

A DISCOVERY OF SORTS: REEXAMINING THE ORIGINS OF THE FEDERAL INDIAN HOUSING OBLIGATION*

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I. INTRODUCTION

Throughout the 1800s, the United States government induced countless Indians¹ “to give up their old homes by the promise of assistance in building new ones.”² Despite the pivotal role of housing promises in negotiations for peaceful removal and land cessions, the federal government has never successfully provided housing assistance to Indian tribes. Many Indian people have lived in substandard housing since their removal to reservations in the 1800s.³ For over one hundred years, the federal gov-

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1. A great deal of debate surrounds the terminology used to refer to the indigenous peoples of North America. The terms “Native American,” “American Indian,” and “Native peoples” are all used, but the term “Indian” appears most frequently in United States legislation that affects tribes. This Article will employ specific tribal designations when possible, and will use the term “Indian” or “Indian peoples” when referring to policies that affect more than one tribal group.
2. 1877 COMM’R OF INDIAN AFFAIRS ANN. REP. 169.
3. Over thirty percent of houses in Indian Country are overcrowded compared with five percent nationally, according to the 1990 census, the most recent data available. BUREAU OF THE CENSUS, STAT. BRIEF: HOUSING OF AMERICAN INDIANS ON RESERVATIONS—AN OVERVIEW 4 (Dec. 1994). About twenty percent of Indian homes lack complete plumbing facilities compared with one percent nationally. BUREAU OF THE CENSUS, STAT. BRIEF: HOUSING OF AMERICAN INDIANS ON RESERVATIONS—PLUMBING 3 (Apr. 1995). In addition, more than ten percent of Indians live in households that are both overcrowded and lack complete plumbing, compared to less than one-tenth of one percent nationally. *Id.* at 4. The overwhelming poverty and unemployment in Indian Country compounds the housing problem. According to Senator McCain, “[t]he 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. S12,405-01, at 12405 (1996) (statement of Sen. McCain).

ernment has recognized that housing conditions in Indian Country⁴ threaten Indian peoples' health and their ability to educate their children.⁵ The United States government, however, continues to abrogate its treaty promises by not providing adequate housing to Indian nations.⁶

Historical records reveal a persistent but ultimately ineffective effort on the part of the United States Indian Service⁷ to improve housing conditions for tribes. These same records suggest that Congress's willingness to dedicate resources to Indian housing has been, at best, insufficient and haphazard. As Congress continues to address the ongoing housing crisis experienced by many tribes, policymakers must consider the complete history of the federal Indian housing obligation—a history which has thus far been mistakenly recollected.

Various histories of federally assisted Indian housing programs reflect an inaccurate consensus in the literature. Commentators erroneously agree that although the United States Housing Act⁸ created legal authorization for such programs in 1937, the federal government did not implement any housing programs until the 1960s.⁹ Scholars also maintain that the government recognized an Indian housing crisis for the first time in the 1960s.¹⁰ Law review articles,¹¹ judicial opinions,¹² federal commissions,¹³ and congressional reports¹⁴ all incorrectly report that no federal consideration of Indian housing needs occurred before 1961. For example,

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4. The term "Indian Country" refers to "country within which Indian laws and customs and federal laws relating to Indians are generally applicable." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 5 (1986) [hereinafter COHEN I].
 5. See *infra* notes 61, 62, 108 and accompanying text; Final Report of the Commission on American Indian, Alaska Native, and Native Hawaiian Housing, BUILDING THE FUTURE: A BLUEPRINT FOR CHANGE "BY OUR HOMES YOU WILL KNOW US" xiv (1992) [hereinafter BLUEPRINT FOR CHANGE] ("public health, social conditions, education, economic opportunity, and a host of other facets of Indian life have been negatively affected by the protracted housing crisis suffered by our nation's first residents.").
 6. The terms "adequate" and "standard" housing mean housing that is "physically intact and not requiring substantial repairs, with electricity, central heat, indoor plumbing, and access by an all-weather road." Richard Pottinger, *Sheltering the Future*, 18:1 AM. INDIAN CULTURE & RES. J. 122 (1994).
 7. "Indian Service" refers to the bureaucracy established by the federal government to implement its Indian policies. See FRANCIS PRUCHA, THE GREAT FATHER 328–32 (1984), for an in-depth discussion of the evolution of the Indian Service.
 8. Pub. L. No. 75-412, 50 Stat. 888 (1937) (current version at 42 U.S.C. §§ 1437-1444).
 9. See *e.g.*, Susan J. Ferrell, *Indian Housing: The Fourth Decade*, 7 ST. THOMAS L. REV. 445, 449 (1995); HOUSING ASSISTANCE COUNCIL, INDIAN HOUSING IN THE U.S.: A HISTORY 2 (1988); Arnold C. Sternberg & Catherine M. Bishop, *Indian Housing: 1961–1971, A Decade of Continuing Crisis*, 48 N.D. L. REV. 593, 593 (1972); BLUEPRINT FOR CHANGE, *supra* note 5, at 52–53.
 10. See *e.g.*, Sternberg & Bishop, *supra* note 9, at 593 ("More than a decade has passed since the existence of a housing problem among the Indians was first recognized by the federal government.").
 11. See *e.g.*, Ferrell, *supra* note 9; Sternberg & Bishop, *supra* note 9.
 12. See *e.g.*, *Dewakuku v. Cuomo*, 107 F. Supp. 2d 1117, 1121 (D. Ariz. 2000), *rev'd on other grounds*, 271 F.3d 1031 (Fed. Cir. 2001) ("While national housing legislation to help Americans find decent, safe and sanitary living conditions was introduced in 1937, programs for Native Americans were not created for another thirty years.").
 13. See *e.g.*, BLUEPRINT FOR CHANGE, *supra* note 5, at 52–53.
 14. See *e.g.*, U.S. SENATE COMM. ON INDIAN AFFAIRS, 96TH CONG., REPORT ON INDIAN HOUSING 2 (Comm. Print 1979).

the *Final Report of the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing* states that “according to a current BIA [Bureau of Indian Affairs] staffperson, there are no records of *any* housing-related programs initiated by the BIA [prior to 1961].”¹⁵ A thorough examination of original historical records, however, reveals the inaccuracy of this statement and contradicts the dominant beliefs about the genesis of Indian housing programs.

Numerous Indian housing documents, pre-dating both 1961 and the 1937 United States Housing Act, reflect the government’s early involvement in Indian housing and illuminate the ongoing federal obligation. These documents include: treaties with tribes promising housing assistance;¹⁶ reports from treaty negotiations discussing housing promises;¹⁷ reports from reservation superintendents and Indian agents from the late 1800s concerning housing programs and needs;¹⁸ BIA circulars assessing housing problems and providing plans for potential development;¹⁹ surveys documenting the substandard conditions of Indian housing;²⁰ and detailed documentation of a large scale federal Indian housing program in the 1930s.²¹ All of these primary documents demonstrate that the United States has acknowledged the federal Indian housing obligation and has attempted to address, without success, the Indian housing crisis since the removal of tribes to reservations in the 1800s.

Historical documents suggest that contemporary policymakers and historians have overlooked the first one hundred years of federally assisted Indian housing programs. A review of primary documents plainly shows a federal obligation to provide Indian housing assistance stemming from reservation policy and the resulting treaty negotiations, *not* the United States Housing Act. Since no scholar has yet a comprehensive examination of the history of Indian housing, the modern understanding of the federal housing obligation ignores early events that created the current obligation. The incomplete, and consequently inaccurate, historical narrative has potentially profound significance in a field where “[e]ven more than other domains of law, ‘the intricacies and peculiarities of Indian law demand an appreciation of history.’”²² Advocates and policy-

15. BLUEPRINT FOR CHANGE, *supra* note 5, at 24.

16. See, e.g., Treaty with the Ponca, Mar. 12, 1858, art. 2, 12 Stat. 997 (promising to pay twenty thousand dollars for housing and other types of assistance); Treaty with the Sauk and Foxes of Missouri, May 18, 1854, art. 2, 10 Stat. 1074 (stating that certain sums “shall be paid directly to the Indians, or otherwise as the President may deem advisable, for building houses.”).

17. See *infra* notes 45–52 and accompanying text.

18. See *infra* note 56 and accompanying text.

19. See, e.g., OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, CIRCULAR No. 678, SANITARY HOMES FOR INDIANS (Sept. 6, 1912).

20. See, e.g., INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 553 (1928) (“[Indians] in general still live in primitive dwellings, in tents and shacks, and in small houses poorly constructed, ill kept and in bad repair.”).

21. See OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, THE RELIEF AND REHAB. PROGRAM (1939).

22. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511–12 (1986) (Blackmun, J., dissenting) (quoting Felix Frankfurter, *Foreword to a Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 RUTGERS L. REV. 355, 356 (1954)). See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47–50 (1982 ed.) [hereinafter COHEN II], for a discus-

makers alike have been operating without full knowledge of the origins and history of federally assisted Indian housing programs.

This Article attempts to reconstruct the history of the federal Indian housing obligation. It begins by surveying early historical documents that establish the federal obligation. It also explores the subsequent historical, legislative, and legal developments that helped shape the federal government's current obligation. Although predominantly focused on reconstructing the historical narrative of federal Indian housing programs, this Article also contemplates the implications that such a revision might have on the current conceptualization of the federal responsibility. The primary goal of this Article is to ensure that a more comprehensive and accurate understanding of the origins of the federal government's obligation informs the debate about federal assistance for Indian housing programs—a debate that will occur as Congress considers appropriations for Indian housing programs and reauthorization of the Native American Housing Assistance and Self-Determination Act (NAHASDA)²³ in 2002.

Part II of this Article canvasses previously ignored primary documents that substantiate the federal government's involvement in Indian housing programs since the mid-1800s. The existing histories of Indian housing programs do not examine the primary documents presented in this Article.²⁴ After tracing federal involvement in Indian housing from the 1800s to the present, Part III of this Article considers the implications of this corrected history on the federal government's ongoing obligation to provide housing assistance to Indian tribes. Part IV discusses NAHASDA, Congress's most recent attempt to solve the Indian housing crisis, and its shortcomings.

II. HISTORY AND POLICY DEVELOPMENT²⁵

Federal Indian policy is frequently divided into the following periods: Formative years (or Treaty-making), Removal & Relocation, the Reservation Era, the Allotment Era, Reorganization, Termination, and Self-Determination.²⁶ The commonly accepted history of Indian housing contends that federal programs only exist in the most recent policy period, Self-Determination. This Part outlines federal involvement in Indian

sion about the role of history in understanding federal Indian policy. Cohen explains in part that "the history of federal-Indian relations can assist in synthesizing the currents in our national policy Great fluctuations occur from era to era." *Id.* at 49. Understanding these fluctuations can help "distinguish between . . . the norms and patterns of our national policy and the deviations and pathologies resulting from misunderstanding and corruption." *Id.*

23. Pub. L. No. 104-330, 110 Stat. 4016 (1996). Congress is expected to resolve the issue of NAHASDA reauthorization in the current congressional session.

24. See, e.g., Ferrell, *supra* note 9; Sternberg & Bishop, *supra* note 9; HOUSING ASSISTANCE COUNCIL, *supra* note 9; BLUEPRINT FOR CHANGE, *supra* note 9.

25. A large portion of the broad history of federal Indian policy comes from a previous paper written by the Author for Professor Richard Pomp, University of Connecticut School of Law, in the fall of 1999, and is used here with his permission.

26. E.g., VINE DELORIA & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 2 (1983); BLUEPRINT FOR CHANGE, *supra* note 5, at 2. The policy periods outlined in these and other sources differ slightly at the margins and most dates used are approximations.

housing in each of these policy periods and reveals that the federal government in fact was concerned with, and engaged in, Indian housing from a very early period, albeit unsuccessfully.

A. *Formative Years (1789–1828)*

During the formative years of United States history, the federal government, which had exclusive control over Indian affairs,²⁷ entered into treaties with Indian nations and recognized them as sovereign entities. In addition to securing the transfer of Indian lands, the United States government intended these treaties to form alliances and preserve peaceful relations between the settlers and the tribes.²⁸ During this period of “treaties among equals,”²⁹ federal assistance for Indian housing was not proposed or ever considered necessary.

B. *Removal and Relocation (1828–1850s)*

By the 1820s, public opinion among land-hungry eastern settlers favored moving many Indian tribes from their ancestral lands in the east to land west of the Mississippi River. Although the United States government did not adopt removal as *official* policy until the Indian Removal Act in 1830,³⁰ policy had shifted toward removal in the years preceding the act.³¹ The removal treaties negotiated with Indian tribes frequently guaranteed the tribes tracts of land in the west “forever.”³² For the first time, several of the treaties mentioned federal housing assistance for tribes.³³ Nonetheless, Indian housing was not of major concern to the federal government during this period.

C. *Reservation Era (1850s–1887)*

Despite the government’s promises to tribes during the removal era that they would possess land in the West undisturbed, white settlers soon followed the Indians west. By the 1850s, the United States government was again debating how to solve the “Indian problem.”³⁴ As tensions in-

27. The United States Constitution’s Indian Commerce Clause gives the federal government, rather than the States, power to regulate commerce with Indian tribes. U.S. CONST. art. I, § 8, cl. 3.

28. DELORIA & LYTLER, *supra* note 26, at 4. For a discussion of the Indian perspective on treaty-making compared with that of the United States, see ROBERT A. WILLIAMS, *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE* (1997).

29. Ralph Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1021 (1997).

30. Ch. 148, 4 Stat. 411 (1839), 25 U.S.C.A. § 174.

31. For example, the Treaty with the Delawares, Sept. 24, 1829, 7 Stat. 327 and the Treaty with the Miami, May 7, 1828, 7 Stat. 309 both precede the Removal Act but nonetheless arrange for the removal of the tribes.

32. COHEN II, *supra* note 22, at 80.

33. *E.g.*, Treaty with the Delawares, Sept. 24, 1829, 7 Stat. 327 (“the United States hereby agrees to furnish the Delaware Nation . . . with all necessary farming utensils and tools necessary for building houses”); Treaty with the Miami, May 7, 1828, 7 Stat. 309 (stating that in exchange for land cessions, the United States would build twelve houses, clear and fence the land, and provide the Miami with other necessary goods).

34. ARRELL GIBSON, *THE AMERICAN INDIAN* 428 (1980).

creased between the settlers and the Indian tribes in the West, the government found its policy of removal and separation disintegrating rapidly. As former Secretary of the Interior Alexander Stuart declared, "the policy of removal, except under peculiar circumstances, must necessarily be abandoned; and the only alternatives left are to civilize or exterminate them."³⁵

During this time, Indian housing first became a major concern of the United States government. As the review of primary documents below suggests, housing programs, which were of great practical necessity as the government uprooted Indians from their homes and resettled them, became an important part of the federal civilization program. The desire to assimilate Indian people into white society and to divest tribes of their land resulted in the formal establishment of the reservation system in the 1850s.³⁶ The government hoped that once on the reservations, Indians, under the supervision of a federal Indian agent, could be detribalized and Americanized.³⁷ Indian agents oversaw the distribution of rations, managed tribal property and funds, and enforced the various policies of the Bureau of Indian Affairs (BIA) designed to civilize Indian peoples.³⁸ By the late 1880s, the government had forced nearly all of the remaining Indian tribes onto reservations.

Treaties establishing reservations frequently promised that the United States government would provide a variety of goods and services, including housing, to the tribes.³⁹ In some cases, treaties expressly stated that the federal government would expend a sum of money to build houses on the new reservation.⁴⁰ The following language from the Treaty with the Ponca, 1858, is a typical example:

In consideration of the foregoing cession and relinquishment, the United States agree and stipulate . . . [t]o expend the sum of twenty thousand dollars (\$20,000) in maintaining and subsisting the Poncas during the first year after their removal to their new homes, purchasing stock and agricultural implements, breaking up and fencing land, building houses, and in making such other

35. DAVID STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* 200 (1992).

36. Former Commissioner of Indian Affairs William Medill described the reservation policy:

The policy already begun and relied on to accomplish objects so momentous and so desirable to every Christian philanthropist, is, as rapidly as it can safely and judiciously be done, to colonize our Indian tribes beyond the reach, for some years, of our white population; confining each within a small district of country, so that, as the game decreases and becomes scarce, the adults will gradually be compelled to resort to agriculture and other kinds of labor to obtain a subsistence, in which aid may be afforded and facilities furnished them out of the means obtained by the sale of their former possessions.

PRUCHA, *supra* note 7, at 342.

37. GIBSON, *supra* note 34, at 429.

38. *Id.*

39. CHARLES F. WILKINSON, *AMERICAN INDIANS TIME AND THE LAW* 15 (1987). The desire to fulfill treaty provisions led to many services provided by the federal government to Indian people today. COHEN II, *supra* note 22, at 673.

40. *E.g.*, Treaty with the Ponca, Mar. 12, 1858, art. 2, 12 Stat. 997.

improvements as may be necessary for their comfort and welfare.⁴¹

Other treaties provided that the United States would pay a housing annuity to the tribe for a set number of years.⁴² At least one treaty stated that the proceeds from the sale of Indian land would accrue in trust with five percent paid to the tribe annually to build houses and to complete other projects.⁴³ The treaties that established reservations also included a standard promise that the United States would provide a carpenter and a sawmill for the tribe to assist with construction.⁴⁴

The fact that some treaties explicitly promise funds for housing does not confine the federal obligation to only those tribes with specific treaty provisions. Many tribes may have been promised housing assistance during negotiations that did not subsequently appear in the treaty language. In fact, reports from treaty negotiations confirm that housing promises sometimes played an integral role in the negotiation process even when housing was not explicitly incorporated into the treaty. The well-documented negotiations leading to the Treaty with the Nisqualli, Puyallup, and Other Indians⁴⁵ offer a good example. During negotiations, Governor Isaac I. Stevens⁴⁶ told the Nisqualli:

[T]he Great Father wishes you to have homes, pasture for your horses and fishing places. He wants you to learn to farm and your children to go to a good school; and he now wants me to make a bargain with you, in which you will sell your lands and in return be provided with all these things.⁴⁷

Governor Stevens's statement demonstrates that the federal government offered to provide housing and other assistance in exchange for land cessions. Later documents reporting on the progress of the negotiations further indicate that the United States believed that providing housing to the tribes was crucial to maintain the often tenuous peace between the Nis-

41. *Id.*

42. *E.g.*, Treaty with the Sauk and Foxes of Missouri, May 18, 1854, art. 2, 10 Stat. 1074.

43. Treaty with the Osage, Sept. 29, 1865, art. 2, 14 Stat. 687 ("The proceeds of such sales [of tribal land], as they accrue, after deducting certain expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of said tribe of Indians; and the interest thereon, at the rate of five percent per annum, shall be expended annually for building houses, purchasing agricultural instruments and stock animals, and for the employment of a physician and mechanic.").

44. *E.g.*, Treaty with the Yakima, June 9, 1855, art. 4, 12 Stat. 951.

45. Treaty with the Nisqualli, Puyallup, and Other Indians, Dec. 26, 1854, 10 Stat. 1132.

46. Isaac I. Stevens was appointed territorial governor of the Washington Territory and *ex officio* superintendent of Indian affairs in 1853. In this capacity, Governor Stevens was responsible for negotiating land cession treaties with the Washington tribes. PRUCHA, *supra* note 7, at 402.

47. Extracts from "Records of the Proceedings of the Commissioner of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfeet Country," (Proceedings of Dec. 26, 1854), Microcopy T494, Record Group 75, Roll No. 1, Frame 176 (National Archives) *cited in* Vine Deloria, Jr., Legislative Analysis of the Federal Role in Indian Education 107 (Aug. 20, 1975) (unpublished policy paper prepared for the Dept. of Health, Educ., and Welfare's Office of Indian Education).

qualli and Puyallup tribes and the white settlers in Washington Territory. A letter from Governor Stevens dated December 6, 1854 states:

I propose . . . to move [the Indians] . . . and to put up houses for the winter. The taking of this responsibility I deem essential to preserving the relations of confidence and goodwill which now exists and I trust the Department in view of the suffering both of the whites and the Indians of the Sound in consequence of the war, will approve of this course as a peace measure.⁴⁸

These statements suggest that the provision of housing to tribes did not in any way constitute a gratuity or charity program. To the contrary, Governor Stevens's statements clarify that the provision of housing was important not only for securing land, but also for ensuring peaceful relations. Moreover, statements made to the Yakima during treaty negotiations directly contradict the notion of housing assistance as a mere gratuity. Referring to the standard treaty provisions of a school, mill, and homes, the agent instructed the Yakima that the provisions were "not to be regarded by them in the light of a gift or favor, but as belonging to them under the treaty provisions."⁴⁹

Similar to the Treaty with the Nisqualli and Puyallup, the Treaty with the Dwamish, Suquamish, and Other Indians did not specifically include housing provisions. However, in negotiations for the Treaty with the Dwamish, Suquamish, and Other Indians, January 22, 1855, Governor Stevens made similar housing promises saying, "I want that you shall not have simply food and drink now, but that you will have them forever We want to give you houses and having homes you will have the means to cultivate the soil."⁵⁰ Both of these treaties contain general provisions stating that money paid for land cessions will be used for the benefit of the Indians at the discretion of the President.⁵¹ There is also a specific provision in each treaty that the federal government will pay for removal expenses.⁵² It is possible that one of these more general treaty provisions incorporated the housing promises made orally to the tribes in negotiations. At least one court has interpreted such vague treaty clauses to include housing promises.⁵³ The Court of Claims in *White Mountain Apache Tribe of Arizona v. United States* found that implicit promises of housing assistance

48. Letter from Governor Isaac I. Stevens to the Commissioner of Indian Affairs (Dec. 26, 1854), *microformed on Microcopy T494*, Record Group 75, Roll No.5, Frame 0222 (National Archives).

49. Letter from Governor Isaac I. Stevens to the Commissioner of Indian Affairs (June 9, 1855), *microformed on Microcopy T494*, Record Group 75, Roll No.5, Frame 0623 (National Archives).

50. Letter from Governor Isaac I. Stevens to the Commissioner of Indian Affairs (Jan. 22, 1855), *microformed on Microcopy T494*, Record Group 75, Roll No.5, Frame 0261 (National Archives).

51. Treaty with the Nisqualli, Puyallup, and Other Indians, Dec. 26, 1854, 10 Stat. 1132; Treaty with Dwamish, Suquamish, and Other Indians, Jan. 22, 1855, 12 Stat. 927.

52. Treaty with Dwamish, Suquamish, and Other Indians, Jan. 22, 1855, art. 13, 12 Stat. 927; Treaty with the Nisqualli, Puyallup, and Other Indians, Dec. 26, 1854, art. 5, 10 Stat. 1132.

53. *White Mountain Apache Tribe of Arizona v. U.S.*, 26 Cl. Ct. 446, 464 (July 14, 1992) (holding that under a fair and honorable dealings analysis the treaty gives rise to a federal obligation to provide food, clothing, housing, health care, and education).

can be inferred from general treaty language or language in the negotiations that promise to provide tribes “the means of subsistence” or all “requisites to ‘promote civilization.’”⁵⁴ As evinced by the text of the treaties and the reports of the treaty negotiations, the federal government promised housing assistance to many tribes in exchange for land cessions.

The reports of the Indian agents in the years following treaty negotiations intimate that the tribes took the government negotiators at their word and anticipated that the United States would provide housing assistance in exchange for land cessions. As one commentator has noted, “Indian treaties were legally binding agreements between real parties. They were agreements that the American Indians rightfully expected to be upheld.”⁵⁵ Reports from the Indian superintendents after treaty ratification confirm this expectation and simultaneously demonstrate the sporadic and unreliable efforts of the federal government to fulfill its housing obligation.⁵⁶

The annual reports of the Commissioner of Indian Affairs from the late 1800s indicate that housing assistance was an important issue on the reservations. During this time, the Bureau of Indian Affairs kept an annual tally of the number of Indians living in houses and the number of new houses built for Indians in each previous year. The table below summarizes these tallies from the years 1867 to 1904.⁵⁷

54. *Id.*

55. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows upon the Earth”—How Long a Time is That?*, 63 CAL. L. REV. 601, 612 (1975).

56. *See, e.g.*, 1877 COMM’R OF INDIAN AFFAIRS ANN. REP. 170 (noting that although the Alesia Indians “were induced by the authorized agents of the Government to give up their old homes by the promise of assistance in building new ones,” no provisions had been made to provide them with homes or materials for building); 1881 COMM’R OF INDIAN AFFAIRS ANN. REP. 78 (reporting that the Kiowa, Comanche, and Apache continue to insist that the government has failed to build the houses promised during negotiations); 1885 COMM’R OF INDIAN AFFAIRS ANN. REP. 178 (quoting the Ute agent as stating “my Indians have been promised houses and continually remind me of the unfulfilled expectations.”).

57. The author compiled the following table for the purposes of this Article. The statistics come from the individual Commissioner of Indian Affairs Annual Reports for the years 1867 through 1904. Missing statistics indicate that records were not kept for that year and/or reservation superintendents did not report housing developments in that year. Additionally, complete data is not available from all years.

Year	# of Indians living in houses [†]	# of Indian homes built
1867	1,791 (frame) 7,258 (log)	-
1870	10,329	-
1873	17,678	-
1874	18,179	1,017
1875	19,902	-
1876	55,717 ^{**}	1,702
1879	11,634	1,211
1880	16,250 (5 Civilized tribes); 12,527	1,642
1882	15,800 (5 Civilized Tribes); 14,607	1,597
1884	14,824	2,267
1885	17,812	2,136 (total cost \$39,761)
1886	21,232	2,440 (total cost \$33,784)
1887	-	1,674 (total cost \$45,828)
1888	17,016	-
1889	16,554	
1890	19,104	1,882
1891	20,696	1,816
1892	20,733	2,068
1893	21,317	2,136
1894	21,602	1,484
1895	23,642	2,303
1896	25,155	1,882
1897	25,744	1,403
1898	26,578	1,390
1899	25,326	1,153
1900 ^{***}	25,749	1,005
1901	26,574	1,033
1902	26,629	-
1903	26,638	-
1904	28,417	-

[†]Except where otherwise noted, the statistics in this chart *do not* include data from the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Seminole, and Creek).

^{**}This number is substantially higher because the Five Civilized Tribes were included in the data and brush houses were counted in addition to log and frame.

^{***}1900 was the nadir of Indian population. At this time, there were approximately 230,000 Indians living in the United States. See The Urban Institute, ASSESSMENT OF INDIAN HOUSING NEEDS AND PROGRAMS FINAL REPORT 27 (1995).

The fact that many superintendents tracked the number of homes built for tribal members suggests the importance of reservation housing development to the federal government during the reservation era. Furthermore, many of the tribes included in the table did not have explicit treaty promises of federal housing assistance.⁵⁸ This information collected by the BIA demonstrates that the federal government provided some housing assistance to tribes, even those without treaties, as they transitioned to reservations.

The Indian agents' reports in the years following the establishment of reservations reflect the federal government's ambivalence about providing housing for reservation Indians. In some cases, the reports establish the government's failure to supply houses promised in treaty negotiations.⁵⁹ Yet, other reports denote a strong commitment on the part of the federal government to provide housing as a component of a broader assimilation program.⁶⁰ The Indian agents' reports also confirm that the government found adequate housing vital for Indian education,⁶¹ and improved health conditions among tribes.⁶²

The reports further demonstrate that the Indian agents on the various reservations possessed a great deal of discretion with respect to housing programs. For example, on some reservations, agents paid Indians to build their own houses,⁶³ while others expected Indians to provide the labor with the government providing materials.⁶⁴ Although the Winnebago treaty explicitly promised housing to the tribe,⁶⁵ the Winnebago agent reported in 1875 that "houses [were] being constructed on the allotments of those who have proven the most worthy and industrious."⁶⁶ Similarly, the Osage agent reported in 1874 that "no encouragement or

58. *See, e.g.*, Treaty with the Nisqualli, Puyallup, and Other Indians, Dec. 26, 1854, 10 Stat. 1132.

59. *See supra* note 56.

60. *See, e.g.*, 1877 COMM'R OF INDIAN AFFAIRS ANN. REP. 199 (explaining that money would be spent on buying furnishings for houses because "one of the most powerful means of advancing civilization among these Indians . . . is to make their homes more attractive to encumber them with so much furniture that they can no longer move the whole family and all of the household effects"); *Id.* at 51 (suggesting that replacing tepees with houses would encourage civilization of Indians).

61. A Montana Indian agent reported in 1879 that "scarcely anything [has been done] here yet in the way of education, nor can I see that much can be done till [sic] the Indians are located in permanent homes." 1879 COMM'R OF INDIAN AFFAIRS ANN. REP. 96.

62. *See, e.g.*, 1882 COMM'R OF INDIAN AFFAIRS ANN. REP. 78 (reporting Nez Perce agent as stating that as a result of nineteen new houses, "the sickness consequent on tent life has greatly decreased.").

63. *E.g.*, 1874 COMM'R OF INDIAN AFFAIRS ANN. REP. 222 (quoting the Osage agent as reporting that many of the Indians on the reservation were engaged in building houses, an activity for which "reasonable compensation was paid them.").

64. *E.g.*, 1875 COMM'R OF INDIAN AFFAIRS ANN. REP. 238 (recording Crow Creek Agency as urging the government to provide the materials necessary for the construction of a log cabin and stating that "any Indian desirous of a house would gladly render service to the full amount of the material required, and securing a home for himself and family in this way, he would appreciate it more and take better care of the same than if it had been the free gift of the government.").

65. Treaty with the Winnebago, Feb. 27, 1855, art. 3, 10 Stat. 1172.

66. 1875 COMM'R OF INDIAN AFFAIRS ANN. REP. 326.

assistance is given to any of the Indians to build houses until they first have a well-fenced field . . . experience has taught me that they will not live in houses until they have first learned manual labor."⁶⁷ The agents, without regard to treaty provisions, established these arbitrary requirements for housing assistance.

Starting in the 1870s, the agents' reports suggested for the first time that the houses built by the government for the Indians were substandard and inadequate. For example, in 1877, the Shoshone agent reported that the houses built by the government remained uninhabitable because they lacked furniture,⁶⁸ and the Tulalip agent reported that the majority of Indian houses were "in bad condition."⁶⁹ The Sisseton agent reported in 1884 that the poor condition of Indian homes "drives the people to their lodges and this seems to recall all their old roving habits."⁷⁰ Similarly, in 1878, the Wyoming Indian agent reported that homes built for the tribes in 1873 were already "fast going to decay,"⁷¹ and that some were uninhabitable.⁷²

The testimony at an 1883 Senate hearing concerning the condition of the Indian tribes in the territories of Montana and Dakota offers further insight into the ad hoc nature of Indian housing programs in the reservation era.⁷³ Several agents testified that the government should build houses rapidly,⁷⁴ while others asserted that building houses for Indians was not advisable, but that agents should help Indians to build houses for themselves.⁷⁵ Further testimony indicated that houses were being built for Indians at that time, and that the Department of the Interior maintained a policy to "settle them on the most eligible portion of their reserve, build them houses, break land for them, buy stock cattle for them all."⁷⁶ One agent suggested that the government give cattle to those tribal members who were willing to live in houses in order to encourage civilization.⁷⁷

Testimony by Indians at the same hearing conveyed the Indians' frustration and disappointment at the government's failure to fulfill

67. 1874 COMM'R OF INDIAN AFFAIRS ANN. REP. 223.

68. 1877 COMM'R OF INDIAN AFFAIRS ANN. REP. 208.

69. 1877 COMM'R OF INDIAN AFFAIRS ANN. REP. 199.

70. 1884 COMM'R OF INDIAN AFFAIRS ANN. REP. 52.

71. 1878 COMM'R OF INDIAN AFFAIRS ANN. REP. 154.

72. *Id.*

73. Testimony Taken by a Select Comm. of the Senate Concerning the Condition of the Indian Tribes in the Territories of Montana and Dakota, Under Resolution of the Senate of March 2, 1883.

74. *Id.* at 12 (Reservation superintendent Charles H. Barstow stated that "[h]ouses should be built rapidly for the Indians . . . on the Big Horn River and the other portion of the reservation should be sold").

75. *Id.* at 15 (Reservation superintendent A. M. Quivey stated that "I also believe that it is doing them a great injury to build houses for them and put up fences on their land. They should be made to help. White men should not do the work and they sit by and smoke; and I don't believe in paying them for building their own houses. . . . [B]ut I don't believe they will do much work as long as they all live together, because they are dancing most of the time. They should not live together, but should have separate farms.").

76. *Id.* at 20.

77. *Id.* at 22.

housing promises in exchange for land.⁷⁸ Running Antelope, a tribal member from the Standing Rock reservation, asserted “[t]he Great Father has made many promises to us and we have come here to-day [sic] to see if we will ever get any benefit from those promises . . . The Great Father promised us houses to live in, and some one to show us how to work the land”⁷⁹ The Indians also reported that they had built numerous houses, but were now waiting for the doors and windows promised to them by the government.⁸⁰ As this testimony shows, housing at this time concerned the tribes as well as the federal government.

D. Allotment Era (1887–1928)

Documents from the late 1880s indicate that as allotment became the federal Indian policy, housing programs increased in significance on the reservations. By the 1880s, dissatisfaction with the reservation system was growing among federal policymakers.⁸¹ In addition, although the Indian tribes were already living in abject poverty, western settlers resented the fact that large tracts of land were being kept from white settlement.⁸² With the passage of the General Allotment Act of 1887, also known as the Dawes Act, Congress abandoned the reservation system and adopted the allotment policy.⁸³ The goal of allotment was twofold: (1) to assimilate Indians into mainstream American society;⁸⁴ and (2) to open up more land for white settlement.⁸⁵ As the impetus for these dual purposes has been explained, “[e]astern philanthropists wanted to civilize the Indian; western settlers wanted Indian land.”⁸⁶

The Dawes Act empowered the President to allot a reservation whenever he considered it to be in the best interest of a particular tribe. The United States would hold allotted land in trust, free of any taxes, for a pe-

78. *Id.* at 69–70.

79. *Id.* at 69.

80. *Id.* at 75.

81. GIBSON, *supra* note 34, at 489 (“federal officials regarded reservations as the halfway house to Native American assimilation . . . there was a growing public conclusion that the federal government’s Americanization experiment had failed.”).

82. WILLIAM CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 20 (3d ed. 1998).

83. General Allotment Act (1887), 25 U.S.C.A. § 354.

84. GIBSON, *supra* note 34, at 489 (describing federal officials as hopeful that “fee-simple private landownership would so individualize Indians that they would Americanize themselves.”).

85. *Id.* at 495.

86. COHEN II, *supra* note 22, at 132. President Harrison captured the assimilationist dimension of the new Indian policy:

We can no longer push the Indian back into the wilderness, and it remains only by every suitable agency to push him upward into the estate of a self-supporting and responsible citizen. For the adult the first step is to locate him upon a farm, and for the child to place him in a school.

1 JAMES D. RICHARDSON, *A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS (1789–1902)* 45, *cited in* Deloria, *supra* note 47, at 107. A contemporaneous statement by reservation superintendent Charles H. Barstow reflects the commonly held belief that Indians should be divested of their land: “I don’t see why these wild men, who have no use for the land, should keep it.” Testimony Taken by a Select Comm. of the Senate Concerning the Condition of the Indian Tribes in the Territories of Montana and Dakota, Under Resolution of the Senate of March 2, 1883, at 12.

riod of twenty-five years. During this period, the statutory scheme expected that the Indian allottee would learn to manage the land successfully. At the end of the trust period, the land would be conveyed to the Indian in fee, and the new landowner would acquire United States citizenship and become subject to the laws of the state or territory where he resided.⁸⁷ It was widely believed that individual land ownership would finally “civilize” the Indians and abolish tribal governments.⁸⁸

Writings in support of allotment frequently discussed the importance of providing houses to achieve the government’s goal of “civilizing” the Indians. Henry Dawes, in sponsoring the General Allotment Act, strongly emphasized that the allotment policy would not work if housing was not included:

If [the Indian] starts wrong; if he comes upon the homestead and is left there with no house to put himself in; nobody to tell him what to do with it; nobody to help by a word of encouragement; nobody to speak to him so that he can understand it, what is to become of him? He had better never have been put there.⁸⁹

The Commissioner’s 1885 Annual Report argued strongly in favor of allotment as the means through which to civilize the Indians, and described it as every Indian having a “homestead his own with assistance by the government to build houses and fences, and open farms.”⁹⁰ The allotment policy plainly continued to recognize the need for federal Indian housing assistance.

The allotment era, and the federal policy of assimilating Indian peoples, persisted until the 1930s. During this time, reservation superintendents, with the encouragement of the BIA, continued to implement housing programs. These housing programs continued largely on an ad hoc basis with limited documentation. Nonetheless, several existing documents confirm that reservation housing remained a federal concern. In 1912, BIA issued a circular to all of the reservation superintendents entitled *Sanitary Homes for Indians*.⁹¹ The circular reaffirmed that the BIA regarded housing as crucial to assimilation efforts, asserting “it is difficult to develop an Indian to a standard of civilization above and beyond his home environment.”⁹² Confirming the individual superintendents’ responsibility for devising housing programs,⁹³ the circular called for each

87. PRUCHA, *supra* note 7, at 668.

88. *Id.* at 659.

89. Henry L. Dawes, *Defense of the Dawes Act*, PROCEEDINGS OF THE 5TH ANN. MEETING OF THE LAKE MOHONK CONF. OF THE FRIENDS OF THE INDIANS (1887), reprinted in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIANS” 1880–1900, at 106 (Francis Prucha ed., 1973) [emphasis added].

90. 1885 COMM’R OF INDIAN AFFAIRS ANN. REP. iv–v (“It should be industriously and gravely impressed upon [the Indians] that they must abandon their tribal relations and take lands in severalty, as the cornerstone of their complete success in agriculture, which means self-support, personal independence, and material thrift.”).

91. OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, CIRCULAR NO. 678, SANITARY HOMES FOR THE INDIANS (Sept. 6, 1912).

92. *Id.*

93. *Id.* (“the campaign for improved housing conditions is largely up to the superintendents.”).

of the superintendents to submit reports outlining their plan to improve reservation housing conditions.⁹⁴

In 1922, another BIA circular instructed the reservation superintendents to personally survey all of the homes in their jurisdiction and to report on the housing, health, and “general progress”⁹⁵ of the people.⁹⁶ The reports submitted in response to this circular indicate that the superintendents had engaged, to varying degrees, in housing assistance on their reservations.⁹⁷ The 1926 BIA booklet distributed to the superintendents entitled *Plans and Specifications for Indian Homes and Improvements* provided blueprints for reservation houses and instructions for using the plans.⁹⁸ All of these BIA materials confirm that housing remained a constant concern of the federal government during the allotment era, as in preceding years.

In response to a growing awareness of the allotment policy’s failure to achieve assimilation and increasing criticism of federal Indian policy in general, the Institute of Government Research was commissioned in 1926 to survey the status of Indians in the United States.⁹⁹ The resulting study, popularly known as the Meriam Report, was published in 1928 under the title *The Problem of Indian Administration*.¹⁰⁰ An immensely influential document,¹⁰¹ the Meriam Report recommended badly needed changes in virtually every aspect of federal Indian policy,¹⁰² sharply criticized the allotment policy,¹⁰³ outlined programs for improvement,¹⁰⁴ and advocated for increased federal funding of Indian programs.¹⁰⁵

The Meriam Report documented the substandard housing conditions on Indian reservations. The report observed that substandard, unsanitary, profoundly over-crowded housing constituted a major health concern for tribes.¹⁰⁶ The Report further noted that the government had successfully “stimulated” the building of modern homes in some places, but that most of the permanent homes constructed on the reservations were “small

94. *Id.*

95. O. H. Lipps, *The Nez Perce Indians: Report of a Survey of their Economic, Social and Industrial Conditions*, response to BIA Circular 1774, submitted to the Department of the Interior on Nov. 18, 1922, at 12.

96. OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, CIRCULAR NO. 1774 (Mar. 23, 1922).

97. *See, e.g.*, Lipps, *supra* note 95.

98. H.B. PEAIRS, BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, PLANS AND SPECIFICATIONS FOR INDIAN HOMES AND IMPROVEMENTS (July 1, 1926).

99. PRUCHA, *supra* note 7, at 808.

100. INSTITUTE FOR GOVERNMENT RESEARCH, *supra* note 20, at 4.

101. COHEN II, *supra* note 22, at 26.

102. COHEN II, *supra* note 22, at 26–27.

103. COHEN I, *supra* note 4, at 26 (observing that the allotment policy “has largely failed in the accomplishment of what was expected of it. It has resulted in much loss of land and an enormous increase in the details of administration without a compensating advance in the economic ability of the Indians.”).

104. COHEN II, *supra* note 22, at 144 (noting that the Meriam report recommended, *inter alia*, a comprehensive education program, economic planning and development, the strengthening of Indian communities, better trained Indian Service staff, and the settlement of Indian legal claims).

105. DELORIA & LYTLE, *supra* note 26, at 12.

106. INSTITUTE FOR GOVERNMENT RESEARCH, *supra* note 20, at 4.

shacks with few rooms and with inadequate provision for ventilation."¹⁰⁷ According to the Meriam Report, the inadequate permanent homes that replaced traditional shelters as a part of the civilization program likely worsened the health problems on reservations.¹⁰⁸

The Report commented that a model home campaign implemented by the government¹⁰⁹ was a waste of money because the government failed to provide the services and personnel necessary to assist the Indians in adjusting to their new homes and way of life.¹¹⁰ A survey of Indian homes revealed that a number of Indians who received modern homes from the government used them for storage and lived in a nearby traditional shelter.¹¹¹ The Report recommended that "the public health nurse and the home demonstration worker should precede the builder of homes."¹¹² Even when the federal government assisted tribes with housing, it failed to provide the support and infrastructure to make this assistance meaningful, a problem that continues today.¹¹³

Following the Meriam Report, the BIA issued a circular outlining the program for superintendents to follow concerning home improvements on the reservations.¹¹⁴ The circular emphasized the BIA's goal of "a home for each family."¹¹⁵ The circular included plans for Indians "well provided with funds"¹¹⁶ and separate plans for those with limited funds.¹¹⁷ Addressing some of the concerns from the Meriam Report, the circular indicated that all satisfactory plans should include "a dwelling house, water supply, toilet, cellar, barn, and poultry house."¹¹⁸ Agency officials hoped that requiring a water supply and a toilet would end the practice of providing Indians with unsanitary homes. The circular concluded by informing the superintendents that "[the Office of Indian Affairs is] anxious to put on an aggressive home building and home improvement campaign on each Indian reservation . . . much remains to be done before all Indian families are suitably housed."¹¹⁹

An analysis of the Meriam Report and earlier reports of the Indian agents leads to several conclusions about the federal government's role in Indian housing during the allotment era. Most significantly, the federal government was substantially involved in providing Indian housing

107. *Id.*

108. *Id.* at 554.

109. Likely referring to the programs implemented pursuant to the 1912, 1922, and 1926 BIA circulars discussed earlier. *See supra* notes 91–98 and accompanying text.

110. INSTITUTE FOR GOVERNMENT RESEARCH, *supra* note 20, at 221.

111. *Id.* at 220.

112. *Id.* at 601.

113. *E.g.*, BLUEPRINT FOR CHANGE, *supra* note 5, at 77 ("Addressing the housing problem means first and foremost recognizing multiple, interlocking problems that demand an integrated solution. The causes of . . . overwhelming need include the following: lack of adequate funding . . . lack of proper infrastructure to support development . . .").

114. OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, CIRCULAR NO. 2563, HOME IMPROVEMENTS, REPAIR & UPKEEP (Mar. 9, 1929).

115. *Id.* at 1.

116. *Id.* at 3.

117. *Id.*

118. *Id.* at 1.

119. *Id.* at 4.

during this time through projects initiated by reservation superintendents. Agents reported that from 1890 to 1900, the federal government built over 19,000 homes for Indian people.¹²⁰ Despite these efforts, evidence suggests that the government was failing to provide all of the houses promised to tribes, and that the housing supplied was frequently inadequate, substandard, and resulted in severe overcrowding. In some cases, the government's assimilationist desire to replace traditional dwellings compromised Indian health. It is also clear that the government neglected to provide the support and infrastructure necessary to realize its stated goal of improving Indian housing.

E. Reorganization (1928–1945)

During the 1930s, federal Indian policy changed radically and vacillated from assimilation back toward a respect for tribal self-determination. In 1933, President Roosevelt appointed John Collier as Commissioner of Indian Affairs. Collier, a reformer and strong supporter of the rights of tribal governments, was also a strong advocate for Indian housing programs. He identified reservation housing conditions as one of the "major problems of Indian welfare,"¹²¹ and described the Indians as "landless, miserably housed, and without means of support."¹²² The same year as Collier's appointment, a survey confirmed the "desperate straits"¹²³ of Indian housing conditions, revealing that of 31,650 Indians, less than one-third were living in houses of "good" condition.¹²⁴

In 1934, reacting to the Meriam Report, Congress drastically shifted federal Indian policy with the passage of the Indian Reorganization (Wheeler-Howard) Act (IRA).¹²⁵ A central premise of the IRA was that Indian tribal governments should continue to exist.¹²⁶ Detribalization and assimilation were no longer the stated goals of federal Indian policy. The IRA officially ended allotment of tribally owned lands, prohibited the transfer of Indian lands or shares in tribal corporations to anyone except the tribe itself, and established that any surplus tribal lands acquired by the federal government during allotment could be restored to the tribes so long as they had not been purchased by third parties.¹²⁷ In addition, the IRA established the Revolving Loan Fund in order to provide capital for long-term improvements, sawmills, and homes.¹²⁸

The Revolving Loan Fund may have possessed substantial potential to improve reservation housing conditions. Unfortunately, reports from John Collier as early as 1934, the year Congress passed the IRA, suggest

120. See Table *supra* p. 220 and text accompanying note 57.

121. 1938 COMM'R OF INDIAN AFFAIRS ANN. REP. 199.

122. 1937 COMM'R OF INDIAN AFFAIRS ANN. REP. 198.

123. U.S. BUREAU OF INDIAN AFFAIRS, THE PROGRESS OF INDIAN AFFAIRS FROM 1933 TO 1936, at 92 (Sept. 1937) [hereinafter PROGRESS 1933–1936].

124. *Id.*

125. 25 U.S.C.A. § 461 (1934).

126. CANBY, *supra* note 82, at 24.

127. *Id.*

128. John Collier, 1934 COMM'R OF INDIAN AFFAIRS ANN. REP., reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 226 (Francis Prucha ed., 1975).

that the funds dedicated to the Revolving Loan Fund were inadequate.¹²⁹ The IRA's Revolving Loan Fund did, however, finance the first documented, large-scale, tribally operated reservation housing program conducted by the Mescalero Apache.¹³⁰ An Indian agent for the Mescalero Apache described their housing conditions in 1934, saying "they live in tents, in brush tepees, or in board shacks in conditions of utmost squalor . . . [m]any of their hovels are vermin invested and disease breeding."¹³¹ Four years later, records show that the tribe had successfully used the Revolving Loan Fund to establish a tribally run housing program where "every family [had] or soon [would] have a comfortable home."¹³²

In addition to the IRA, the Emergency Relief Appropriation Acts, the first of which was passed in 1935,¹³³ impacted Indian housing programs. The following year, President Roosevelt allotted \$1,396,750 to the Office of Indian Affairs "to finance the rehabilitation of Indians . . . by means of loans or grants, or both, to enable them to construct or repair houses, barns, outbuildings, and root cellars."¹³⁴ This appropriation marked the beginning of the Indian Relief and Rehabilitation Program that continued into the 1940s. The program subsequently received appropriations from the Emergency Relief Appropriation Acts of 1937,¹³⁵ 1938,¹³⁶ 1939,¹³⁷ and 1941.¹³⁸ The Indian Relief and Rehabilitation Program constituted the first major federally funded program specifically aimed at improving housing conditions for reservation Indians. Past programs had generally existed as part of a larger civilization program,¹³⁹ with reservation superintendents administering the programs on an ad hoc basis and using funds not always specifically earmarked for housing programs.¹⁴⁰

By 1939, the federal government had allocated Indian Relief and Rehabilitation Program funds to seventy agencies in twenty-five different states and had improved the housing conditions of over 5,700 Indian

129. *Id.*

130. PROGRESS 1933-1936, *supra* note 123, at 37.

131. U.S. BUREAU OF INDIAN AFFAIRS, THE NEW DAY FOR THE INDIANS: A SURVEY OF THE WORKING OF THE INDIAN REORGANIZATION ACT OF 1934 at 18 (Dec. 1938).

132. PROGRESS 1933-1936, *supra* note 123, at 37.

133. Joint Res. Apr. 8, 1935, ch. 48, 49 Stat. 115, which was not classified to the Code but was set out as a note under 15 U.S.C. § 728, Commerce and Trade.

134. Franklin D. Roosevelt, Presidential Letter No. 1323, January 11, 1936, from the President's Official File 79 Bureau of the Budget; subfile Emergency Relief Appropriation Act, Box 37.

135. The Emergency Relief Appropriation Act of June 29, 1937, ch. 401, Title I, 50 Stat. 352, which was not classified to the Code but was listed in the Supplementary Legislation note under 15 U.S.C. § 721, Commerce and Trade.

136. The Emergency Relief Appropriation Act of June 21, 1938, ch. 554, Title I, 52 Stat. 809, which was not classified to the Code but was listed in the Supplementary Legislation note under 15 U.S.C. § 721, Commerce and Trade.

137. The Emergency Relief Appropriation Act of June 30, 1939, ch. 252, 53 Stat. 927, which was not classified to the Code but was listed in the Supplementary Legislation note under 15 U.S.C. § 721, Commerce and Trade.

138. The Emergency Relief Appropriation Act, fiscal year 1941, Joint Res. June 26, 1940, ch. 432, 54 Stat. 611, which was not classified to the Code but was listed in the Supplementary Legislation note under 15 U.S.C. § 721, Commerce and Trade.

139. *See generally supra* Part II.D. Allotment Era.

140. *See generally supra* Part II.D. Allotment Era.

families.¹⁴¹ In addition to much needed reservation housing, the Indian Relief and Rehabilitation Program also provided work relief for hundreds of tribal members.¹⁴² During this time, the federal government passed the United States Housing Act of 1937,¹⁴³ which announced as federal policy the principle that decent and affordable shelter is a necessity for all Americans.¹⁴⁴ In 1940, the Solicitor General of the Department of the Interior issued an opinion holding that Indian tribes were governmental entities capable of running low-rent housing programs under the United States Housing Act.¹⁴⁵ Despite this determination, the federal government did not initiate any Indian housing programs under the United States Housing Act until the 1960s. Rather, Indian housing programs continued as a part of the Indian Relief and Rehabilitation Program into the 1940s, and remained within the policies and programs of the BIA in general.

The Indian Reorganization Act and the Emergency Relief Appropriation Acts enabled John Collier to increase the BIA's commitment to improving Indian housing conditions. Congressional support for Indian reform, however, was divided during this time. In some instances, Congress passed legislation but failed to adequately fund it.¹⁴⁶ A 1939 report issued by the Department of the Interior's Office of Indian Affairs cautioned that inadequate Congressional funding would eventually lead to the collapse of the Indian Relief and Rehabilitation Program.¹⁴⁷ This report, perhaps issued in response to the defunding of the Indian Relief and Rehabilitation program, presents an informative overview of the accomplishments of this program and includes testimonials, before and after photographs, and statistics.¹⁴⁸ The report advised that three million dollars appropriated annually for ten to twelve years would virtually solve the Indian housing problem, and would substantially elevate the economic status of tribes.¹⁴⁹

Notwithstanding the decrease in funding for the program, in 1941 the BIA released a new manual of instruction for providing relief and rural rehabilitation for needy Indians.¹⁵⁰ The new manual expected the agency to utilize funds appropriated under the Emergency Relief Appropriation Act of 1941 for housing assistance and stressed that agents should apply the funds toward assisting needy Indians.¹⁵¹ The manual further encouraged grants to tribes, rather than individuals, for rehabilitation projects because "it furthers group solidarity and fosters a sense of community

141. U.S. DEPT. OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, THE RELIEF AND REHAB. PROGRAM 1-2 (June 15, 1939).

142. *Id.*

143. Pub. L. No. 75-412, 50 Stat. 888 (1937) (current version at 42 U.S.C. §§ 1437-1444).

144. *Id.*

145. FREDERICK L. KIRGIS, U.S. DEPT. OF THE INTERIOR, NATIONAL HOUSING ACT—ELIGIBILITY OF INDIAN TRIBES, SOLICITOR GENERAL OPINION (Aug. 6, 1940).

146. COHEN II, *supra* note 22, at 146.

147. OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, RELIEF AND REHAB. PROGRAM 17 (June 15, 1939) (reporting that the only criticism of the program is that "lack of funding is bringing the program to a close.").

148. *Id.*

149. *Id.* at 4.

150. OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, ADMINISTRATION OF PROGRAMS FOR RELIEF AND RURAL REHAB. FOR NEEDY INDIANS AS PROVIDED FOR IN THE EMERGENCY RELIEF APPROPRIATION ACT, FISCAL YEAR 1941 (1940).

151. *Id.* at 2, 6.

responsibility.”¹⁵² This comports with the contemporary policy of respecting tribal self-determination and is echoed in the current housing policy established by NAHASDA.¹⁵³ A thorough search of the BIA archives uncovers no reference to the Indian Relief and Rehabilitation Program that postdates the 1941 manual. It is unclear why the program ended. It is known, however, that overall BIA appropriations decreased steadily after 1939,¹⁵⁴ and with the pressures of World War II, “Indian interests were no longer significant enough to command the attention of the President or the Secretary of the Interior.”¹⁵⁵

F. Termination and Relocation (1945–1961)

By 1949, federal Indian policy had again changed dramatically. Assimilation resurfaced as the dominant goal, and the federal government abandoned the policy of respecting tribal self-determination. In response to a growing attitude among Americans and policymakers that Indian tribes should not exist as sovereign entities within the United States,¹⁵⁶ Congress passed House Concurrent Resolution 108 and instituted the termination policy.¹⁵⁷ The goal of termination was “as rapidly as possible, to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens . . . to end their status as wards of the United States.”¹⁵⁸

Even with the shift toward termination, the federal government remained concerned with the Indian housing problem. In 1948, the Indian Service report for Region IV generally observed poor housing conditions and stated that in one community it planned “to assist at least 200 Indian families not now having houses to build permanent homes in the next five years.”¹⁵⁹ The report further determined, however, that all funds needed for relief and welfare would come from the tribe or through the revolving loan funds.¹⁶⁰ Congress also demonstrated a degree of awareness of Indian housing issues during this time, but with the same ambivalence that had characterized federal housing assistance to tribes in the past. For example, in 1950, Congress passed the Navajo-Hopi Long Range Rehabilitation Act, with \$820,000 authorized for “housing and necessary

152. *Id.* at 13.

153. Native American Housing Assistance and Self-Determination Act, Pub. L. No. 104-330, § 2(7), 110 Stat. 4016, 4017 (1996) (“Federal assistance to meet these [housing] 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 under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.)”).

154. COHEN II, *supra* note 22, at 154.

155. *Id.*

156. See DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 204 (4th ed. 1998).

157. H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

158. *Id.*

159. OFFICE OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, THE INDIAN SERVICE REGION IV, at 27 (1948).

160. *Id.*

facilities and equipment.”¹⁶¹ Of this \$820,000, Congress only appropriated \$26,300.¹⁶² In 1956, a BIA Task Force on Indian Affairs examined housing conditions, found them horribly inadequate, and recommended increased federal assistance for Indian housing programs.¹⁶³

During the termination era, federal Indian policy hoped to end special services for tribes. Given this context, the lack of Indian housing programs developed during these years is not surprising, despite the recognition of poor housing conditions in Indian Country and the continued development of a national low-income housing program. In 1950, the Commissioner of the Bureau of Indian Affairs advocated for the inclusion of tribes in the national housing programs.¹⁶⁴ However, because the federal policy at that time mandated an end to services for tribes, Indian tribes were not included until 1961. Rather, the BIA developed the relocation program for the purpose of moving Indians from reservations to urban areas. Congress appropriated funds to “assist [Indians] to move to new communities and establish themselves,”¹⁶⁵ and to combat the high levels of poverty and unemployment on the reservations. Consistent with the termination program, relocation was intended to break up tribal units and encourage Indian peoples to assimilate into mainstream life in America.¹⁶⁶ The relocation program offered grants to Indians to move to various metropolitan areas.¹⁶⁷ Although relocation was successful for a few Indians, the vast majority found themselves not only unemployed, but also completely unprepared for urban life and separated from their tribal communities.¹⁶⁸

Housing assistance was a key component of the relocation program. The BIA officially established guidelines to help newly relocated Indian families find a home and adjust to their new living environment.¹⁶⁹ In accord with the termination policy, however, officials thought that relocated Indians should avail themselves of the services provided in their new community rather than special Indian services.¹⁷⁰ Even when Congress created a federal Indian policy to terminate the existence of tribes as dis-

161. Navajo-Hopi Rehabilitation Act of 1950, ch. 92, § 13, 64 Stat. 44 (1950) (codified as amended at 25 U.S.C. § 631 (2000)).

162. THEODORE W. TAYLOR, HISTORY OF THE NAVAJO-HOPI LONG RANGE REHABILITATION ACT OF 1950, at 7 (1973).

163. *Id.*

164. Dr. John R. Nichols, Commissioner Bureau of Indian Affairs, Department of the Interior, Statement at the Governor’s Conference on Indian Affairs, St. Paul, Minnesota, at 5 (Mar. 14, 1950) (transcript available in the Department of the Interior Library) (noting that Emergency Relief and Rehabilitation Funds were no longer available for Indian housing assistance and stating that “[i]t is our present hope that legislation can be obtained making specific provision for Indian tribes in the low-cost housing program, including the farm housing authorized by the [United States Housing] Act.”).

165. BUREAU OF INDIAN AFFAIRS, U.S. DEPT. OF THE INTERIOR, RELOCATION SERVICES HANDBOOK, Release 82-1, at 1.1 (1956) [hereinafter BIA RELOCATION HANDBOOK].

166. DONALD FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960, at 134 (1986).

167. *Id.* at 136.

168. CANBY, *supra* note 82, at 26.

169. BIA RELOCATION HANDBOOK, *supra* note 165.

170. *Id.* at 3.10.

tinct entities, the problem of inadequate housing for Indian people remained a concern to the federal government.

G. Self-Determination (1961–present)

By the 1960s, policymakers widely viewed termination as another failed attempt at assimilation.¹⁷¹ Federal Indian policy again entered an era of tribal self-determination that continues today. A trend developed in the 1960s to expand, or interpret, current legislation to include special provisions for tribes.¹⁷² During this time, Indian tribes were first included in Department of Housing and Urban Development (HUD) housing programs. Around the same time, the BIA established its own Indian housing program, the Housing Improvement Program (HIP).¹⁷³

Since the primary purpose of this Article is to expound a history thus far ignored by policy-makers and historians alike, it is not necessary to detail subsequent developments. Several excellent histories of federal Indian programs effectively document the developments from the 1960s to the present.¹⁷⁴ As such, a summary of post-1960s developments is included in a timeline in Appendix A. This Article now turns to the implications the history of Indian housing has on today's conceptualization of the government's responsibility for Indian housing assistance.

III. RETHINKING THE FEDERAL INDIAN HOUSING OBLIGATION

The corrected history discussed above leads to two important conclusions. First, the federal government was involved in Indian housing efforts long before passage of the United States Housing Act in 1937. Second, the federal government recognized the problem of substandard, unsanitary housing conditions in Indian Country over one hundred and fifty years ago, not in the 1960s as has been previously recollected.¹⁷⁵ These two conclusions represent a marked departure from the universally cited history. Given the historical evidence, the federal obligation to provide Indian housing programs cannot arise from the United States Housing Act. Rather, it is born out of the unique relationship and history tribes have with the federal government. For some tribes, the federal obligation was articulated in treaty provisions or oral promises made during treaty negotiations. For others, it stems from the events and policies of the mid

171. CANBY, *supra* note 82, at 29.

172. Deloria, *supra* note 47, at 118.

173. The BIA's Housing Improvement Program (HIP) was established in 1965 under the authority of the Snyder Act, ch. 115, 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13). Congress passed the Snyder Act in 1921 to authorize the BIA to manage the expenditure of congressional appropriations "for the benefit, care, and assistance of the Indians throughout the United States." *Id.* The Snyder Act originally authorized expenditures for such activities as health, education, employment, administration of Indian property, and irrigation, and was later expanded by further legislation. BLUEPRINT FOR CHANGE, *supra* note 5, at 26. Records seem to indicate that the Snyder Act was first interpreted to authorize expenditures for housing assistance with the creation of HIP. *Id.* HIP continues to exist today, but with minimal appropriations. *Id.*

174. See, e.g., Ferrell, *supra* note 9; Sternberg & Bishop, *supra* note 9; HOUSING ASSISTANCE COUNCIL, *supra* note 9; BLUEPRINT FOR CHANGE, *supra* note 9.

175. E.g., Sternberg & Bishop, *supra* note 9, at 593.

to late 1800s. As the court notes in *Dewakuku v. Cuomo*, “vacillating federal policies and resulting disruption and dislocation has helped create a Native American housing crisis.”¹⁷⁶ These federal government policies created the need for housing assistance to Indian tribes,¹⁷⁷ and tribes expected a remedy to this problem based on promises made to them by the federal government. Policymakers and advocates alike have been working unaware of the early years of federally assisted Indian housing programs.

Before considering the implications of these conclusions on the federal housing obligation, it is necessary to discuss the *sui generis*¹⁷⁸ nature of tribes’ relationship to the federal government. This relationship involves a government-to-government relationship between sovereign states,¹⁷⁹ and a simultaneous trust responsibility on the part of the United States to Indian tribes.¹⁸⁰ The trust relationship, a central tenet of federal Indian law, developed judicially and has subsequently been recognized by Congress and the executive branch.¹⁸¹ Scholars and analysts have described the trust responsibility as both a legal and a moral obligation.¹⁸² Chief Justice John Marshall first articulated the trust concept in *Cherokee Nation v. Georgia*.¹⁸³ Marshall referred to the Cherokee Nation as a “domestic dependent

176. 107 F. Supp. 2d 1117, 1121 (D. Ariz. 2000), *rev’d on other grounds*, 271 F.3d 1031 (Fed. Cir. 2001).

177. George H. Cortelyou, *An Attempted Revolution in Native American Housing: The Native American Housing and Self Determination Act*, 25 SETON HALL LEG. J. 429, 438 (2001) (“The policies the federal government adopted for Native Americans devastated their health, housing, and culture.”).

178. The relationship of Indian tribes and the federal government is *sui generis*, “one of a kind.”

179. The United States government recognized the notion of tribal sovereignty in the numerous treaties formed with tribes. The act of entering into treaties with Indian tribes implicitly constitutes recognition of their inherent sovereignty. See CANBY, *supra* note 82, at 68. Since treaties are negotiated with other nations, treaties made with Indian tribes confirm their status as sovereign entities at the time of treaty formation. Tribal sovereignty is an inherent right, not one delegated to the tribes by the federal government. However, Indian tribes are not like foreign nations. The doctrine of discovery divested tribes of both their power to alienate their land to anyone other than the United States government and their power to form alliances with foreign nations. *Johnson v. McIntosh*, 21 U.S. 543, 567–68 (1823). Besides these limited exceptions, tribal nations retain all the rights of sovereign nations unless Congress explicitly divests tribes of further rights. Most recently, President Clinton released an Executive Order for the purpose of “strengthen[ing] the government-to-government relationship with Indian tribes.” Exec. Order No. 13,175, 25 C.F.R. § 32.3 (2000), *reprinted as amended in* 25 U.S.C.A. § 450 (2001).

180. For several excellent discussions of the trust doctrine, see Reid Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Larry Levanthal, *American Indians—The Trust Responsibility: An Overview*, 8 HAMLIN L. REV. 625 (1985); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

181. President Clinton acknowledged that “[s]ince the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.” Exec. Order No. 13,175, *supra* note 179, at § 2(a).

182. BLUEPRINT FOR CHANGE, *supra* note 5, at 8–10.

183. 30 U.S. (5 Pet.) 1, 17 (1831).

nation"¹⁸⁴ and described the relationship between tribes and the federal government as one of "a ward to his guardian."¹⁸⁵ Several scholars have persuasively argued that the trust responsibility grows out of the process of land cession, a process not restricted to treaty-making, and as such, the trust responsibility is owed to all tribes.¹⁸⁶ Supporting this view, the First Circuit held that the absence of a treaty between a tribe and the United States does not negate the existence of a trust relationship.¹⁸⁷ Because the trust doctrine is a common law concept, courts possess some latitude in defining its scope, making it adaptable and changeable over time.

Both Congress¹⁸⁸ and the courts¹⁸⁹ have recognized that providing adequate housing comprises a part of the federal government's statute-based trust responsibility to Indian tribes. Housing programs are not recognized, however, as obligations arising from land cessions, treaty negotiations, or as a fulfillment of promises made with a sovereign entity. Rather, they are commonly perceived as a much-needed federal gratuity initiated because of a moral commitment to tribes and the American people in general.¹⁹⁰ If the United States Housing Act were in fact the origin of the Indian housing obligation, this conception would make sense. Congress established the United States Housing Act as a poverty program to assist low-income Americans. Since Indian people are also U.S. citizens, to the extent that they are low-income, they are entitled to participate in federal housing programs. However, an accurate picture of the historical origins of the federal housing obligation reveals that while this assessment is not entirely inaccurate, it is nonetheless incomplete. As Chairman of the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing stated, "[i]n addition to, not instead

184. *Id.*

185. *Id.*

186. *E.g.*, Sharon O'Brien, *The Government-Government and Trust Relationships: Conflicts and Inconsistencies*, 10 AM. INDIAN CULTURE & RES. J. 57, 76 (1986).

187. *Passamaquoddy Tribe v. Morton*, 528 F.2d. 370 (1st Cir. 1975) (holding that even though the Passamaquoddy have no treaty with the United States government, the federal government still has a trust obligation to assist the tribe in their land claim case).

188. *E.g.*, Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(4), 110 Stat. 4016, 4017 (1996) ("Congress . . . has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions . . .").

189. *E.g.*, *Eric v. Sec'y of HUD*, 464 F. Supp. 44 (D. Ala. 1978) (holding that the trust responsibility requires strict administrative standards in the management of an off-reservation housing program); *St. Paul Intertribal Housing v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983) (stating that "the trust relationship between the United States and the Indians is broad and far reaching, ranging from protection of treaty rights to the provision of social welfare benefits, including housing" and that "provision for housing is well within the spirit of the trust doctrine").

190. COHEN I, *supra* note 4, at 237 ("Federal services which the United States provides for Indians are frequently viewed as a matter of charity. The erroneous notion is widely prevalent that in their relationship with the federal government the Indians have been the regular recipients of unearned bounties. In reality, federal services were, in earlier years, largely a matter of self-protection for the white man or partial compensation to the Indian for land cessions or other benefits received by the United States.").

of, our due as citizens, we are owed the support promised us as dependent sovereign peoples for our well-being and survival."¹⁹¹

A policy paper analyzing the federal role in Indian education introduces a model that is useful in thinking about the Indian housing obligation as well.¹⁹² The paper explains the federal Indian education obligation as the product of a "gradual merger of two different forms of obligations: treaty rights and the general concern for Indian welfare seen in statutory law."¹⁹³ In certain treaties, the federal government promised education assistance.¹⁹⁴ In establishing how these promises would be fulfilled, the federal government developed a more universal Indian education policy that extended to Indians generally as a part of the government's trust responsibility.¹⁹⁵ Over time, treaty-based and statutory education obligations have become so intertwined that it is impossible to analyze them separately.¹⁹⁶ Both—or either—of these lead to the conclusion that Indian education is a part of the government's trust responsibility.¹⁹⁷

This model applies equally well to housing. The history of the government's involvement in Indian housing demonstrates that what initially began because of promises to certain tribes in exchange for land cessions and removal to reservations has evolved to become a part of the federal trust responsibility to all tribes as recognized by statutory law. Unfortunately, the current conception of the federal housing obligation only considers the general welfare concern or statute-based obligation to provide housing assistance without acknowledging that housing was promised to many tribes in treaty negotiations.

Realizing the full history and true origin of Indian housing programs expands the rhetoric of the debate from a discussion of need and poverty to encompass the discourse of obligation and promise. Federal officials and policy-makers today have not considered the historical documentation of treaty promises and early Indian housing programs discussed in this Article. Recognition of the link between land cessions and the housing obligation collapses the perception of federally assisted Indian housing as solely a poverty program, moving Indian housing programs beyond a nebulous moral responsibility. Changing the framework of the federal Indian housing obligation from a mere moral responsibility arising under the trust doctrine to a legal obligation first acknowledged in treaty language is valuable and necessary, not only for historical accuracy, but also for the moral, social, and practical implications.¹⁹⁸

191. Pottinger, *supra* note 6, at 123.

192. Deloria, *supra* note 47.

193. *Id.* at ii.

194. *Id.* at Section II.

195. *Id.* at 25–26.

196. *Id.* ("[I]t became impossible to distinguish which services were gratuitous on the part of the federal government and which were direct results of an effort to fulfill the requirements of the treaties.").

197. *Id.*

198. This Article does not address the possibility of a tribal lawsuit against the government for failure to provide promised housing. Some tribal attorneys have indicated, however, that they are investigating the issue and feel that such claims could be made. One tribe has determined that based on the number of tribal members who should have received housing assistance at the time it was promised, the number of

Importantly, the early history of federally assisted Indian housing highlights the length of time the federal government has acknowledged, but failed to resolve, the housing crisis in Indian Country. A 1971 article states that “[m]ore than a decade has passed since the existence of a housing problem among the Indians was first recognized by the federal government. Despite this recognition, housing conditions for the vast majority of Indians have not improved.”¹⁹⁹ Historical evidence reveals that the federal government has recognized an Indian housing problem for well over a century, not a decade. Still, the statement above is partially correct in the sense that despite half-hearted attempts to address the housing problems in Indian Country, conditions for many Indian people have not improved, in the last decade *or* the last century. The deplorable state of Indian housing today serves as a sad reminder that the government continues to fail in fulfilling its housing obligation to Indian peoples.

IV. NAHASDA: INDIAN HOUSING TODAY

Congress took an important step toward fulfilling its obligation to tribes with the passage of the Native American Housing Assistance and Self-Determination Act (NAHASDA)²⁰⁰ in 1996.²⁰¹ NAHASDA recognizes the federal government’s trust obligation to provide housing assistance and creates a block grant to allow tribal governments the opportunity to design successful programs in a way that comports with tribal self-determination.²⁰² In spite of NAHASDA’s recognition of the federal trust obligation to provide housing, NAHASDA restricts housing assistance to tribes on the basis of income. This restriction reflects the continuing misconception that federally assisted Indian housing programs are charitable poverty programs rather than payment for land cessions.²⁰³

A recent article analyzing NAHASDA’s success concludes that “NAHASDA succeeded in part but failed overall because of inadequate funding, . . . and its failure to address the economic crisis underlying the [Indian] housing problem.”²⁰⁴ Although NAHASDA might be an improvement over previous programs, Congress’s failure to fund NAHASDA adequately in the years since its passage will likely result in yet

houses that were actually built, and the current cost of building a house on the reservation, the federal government owes the tribe \$300–500 million. These calculations do not assume an ongoing duty to provide housing for tribes in perpetuity. Personal correspondence with the author (Dec. 2000).

199. Sternberg & Bishop, *supra* note at 9, at 593.

200. Native American Housing Assistance and Self-Determination Act, Pub. L. No. 104-330, 110 Stat. 4016 (1996).

201. Cortelyou, *supra* note 177, at 431 (“NAHASDA broke the status quo of failed housing policies”).

202. Native American Housing Assistance and Self-Determination Act, Pub. L. No. 104-330, §§ 2(4)–2(7), § 101, 110 Stat. 4016, 4017, 4022 (1996).

203. Low-income requirements may be necessary due to limited resources available for housing assistance. Even so, Congress must leave such programmatic decisions about resource distribution to tribal governments if it is to fulfill its treaty obligations and remain consistent with the current policy of tribal self-determination.

204. Cortelyou, *supra* note 177, at 431–32.

another failed Indian housing policy.²⁰⁵ Representative Kennedy voiced this concern during the initial consideration of NAHASDA:

[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 . . . let 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.²⁰⁶

Only through robust and sustained efforts can Congress correct its generations of failed and broken promises to Indian peoples.

Indian Country needs an estimated 210,000 housing units immediately to provide adequate housing.²⁰⁷ Toward this end, the National American Indian Housing Council (NAIHC) is currently requesting that Congress appropriate \$1.1 billion to begin meeting the housing needs in Indian Country.²⁰⁸ The history of federally assisted Indian housing demonstrates that the severely substandard housing conditions experienced by many Indian people will not be alleviated without sufficient funding.

V. CONCLUSION

Not only must Congress learn from history, it is imperative that tribes now responsible for reservation housing evaluate why housing programs have failed in the past and learn from those mistakes. One hundred fifty years of failed housing programs provide insight into how housing programs should be structured. Although sufficient funding is indispensable, simply funneling money into housing will not solve the problem. Congress and the tribes must also develop the infrastructure and support systems necessary to sustain reservation housing development.²⁰⁹ Both Indian nations and the federal government can glean valuable information from the early history of Indian housing programs as they move forward in their attempts to finally resolve the housing crisis in Indian Country.

205. *Id.* at 456.

206. 142 CONG. REC. H11,614 (Sept. 28, 1996) (statement of Rep. Kennedy).

207. Chester Carl, News Conference on NAHASDA Reauthorization, Before the National Press Club (Jan. 11, 2001), *available at* http://naihc.indian.com/doc/Carl_Statement_11101 (Jan. 30, 2001).

208. *Id.*

209. David Stea, *Indian Reservation Housing: Progress Since The "Stanton Report"?*, 6:3 AM. INDIAN CULTURE & RES. J. 4 (1982) ("HUD should face squarely the responsibility to help build institutions as well as houses").

APPENDIX A

TIMELINE OF INDIAN HOUSING DEVELOPMENTS 1961 TO THE PRESENT²¹⁰

1961: Task force established by Interior Secretary Stewart Udall issues a report recommending that the BIA and Public Housing Authority (PHA) provide services to Indians; in response, the PHA General Counsel confirms that Indians are eligible for PHA low-rent programs and that tribes can establish Indian Housing Authorities (IHA)

1962: PHA General Counsel finds that authority exists for mutual-help housing programs on reservations

1965: Department of Housing and Urban Development Act creates HUD; BIA creates Division of Housing Assistance, which houses the Housing Improvement Program

1966: BIA surveys Indian housing conditions and issues report

1968: 1968 HUD Act refers specifically to the obligation to serve low-income families in Indian areas

1969: Tri-Partite Agreement signed by BIA, HUD, and the Indian Health Services (IHS) addresses coordination of housing responsibilities

1970: President Nixon issues Indian Policy Statement declaring, in part, "we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support"²¹¹

1971: GAO releases report entitled, "Slow Progress in Eliminating Substandard Indian Housing"

1975: Senate Committee on Indian Affairs holds hearings in Oklahoma on Indian housing; HUD Offices of Indian Programs established in Denver and San Francisco

1976: HUD Secretary creates Office of Indian Policy and Programs; first HUD Indian housing regulations promulgated

1977: Congress passes Housing and Community Development Act of 1977, which creates the position of Special Assistant to the Secretary for Indian and Alaska Native Programs

210. This summary is taken in large part from Ferrell, *supra* note 9, at 449, and HOUSING ASSISTANCE COUNCIL, *supra* note 9, at 1.

211. President Richard M. Nixon, Special Message on Indian Affairs, 1970 PUB. PAPERS 564-67 (July 8, 1970), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 256-58 (Francis Prucha ed., 2d ed. 1990).

1978: GAO issues report entitled, *Substandard Indian Housing Increases Despite Federal Efforts—A Change is Needed*; separate Office of Indian Housing created within HUD

1982: Legislation to create new Indian housing programs within the BIA and eliminate HUD Indian housing programs is introduced and fails

1983: Housing and Urban-Rural Recovery Act permits FHA insured mortgages on Indian trust land

1988: Congress passes the Indian Housing Act creating a separate program to provide housing assistance to Indians and ordering the HUD Secretary to “provide lower income housing on Indian reservations and other Indian areas”²¹²

1992: National Commission on American Indian, Alaska Native, and Native Hawaiian Housing issues *Building the Future: a Blueprint for Change* reporting findings of investigation into the status of native housing and suggesting solutions

1995: U.S. Department of Housing and Urban Development Office of Policy Development and Research releases *Assessment of American Indian Housing Needs and Programs: Final Report* (this report leads to the reform of Indian housing legislation in subsequent years)

1996: Congress passes Native American Housing Assistance and Self-Determination Act (NAHASDA) establishing a new block grant system for housing assistance and giving control of programs to tribes

2000: Congress passes amendments to NAHASDA, which, inter alia, clarify tribal due process rights under NAHASDA and allow tribes to preempt Davis-Bacon wage requirements

2001: NAHASDA initial authorization by Congress expires, prompting a reauthorization and review process

212. 42 U.S.C. § 1437 aa(a) (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 501(a), 110 Stat. 4016, 4041 (1996).