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## A House with No Walls: The Federal Government's Role in Indian Housing

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## A HOUSE WITH NO WALLS: THE FEDERAL GOVERNMENT'S ROLE IN INDIAN HOUSING

Imagine what it would be like if you lived in a house with no walls. Imagine that you live in a one room house with as many as 17 other people. Your house was built in the 1960s and has long outlived its purpose, but that is all there is. Not only has it outlived its usefulness, at one point in time it was abandoned due to deterioration, but you live there now without any changes being made because that is all there is. Your house has almost no insulation and the winters where you live can be described as brutal, so much so that the wind literally rips through the house. You have tried to put plastic over the windows but that really does not seem to help, and the wood stove and the oven just cannot keep the house warm at night. The roof over the bedroom is completely collapsing in on the house, while the floor in the living room and kitchen are caving in so that you can see the earth underneath. You do have some electricity, but the wiring is bad, and while you do have running water and indoor plumbing, the fixtures spray water across the room. This house has literally become a house with no walls.<sup>1</sup>

While this may seem like a description of the worst case scenario, it is not. It is a description of a real house in which a real Indian family lives.<sup>2</sup> This particular house is eligible for federal funding that could help to rehabilitate the structure, but nothing has been done because of the long waiting lists.<sup>3</sup> The waiting lists are long because this house is far from the only housing structure that needs help and may not even be one of the ones that needs the most help.<sup>4</sup> So why are families forced to live in such conditions? Because the federal government has failed to meet its responsibility to the American Indian tribes in regard to providing a means for which adequate housing can be obtained. Although the Native American Housing Assistance and Self-Determination Act (NAHASDA) has revolutionized housing assistance for American Indians, it has still fallen short of providing access to adequate housing for many American Indians. This paper will explore these shortfalls and how they have affected housing in Indian Country.

The first section of this paper will explore the historical role that the United States has played in Indian housing. Section two will explore the relationship between the

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1. U.S. Commn. on Civ. Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 61-62 (July 2003) (available at <http://www.usccr.gov/pubs/na0703/na0731.pdf>) [hereinafter *A Quiet Crisis*] (citing Natl. Am. Indian Hous. Council (NAIHC), *Too Few Rooms: Residential Crowding in Native American Communities and Alaska Native Villages* 28-29 (2001) (available at <http://www.naihc.net/NAIHC/files/CCLIBRARYFILES/FILENAME/00000000051/Too%20Few%20Rooms%20Publication.pdf>)[hereinafter *Too Few Rooms*]).

2. *Id.*

3. *Id.* at 62.

4. See *Too Few Rooms*, *supra* n. 1, at 29.

federal government and Indian tribes, in regard to housing, and why the federal government is obligated to provide housing assistance to Indian tribes. The third section will explore NAHASDA and its amendments, including the proposed reauthorization currently before Congress, as well as look at the effects the legislation has had in Indian Country and whether this legislation has fulfilled the responsibility that the federal government has to American Indians. The final section will discuss proposals that can make NAHASDA more effective so that the housing gap can be closed.

### I. HISTORY OF THE UNITED STATES' ROLE IN INDIAN HOUSING

Starting in the early nineteenth century, during the removal era, the United States began to take responsibility for the housing of Indian tribes through the removal treaties of the 1820s and 1830s.<sup>5</sup> The United States first began this relationship by inducing Indians to leave their old homes and promising to compensate them by helping to establish new ones.<sup>6</sup> Starting in the 1850s, the policy of the United States began to focus on the establishment of formal reservations, which was fueled by the desire to assimilate Indians and divest the tribes of their land.<sup>7</sup> The treaties that established these reservations often included provisions stating that the United States would provide certain goods and services including housing; some treaties even expressly stated that the United States would spend a certain sum of money to build houses on the reservation.<sup>8</sup> Other language that was used in treaties included "that the United States would pay a housing annuity . . . for a set number of years" or that money from the sale of Indian land would be put in trust with a certain percentage going to build houses.<sup>9</sup> A standard provision in many treaties also included "that the United States would provide a carpenter and a sawmill" to help in the building of new homes.<sup>10</sup>

While some treaties expressly addressed funds being expended towards housing, others mentioned nothing.<sup>11</sup> However, this does not mean that the United States did not develop a responsibility towards tribes where housing was not expressly addressed in treaties.<sup>12</sup> By examining reports from treaty negotiations, it is apparent that promises to provide housing often played an important role in the negotiation process even if, in the end, the treaty did not expressly address what assistance the United States would provide to the tribe.<sup>13</sup>

When the Meriam Report was issued in 1928, it was revealed that the housing on reservations and the United States efforts to establish housing on these reservations were deficient.<sup>14</sup> There was extensive overcrowding and overall very poor housing

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5. *Cohen's Handbook of Federal Indian Law* § 22.05[1], 1387 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter *Cohen's*].

6. *Id.*; Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 Harv. Blackltr. L.J. 211, 211 (2002).

7. Davis, *supra* n. 6, at 216.

8. *Id.*

9. *Id.* at 217 (footnote omitted).

10. *Id.*

11. *Id.*

12. See Davis, *supra* n. 6, at 217.

13. *Id.*

14. *Cohen's*, *supra* n. 5, at § 22.05[1], 1388.

conditions.<sup>15</sup> In houses that were built by the government, these conditions were often worse because they were not suited for Indian needs and had less ventilation.<sup>16</sup> In 1934, through the Indian Reorganization Act, the United States took the first steps to resolve these problems by establishing a revolving loan fund that could be used to build and improve Indian housing.<sup>17</sup> In 1936, the Indian Relief and Rehabilitation Program was established as the first federal housing program specifically directed to Indian housing needs.<sup>18</sup> In 1940, yet another housing program was made available to Indian tribes when the Solicitor General determined that Indian tribes could qualify as a public housing agency under the Housing Act of 1937.<sup>19</sup> This meant that tribes were eligible for loans to develop public and low-rent housing.<sup>20</sup>

However, in 1961, a report by the Secretary of the Interior on the state of Indian housing demonstrated that American Indians still had a compelling need for housing assistance and recommended that a housing division within the Bureau of Indian Affairs be established.<sup>21</sup> The report also recommended that the low-rent public housing program administered through the Public Housing Administration be expanded so that it could provide housing in Indian Country.<sup>22</sup> In response to this report, the Public Housing Administration began to permit Indian Housing Authorities (IHAs) to participate under the Housing Act of 1937.<sup>23</sup> During this time, in order for tribes to receive funding they had to establish an IHA.<sup>24</sup> The Department of Housing and Urban Development (HUD) would then only deal with the IHA, which left the tribe's role to be that of leasing lands to the IHA who would then use the leased lands for housing development.<sup>25</sup> In order for tribes to get assistance through its IHA, it had to comply with HUD requirements which included standard lease forms and 50-year term leases.<sup>26</sup> These types of regulations often caused tension with the tribes, and as a consequence tribes tended to only lease land that had soil problems.<sup>27</sup> This led to houses being built that quickly developed foundation failure and other undesirable housing problems.<sup>28</sup>

In 1988, separate funding was allocated for Indian housing under the IHA.<sup>29</sup> The funds were still funneled through HUD, but through the newly designated Office of Native American Programs which oversaw the administration of funds.<sup>30</sup> By the early 1990s there were 14 programs under HUD addressing Indian housing needs, but each

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Cohen's*, *supra* n. 5, at § 22.05[1], 1388.

20. *Id.*

21. Susan J. Ferrell, *Indian Housing: The Fourth Decade*, 7 St. Thomas L. Rev. 445, 452–53 (1995).

22. *Id.* at 453.

23. *Cohen's*, *supra* n. 5, at § 22.05[1], 1388.

24. Denise Chee, *Unique Aspects of Housing Development on Tribal Lands*, 10 Experience: Mag. Senior Laws. Div. 7, 38–39 (Spring 2000).

25. *Id.* at 39.

26. *Id.*

27. *Id.*

28. *Id.*

29. Chee, *supra* n. 24, at 38.

30. *Cohen's*, *supra* n. 5, at § 22.05[1], 1389.

program had different requirements for administration and all the programs were aimed at urban housing needs, which were often far different from the needs of most tribes.<sup>31</sup> During this time the Bureau of Indian Affairs, the Department of Agriculture, and the Department of Veteran's Affairs had also established programs that focused on Indian housing needs.<sup>32</sup>

## II. THE UNITED STATES HAS AN OBLIGATION TO PROVIDE HOUSING ASSISTANCE IN INDIAN COUNTRY, BUT WHY?

There are two reasons why the federal government has an obligation to provide housing assistance in Indian Country. The first is that there is a pervasive need for adequate housing in Indian Country.<sup>33</sup> However, this obligation is based on more than a great need for housing; it is based on a relationship.<sup>34</sup> The United States government has a special and unique government-to-government relationship with the Indian tribes within its borders.<sup>35</sup> This relationship has been described in many ways but the most common is that of a "trust relation."<sup>36</sup> This relationship began when the

"Federal Government undertook the obligation to insure the survival of Indian tribes. . . . It is a 'duty of protection' which arose because of the 'weakness and helplessness' of Indian tribes 'so largely due to the course of dealings of the Federal Government with them and the treaties in which it has been promised . . . .' Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property and the self-government of Indian tribes."<sup>37</sup>

This trust relationship affects many aspects of tribal affairs, one of which is federal housing assistance.<sup>38</sup> Throughout the last two centuries, the Federal Government has repeatedly reaffirmed this relationship in the Indian housing arena through treaties, legislation, and agency programs.<sup>39</sup>

While this trust relationship can be traced back to the removal treaties which included promises to provide a permanent homeland, food, clothing, and other services, it is more than what is embodied in these treaties.<sup>40</sup> The trust doctrine goes beyond these specific treaty promises and has become a judicial opportunity to embrace a duty to protect.<sup>41</sup> This trust concept between the federal government and Indian tribes was articulated by Justice Marshall in *Worcester v. Georgia*:<sup>42</sup> "This relation [between the

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31. *Id.* at 1390.

32. *Id.* at 1389.

33. See Davis, *supra* n. 6, at 235.

34. *Id.*

35. See Larry B. Leventhal, *American Indians—The Trust Responsibility: An Overview*, 8 Hamline L. Rev. 625, 630 (1985).

36. *Id.*

37. *Id.* at 632 (quoting Am. Indian Policy Rev. Comm., *Final Report* vol. 1, 126 (May 17, 1977) (footnote omitted)).

38. See generally *A Quiet Crisis*, *supra* n. 1; Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1495–1522.

39. See generally *A Quiet Crisis*, *supra* n. 1; Wood, *supra* n. 38, at 1495–1523.

40. Wood, *supra* n. 38, at 1497.

41. *Id.* at 1506.

42. 31 U.S. 515 (1832).

Cherokee Nation and the United States] was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master.”<sup>43</sup> While the Supreme Court has recognized that there is a trust doctrine that governs the relationship between the federal government and Indian tribes, it has not explicitly clarified the reach of this doctrine.<sup>44</sup> In several cases, the Court has given great latitude to Congress to determine what the federal government’s duties are to Indian tribes, and has even upheld Congress’s power to terminate its trust relationship with a tribe.<sup>45</sup>

However, in regards to Indian housing assistance, Congress has consistently embraced its duty to protect by providing housing assistance to tribes.<sup>46</sup> Starting with removal when tribes were often forced to relocate to unfamiliar and undeveloped areas where it was often difficult to build their traditional houses, the federal government has provided assistance.<sup>47</sup> While government policies towards Indians have shifted and this has affected the housing programs that were in place, there has never been a time since removal where there was not a housing assistance program that recognized this relationship,<sup>48</sup> as demonstrated above. This history is evidence that the federal government recognized that there was a trust relationship, but it does not show that the relationship was fulfilled; only that it exists.<sup>49</sup> Regardless of all of these programs, there were still deficiencies in the quantity and quality of housing in Indian Country, and as a response, in 1996, Congress enacted the Native American Housing Assistance and Self-Determination Act (NAHASDA).<sup>50</sup> In this legislation Congress not only enacted a statute to help alleviate the need for adequate housing; Congress also recognized that the federal government does have a trust obligation to Indian tribes in regards to housing assistance.<sup>51</sup>

### III. NAHASDA AND ITS AMENDMENTS: WHAT THEY DID AND DID NOT DO

NAHASDA’s purpose was not only to increase the availability of housing to tribes, but also to establish a program that was tailored to meet the needs of Indian tribes.<sup>52</sup> However, the Act did more than that; it recognized and affirmed that there is a trust relationship between the United States and Indian tribes and that the government has a responsibility to provide housing assistance to Indian tribes.<sup>53</sup> In order to accomplish the legislative goals, NAHASDA has two primary focuses.<sup>54</sup> The first is to

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43. Wood, *supra* n. 38, at 1500 (quoting *Worcester*, 31 U.S. at 555) (article modifies some punctuation).

44. *Id.* at 1512.

45. *Id.* at 1512–13.

46. See generally *A Quiet Crisis*, *supra* n. 1; Davis, *supra* n. 6, at 212.

47. *A Quiet Crisis*, *supra* n. 1, at 51.

48. See Davis, *supra* n. 6, at 214–32.

49. See generally *A Quiet Crisis*, *supra* n. 1, at 63–64; George H. Cortelyou, Student Author, *An Attempted Revolution in Native American Housing: The Native American Housing Assistance and Self-Determination Act*, 25 Seton Hall Legis. J. 429, 465 (2001).

50. Pub. L. No. 104-330, 110 Stat. 4016 (1996).

51. See *id.*

52. *Cohen’s*, *supra* n. 5, at § 22.05[1], 1390.

53. *Id.*

54. Cortelyou, *supra* n. 49, at 446.

provide a way to bring in private lending, and the second is to offer a single block grant that tribes are able to use according to that tribe's specific needs.<sup>55</sup>

When NAHASDA was originally enacted, it had seven titles.<sup>56</sup> Title I authorizes that block grants be directly made to tribes who design their own housing plans and submit them to the Secretary of Housing and Urban Development.<sup>57</sup> In the alternative, tribes may, but are not required to, designate tribal housing entities as grant recipients.<sup>58</sup> The housing plans that must be filed include a one-year plan and a five-year plan and must state "the tribe's objectives, housing needs, an account of outside financial resources, and a certificate of compliance with federal non-discrimination statutes."<sup>59</sup> After the initial plan is submitted, the tribe must continue to submit subsequent plans for each year in order to continue receiving the annual block grants.<sup>60</sup> After plans are submitted, the Secretary of HUD reviews the housing plans for their compliance with NAHASDA, and then HUD will continue to monitor the tribe's compliance with the provisions of NAHASDA.<sup>61</sup> If a tribe is noncompliant, HUD can either reduce or eliminate funding.<sup>62</sup> Title I also requires that housing that is assisted by a block grant must be exempt from real or personal property taxes and instead the recipient must make annual payments of user fees.<sup>63</sup> In addition, Title I requires that an environmental review be completed, either by HUD or the tribe, to make sure that environmental policies are adhered to.<sup>64</sup>

Title II states the national objectives for the Act.<sup>65</sup> These objectives include assisting and promoting affordable housing, better access to private mortgage markets, as well as to plan and integrate infrastructure resources.<sup>66</sup> Title II outlines the qualifications for receiving a block grant and lists the activities that may be funded through the grant, which include "buying, building, or improving homes . . . ."<sup>67</sup> Title II also addresses rent ceilings and homebuyer payment caps to ensure that there is access for the low-income Indian families that the Act is meant to help.<sup>68</sup> This Title states that rent and house payments cannot exceed 30 percent of the family's monthly adjusted gross income to ensure this access.<sup>69</sup>

Title III states how the allocation of grant amounts are decided and who helps to determine these amounts.<sup>70</sup> The formula that is used under Title III is drafted by the

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55. *Id.*

56. *Id.* at 447.

57. *Id.*

58. *Cohen's*, *supra* n. 5, at § 22.05[2][a], 1391.

59. Cortelyou, *supra* n. 49, at 447 (citing 25 U.S.C. § 4112 (2000)); *see also Cohen's*, *supra* n. 5, at § 22.05[2][a], 1391.

60. Cortelyou, *supra* n. 49, at 447–48.

61. *Id.* at 448.

62. *Id.*

63. 25 U.S.C. § 4111(d) (2006).

64. *Cohen's*, *supra* n. 5, at § 22.05[2][a], 1392.

65. 25 U.S.C. § 4131(a) (2006).

66. *Id.*

67. Cortelyou, *supra* n. 49, at 449.

68. *Id.* at 449–50.

69. *Cohen's*, *supra* n. 5, at § 22.05[2][a], 1391.

70. 25 U.S.C. § 4151 (2006).

rulemaking committee of HUD and tribal representatives.<sup>71</sup> The block grant amounts are then calculated by the Secretary using this formula.<sup>72</sup> Title III lays out the factors that the committee must consider in determining the formula.<sup>73</sup> These factors include the number of low-income housing units already operated, the extent of poverty, the number of Indian families, the tribe's ability to administer the housing plan, and other outside housing funds.<sup>74</sup> However, the committee cannot take into account a tribe's performance under other housing programs before NAHASDA was enacted.<sup>75</sup> The original legislation also included a "safety net" in Title III to ensure that funds would not be allocated in an amount less than the funding in 1996.<sup>76</sup>

Title IV is the compliance section of the Act. This section outlines the procedures for tribes to follow for compliance and reporting.<sup>77</sup> It provides that if after reasonable notice the Secretary finds that a recipient has failed to sufficiently comply with the Act, then the Secretary can terminate payments, reduce payments, or limit the payments to only those programs that are in compliance.<sup>78</sup> This Title also offers procedures to tribes for review of the Secretary's decision to limit or terminate funding, which includes petitioning the federal appeals courts for review.<sup>79</sup> Title V states that funding for the tribes under the United States Housing Act of 1937 is repealed and other housing assistance programs as listed in the Act.<sup>80</sup>

Title VI of the Act sets out that the United States will guarantee loans for up to five times the amount of the block grant.<sup>81</sup> The tribe may also use their block grant to repay a loan.<sup>82</sup> The Act authorizes the Secretary to guarantee up to \$400 million each year for five years and \$2 billion over five years.<sup>83</sup> Title VII increases the term of years for leaseholds from 25 to 50.<sup>84</sup> Title VII also allows for the appropriation of funds for assistance for a national organization that will represent Native American housing interests and will provide training and technical assistance to Indian housing authorities.<sup>85</sup>

While NAHASDA was a revolution in Indian housing assistance, the original legislation still exhibited many shortfalls.<sup>86</sup> The first of these is the environmental review that must be completed under Title I.<sup>87</sup> The problem develops in one of two ways. First, if the tribe has HUD perform the review, it can take up to two years before

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71. Cortelyou, *supra* n. 49, at 450.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Cortelyou, *supra* n. 49, at 450–51.

77. *Id.* at 451 (citing 25 U.S.C.A. §§ 4161–4167).

78. *Id.* (citing 25 U.S.C.A. § 4161(a)).

79. *Id.*

80. *Id.* at 451–52.

81. Cortelyou, *supra* n. 49, at 452 (citing 25 U.S.C.A. § 4191).

82. *Id.*

83. *Id.* (citing 25 U.S.C.A. § 4195).

84. *Id.* (citing 25 U.S.C.A. § 4211).

85. *Id.* (citing 25 U.S.C.A. § 4212).

86. Cortelyou, *supra* n. 49, at 465 (citing 25 U.S.C.A. § 4212).

87. *Cohen's*, *supra* n. 5, at § 22.05[2][a], 1392.

any progress is made on the actual housing structures.<sup>88</sup> Second, while tribes are allowed to take responsibility for the environmental review this is often out of reach for some tribes, thus forcing them to rely on HUD. The Act also required that housing that was to be developed with the assistance of grant money had to be exempt from both real and personal property taxes as levied by a state, tribe, city, or other political body, and instead required the recipient to pay a user fee.<sup>89</sup> This caused problems for tribes that have no trust land if they could not get an exemption from the tax body and also caused the tribes to have to work closely with the governing entity to get an exemption.<sup>90</sup>

The original legislation also required that tribes comply with the David-Bacon Wage Act, which requires that wages are not less than the wages of the prevailing locality as determined by the Secretary of Labor.<sup>91</sup> This caused a problem because to meet these wages requirements, tribes were often forced to pay up to \$10 more per hour than typical reservation wages but often got mediocre work for the high-end prices.<sup>92</sup> Another of NAHASDA's shortfalls was with the Title VI Loan Guarantee Program, which should have been one of the most significant parts of the legislation. However, it took HUD three years to issue regulations for Title VI.<sup>93</sup> Title VI was also not publicized so there was a lack of information which led to an under usage of the benefits under Title VI.<sup>94</sup>

While the above shortfalls are significant, they are not the most significant. NAHASDA fell far short on funding and lacked authorization for increased funding.<sup>95</sup> NAHASDA essentially did not take into account increases for inflation which automatically limited its success.<sup>96</sup> However, at the same time that there was no increase for funding for NAHASDA, there was an increase of 46.5 percent in other HUD funding even after adjustments for inflation were taken.<sup>97</sup> The bottom line is that without adequate funding, NAHASDA will be just another "band-aid" to the Indian housing deficiencies. As Representative Kennedy noted when NAHASDA was passed,

"[U]ntil 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 . . . [L]et us not pretend in any way that the legislation we have today will significantly change the lives and housing concerns of the vast majority of Indians."<sup>98</sup>

While NAHASDA did revolutionize housing assistance in Indian Country, it still left many shortfalls. Since the original legislation was enacted, the federal government has tried to correct the shortfalls through subsequent amendments and it has both succeeded

88. *Id.*

89. *Id.* at § 22.05[2][a], 1393 (citing 25 U.S.C. § 4111(d) (2000)).

90. *Id.*

91. *Id.* (citing 25 U.S.C. § 4114(b) (2000)).

92. *Cohen's, supra* n. 5, at § 22.05[2][a], 1393.

93. Cortelyou, *supra* n. 49, at 456.

94. *Id.*

95. *Cohen's, supra* n. 5, at § 22.05[2][a], 1393; Cortelyou, *supra* n. 49, at 457.

96. *Cohen's, supra* n. 5, at § 22.05[2][a], 1393; Cortelyou, *supra* n. 49, at 457.

97. *Cohen's, supra* n. 5, at § 22.05[2][a], 1393.

98. Davis, *supra* n. 6, at 237 (quoting Rep. Kennedy's statements in 142 Cong. Rec. 25753 (1996)).

and failed.

Since NAHASDA's enactment in 1996, sections of the Act have been amended with the goal of making the Act more effective. In 2000, Congress took steps to amend technical problems with NAHASDA through the Omnibus Indian Advancement Act.<sup>99</sup> Under Title I in the original legislation, the Secretary had the authority to waive the plan requirements in order to receive a block grant.<sup>100</sup> The 2000 amendment limited the waiver so that it was only valid for three months.<sup>101</sup> All that the amendment did was set a more restrictive standard for the waiver requirement, but it did nothing to fix any of the regulations that were impeding tribes.<sup>102</sup> Also, under Title I, the environmental review section was amended by authorizing a waiver for errors in tribal reviews as long as the goals of environmental law were not frustrated and health and safety were not threatened.<sup>103</sup> While the environmental review had been an impediment for some tribes and a waiver would be a useful tool in overcoming that impediment, the waiver was accompanied by a four-prong test.<sup>104</sup> As a result, the smaller tribes that were the most likely not to be able to complete an environmental review under the original legislation are now required to meet a restrictive test, thus leaving them in the same place that they were under the original legislation with either long delays waiting on HUD to perform the review or not having the funds released to them at all for not being able to comply with this restriction.<sup>105</sup>

Under Title I, the requirement for real and personal property tax exemption was left in place.<sup>106</sup> However, the section was amended to give the Secretary the authority to grant a waiver to a tribe that had tried in good-faith to comply with the requirement.<sup>107</sup> The other standard that was also left in place was the section requiring that tribes comply with the Davis-Bacon Wage Act, but under the amendment, the requirement did not apply to tribes if the tribe had laws requiring wages above the prevailing rate.<sup>108</sup> Both the waiver requirement to the tax exemption and the amendment to the Davis-Bacon wage requirement helped to put the control back with the tribe. For the waiver of the tax exemption, as long as the tribe has tried in good-faith to negotiate with the taxing body, then an exception should be granted. Also under the amendment for the Davis-Bacon wage requirement, the tribes were put in control since their own laws can be used to set

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99. Pub. L. No. 106-568, § 1003, 114 Stat. 2868, 2925-30 (2000).

100. 25 U.S.C. § 4111(b)(2).

101. Cortelyou, *supra* n. 49, at 460.

102. *Id.*

103. *Cohen's*, *supra* n. 5, at § 22.05[2][a], 1392; Cortelyou, *supra* n. 49, at 460; 114 Stat. at 2926.

104. Cortelyou, *supra* n. 49, at 460 (citing 114 Stat. at 2926 (which provides that "[t]he Secretary may waive the requirements under [the Environmental Compliance] section if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section—(1) will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. § 4331 et. seq.) or any other provision of law that furthers the goals of that Act; (2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community; (3) is a result of inadvertent error, including an incorrect or incomplete certification provided under subsection (c)(1); and (4) may be corrected through the sole action of the recipient.")).

105. *Id.*

106. *Id.* at 461.

107. *Id.* (citing Pub. L. No. 106-568, § 1003(a)(2), 114 Stat. at 2926).

108. *Id.* (citing Pub. L. No. 106-568, § 1003(j), 114 Stat. at 2930).

the standard, with the only restriction being that they must be above the prevailing rate.

Under Title III, Congress amended the allocation formula so it is no longer required that the funding to meet the amount established in 1996 and limited "modernization assistance."<sup>109</sup> While this seems like it would be devastating to tribes, in reality, what it did was a couple of different things. First, this amendment only applied to tribes that owned or operated fewer than 250 public housing units.<sup>110</sup> Second, it applied when the allocation formula provided for an amount that was greater than or equal to the amount available in 1996.<sup>111</sup> If this were true then the amount that would actually be provided for modernization would be the average of funds that the tribe had received between the years 1992 and 1997 under the Housing Act of 1937.<sup>112</sup> While this seems like it would cause a decrease in funding, this provision has actually been referred to as "fair" since there are insufficient appropriations for the block grants.<sup>113</sup>

Under Title IV, section 405 was amended in two ways. First, it clarified that an entity that is designated by a tribe is to be treated as a nonfederal entity under the Single Audit Act.<sup>114</sup> The amendment, in essence, granted "the Secretary unlimited authority to audit."<sup>115</sup> While some have said this provision might "force tribes to compromise their time and staff for auditing rather than providing tribal members with housing,"<sup>116</sup> in reality, this provision should only ensure that the tribes are using the funds granted in the most effective way and ensure that housing is being provided for tribal members.

Under Title IV, the notice section was amended to require the Secretary to conduct a hearing within 60 days of finding a tribe to be non-compliant before any further action can be taken.<sup>117</sup> However, before the amendment was passed, Congress was aware that there were already regulations in place calling for a hearing within 90 days.<sup>118</sup> It was also brought to the attention of the Senate Committee on Indian Affairs that by shortening the time for a hearing, HUD and tribes would have less time to prepare and perform necessary functions before the hearing took place.<sup>119</sup> However, the amendment was passed with the shorter 60 day provision. While not a focus of this paper, the biggest amendment was in the form of an added title, Title VIII.<sup>120</sup> Title VIII plays the same role to the Native Hawaiians as the block grants section plays for Indian tribes.<sup>121</sup>

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109. Cortelyou, *supra* n. 49, at 460 (citing Pub. L. No. 106-568, § 1003(g), 114 Stat. at 2928).

110. *Id.* at 460 n. 152 (noting that Pub. L. No. 106-568, § 1003(g)(2), 114 Stat. at 2928 amended § 302(d)(1) of NAHASDA (25 U.S.C. § 4152(d)(1)).

111. *Id.* (discussing how 114 Stat. at 2928 amended 110 Stat. at 4036-37).

112. *Id.*

113. *Id.*

114. See Cortelyou, *supra* n. 49, at 460 n. 148 (citing Pub. L. No. 106-568, § 1003(f)(2), 114 Stat. at 2927-28).

115. *Id.* (citing Sen. Comm. Indian Affairs, *Oversight Hearing to Clarify the 1996 Native American Housing Assistance and Determination Act*, 106th Cong. 26-27 (Mar. 17, 1999) (statement of Chester Carl, Chairman, NAIHC)).

116. *Id.*

117. *Id.* at 460 n. 153 (citing Pub. L. No. 106-568, § 1003(h), 114 Stat. at 2928-29 (amending § 401(a) of NAHASDA (25 U.S.C. § 4161(a))).

118. *Id.* at 460-61 n. 153 (citing Sen. Comm. Indian Affairs, *supra* n. 115, at 18 (statement of Jacqueline Johnson, Dep. Asst. Sec., Native Am. Programs)).

119. Cortelyou, *supra* n. 49, at 461 n. 153. (citing Sen. Comm. Indian Affairs, *supra* n. 115, at 18).

120. 114 Stat. at 2876-2903 (Title VIII is labeled "Housing Assistance for Native Hawaiians.").

121. *Cohen's, supra* n. 5, at § 22.05[6], 1400.

Under Title VIII, HUD is authorized to provide block grants for the eligible families to occupy Hawaiian Home Lands.<sup>122</sup>

In 2002, Congress enacted the first reauthorization of NAHASDA.<sup>123</sup> During this reauthorization Congress made no significant changes to the legislation, however, Congress did extend the term of the Act to 2007.<sup>124</sup> It was not until 2004 in the Homeownership Opportunities for Native Americans Act that the next amendment was enacted.<sup>125</sup> This amendment changed the amount of loan guarantees to 95 percent of the unpaid principal and interest due on the notes or other obligations guaranteed.<sup>126</sup> While this sounds like a limitation, this is the percentage that the program had been operating at, and the amendment simply provided explicit statutory authority for the program to continue to operate at that level.<sup>127</sup>

In 2005, Congress enacted the Native American Housing Enhancement Act.<sup>128</sup> This 2005 Act did not substantively change NAHASDA but corrected what had been a technical restriction.<sup>129</sup> Under Title I, a provision existed that prohibited the Secretary from reducing grant amounts to tribes based solely on four specified reasons<sup>130</sup> dealing with retention of program money.<sup>131</sup> However, the provision only specified reducing a tribe's funding and did not expressly prohibit restricting a tribe's access or prohibiting application by a tribe altogether for the same reasons.<sup>132</sup> This amendment expressly set out what might restrict a tribe's access to funding.<sup>133</sup> While fixing technical problems to NAHASDA is always a step in the right direction, there is no indication that this had actually been an issue that was burdening tribes trying to receive grants.<sup>134</sup>

On October 14, 2008, House Bill 2786 was signed by the President and became Public Law 110-411.<sup>135</sup> Public Law 110-411 is the reauthorization legislation for NAHASDA.<sup>136</sup> This legislation has two purposes: first, it is to authorize appropriations for the years 2009 through 2013, and second, it is to make certain amendments to NAHASDA that will offer tribes more flexibility and correct some of the issues from the original legislation that have not been addressed in previous amendments.<sup>137</sup> The first of

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122. *Id.*

123. Pub. L. No. 107-292, 116 Stat. 2053 (2002).

124. *Id.* at 2053.

125. Pub. L. No. 108-393, § 1, 118 Stat. 2246 (2004).

126. *Id.* at 2246.

127. See H.R. Rpt. 108-550 (June 17, 2004).

128. Pub. L. No. 109-136, 119 Stat. 2643 (2005).

129. Sen. Rpt. 109-160 (Oct. 27, 2005).

130. *Id.* at 3 (citing 25 U.S.C. § 4114(a)(2) (2006)) (stating that the Secretary cannot reduce housing grants "to . . . tribes based solely on (1) the tribe's retention of program income, (2) the amount of such income retained by the tribe, (3) the tribe's retention of reserve amounts from the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.), or (4) whether the recipient has expended retained program income for housing related activities").

131. *Id.*

132. *Id.*

133. See *id.*; 119 Stat. at 2644.

134. Sen. Rpt. 109-160.

135. Pub. L. No. 110-411, 122 Stat. 4319 (2008).

136. *Id.* at § 1.

137. See Kimberly Hayes, *Reauthorization of NAHASDA Offers More Tribal Flexibility*, Am. Indian Rpt. 4 (July 2007).

these is an amendment that would “streamline” the housing plans that must be submitted by each tribe.<sup>138</sup> HUD pushed for this amendment so that the tribes would be relieved of having to provide duplicate information by deleting the five-year plan and “streamlining” the one-year plans.<sup>139</sup>

Second, tribes are offered more flexibility through an added subtitle, Self-Determined Housing Activities for Tribal Communities.<sup>140</sup> This new section specifically provides that the purpose of the section is to

establish a program for self-determined housing activities for the tribal communities to provide Indian tribes with the flexibility to use a portion of the grant amounts under section 101 for the Indian tribe in manners that are wholly self-determined by the Indian tribe for housing activities involving construction, acquisition, rehabilitation, or infrastructure relating to housing activities or housing that will benefit the community served by the Indian tribe.<sup>141</sup>

While this provision should provide flexibility in the way that tribes are able to allocate funding received through NAHASDA, the provision also calls for limitations to these self-determinative activities.<sup>142</sup> Specifically, only tribes that have had no unresolved significant audit findings for the preceding three-year period are eligible and the activities must be described in the Indian housing plan that is submitted to the Secretary.<sup>143</sup> This expansion in flexibility is important to building adequate housing and this importance was aptly illustrated during a hearing before the House Financial Services Committee when the question was raised by a Representative as to why there was such a need for more flexibility. In response, Mark Chino<sup>144</sup> explained “[t]here is no use of sitting a housing structure on a piece of land without sewers and electricity.”<sup>145</sup>

The reauthorization also includes a new provision that allows tribes to establish reserve accounts.<sup>146</sup> This provision could potentially allow tribes to accumulate funds using grant money which they can then leverage.<sup>147</sup> However, the amount that a tribe is allowed to accumulate in a reserve account is severely limited in that it cannot exceed one-quarter of the five-year average that the recipient uses for administration and planning and the purpose for the accumulation is limited to accumulating such funds specifically for administration and planning related activities.<sup>148</sup> The issue of reserve accounts had become controversial between HUD and tribes because HUD had taken the position that the purpose of NAHASDA is to produce affordable housing to an already extensive, unmet need and creating reserve accounts does not meet this purpose because the money is not being put to work.<sup>149</sup> The problem is that tribes that only have a small

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138. 122 Stat. at 4321–23; Hayes, *supra* n. 137, at 4.

139. 122 Stat. at 4321–23; Hayes, *supra* n. 137, at 4.

140. 122 Stat. at 4326–28.

141. *Id.* at 4326.

142. *Id.*

143. *Id.*

144. President of the Mescalero Apache Tribe.

145. Hayes, *supra* n. 137, at 4.

146. *Id.* at 5; 122 Stat. at 4325.

147. See Hayes, *supra* n. 137, at 5; 122 Stat. at 4325.

148. 122 Stat. at 4325.

149. Hayes, *supra* n. 137, at 5.

amount of money do not want to leverage that small amount.<sup>150</sup> A reserve is required so that money can be saved and the tribes will have a larger amount to leverage to meet that tribe's needs.<sup>151</sup> Since part of the intent behind the legislation was that tribes be self-determinative, this provision would fall in line with this goal by providing tribes another tool to accomplish what is in best interest of that tribe.<sup>152</sup> However, the limitations that are now provided for in the amendment may severely limit a tribe's ability to leverage amounts which are placed into a reserve account.<sup>153</sup>

An amendment that is being called a step in the right direction is one that relaxes the procurement procedure so that any purchases for under \$5,000 will not have to go through the competitive procurement process.<sup>154</sup> This will allow for streamlining of the program and less micro-management.<sup>155</sup> Finally, there is a new provision that calls for a GAO "study of the effectiveness of the [NAHASDA] in achieving its purposes of meeting the needs for affordable housing for low-income Indian families . . . ."<sup>156</sup> Additionally, the compares the effectiveness between Indian tribes of different sizes and types.<sup>157</sup>

The amendments discussed above do not cover each change that was made to NAHASDA through the new reauthorization, only those that may specifically help remedy some of the problems that have persistently plagued NAHASDA. Additionally, while these amendments may not address all of the issues that have persisted throughout the life of NAHASDA or the persistence of housing problems throughout Indian Country, they are a step in the right direction.

#### A. *What Has This Meant for Housing in Indian Country?*

While NAHASDA has revolutionized housing in Indian Country, it is important to look at what practical effects it has had. In 2002, more than four years after NAHASDA took effect, it was estimated that 90,000 Indian families were either facing inadequate housing or homelessness.<sup>158</sup> The same report also stated that "more than 30 percent of reservation households are crowded; 18 percent are severely crowded; and one in five Indian houses lacks complete plumbing facilities."<sup>159</sup> Basic communication is also an issue, since approximately 16 percent of Indian homes do not have telephones, and many communities do not even have the infrastructure to support telephone service.<sup>160</sup> While telephone service may not seem like a basic need, in these communities, it is. Since many of these homes and communities are located in rural areas, this may mean that

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150. *Id.*

151. *Id.*

152. *See id.* at 4.

153. *See generally* 122 Stat. at 4325.

154. H.R. Rpt. 110-295 at § 2(g) (June 20, 2007) (as introduced); Hayes, *supra* n. 137, at 5.

155. Hayes, *supra* n. 137, at 5.

156. 122 Stat. at 4335.

157. *Id.*

158. *A Quiet Crisis*, *supra* n. 1, at 50.

159. *Id.* (footnote omitted).

160. *Id.*

there is no way to get help in an emergency.<sup>161</sup> Nationwide, only six percent of housing is considered to be inadequate compared to the 40 percent of on-reservation housing that is considered to be inadequate,<sup>162</sup> illustrating that this really is a crisis in Indian Country.

While the above problems are certainly a cause for concern, an even bigger problem is the lack of plumbing in Indian homes. According to data collected in the 1990 census, 20 percent of Indian households lacked complete plumbing facilities, which is defined as hot and cold piped water, a flush toilet, and a bathtub or shower.<sup>163</sup> This is in comparison to the only one percent of homes nationwide that lacked complete plumbing during the same census period.<sup>164</sup> While seven out of ten Indian households on reservations were able to obtain water from either public or private companies, this was not always the case and in the other three households these sources of water were rare.<sup>165</sup> When it came to sewage disposal, less than half of the households on reservations were connected to a public sewer.<sup>166</sup> One in five Indian households was forced to use other means of disposal including outhouses, chemical toilets, or facilities in another structure.<sup>167</sup> However, in the worst cases, households would resort to what is described as the "honeybucket" method where large receptacles are used to collect sewage and then are later dumped into lagoons that are outside of the boundaries of the tribe.<sup>168</sup> This can then lead to a host of other problems, such as after a heavy rain, the sewage can wash back into the communities, which can cause contamination, severe bacterial and viral infections, and poisoning of crops.<sup>169</sup> While these issues were present before NAHASDA was implemented, they have continued to persist at a rate much higher than the national average.<sup>170</sup> Four years after NAHASDA was implemented, many of these problems had not been decreased.<sup>171</sup>

While NAHASDA can help to alleviate these problems through its modernization programs, which allow for funding to update and renovate houses already in place,<sup>172</sup> there is still the overall problem of lack of housing. As of April 2002, NAHASDA had helped with the construction and renovation of an estimated 25,000 homes.<sup>173</sup> However, the closest estimates suggest that there is still an immediate need for at least 200,000 housing units.<sup>174</sup> Even HUD estimates that there is a need for at least 230,000 housing

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161. See generally *A Quiet Crisis*, *supra* n. 1, at 50–65 (discussing HUD).

162. *Id.* at 50.

163. U.S. Dept. Commerce, Econ. & Statistics Administration, Census Bureau, *Statistical Brief: Housing of American Indians on Reservations—Plumbing* 1 (Apr. 1995) (available at [http://www.census.gov/apds/www/statbrief/sb95\\_9.pdf](http://www.census.gov/apds/www/statbrief/sb95_9.pdf)).

164. *Id.*

165. *Id.* at 3.

166. *Id.*

167. *Id.* at 3.

168. *A Quiet Crisis*, *supra* n. 1, at 50.

169. *Id.*

170. See *id.* at 64.

171. *Id.* at 50.

172. 25 U.S.C. § 4132(1) (2006) ("The [statutory] provision of modernization or operating assistance for housing previously developed or operated pursuant to a contract between the Secretary and an Indian housing authority.").

173. *A Quiet Crisis*, *supra* n. 1, at 54.

174. *Id.*

units but concedes that there is only enough funding to meet about five percent of that need.<sup>175</sup>

Ultimately, it is not a problem in recognizing that there is a devastating need for adequate housing; it is a lack of funding. Even though NAHASDA did help give tribes access to funding that was more flexible and specifically targeted at addressing the lack of adequate housing in Indian Country, without adequate funding there is only so much that the legislation, even at its best, can accomplish.<sup>176</sup> Due to the inadequate funding, tribes are not able to significantly improve the overall living conditions and are barely able to maintain the housing that they are currently providing.<sup>177</sup>

#### IV. MAKING NAHASDA MORE EFFECTIVE

There is no doubt that the enactment of NAHASDA was an extremely important step in addressing the need for adequate housing in Indian Country. For the first time, Congress recognized that tribal housing needs do not fit into HUD's urban housing plans, which had been the focus of past housing programs.<sup>178</sup> By using a block grant, program tribes are now able to determine how the funds can best be used for the needs of that particular tribe.<sup>179</sup> Because of this, NAHASDA has had more success than any other housing program.<sup>180</sup> In a survey of 77 tribes by the National American Indian Housing Council, it was determined that 84 percent of the tribes believed that NAHASDA was an improvement over past housing programs.<sup>181</sup> In the first year, there were 6,000 housing units built.<sup>182</sup> This is compared to the 2,000 housing units per year that were built under the 1937 Housing Act.<sup>183</sup> However, in 2003, there was still an estimated need for 200,000 housing units.<sup>184</sup> While NAHASDA was a step in the right direction, this legislation has not been fully effective in alleviating the need for adequate housing.<sup>185</sup> In order for the federal government to fulfill its trust obligations to Indian tribes in the area of housing assistance, this need for adequate housing must be fully alleviated.<sup>186</sup>

One way of doing this is by addressing the specific issues in the legislation itself that have hindered tribes in receiving funding. Several of these issues have been addressed in amendments to the original legislation.<sup>187</sup> One of these was the good-faith

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175. *Id.*

176. *See id.* at 64.

177. *Id.* at 54.

178. Cortelyou, *supra* n. 49, at 453.

179. *Id.* at 453.

180. *See generally id.* at 452–55; Mark Fogarty, *Fogarty: Indian Country Housing*, Indian Country Today, (last updated Sept. 10, 2008), <http://www.indiancountry.com/archive/28164759.html>.

181. Cortelyou, *supra* n. 49, at 453.

182. *Id.* at 452; Fogarty, *supra* n. 180.

183. Fogarty, *supra* n. 180; *see also* Cortelyou, *supra* n. 49, at 440.

184. *A Quiet Crisis*, *supra* n. 1, at 54.

185. *See* Davis, *supra* n. 6, at 211; *see generally* Cortelyou, *supra* n. 49, at 431–32.

186. *See generally* 25 U.S.C. § 4104 (2006) (entitled "Waiver of matching funds requirements in Indian housing programs").

187. *See* Cortelyou, *supra* n. 49, at 458–61.

exception that was added to the exemption of real and personal property taxes.<sup>188</sup> Another change was the amendment to the Davis-Bacon wage requirement, which was amended so that the tribes could pass their own laws to be used as the standard for the requirement.<sup>189</sup> Although the requirements remain in place, the amendments essentially gave the tribes the control by allowing exemptions if the tribes had negotiated in good faith or had enacted their own wage laws.<sup>190</sup>

However, the changes must go beyond the technical barriers in the legislation to finding ways of making sections of the legislation that contain appropriate provisions work. One of these issues is addressing how to make the Title VI loan guarantee program a major force in closing the gap in the housing need.<sup>191</sup> NAHASDA contains the provisions to make the Title VI Loan Guarantee Program successful.<sup>192</sup> The program allows for 95 percent of the funds to be guaranteed by the federal government, which can be leveraged and used to complete projects beyond providing housing units, including projects such as infrastructure and housing related community development.<sup>193</sup> NAHASDA also allows for extended leasehold terms of 50 years on trust land.<sup>194</sup> This allows for members to apply for traditional 30-year mortgages and overcome what the lending community had perceived as a major impediment for offering mortgages for leaseholds located on trust land.<sup>195</sup>

While NAHASDA does contain provisions that can make this program successful, there are other issues that need to be addressed. The first is that tribes need to be educated about how the program works.<sup>196</sup> This can be accomplished by setting up a program through HUD where tribes can learn and understand the program and also learn how to work with lending institutions.<sup>197</sup> HUD could also further this effort by educating lending institutions about the program.<sup>198</sup> Second, tribes need to be able to educate its members about the program.<sup>199</sup> While HUD and several other housing agencies, such as Fannie Mae and the National American Indian Housing Council, have conducted seminars and training programs,<sup>200</sup> education and training are still issues that HUD has stated need to be addressed.<sup>201</sup>

Tribes also need to be able to easily learn about and access other programs that

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188. *Id.* at 461.

189. *Id.*

190. *See id.* at 461.

191. *See* Hayes, *supra* n. 137, at 5.

192. *See generally* Cortelyou, *supra* n. 49, at 452; Hayes, *supra* n. 137, at 5.

193. Hayes, *supra* n. 137, at 5; *see also* Cohen's, *supra* n. 5, at § 22.05[2][a], 1392.

194. Cohen's, *supra* n. 5, at § 22.05[2][a], 1392.

195. John McGee Ingram, *Home Ownership Opportunities in Indian Country*, 7 J. Afford. Hous. & Community Dev. L. 164, 168–69 (1998).

196. Hayes, *supra* n. 137, at 5; *see also* Cortelyou, *supra* n. 49, at 456; Jane DeMarines & Joy Myers, *Survey Proves Native Housing Law (NAHASDA) a Success: Research by National American-Indian Housing Council Shows Tribal Support*, (Jan. 11, 2001) (available at [http://www.naihc.net/NAIHC/files/CCPAGECONTENT/docfilename/0000001118/NAHASDA\\_Reauthorization\\_11101.doc](http://www.naihc.net/NAIHC/files/CCPAGECONTENT/docfilename/0000001118/NAHASDA_Reauthorization_11101.doc)).

197. *See* Ingram, *supra* n. 195, at 166–67, 179.

198. *See id.* at 179.

199. *See generally* Cortelyou, *supra* n. 49, at 445.

200. Ingram, *supra* n. 195, at 177.

201. Hayes, *supra* n. 137, at 5.

may be appropriate for the tribe to receive assistance.<sup>202</sup> One way in which this could be done is by greater program coordination within an agency and greater inter-agency coordination.<sup>203</sup> While NAHASDA did replace most of the Indian housing programs that were administered through HUD, it did not replace all Indian housing programs.<sup>204</sup> Also administered through HUD is section 184's loan program.<sup>205</sup> Under this program, HUD is authorized to guarantee up to 100 percent of home loans made to an Indian tribe, Indian housing authority, or an Indian family.<sup>206</sup> Also administered by HUD is the Rural Housing and Economic Development Program.<sup>207</sup> Under this program, grants are made by HUD to areas where access to economic development is limited.<sup>208</sup> This program also includes tribes as appropriate grantees.<sup>209</sup> HUD also administers the Indian Community Development Block Grant program, which also was not absorbed by NAHASDA.<sup>210</sup> While this program does not specifically focus on providing housing assistance, this program is flexible in the nature in which funds can be used.<sup>211</sup> It allows funds to be used for housing counseling, removal of deteriorated homes, loan processing, and other community development projects.<sup>212</sup>

There are also programs administered by other agencies, such as the Bureau of Indian Affairs (BIA) and the Department of Agriculture (USDA).<sup>213</sup> The BIA administers the Housing Improvement Program which provides housing assistance through grants to needy Indian families living in substandard housing.<sup>214</sup> The USDA also administers programs that are targeted at rural residents.<sup>215</sup> Since many Indian communities are in rural areas, these programs may be well suited to serve these communities.<sup>216</sup>

While these programs can be found if searched for, there is a more effective way to help tribes learn about the programs that can help provide adequate housing.<sup>217</sup> If there was a central system through which tribes could find housing programs and their requirements, tribes could more easily apply for and receive funding through the programs best suited for that tribe.<sup>218</sup> Some programs may be a great way to close the housing gap for some tribes, while other programs may be more effective for other

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202. See generally *A Quiet Crisis*, *supra* n. 1, at 115.

203. *Id.*

204. *Cohen's*, *supra* n. 5, at § 22.50[2][a], 1390 (explaining that nine of the 14 HUD housing programs for American Indians were consolidated under NAHASDA).

205. *Id.* at 1395 (citing Pub. L. No. 102-550, § 184, 106 Stat. 3739 (1992)).

206. *Id.*

207. *Id.* at 1396 (citing Pub. L. No. 105-276, 12 Stat. 2461 (1998)).

208. *Id.*

209. *Cohen's*, *supra* n. 5, at § 22.05[2][c], 1396.

210. *Id.* (citing 42 U.S.C. § 5301 et seq. (2000)).

211. *Id.* at § 22.05[2][d], 1397.

212. *Id.* (citing 42 U.S.C. § 5305 (2006), 24 CFR § 1003.200 (2008)).

213. *Id.* at § 22.05[3][a], 1397-98.

214. *Cohen's*, *supra* n. 5, at § 22.05[3][a], 1397 (citing 25 CFR § 256.5).

215. *Id.* at § 22.05[4], 1398 (citing 42 U.S.C. §§ 1471-1490 (2000)).

216. *Id.*

217. See Ingram, *supra* n. 195, at 179 (asserting that continued improvements to educational programs are necessary).

218. See *id.* (discussing the necessity of flexibility in the use of grant money to account for all the needs of a tribe).

tribes.<sup>219</sup> However, if the tribes do not know and understand what programs are available to provide housing assistance, then none of the programs can be effective.<sup>220</sup> It is also important that the agencies that administer these programs cooperate and coordinate their efforts.<sup>221</sup>

In addition to understanding the programs available, tribes also need to address poverty and unemployment among its members.<sup>222</sup> By helping tribal members overcome these obstacles, tribes can increase the availability of private mortgages.<sup>223</sup> As so often is the case, many tribal members do not qualify for home loan mortgages because of unemployment or low income.<sup>224</sup> Because of this, many lending institutions have considered tribal members high-risk and have not been receptive to providing loans.<sup>225</sup> While the loan guarantee program was meant to ease the lenders' worries regarding default on the loans, it did not address the issue of tribal members not qualifying for the loans.<sup>226</sup> In order for tribes to help their members obtain mortgages, they must look at all of the problems associated with why members may not be able to obtain a mortgage, including unemployment and poverty, and devise ways in which these barriers can be overcome.<sup>227</sup> One way of doing this is by offering homebuyer education and credit counseling services to members.<sup>228</sup> These programs can help members understand the importance of credit ratings, the process of obtaining a mortgage, the steps in obtaining a home site lease, and even bettering their financial situations.<sup>229</sup> By tribes recognizing the barriers that members face when obtaining a mortgage and finding solutions to help overcome these barriers, there will be greater opportunities to close the housing gap.<sup>230</sup>

While federal programs matched with tribal initiatives may be helpful in closing the housing gap, without adequate funding for these programs they will not be effective.<sup>231</sup> Since NAHASDA was enacted in 1996, funding has only increased

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219. *A Quiet Crisis*, *supra* n. 1, at 115; *see generally* Ingram, *supra* n. 195, at 179.

220. *See A Quiet Crisis*, *supra* n. 1, at 115; *see generally* Ingram, *supra* n. 195, at 180.

221. *A Quiet Crisis*, *supra* n. 1, at 115.

222. *See* Cortelyou, *supra* n. 49, at 444 (explaining that "[p]overty impacts at all levels of the lending process and it is arguably the single most important factor in access to loans" (footnote omitted)).

223. Ingram, *supra* n. 195, at 164 (asserting that poverty creates many difficulties when trying to obtain a mortgage, including "a lack of funds for down payment, closing costs and lender-required cash reserves, unstable incomes, problematic or nontraditional credit histories, a lack of adequate home buyer education, and lender discrimination"); *see also* Cortelyou, *supra* n. 49, at 445.

224. *See generally* NAIHC, *Indian Housing Fact Sheet*, <http://www.naihc.net/news/index.asp?bid=6316> (accessed Apr. 24, 2009) (data indicates that the poverty rate for American Indians is 26 percent, which is more than two times the average for all Americans, and the unemployment rate is also "more than twice as high as the U.S. rate of 6 [percent]").

225. *See* Cortelyou, *supra* n. 49, at 445; Yair Listokin, Student Author, *Confronting the Barriers to Native American Homeownership on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 Urb. Law. 433, 448 (2001).

226. *See generally* Cortelyou, *supra* n. 49, at 444–45.

227. *See id.* at 444; Listokin, *supra* n. 225, at 447–48.

228. Listokin, *supra* n. 225, at 458 (discussing the best ways the Navajo Nation has found to get applicants qualified for mortgages).

229. *See id.* at 458–63.

230. *See generally id.*

231. *See A Quiet Crisis*, *supra* n. 1, at 114–15.

slightly.<sup>232</sup> However, once inflation is factored in, the program actually lost purchasing power.<sup>233</sup> In regard to the funding increases that were approved they were significantly less than the increases in funding to HUD as whole.<sup>234</sup> The grants for the American Indian programs are allocated through the discretionary budget of HUD.<sup>235</sup> In 2003, HUD's discretionary fund allocation was \$30.4 billion, and of that only \$731 million was used to fund all of HUD's Indian assistance grant programs.<sup>236</sup> This translates into only 2.4 percent of HUD's discretionary budget.<sup>237</sup> Without the funds to support the American Indian housing assistance programs, including the block grant program under NAHASDA, the housing gap will never be closed and tribes will only be able to continue to operate at a subsistence level.<sup>238</sup>

## VI. CONCLUSION

NAHASDA has revolutionized housing assistance to American Indians by recognizing that there is an extensive need for housing assistance in Indian Country and also by reaffirming that there is a trust relationship between the federal government and Indian tribes, in regard to housing. While NAHASDA has been the most effective program that the federal government has established to address the housing issues in Indian Country, there are still issues that need be addressed to make sure the housing gap is closed. With some amendments to the legislation, programs that will provide greater opportunities for overcoming homeownership barriers and adequate funding, the housing gap in Indian Country can be closed and the trust relationship in, regard to housing, can be fulfilled.

—Courtney Eagan-Smith\*

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232. See *id.* at 56 (showing that between 1998 and 2003, HUD funding for Native American grant programs did not significantly increase).

233. *Id.*

234. *Id.* at 55.

235. *Id.* at 54.

236. *A Quiet Crisis*, *supra* n. 1, at 54.

237. *Id.*

238. See *id.* at 50–65, 111, 114.

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