



## UNITED SOUTH AND EASTERN TRIBES, INC.

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Resolution No. USET 97:25

### HUD RULEMAKING UNDER NAHASDA

- WHEREAS**, the United South and Eastern Tribes Incorporated (USET) is an intertribal organization comprised of twenty-three (23) federally recognized tribes; and
- WHEREAS**, the actions taken by the USET Board of Directors officially represent the intentions of each member tribe, as the Board of Directors is comprised of delegates from the member tribes leadership; and
- WHEREAS**, on October 26, 1996, the Native American Housing Assistance and Self-Determination Act of 1996 (“the Act”), providing federal housing assistance for Indian tribes through formula-based block grants in recognition of tribal self-governance, became Public Law 104-330; and
- WHEREAS**, Section 106 of the Act directs the Secretary of HUD to issue final regulations necessary to carry out the Act in accordance with the Negotiated Rulemaking Act no later than September 1, 1997; and
- WHEREAS**, key elements of the Negotiated Rulemaking Act include the establishment of a negotiated rulemaking committee and publication in the Federal Register of a notice which includes 1) an announcement that the agency intends to establish a negotiated rulemaking committee, 2) a description of the subject and scope of the rule, 3) a list of persons proposed to represent interests which are likely to be significantly affected by the rule, 4) a proposed agenda and schedule for completing the work of the committee, 5) a description of administrative support for the committee, and 6) other related matters; and
- WHEREAS**, the Act further mandated that the Secretary of HUD, in establishing the negotiated rulemaking committee, adapt procedures “to the unique government-to-government relationship between the Indian tribes and the United States”, and further directed that the Secretary of HUD “ensure that the membership of the committee include only representatives of the Federal Government and of geographically diverse small, medium, and large Indian tribes” while not precluding the participation of tribally designated housing entities should tribes elect to be represented by such entities in the negotiated rulemaking process; and
- WHEREAS**, HUD did appoint 48 representatives from Indian tribes and tribal housing authorities to the rulemaking committee and did consult with USET as to the tribal representatives which USET wished to have nominated to the rulemaking committee; and
- WHEREAS**, it is not clear whether HUD did consult with other tribal organizations or individual tribes regarding the rulemaking committee membership; and
- WHEREAS**, HUD, however, nominated the members to the rulemaking committee without publishing a timely notice in the Federal Register as required by the Negotiated Rulemaking Act, and subsequently divided the 48 member rulemaking committee into two separate committees and limited the rulemaking jurisdiction of each committee without consulting Indian tribes; and

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**WHEREAS**, HUD called three meetings of the two committees without first complying with the public notice requirements of the Negotiated Rulemaking Act in Scottsdale, Arizona and Denver, Colorado to discuss the rulemaking process, and after the insistence by tribal representatives that HUD publish a rulemaking notice required by law has HUD, on January 27, 1997, 93 days after the Act became law, published a Federal Register notice announcing the establishment of a negotiated rulemaking committee; and

**WHEREAS**, USET believes that the establishment of organizational procedures contemplated by the Negotiated Rulemaking Act and the Federal Advisory Committee Act (FACA) are essential to achieving the Act's stated goals; and

**WHEREAS**, USET, whose member tribes actively participated in the negotiated rulemaking process mandated by Congress in 1994, to implement joint regulations of the Department of the Interior and Department of Health and Human Services to Title 1 of the Indian Self-Determination and Education Assistance Act, firmly believe that the rulemaking process followed by the Interior Department and DHHS provides a valuable model which HUD should follow in the negotiated rulemaking process mandated by the Act; and

**WHEREAS**, USET does not believe, given HUD's extended delay in complying with the Act's requirements to establish a formal rulemaking committee, that HUD's proposed "target date" of June 1, 1997, for publication of a proposed rule, can be met by the rulemaking committee; therefore, be it

**RESOLVED**, that USET does hereby recommend, in the strongest sense possible, that HUD comply with the following:

1. **One Committee**. Establish one Negotiated Rulemaking Committee, with tribal committee members free to sit on any workgroup(s) established to draft proposals for review and approval by the full committee, charged under the Act with reaching agreement with HUD on a draft rule which HUD agrees to publish in the Federal Register as the proposed regulation;
2. **Public Meeting Properly Noticed**. Consistent with the unique government-to-government relationship between the U.S. and Indian tribes, permit affected Indian tribes the opportunity to attend and participate in rulemaking meetings by publishing, in advance, a Federal Register notice of the date, time and location of such meetings, with adequate procedures adopted to permit non-committee members the opportunity to participate in the committee's work;
3. **Administrative Support for Rulemaking**. In accordance with the Negotiated Rulemaking Act and FACA, commit such Department resources as are necessary for the rulemaking committee to complete the work requiring administrative support during all rulemaking sessions;
4. **Consensus Negotiations Using Facilitators**. Support the goal of consensus negotiations whereby general agreement is sought among tribal and federal officials, rather than majority vote, in conducting the rulemaking sessions to develop a proposed rule. To assist in achieving consensus, as authorized by the Negotiated Rulemaking Act, HUD should also commit to engage and pay neutral facilitators, approved by the committee, to work with Federal and tribal representatives;

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**5. Compliance with Negotiated Rulemaking and Federal Advisory Committee Acts.**

Commit, for the duration of the rulemaking process, to comply with the requirements of the Act, the Negotiated Rulemaking Act and the Federal Advisory Committee Act (FACA) concerning:


- a) establishment of the rulemaking committee,
- b) public notice of the Secretary's nominations to the committee,
- c) administrative support for the negotiated rulemaking committee,
  
- d) creation of a committee charter and organizational protocols which clearly set out the goals and objectives of the committee;
- e) identification of the Designated Federal Office (DFO) and his/her alternate, to attend all rulemaking negotiations with the requisite authority to bind HUD to agreements reached during the negotiations with the tribal members of the committee;
- f) maintenance of minutes of each rulemaking session, and
- g) compliance with such other procedural requirements of the Negotiated Rulemaking Act and FACA as tribes conclude will serve the best interests of Indian country;

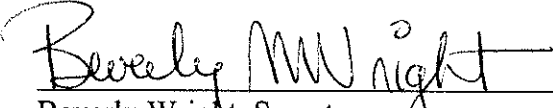
**6. Good Faith.** Both Indian tribes and HUD should commit to work cooperatively and in good faith in developing proposed regulations which will achieve the goals of the Act, including the commitment to take such actions as may be required, whether through secretarial waiver or by legislation in Congress, to defer implementation of final regulations in the event that the committee cannot conclude its work within the time frames set forth in the Act;

**7. Government-to-Government Relationship.** HUD should strictly honor the spirit and intent of the Act which makes clear that the negotiated rulemaking committee is not a mere advisory committee, but instead is a committee authorized to reach consensus with HUD on a final regulation, and that such negotiations must be carried out on a government-to-government basis consistent with the trust responsibility of the United States for the protection and preservation of Indian tribes and the improvement of housing conditions so badly needed by Indian people throughout the country.

**CERTIFICATION**

This resolution was duly approved at the USET Washington Impact Week meeting, at which a quorum was present, in Washington, DC on Wednesday, February 5, 1997.

  
Keller George, President  
United South and Eastern Tribes, Inc.

  
Beverly Wright, Secretary  
United South and Eastern Tribes, Inc.