Title VI Loan Bought in Secondary Market Will Finance Pojoaque Housing*, INDIAN COUNTRY TODAY, Aug. 22, 2001, at D1 (hereinafter Fogarty-Secondary Market). By contrast, block grant funding in fiscal year 2001 was \$650 million. Fogarty 19316638, *supra* note 52. The loans were \$1.7 million for the Asa'carsarmiut tribe from the First National Bank of Anchorage, AK; Fogarty, *supra* note 27; \$5.3 million for the Catawba tribe from the First Union Corp. of Charlotte, NC, to build 120 homes; Mark Fogarty, *South Carolina Indian Reservation Loaned \$5.3 Million to Develop Housing*, INDIAN COUNTRY TODAY, Nov. 27, 2000, available in 2000 WL 29944456; \$900,000 for 40 homes on the Lac Court Oreilles reservation in Winter, WI; \$1.525 million for a mobile home park on the Flathead Reservation in Pablo, MT; and \$435,000 for rental housing for the Pueblo of Pojoaque from the Century Bank FSB of Santa Fe, NM; Fogarty-Secondary Market, *supra* at D1. Fannie Mac purchased the \$435,000 loan, which was the first one by the giant mortgage company, raising hopes that it will purchase many more. *Id.* Surprisingly, the Federal Home Loan Bank of Seattle announced a plan to guarantee \$100 million of Title VI loans. *Id.*

“jewel” that would thrust NAHASDA above prior housing assistance programs.²⁰¹ Ultimately, NAHASDA was a revolution that left untouched the status quo of Native American housing.

²⁰¹ See *supra* note 128.