Final Convening Report

Negotiated Rulemaking Committee on Bureau of Indian Affairs-Funded School Facilities Construction

Prepared by The Consensus Building Institute
with the U.S. Institute for Environmental Conflict Resolution

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EXECUTIVE SUMMARY

The Secretary of the Department of the Interior has sponsored a convening process and this convening report for a Negotiated Rulemaking Committee on Bureau of Indian Affairs (BIA)-funded school facilities construction called for under the No Child Left Behind Act of 2001 (NCLB). The convening report is intended to aid the Department in exploring the opportunities of and barriers to using negotiated rulemaking for developing regulations to implement the requirements of the No Child Left Behind Act related to BIA-funded school facilities. The Department has retained an independent, impartial convening team from the Consensus Building Institute, working through the U.S. Institute for Environmental Conflict Resolution (U.S. Institute), to conduct the assessment and develop this convening report.

The scope of the convening process included soliciting views on the school facility topics identified from the No Child Left Behind Act and exploring the opportunities of and barriers to negotiated rulemaking. The topics included:

- Methods used to catalog school facilities;
- Formulas for priority and funding for school replacement construction and new construction; and
- Formulas for priority and funding for school renovation and repair.

To understand the range of perspectives on and interests in these topics, the convening team has conducted confidential interviews with tribal officials or their designees, representatives of BIA-funded or tribally-controlled grant schools, BIA, Bureau of Indian Education (BIE) and Office of Facilities Management and Construction (OFMC) staff, and others with an interest in Bureau-funded school facilities construction (e.g. school boards, Diné Department of Education).

Working through the Bureau of Indian Education, CBI's team spoke in person or by telephone with tribal and school representatives in each of the 21 BIE Line Offices located around the country. Staff from the Diné Department of Education was also interviewed. The team also spoke with representatives from the BIE, OFMC, and the DOI. The team also conducted two focus group sessions at the July 2007 Bureau of Indian Education's first National Partnership Conference, organized by the National Indian School Board Association. Altogether, the team spoke with 198 individuals, representing some 99 different schools. A list of interviewees and their affiliations can be found in Appendix C.

The individual and group interviews sought input on the following topics:

- Interviewees' views on the substantive issues listed above
- Suggestions for how diverse geographic, size, and tribal interests can best be represented on a Negotiated Rulemaking Committee
- Concerns or barriers to the establishment of and successful conclusion of a Negotiated Rulemaking Committee on these topics
- Consultative activities and potential approaches to consultation that the Bureau might undertake regarding these issues

This convening report was written based on the views and opinions expressed by interviewees. It compiles the findings from these interviews and makes recommendations to BIA on the topics and process for rulemaking.

This report was issued in draft on October 12, 2007 and made available on the websites of the U.S. Institute for Environmental Conflict Resolution (www.ecr.gov) and the Consensus Building Institute (www.cbuilding.org). All interviewees were notified about the draft report by e-mail or fax, and encouraged to submit feedback and comments on the report's findings and recommendations. A comment period was established through December 22, 2007, and later extended through February 2, 2008. Stakeholders were further notified about the report and the comment period through a Federal Register Notice, notices from BIA Education Line Officers, and through a broadcast fax to all BIA-funded schools[1]. Stakeholders were invited to submit their comments via mail, e-mail, or fax.

CBI received five sets of comments, which we have used to revise this final report.

FINDINGS ON THE SUBSTANTIVE ISSUES

A. FINDINGS ON THE CONDITIONS OF SCHOOLS

At the outset of the interviews, interviewees were invited to speak about the conditions of their schools, to provide a context for the substantive discussions about facility construction. We learned that schools vary in age from fairly new to quite old, and in condition from excellent to dilapidation. Overall, interviewees perceived that many facilities face an array of physical problems, including environmental, health and safety, HVAC, plumbing, structural, windows and doors, electrical, and roofing.

Within the specific facility conditions raised by interviewees, a number of key themes arose, including:

- Many schools are ill equipped for the information age
- Security needs and related funding are major sources of concern for many schools
- Aging or poor design may lead to a substandard educational environment
- Operations & Maintenance needs are not matched by O&M annual funding
- Overcrowding is a major concern and a source of accelerating physical decline

B. FINDINGS ON THE METHODS USED TO CATALOG SCHOOL FACILITIES

On July 31, 2003, GAO submitted a report to Congress, which focused primarily on a review of the Facility Management Information System (FMIS), the system being used to catalog the conditions and needs of BIA schools, then in its third year of operation. Given this focus on FMIS in the GAO report and the current role of FMIS in cataloging the conditions of schools and in determining the funding and priority for school renovation and repair, the assessment team

[1] The fax was sent on January 14 to 186 schools based on a list of fax numbers provided to CBI by the BIE. 57 of those faxes were unsuccessful.

asked interviewees to speak about their experiences and perspectives on the system's advantages and problems.

The following findings focus on interviewees' perspectives on FMIS.

- FMIS doesn't sufficiently allow for educational programming needs
- The FMIS is, in general, working as a catalog of conditions
- **FMIS backlog data contains significant inaccuracies.**
- FMIS data entry is laborious, and skill- and time-intensive
- The FMIS system does not provide a holistic view of the school facility as it actually is
- The FMIS system may not meet the full requirements of the NCLB "catalogue of school facilities."
- Pressing needs can overwhelm the careful, rationalized planning of FMIS
- The connection between FMIS information and the prioritization and actual funding of projects is opaque

C. Findings on the Priority and Funding for Repair and Renovation

No Child Left Behind calls for the negotiated rulemaking committee to develop a renovation and repair report that determines renovation needs (major and minor) and a formula for the equitable distribution of funds to address such needs, for Bureau-funded schools. The NCLB Act notes that the formula developed shall utilize necessary factors in determining an equitable distribution of funds, including such factors as the size of the school, school enrollment, the age of the school, the condition of the school, the environmental factors at the school, and school isolation.

The following summarizes the findings from CBI's interviews regarding school repair and renovation.

- The overall annual repair and renovation budget is insufficient
- The prioritization of funding for repairs and renovation is often viewed as opaque, arbitrary, and disconnected from the pressing needs of the school
- The prioritization process is viewed as too multi-layered and bureaucratic
- Prioritization for school repair and renovation should be transparent, efficient, and integrated
- Funding for necessary repairs is too slow
- Problems arise in sequencing and coordinating across projects
- Any system will have to deal with structural conflicts of interest

D. Findings on Priority and Funding for New Construction and Replacement

No Child Left Behind directs the negotiated rulemaking committee to develop a school replacement and new construction report that determines replacement and new construction need—and a formula for the equitable distribution of funds to address such need—for Bureau-funded schools. For school replacement, the process for identifying, prioritizing, and funding such major projects has changed through the years

The following summarizes the findings from CBI's interviews regarding new construction and replacement.

- Schools are not well informed about the priority list for replacement and new construction
- Prioritization for replacement of schools is seen as highly political
- The last competitive application process was perceived as subjective
- Prioritization for school replacement should be based on transparent and jointly acceptable criteria for prioritizing
- Budgets for replacement and new construction do not account for inflation
- Critical needs are left out of new schools
- School replacement, repair, and renovation prioritization may cause short-term problems

E. Findings on Contracting and Project Management

In addition providing input on the three substantive issues of 1) a catalogue of school conditions; 2) formula and priorities for renovation and repair; and 3) formula and priorities for replacement and new construction; interviewees spoke in detail about the process of contracting and managing projects once they were funded. Though these issues are not directly part of our scope, given their intimate relation to overall facilities, we have included these findings as well.

- The relationships between schools/tribes and OFMC during projects are inefficient and unclear
- OFMC/Bureau oversight on projects can be problematic
- Tribal/school oversight on projects can also be problematic
- Code requirements of OFMC/BIE are hard to meet
- Efficiency could be greatly improved

F. Findings on the Negotiated Rulemaking Process

Many interviewees had not participated in the previous negotiated rulemakings for NCLB and therefore had limited comments on the process. Those that had knowledge of the previous efforts, or had participated directly, expressed strong views on the subject. Our findings thus reflect a general sense of the requirements under NCLB and specific suggestions from a smaller number of interviewees about how to ensure an effective process.

- The regulatory negotiation on these issues is required by law and must be done
- Representation is and will remain a challenge to regulatory negotiation
- The regulatory negotiation must be authentic and not pre-decisional
- The regulatory negotiation must be tied to broader outreach
- The Department and/or Bureau must commit to providing full financial support.

Review and Analysis of the Requirements for a Regulatory Negotiation

The federal Negotiated Rulemaking Act of 1996 outlines seven criteria for determination of need for a negotiated rulemaking committee. The following chart provides a summary of our findings

in relation to the particular issues of BIE-funded schools and their repair, renovation, and replacement for each of the criteria. While we believe this to be a useful analysis, we note that the NCLB Act explicitly calls out for a negotiated rulemaking on these issues and, to some degree, thus preempts any analysis.

CHART 1: Criteria for Initiating Negotiated Rulemaking

CRITERIA AND DISCUSSION	YES	NO	MAY-BE
1. Need for a rule	X		
2. Limited number of identifiable interests?	X		
3. Balanced, representative committee?			X
4. Likelihood of reaching consensus?	X		
5. Not unreasonably delay rulemaking?			X
6. Adequate resources to support process?			X
7. Commits to use consensus if reached?	X		

RECOMMENDATIONS

These draft recommendations are based on our interviews, regarding regulatory negotiation pertaining to the repair, renovation, and replacement of BIE-funded schools.

A. INITIATE THE REGULATORY NEGOTIATION (REG NEG)

In our best professional judgment, we conclude that a consensus-based negotiation to develop proposed regulations should be initiated.

B. PROCEED WITH THE REG NEG. OBTAIN SUFFICIENT FUNDING AND SEEK PUBLIC SUPPORT ON COMMITTEE MEMBERSHIP.

Interviewees and several comments noted that No Child Left Behind requires the BIA to proceed with the regulatory negotiation. In order for the process to be as robust, inclusive and thorough as possible, the process will not be inexpensive in terms of time, staff resources nor costs. The BIA should obtain sufficient funds for a robust, inclusive, and thorough process. BIA should also work to convene a reasonably balanced Committee in the view of tribes and schools, and therefore respond as thoroughly as possible to any comments during the public comment period on the draft composition of the Committee.

Please note that it is our understanding that the typical reg-neg process does not require public comment on the final Committee composition (i.e., membership). However, given the complexity of convening a Committee for such diverse interests, we strongly encourage the Bureau to find a means through the Federal Register or other processes to allow tribes and schools to comment on the draft composition of the Committee.

C. ESTABLISH CLEAR AND ACHIEVABLE GOALS FOR THE PROCESS.

We encourage the BIA to offer a draft set of goals for the process in its Notice of Intent to Proceed with Negotiated Rulemaking (should the Bureau decide to implement these recommendations) and to take comment on such goals. We conclude that a regulatory negotiation on these issues might seek to reach several goals. First and foremost, the goal of all participants ought to be to improve the education of Native American children through improving school facilities in which they are educated by improving the system by which these facilities are repaired, renovated, and replaced. Second, the negotiation should strive to meet the goals laid out in the NCLB Act. Third, even if full agreement is not reached, we conclude that a negotiated rulemaking might also achieve additional valuable goals.

D. ESTABLISH A FAIR, STRUCTURED, AND TRANSPARENT CONVENING PROCESS FOR SELECTING TRIBAL REPRESENTATIVES.

We recommend the following process for convening the Negotiated Rulemaking Committee.

- The Bureau should seek nominations through a Notice of Intent to initiate negotiated rulemaking.
- The Bureau should lay out the general criteria for representatives:
- The Bureau should allow the Committee to exceed twenty-five members.
- Once the draft membership is identified, the Bureau should ensure, as noted above, that tribes, schools, and the interested public have a chance to comment on the draft Committee composition to ensure that it is as reflective of diverse tribal interests as possible.

E. TO THE MAXIMUM EXTENT POSSIBLE, ASSIGN TRIBAL SEATS ACCORDING TO THE PROPORTIONAL SHARE OF STUDENTS FROM TRIBES SERVED BY FEDERAL FUNDS.

Given the 2006 enrollment of students in tribal schools, we recommend assigning approximately 20 seats to the tribes with the proportionate largest share of enrolled students. We also recommend creating approximately 5 to 7 additional seats for tribes, schools, and the kinds of schools that are not covered under the proportionate representation.

F. ASSIGN APPROXIMATELY FIVE (5) SEATS TO PROVIDE FOR REPRESENTATION BY THE FEDERAL GOVERNMENT.

The federal government needs to select its own representatives. While that determination should and will be up to the Department and Bureaus, we recommended that the federal government consider a mix of representatives who: 1) represent the interests of the Office of Facilities Management and Construction; 2) the interests of Indian education more broadly, especially to link facility and space needs with educational program needs; 3) are knowledgeable about federal rules and regulations; and, 4) are knowledgeable about how the current system of prioritizing and funding school repair, renovation, and construction functions.

G. INTEGRATE THE NEGOTIATED RULEMAKING PROCESS WITH ROBUST TRIBAL AND SCHOOL ENGAGEMENT.

In order to be effective in Indian Country, given the diversity and independence of many tribes and their schools, we recommend a process that integrates typical negotiated rulemaking with robust and inclusive tribal, school, and other stakeholder engagement. Please note that such a process would be dependent on the funding and budget of the Department and Bureaus. This process would entail significant logistical costs ranging from travel to facilities rental to hosting a national conference. We recommend a general process steps and summarize the process found in the full report.

H. SUPPORT TRIBAL CONSTITUENCY WORK.

To the extent possible, we encourage the Bureau to help support outreach and constituency work within tribes and groups of tribes, should they share representatives. Dependent on funding, the Bureau might support a modest travel budget for each Committee member to conduct outreach efforts to Tribal Councils, school boards, school staff, and other appropriate stakeholders within a constituency.

I. INTRODUCTION AND OVERVIEW

The Bureau of Indian Education (BIE), formerly known as the Office of Indian Education Programs, has responsibility for 184 elementary schools, secondary schools, and dormitories located on 63 reservations, in 23 states, serving approximately 50,000 students in the continental U.S., and representing 242 different tribes. Educational services are provided either directly by BIE or by Tribal governments who choose to operate the programs themselves through grants under P.L. 100-297 (Tribally Controlled Schools Act of 1988) or contracts under the Indian Self-Determination and Education Assistance Act (P.L. 93-683) . BIE has 22 Education Line Officers, all of whom report directly to the Deputy Director of School Operations. These Education Line Officers (ELOs) have direct line authority and supervision responsibilities over 65 BIA-operated schools and provide technical assistance and contract and grant oversight to the remaining 120 schools.

The physical structures of the BIE-system, along with their management—the "system"—include a number of unique attributes. The schools are scattered geographically across the continental U.S., making it the "school system" with the largest geographic breadth of any school system in the country. Schools are managed in very different ways, from BIE-managed schools run and staffed by federal employees to grant and contract schools managed by Tribal governments and Tribal employees. Some local school boards are active and control hiring and firing, while others act in an advisory capacity. Most of the schools are rural, some located many hours from any large population centers as well as from their supply of building materials, contractors, and other building support needs. The physical plants of the schools vary widely. Some are new and provide leading-edge physical space in which to educate Native American children. Others are aging schools, with original buildings dating from the early 1900's, connected over time to facilities built in the 1950's, all long-past their expected useful life. The schools are managed across various federal agencies: BIE is responsible for the education program and annual operations and maintenance; BIA-OFMC is responsible for various BIA facilities; and Indian Health Service provides certain kinds of health and safety oversight. Lastly, and importantly, the schools as a whole are generally chronically under-resourced and thus must work within a highly constrained fiscal environment.

A. BRIEF DEFINITIONS OF KEY TERMS

Below are definitions for various acronyms and key terms used throughout this report. These definitions were gleaned from websites, annual reports

Bureau of Indian Education (BIE): The Bureau of Indian Education is responsible for directing education programs at BIE-operated and tribally operated contract and grant schools. The schools' mission is to provide quality education opportunities from early childhood in accordance with the tribes' needs for cultural and economic well being and in keeping with the diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities. The Bureau takes consideration of the whole person (spiritual, mental, physical, and cultural aspects).

Bureau of Indian Affairs (BIA): The Bureau of Indian Affairs administers and manages 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. There are 561 federal recognized tribal governments in the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility. In addition, the Bureau of Indian Affairs provides education services to approximately 48,000 Indian students.

Department of the Interior (DOI): The Department of the Interior aims to protect America's resources for future generations, provide access to the Nation's natural and cultural heritage, offer recreation opportunities, and manage its trust responsibilities to American Indians and Alaska Natives. It also has responsibilities to island communities, conducts scientific research, provides oversight of energy and mineral resources, fosters appropriate use of land and water resources, and conserves and protects fish and wildlife. DOI is a large, decentralized agency with over 73,000 employees and located at approximately 2,400 operating locations across the United States (U.S.), Puerto Rico, U.S. territories, and freely associated states.

Facilities Management Information System (FMIS): The Facilities Management Information System (FMIS), is a client-server system that is a life-cycle management tool that assists national, regional, and local facility managers for numerous facilities on Indian lands, including schools, as well as servicing Tribes and their members. The FMIS system replaced the Facility Construction Operations and Maintenance (FACCOM) system. FMIS was subject to a U.S. General Accounting Office review and report issued in July of 2003.

Federal Advisory Committee Act (FACA): Public Law 92-463 was established in 1972 to provide guidance on how federal agencies may obtain advice. FACA committees are established by a federal agency, under regulations established by the General Services Administration (GSA). A FACA committee is a group established or utilized by an agency to provide advice and recommendations by members who are not employees of the federal government.

No Child Left Behind Act (NCLB): The No Child Left Behind Act of 2001 (PL 107-110) is the reauthorization of a number of federal programs that strive to improve the performance of America's primary and secondary schools by increasing the standards of accountability for states, school districts, and schools, as well as providing parents more flexibility in choosing which schools their children will attend. Sections of the Act focus in particular on improving education for Native American children.

Negotiated Rulemaking Act: Established in 1996, Public Law 104-320 details a process by which parties who will be significantly affected by a rule participate in the development of a rule. The Act lays out various procedures for establishing and managing a negotiated rulemaking committee to undertake the Act. Such committees must also adhere to a more general statute known as the Federal Advisory Committee Act (FACA).

Office of Facilities Management and Construction (OFMC): The BIA's Office of Facilities Management and Construction is charged with overseeing the repair, renovation, and construction of over 180 schools in over 20 states, in addition to additional responsibilities

beyond schools. OFMC oversees FMIS, prioritizes and allocates funds for school repair, renovation, and replacement, and manages contracts and procurement for some of the work.

Government-to-Government Consultation (G-t-G): A process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau and representatives of tribal governments. These exchanges are generally considered "tribal" consultation. Each federal agency has its own policy that outlines how that agency should conduct g-t-g consultation.

Government-to-Government (G-t-G) consultation (as defined by the Institute of Environmental Conflict Resolution): Refers generally to consultation between the federal government and a Federally recognized American Indian or Alaska Native Tribal government or Native Hawaiian organization. Each federal agency has its own policy that outlines how that agency should conduct g-t-g consultation. The general parameters of g-t-g consultation are shaped by several Executive Memoranda and Executive Orders which direct federal agencies to: consult with federally recognized tribal governments on matters that significantly or uniquely affect them, including development of federal policies that have tribal implications; consult prior to taking action that may affect a tribal government; to establish regular and meaningful consultation and collaboration with tribal officials; to establish an accountable process to ensure meaningful and timely input by tribal officials. Ideally, the consultation process begins with an agreement between the federal agency and the tribal government as to what "a timely and meaningful exchange of information between governments" means and how the consultation process will be tailored to the subject matter.

B. LAYOUT OF THIS REPORT

This draft convening report is laid out in six sections. They include:

I. Introduction and Overview
II. Assessment Background & Methodology
III. Findings on the Substantive Issues
IV. Review and Analysis of the Requirements for a Regulatory Negotiation
V. Recommendations
VI. Appendices

II. ASSESSMENT BACKGROUND & METHODOLOGY

The Secretary of the Department of the Interior has sponsored a convening process and this convening report for a Negotiated Rulemaking Committee on Bureau of Indian Affairs (BIA)-funded school facilities construction called for under the No Child Left Behind Act of 2001 (NCLB). The convening report is intended to aid the Department in exploring the opportunities of and barriers to using negotiated rulemaking for developing regulations to implement the requirements of the No Child Left Behind Act related to BIA-funded school facilities. Such a convening report is described generally in the Negotiated Rulemaking Act of 1996, P.L. 104-320, Section 563 (b) and is often the first step used by federal agencies in organizing a regulatory negotiation. The Negotiated Rulemaking Act explicitly allows for convenors to: 1) identify persons who will be significantly affected by a proposed rule; 2) conduct discussions with such persons to identify issues of concern and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate. It should also be noted that the NCLB explicitly calls out for a negotiated rulemaking effort on BIA school construction funding issues.

The Department has retained an independent, impartial convening team from the Consensus Building Institute, working through the U.S. Institute for Environmental Conflict Resolution (U.S. Institute), to conduct the assessment and develop this convening report. The U.S. Institute is an independent, impartial entity with expertise in convening, assessment, and alternative dispute resolution processes. The U.S. Institute is a program of the Morris K. Udall Foundation, an independent federal agency headquartered in Tucson, Arizona. (See www.ecr.gov for more information about the U.S. Institute). CBI is a non-profit organization providing mediation, facilitation and process design services to numerous federal and state agencies and their stakeholders. The CBI team includes individuals with experience in education and construction, as well as in designing, convening, and facilitating collaborative processes such as regulatory negotiations. (See www.cbuilding.org for more information about CBI).

CBI has worked with many Tribes across the United States and Canada. CBI's role is to serve as independent, objective process experts and remain non-partisan on substantive issues. Without exception, CBI abides by the code of ethics of The Association for Conflict Resolution, which states: "The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party" regardless of who pays for the services. CBI does not advocate for any particular outcome or interest and are bound to conduct our work in a fair, deliberate, and non-partisan fashion. (See *Code of Ethics,* Appendix D).

The scope of the convening process included soliciting views on the school facility topics identified from the No Child Left Behind Act and exploring the opportunities of and barriers to negotiated rulemaking. The topics included:

- Methods used to catalog school facilities;
- Formulas for priority and funding for school replacement construction and new construction; and
- Formulas for priority and funding for school renovation and repair.

To understand the range of perspectives on and interests in these topics, the convening team conducted confidential interviews with tribal officials or their designees, representatives of BIA-funded or grant-funded tribal schools, BIA, Bureau of Indian Education (BIE) and Office of Facilities Management and Construction (OFMC) staff, and others with an interest in Bureau-funded school facilities construction (e.g. school boards, Diné Department of Education).

Working through the Bureau of Indian Education, CBI's team spoke in person or by telephone with tribal and school representatives in each of the 21 BIE Line Offices located around the country. School and tribal officials were invited to participate in these regional meetings via a letter describing the purpose and logistics of the meeting that was distributed through the BIE Line Officer (Appendix A). Some schools that did not participate in such meetings were contacted directly for input. Staff from the Diné Department of Education was also interviewed. The team also spoke with representatives from the Bureau of Indian Education, the Office of Facilities, Management, and Construction, and the Department of the Interior. The team also conducted two focus group sessions at the July 2007 Bureau of Indian Education's first National Partnership Conference, organized by the National Indian School Board Association.[2] Altogether, the team spoke with 198 individuals, representing some 99 different schools. A list of names of those interviewed is attached (Appendix C).

The individual and group interviews sought input on the following topics:

- Interviewees' views on the substantive issues listed above
- Suggestions for how diverse geographic, size, and tribal interests can best be represented on a Negotiated Rulemaking Committee
- Concerns or barriers to the establishment of and successful conclusion of a Negotiated Rulemaking Committee on these topics
- Consultative activities and potential approaches to consultation that the Bureau might undertake regarding these issues

CBI used an interview protocol as a general guide for conducting the interviews (Appendix B). The interviewers followed the general structure of the protocol, while allowing each conversation to follow the interests and comments of the interviewees. The assessors made extensive notes on each interview, and summarized the interviews for internal team use. The team also reviewed various documents provided by the Department and interviewees.

The draft convening report was written based on the views and opinions expressed by interviewees. It compiles the findings from these interviews and makes recommendations to BIA on the topics and process for rulemaking. The draft report was made available to all interviewees for comment, as well as to all tribes, BIA-funded schools, and other interested parties. Parties were informed via direct e-mail or fax (interviewees and schools) and by a notice in the Federal

[2] The Partnership Conference was held in conjunction with the U.S. Department of Education, the U.S. Department of Health and Human Services Indian Health Service, the National Indian School Board Association, the Association of Community Tribal Schools, the American Indian Higher Education Consortium, the National Indian Education Association, the National Congress of American Indians, the Tribal Departments of Education National Assembly, the National Education Association, and the National Museum of the American Indian.

Register. We received five sets of comments on the draft report, which informed this revision and final report. A summary of major comment points and our responses are included as Appendix F. This final report is being delivered to the DOI, BIA, and BIE, and is available to the interviewees, all interested tribes, and the general public by request or on the websites of the Consensus Building Institute (www.cbuilding.org) and the U.S. Institute for Environmental Conflict Resolution (www.ecr.gov).

CBI's role is to provide an accurate, impartial summary of stakeholder views as represented during the interviews, and an independent analysis of the situation in order to assist the stakeholders in making decisions on how to best proceed with a regulator negotiation, other consensus building process, or other stakeholder engagement process.

Please note that all views are presented without attribution to offer confidentiality to those interviewed and to encourage readers to focus on the substantive issues. This draft convening report is not intended to create an accurate history of current conditions or past events, nor to offer a factual record. This draft report is not a legal document, technical report, or an exhaustive study of all the concerns of individuals and organizations with a stake in BIA-funded school facilities. The final report is limited by the information gathered in the interviews, the comments and feedback CBI received based on the draft report, and CBI's interpretation of that information. Any errors or omissions are the sole responsibility of CBI.

III. FINDINGS ON THE SUBSTANTIVE ISSUES:

The following sections summarize the interview findings. The sections include

A) Findings on the conditions of schools
B) Findings on the methods used to catalogue school facilities
C) Findings on the priority and funding for repair and renovation
D) Findings on priority and funding for new construction and replacement
E) Findings on contracting and project management
F) Findings on the negotiated rulemaking process

A. FINDINGS ON THE CONDITIONS OF SCHOOLS

At the outset of the interviews, interviewees were invited to speak about the conditions of their schools, to provide a context for the substantive discussions about facility construction. We learned that schools vary in age from fairly new to quite old, and in condition from excellent to dilapidation. Overall, interviewees perceived that many facilities face an array of physical problems, including environmental, health and safety, HVAC, plumbing, structural, windows and doors, electrical, and roofing. See Appendix E for a detailed summary of the specific physical concerns that were mentioned.

Within the specific facility conditions raised by interviewees, a number of key themes arose, including:

- **Many schools are ill equipped for the information age.** Many schools have classrooms that are unable to meet the infrastructure requirements of the Information Age. With increasing use of electrical equipment—from computers to copiers to printers to air conditioners—aged electrical systems are overloaded and inadequate for the new demands placed on them. More generally, aging physical space was not designed for the extensive use of computers and electronics in today's classrooms.

- **Security needs and related funding are major sources of concern for many schools.** Interviewees raised many types of security concerns given the increasing attention to children's safety in schools. These concerns include lack of cameras and security guards, too many doors, buildings, or entrance/exits in the school complex, failed intercom systems, excessive glass walls/windows, and limited or no perimeter security fences. Some interviewees asserted that attempts to gain funding for security needs from BIE or OFMC had been unsuccessful, and several felt that their only opportunity for meeting their basic security needs lay in seeking discretionary grants from private organizations.

- **Aging or poor design may lead to a substandard educational environment.** Many interviewees cited concerns about the general design of their aging facilities. Some schools were built for open classrooms and the education trends of the 1960's, and are insufficient for today's educational demands and testing requirements. Some schools were built with modern

design of the 1960's with large, single plane glass windows, which, in the spring and fall in the Southwest, for instance, cause tremendous heat gain (and thus, create either a very uncomfortable indoor environment or excessive energy use) and tremendous heat loss in the winter. In addition, these kinds of designs raise security concerns as well.

- **Operations & Maintenance needs are not matched by O&M annual funding.** Many interviewees noted that they do not receive sufficient funding for yearly maintenance and repair to address problems with their facilities as they arise. Although the requested maintenance budget is often fully funded, the operations budget is frequently funded at half of the requested amount. Consequently, school officials find themselves using their maintenance money to cover their operational costs, especially given rising energy, building materials, and other costs. In addition, the O&M money is often not received in a timely fashion, due to federal budget cycles (delayed Congressional passage of budgets and interim continuing resolutions). Many schools said that the maintenance funds they do spend are spent reactively, rather than proactively, allowing small and inexpensive problems to become larger, more expensive ones. Schools often find themselves either unable to do routine maintenance and repair because their budget was overtaken by rising energy costs, or, find themselves dipping into their O&M budgets to pay for emergency repairs, then, retroactively and some time later, seeking and receiving OFMC repair monies for the work. Lastly, many school representatives and managers noted that many schools do not know how to appropriately calculate the square footage of their facilities, or dispute the accuracy of that number, which is the number on which O&M budgets are based.

  Though the issue of formulas and funding for O&M is not included in the topics highlighted by Congress for negotiation under NCLB, the relationship between this issue and the relevant issues of school repair, renovation and new school construction seemed to interviewees critically connected to larger repair and renovation efforts.

- **Overcrowding is a major concern and a source of accelerating physical decline.** Many school and tribal officials commented that their schools are currently operating at an occupancy level far beyond that for which the school was built. This overcrowding is a concern in and of itself, for safety, comfort, and academic reasons. In addition, the extra people and usage leads to added strain on the electrical, plumbing, and other building systems. Rooms are being used for multiple purposes beyond those for which they were designed (i.e., gyms as cafeterias and classrooms), sometimes causing damage to specialized equipment. It is important to note that some schools face the opposite problem: rapidly declining enrollment, unused physical space, and surplus property, which makes maintenance of unused facilities burdensome and subjects uncomfortable, unoccupied space to vandalism.

  Many interviewees with new schools emphasized their concerns about insufficient space since some of them found that their new spaces had become too small before they even moved in. The space shortage resulted from inaccurate predictions about future enrollment or from reductions in project scope due to budget shortfalls during planning. The use of modular units to provide short-term relief for overcrowding has frequently evolved into a long-term solution for schools. Almost all interviewees noted that the Facility Management

Information System (FMIS) does not adequately account for education programming and thus disconnects the physical space from the education program.

B. Findings on the Methods Used to Catalog School Facilities

No Child Left Behind requires the negotiated rulemaking committee to prepare and submit a report on "a catalog of the condition of school facilities at all Bureau-funded schools…." This report is to incorporate the findings from a national survey of facilities conditions that was to be developed by the General Accounting Office (GAO).

On July 31, 2003, GAO submitted a report to Congress, which focused primarily on a review of the Facility Management Information System (FMIS), the system being used to catalog the conditions and needs of BIA schools, then in its third year of operation. This report found that FMIS improved upon shortcomings in the former system, that BIA and its contractor were making progress in validating the accuracy and completeness of the systems' data, though they are still behind in entering those corrections into the system. The report also identified some recommendations to improve accuracy of the data, from analyzing errors from the field to providing better training, guidance and technical assistance, and establishing data standards and related performance criteria for BIA employees who are entering and reviewing the data.[3]

Given this focus on FMIS in the GAO report, and the current role of FMIS in cataloging the conditions of schools and in determining the funding and priority for school renovation and repair, the assessment team asked interviewees to speak about their experiences and perspectives on the system's advantages and problems.

The following findings focus on interviewees' perspectives on FMIS.

- **The FMIS is, in general, working as a catalog of conditions.** Most interviewees noted that the system was a significant improvement over former systems, and that recent changes in training and access have made it more available and useable. Many felt that a system like FMIS was needed to help catalog the conditions of facilities, and to guide decision-making on school renovation, repair, and replacement. Many noted that using a single system, accessible from the local school to OFMC in Reston, Virginia allows all to have access to information about school facilities, although one comment noted that many remote locations still lack connectivity to FMIS. Some interviewees noted, however, that access to the system could be unreliable and be off-line for weeks at a time.

- **FMIS backlog data contains significant inaccuracies.** Interviewees and feedback on the draft report noted that, despite great efforts and expense to validate each schools' backlog, there are still significant errors and omissions in the data catalogued by FMIS. These inaccuracies impact the validity of the process of prioritization.

- **FMIS data entry is laborious, and skill- and time-intensive.** Interviewees repeatedly expressed concerns about their capacity to keep up to date on data entry. Some described it as a full-time job, or even two; yet, few schools have the resources or staff to dedicate to the

[3] GAO-03-692 BIA School Facilities Management

task. Many said that they were behind in entering their backlogs. Many interviewees noted that with frequent personnel changes, it was difficult to keep skilled personnel who could learn, update, and manage the system well. Some mentioned that with limited staff and pressing physical maintenance needs, representatives of smaller schools simply could not give priority to data entry—even though they recognized that doing so further disadvantaged the school over time by not obtaining repair monies. Comments requested an availability of regular and extensive training on FMIS, to respond to personnel changes and knowledge gaps.

- **Cost estimates in the FMIS are often unreliable**. There were particular concerns about the accuracy of the cost estimations for the backlogs. Despite what is described in the GAO report as a software tool to help develop accurate cost estimates, many schools described the task of making accurate estimates of the costs of repairs to be challenging and overly time-consuming. It was also perceived by some as political: school representatives felt obligated to understate repair costs to increase their probability of actually receiving funding—only then to receive insufficient funding to complete the repairs. Others noted that they would overestimate costs of projects, recognizing that someone else above them would adjust the estimate downward. Interviewees also stressed that, due to the time lapses, even accurate assessments of costs were usually outdated by the time the money was allocated and contracted, due to inflation and rising construction costs. A comment also mentioned the additional costs required to deliver materials and lure contractors to remote locations.

  Many raised concerns that the hired architectural and engineering (A&E) firms that reviewed and revised cost estimates often underestimated costs and failed to take into account the unique circumstances of Indian schools (remote locations, federal contracting and procedures, increasing costs of building supplies, etc.). Some felt that the A&E verification process was ineffective and punitive, rather than helpful in improving data collection and minimizing the burden on schools. Some in the OFMC system generally noted that A&E firms do not aid the schools in addressing deficiencies nearly as well as they ought to and would prefer that full time OFMC or federal employees took on this role. Some interviewees raised concerns about having outside contractors filling this role, who had no accountability to the schools, tribes and public.

- **FMIS doesn't sufficiently allow for educational programming needs.** Currently, and by design, the FMIS system does not take into account the programmatic and academic needs of schools. Interviewees from schools and from OFMC agreed that this was a major shortcoming in need of correction. Examples included:
    - The need for a library
    - Classrooms or gym that are too small
    - Classrooms that are inappropriate for added grade levels or for separating middle school students from high school students
    - Portable partitions instead of walls that allow in noise
    - The need for wiring to support a computer center and Internet connections.

  Although the system sufficiently catalogues much of the physical conditions of the facilities it does not link the information to the actual educational needs and programs of the school,

nor does it consider future projections of changing needs. One comment noted that an area for program issues could be added to FMIS and given weight within the system.

- **The FMIS system does not provide a holistic view of the school facility as it actually is.** Many interviewees noted that the system adequately catalogues individual repair needs as well as larger renovation projects (comprised of several repairs), but it does not communicate an accurate holistic picture of the school facility to people outside the school. Interviewees expressed concern that the FMIS treats projects as discrete, even though many projects depend upon sequences of smaller steps and relationship with interrelated physical systems, such as HVAC, windows and doors, and electrical systems. Regarding project sequencing, some noted that the FMIS system doesn't adequately link related items—for example, a concrete pad for a new modular unit that also ultimately requires a handicapped ramp to receive an occupancy permit.

- **The FMIS system may not meet the full requirements of the NCLB "catalogue of school facilities."** Some interviewees commented that NCLB also required GAO to use additional data in their survey, including an evaluation and comparison of the school systems of the Department of Defense and the BIA, and the methodologies of the American Institute of Architects or other associations, and felt strongly that such evaluations and comparisons were needed. Interviewees from OFMC mentioned that such comparisons would be impossible, since DOD does not use a formula to prioritize construction funding.

- **Pressing needs can overwhelm the careful, rationalized planning of FMIS.** Some noted that the deteriorating conditions of facilities, coupled with unexpected events, overwhelm the FMIS system and general planning. Some noted that because many backlog projects don't get funded, or don't get entered in a timely fashion due to time constraints or lack of access, the problems grow worse. Also, when emergencies happen, the school's priorities change suddenly and dramatically. For instance, one interviewee noted: "I had a dust storm throw rocks into condenser coils on the roof, so, had to push that to the top of emergency spending, and that upended my priorities."

- **The connection between FMIS information and the prioritization and actual funding of projects is opaque.** While many interviewees noted the general sufficiency of the FMIS system, most also noted that they have little or no idea how the FMIS information is linked to actual prioritization and funding of repair and renovation projects. Some noted that as their backlog grows and projects are not funded, they become less motivated to keep up the data because it has no apparent connection to actual funding. One interviewee noted: "We keep entering the data, and the backlog grows, but we don't see much, if any, progress…It's depressing." One commenter noted that "we do not receive funding unless it is on an emergency basis." Many noted that the FMIS catalogue of projects, their categorization, and ultimate funding bear little or no relation to the actual priorities of eliminating pressing problems or resolving smaller problems before they grow larger. This disconnect between data and funding is covered more thoroughly below.

C. Findings on the Priority and Funding for Repair and Renovation

No Child Left Behind calls for the negotiated rulemaking committee to develop a renovation and repairs report that determines renovation needs (major and minor) and a formula for the equitable distribution of funds to address such needs, for Bureau-funded schools. The NCLB Act notes that the formula developed shall utilize necessary factors in determining an equitable distribution of funds, including such factors as the size of the school, school enrollment, the age of the school, the condition of the school, the environmental factors at the school, and school isolation.[4]

The current FMIS system generally breaks repairs and renovations into two broad categories. Minor improvement and repair projects (MI&R) are those exceeding $2,500, but generally under $250,000 in cost. Facility improvement and repair projects (FI&R) are those projects generally exceeding $250,000 in cost. MI&R projects are typically discrete backlog issues such as replacing a ceiling in a single room or installing emergency lights. FI&R projects typically include multiple discrete projects that in total add up to a more major project or renovation, such as replacing HVAC, lighting, and the roof of an existing gymnasium. The FMIS system also breaks projects down into various categories such as serious safety deficiencies (S1) or a facility, grounds, or infrastructure deficiency that renders a facility or system inoperable (M1). Numbers per designation indicate higher or lower priorities (with 1 being the highest priority within a category).

The following summarizes the findings from CBI's interviews regarding school repair and renovation.

- **The overall annual repair and renovation budget is insufficient.** Many noted that despite numerous challenges and inefficiencies to the current system of identifying and prioritizing needs, the underlying issue is that the federal government allocates too little money for too many needs each year. Thus, schools specifically and BIA more generally are forced to make difficult choices that leave many schools, and most importantly, the children they serve, in substandard and declining facilities. It was noted that a previous increase in funding for new schools and FI&R was reversed after the funds were not expended over three years. One individual noted BIA is faced with the hard task of taking $1 million of need, for instance, and translating that into $250,000 of projects, given monies allocated. Many noted that inattention to life cycle costing and deferred maintenance means, in the long run, that the government spends more as problems compound one another.

- **The prioritization of funding for repairs and renovation is often viewed as opaque, arbitrary, and disconnected from the pressing needs of the school.** Perhaps the most common and strong concern voiced by interviewees from schools and tribes was that they did not understand how the data and backlogs from FMIS lead to the funding of actual MI&R and FI&R projects. One interviewee said: "I have no sense of who is making the choices about which projects are funded when." Some understood that the different categories of backlogs were weighted differently, but most complained that there was no predictability about if or when they would receive funding to repair the backlogs that they entered. Schools commented that funding unexpectedly arrives for some projects, while others remain

[4] PUBLIC LAW 107–110—JAN. 8, 2002 115 STAT. 1425 Part E

unfunded, and that the priorities set by the schools did not guide decisions on which backlogs were funded. Many felt that the funding decisions seemed incomprehensible and often arbitrary. One interviewee said, as a reflection of many others' comments: "We may prioritize a floor repair one year. It goes through our ELO, to the region, then to OFMC. Each time, some one else may reprioritize [our request]. We don't often know the changes or why changes were made to our list of priorities. Eventually, some money comes back, for this or that project, but not in any coherent, sensible, or explainable way from our viewpoint on the ground."

In addition to not understanding the algorithms of the backlog funding formula, some of the school representatives and tribes voiced strong perceptions that many of the funding decisions were not based on pure formulas; rather, personal relationships with OFMC, political clout, and dogged persistence accounted for different outcomes. Some noted that simple proximity to the ELO or regional offices increased the chances of funding (in short, the school facility person can more easily show up in-person and advocate for their needs). A few interviewees mentioned that because the prioritization formulas have never been written into regulation, there is a lack of transparency and clarity that they hope to see rectified by a negotiated rulemaking process.

Interviewees from OFMC agreed that schools and tribes do not have a good understanding of how prioritization of the backlogs occurs, and mentioned the need to provide more education to schools on this topic. They also mentioned the high turn over of school staff as a challenge for spreading knowledge about the system. Some noted that if schools cannot complete the various administrative procedures due to understaffing or unskilled personnel, the correct repair projects do not get entered into the system. For instance, a safety office completes a safety report identifying key repair items related to health and safety, which receive priority for funding in the system. However, before those items are "valid" in the system and available for funding, the school must complete a safety abatement plan. If that plan is not completed, the safety items aren't considered by the FMIS system, and no funding ensues.

- **The prioritization process is viewed as too multi-layered and bureaucratic.** Many noted that the approval process is opaque, in part, because the multiple layers that priorities must go through in order to finally receive funding approval. As an example, individual schools are often asked for their priorities for funding (recognizing certain safety issues are automatically given priority in the system). The line office then reviews these priorities across the schools under their jurisdiction, and they are reviewed again at the regional level by the agencies under that jurisdiction, then again at the central OFMC office in Albuquerque across all regions. In addition, safety officers may have had a hand in identifying some priorities and A&E firms may have had a hand in adjusting the data in terms of projects or their cost estimates. Most view this process as complicated and slow and ultimately decreasing the likelihood the schools will get their priority needs met. Some noted that this approach leads to significant inefficiencies. One interviewee noted: "We got money for a handicapped ramp to an older art room we never use anymore. So, now we have a very expensive ramp into a storage room when we have so many other pressing priorities like new doors, windows, and HVAC."

- **Prioritization for school repair and renovation should be transparent, efficient, and integrated.** Interviewees from schools, tribes, and the government all spoke in favor of a process to collaboratively develop a set of criteria, formulas, and/or administration that would assist in prioritizing funding for school repair and renovation. Some interviewees thought that the current approach simply needs to be better explained, shared, and articulated. Some thought it would be better to push prioritization down to the line offices and their schools. Some kind of formula might allocate dollars to regions or line offices, and then schools might sort out among themselves how to allocate limited dollars each year. Some thought that the approach ought to include a clear, explainable, and reportable formula that all might agree to. Some note that the approach has to vary by region and tribe. Some larger tribes have education offices and management that might make decisions; others would still need extensive BIA involvement.

- **Funding for necessary repairs is too slow**. Many interviewees mentioned the problems caused by the time lag in receiving FI&R and MI&R funding for facility needs. When small repairs (a leaking roof) are not made quickly, larger and more costly repairs (a new wood floor) become necessary.

- **Problems arise in sequencing and coordinating across projects.** Interviewees commented that the funding for most renovation projects is allocated for discrete repairs, even though there might be multiple, interdependent repairs needed for the same space. Poor sequencing of projects can cause waste and confusion. Examples included a school receiving funding to fix the steps of a building for which they are awaiting funding to completely rebuild, or receiving modulars but awaiting funds to build a handicap accessible ramp to allow the modular to receive an occupancy permit. One interviewee stated: "We have to figure out a better way to do longer-range planning. We start and stop projects, don't sequence them right, and that all ends up costing more [of the] money we desperately need." A commenter suggested that coordination is poor due to the distance of project managers from the project.

- **Any system will have to deal with structural conflicts of interest.** Some interviewees noted that any system, now matter how well designed, would have to contend with inherent conflicts of interest between the "field" and "headquarters." Individual schools are always going to find their needs most pressing and regional and national offices always will have to make hard choices among numerous projects given funding levels and needs. Thus, some interviewees noted no system can be entirely seen as "fair," but a better way of doing business can certainly be seen as "more fair and efficient."

D. Findings on Priority and Funding for New Construction and Replacement

The No Child Left Behind Act directs the negotiated rulemaking committee to develop a school replacement and new construction report that determines replacement and new construction need—and a formula for the equitable distribution of funds to address such need—for Bureau-funded schools. The NCLB Act notes that the formula developed shall utilize necessary factors in determining an equitable distribution of funds, including such factors as the size of the school,

school enrollment, the age of the school, the condition of the school, the environmental factors at the school, and school isolation.

Since 1989 the BIA has published a priority list of replacement schools in the Federal Register and has used this list to request replacement school appropriations from Congress. As the schools become funded and the priority list decreases, the BIA has prepared and requested applications so additional schools may be prioritized and added to the replacement school priority list. The BIA requested information from school administrators and boards to use to evaluate each applying school facility. Two evaluation teams are generally used to review each application – a team to evaluate the physical condition of the school and a team to review the school's education programmatic needs – and submit cumulative scores to the Director, Office of Indian Education Programs and the Assistant Secretary of Indian Affairs for their review and concurrence. In 2001, the Bureau published a Federal Register Notice on July 11, (66 FR 31248) calling for applications based on revised instructions and ranking criteria. Applications were evaluated and ranked according to the revised criteria and from the list of ranked schools, the first nine schools were placed on the FY 2003 Education Facilities Replacement School Construction Priority List. In 2004, the Department of the Interior directed the Secretary of the Interior to submit a new Priority List to Congress, containing a sufficient number of schools to continue the replacement school program through fiscal year 2007. According to the description published in the Federal Register March 24, 2004

> this identification was conducted by the BIA's Office of Facilities Management and Construction (using the facilities management information system), the BIA's regional facilities program, and the Office of Indian Education Programs' facilities program. The BIA then selected, through a competitive bid process, an independent contractor experienced in facilities construction to conduct a site review of each of the identified schools' core academic and/or dormitory facility. The independent contractor then rated each school based on the following criteria, in order of priority: (1) Health and safety deficiencies, (2) environmental deficiencies, (3) accessibility for persons with disabilities, and (4) condition of existing utilities and site improvements. The Priority List includes 14 schools considered in most need of replacement of their core academic and/or dormitory facilities.[5]

The following summarizes the findings from CBI's interviews regarding new construction and replacement.

- **Schools are not well informed about the priority list for replacement and new construction.** Though a few school or tribal officials seemed to have a clear understanding of how the priority list was established and whether they are on it, this was the exception. Most interviewees did not know how the list was developed, how, when, and why it changed, whether they were on it and what their priority ranking was, when and why they have moved up or down, and when they might get their new schools. As one interviewee stated: "No one understands the priority list and why things happen as they do."

- **Prioritization for replacement of schools is seen as highly political.** Many interviewees stated that they believe the prioritization of funding for replacing schools has, at least

[5] Federal Register: March 24, 2004 (Volume 69, Number 57), page 13870

historically, been highly political. Interviewees had a range of stories of how their placement on the school replacement list changed from year to year and how various tribes had utilized lobbyists as well as Congressmen and Senators to influence BIA priorities. One interviewee captured the sentiments of many in saying: "The system is inherently unfair and political at this point. We got on the list, but further down. We got our Congressman to tour the facility and he assured us we would go higher. Then, we went up, but later, went lower down again. The real need isn't reflected in these choices." Some note that the decision-making process is improving and the formula from FMIS (that indicates when the backlog grows to more than 60% of the school replacement cost) is becoming more influential in funding decisions.

- **The last competitive application process was perceived as subjective.** Most interviewees, including many BIE and OFMC representatives, felt that the mechanism used to develop the current priority list was ineffective. They commented that it was not based on clear, consistent criteria, and gave an advantage to tribes with the resources to hire staff or consultants to write the proposal. Some interviewees also felt that the process was overly laborious. In short, the schools with perhaps the most need were least likely to be able to marshal the resources to "win" in the application process.

- **Prioritization for school replacement should be based on transparent and jointly acceptable criteria for prioritizing**. Interviewees from schools, tribes, and the government all spoke in favor of a process to collaboratively develop a set of criteria that would assist in prioritizing funding for school replacement and new construction. Many offered initial suggestions of criteria, including level of need, length of time waiting, geo-physical climate, poverty of population served, capacity of the tribe/school to get started, cost-share ability, school population (number of children) affected, and remoteness. Several interviewees commented that site visits by highly qualified personnel should be included in the decision-making process. Many of the interviewees were attentive to the question of fairness, and offered different opinions on whether cost-sharing, formulaic approaches, or direct congressional action are "fair" strategies for getting funding for new schools. While most interviewees want a clear, transparent, and predictable approach to school replacement, they also noted that the facility conditions on the ground are dynamic. NCLB calls for a 40-year list, but many interviewees from OFMC and schools found this infeasible and undesirable if the list were "fixed," since unexpected, sudden damages can dramatically alter the condition of schools. Many felt that a new prioritization approach should aim for both consistency and flexibility based on need.

- **Budgets for replacement and new construction do not account for inflation**. As in the case of renovation and repair, the budgeting for new construction projects are often insufficient due to inflation, increasing building materials costs (rising steel costs due to demand in China and wood costs, from time to time, due to events like major hurricanes), and unrealistic expectations about construction work in remote areas under federal contracting rules. This budgeting and cost estimating for replacement schools may be even more problematic than for repair and renovation, since these large projects often take years to be funded, designed, and constructed. Most schools/tribes with financial resources find themselves making up for shortfalls in order to build the schools they initially planned. Those

without their own resources have to scale back their facilities and go without critical needs. This leads to new schools that are outdated even as they open.

- **Critical needs are left out of new schools**. Many of the amenities that schools see as necessities are removed or not included in the funding for new school facilities. These include bus garages (which, according to some interviewees in very cold climates, need to be heated), maintenance facilities, staff housing, recreational facilities, and so forth. One comment saw a cause of the problem in the BIA Space Requirements, which limit some amenities (i.e., number and size of gyms, cafeteria, libraries, and classrooms), and in failures to appropriately validate backlogs and costs before approving a budget for the project, requiring amenities components to be dropped off in order to pay for essential items.

- **School replacement, repair, and renovation prioritization may cause short-term problems**. Some interviewees noted that once a replacement school is approved, the repair funding for the existing facility is reduced. Consequently, while schools wait for new construction, they face short-term facility problems in the interim that may impede their educational programs. One interviewee noted: "While we are waiting for our new school, we don't get sufficient repair money. For instance, the roof leaked, water damage occurred, we got mold, and then had to evacuate the school. We couldn't use 25 rooms the last month of school."

E. Findings on Contracting and Project Management

In addition providing input on the three substantive issues of 1) a catalogue of school conditions; 2) formula and priorities for renovation and repair; and 3) formula and priorities for replacement and new construction; interviewees spoke in detail about the process of contracting and managing projects once they were funded. Though these issues are not directly part of our scope, given their intimate relation to overall facilities, we have included these findings as well.

- **The relationships between schools/tribes and OFMC during projects are inefficient and unclear**. Interviewees from tribes and schools named many challenges in working with OFMC to accomplish their renovation or new construction projects. Many pointed to a lack of accountability, transparency, and efficiency, including long wait times for responses, ever-changing contact people, and unclear and inconsistent requirements. Some commented that because procedures for project management have never been written into regulations, expectations for schools and tribes were unknown and at the whim of the individual project officers at OFMC. There was a perception that personal connections and relationships led to differential outcomes. Several interviewees felt that OFMC as an office was too removed from the schools and from educational expertise, and that school construction management should be part of the functions of BIE.

- **OFMC/Bureau oversight on projects can be problematic.** Some construction projects are managed and led by OFMC. Some advantages of this were mentioned, including OFMC's expertise on contracting, more government oversight of contractors, and more OFMC responsibility for cost overruns due to inflation or errors. However, a number of problems with this model were also cited, including lack of responsiveness of the contractors to the

wishes of the schools/tribes, lack of oversight of contracting team by the school, and lack of contractor knowledge of regional (i.e., climate-related) and functional (i.e., educationally-related) needs. As examples, interviewees mentioned the use of exposed pipes on ceilings that students could grab and pull on, open ditches for drainage that students could fall into, and flat roofs in tornado-prone areas. Schools representatives were also concerned that they were unable to enforce acceptable behavioral norms on contractors—including banning smoking, weapons, sexual harassment—or require background checks and IDs, given their proximity to students. They commented that contractors did not see themselves as working for or accountable to the schools or tribes, and that contracting officers from OFMC often did not communicate with or represent the school.

- **Tribal/school oversight on projects can also be problematic**. Some schools and tribes managed renovation and replacement projects through BIA grants. Schools or tribes that had knowledge and experience overseeing such projects approved of this method. However we also heard many concerns about this structure. Several interviewees spoke of the lack of expertise that some schools or tribes may have in contracting, procurement, and project management. There were also concerns that some tribes accepted contractor bids from relatives, or for political reasons. Most vexing to many interviewees, though, was the difficulty in coordinating steps with OFMC, who provided little oversight yet had to approve plans at multiple stages. Slow responses led to increased costs, with no increased funding, requiring projects to be scaled down.

- **Code requirements of OFMC/BIE are hard to meet**. Several interviewees spoke of the different construction codes—including regulations, policies, and other mechanisms—required by OFMC or BIE, that go beyond those required by state or federal law, and how these created problems for contractors who were used to following state and federal codes. Others felt that some BIE codes were less stringent than state codes, and were dissatisfied when not provided the funding to construct to higher levels. Several interviewees also had concerns about meeting ADA codes for renovation projects, as many of the facilities needing a small repair would require a complete rebuild in order to meet the newest requirements. Many interviewees spoke of new or renovated buildings that sat empty for years after completion because they could not receive their occupancy certificates due to code violations, and some schools were not able to obtain O&M funding due to small discrepancies in code.

- **Efficiency could be greatly improved.** Some interviewees and comments noted that the current methods for implementing major renovation and new construction were simply too fraught with opportunities for delay and disagreement. They mentioned too many layers of decision-making for design and construction, requiring the slow work of too many change orders, leading to escalating costs and therefore project cuts.

F. FINDINGS ON THE NEGOTIATED RULEMAKING PROCESS

Many interviewees had not participated in the previous negotiated rulemakings for NCLB and therefore had limited comments on the process. Those that had knowledge of the previous efforts, or had participated directly, expressed strong views on the subject. Our findings thus

reflect a general sense of the requirements under NCLB and specific suggestions from a smaller number of interviewees about how to ensure an effective process.

- **The regulatory negotiation on these issues is required by law and must be done**. Most interviewees were unequivocal in their view of whether a regulatory negotiation would and should take place. Almost all stated that the process is required by law, makes the BIA more accountable to tribes during and after the process, and must be funded and undertaken. Even among those who have had previous experience and recognize the limitations of regulatory negotiation called for the process to be undertaken.

- **Representation is and will remain a challenge to regulatory negotiation.** Some interviewees raised the concern about how any process involving a committee of 25 members can adequately and effectively represent the interest of 187 different schools and numerous tribes who either manage or use these schools. Some noted that in the last regulatory negotiation it was difficult for committee members to adequately reflect their own Tribe's views, not to mention trying to coordinate across tribes to reflect broader interests. Some also noted concern about who represents whom at the table. Some noted that if tribes or BIE selects school officials who are BIE employees to represent them, they would by nature of their employment be biased toward Bureau versus school interests. Others noted that they are concerned that the members at the table not be attorneys for any particular interests, but rather representatives with extensive experience in schools, school facilities, and construction project management and funding. Some interviewees noted that the Committee must, to the extent possible, reflect the range of schools served by the Bureau, be that by size, age, and wealth of tribes, geography and so forth. Some noted tribal education organizations such as the National Indian Education Association, the Association of Community Tribal Schools, and the National Indian School Board Association were important to include on the committee. Some noted that DOI should not be appointing tribal representatives, but should leave those appointments strictly up to the tribes. Some reminded us of the clear formula for balance of members laid out in the NCLB Act, while others suggested a need to represent small and large tribes equally, suggesting representatives of as many tribes or geographic clustering of tribes as possible.

- **The regulatory negotiation must be authentic and not pre-decisional.** Some interviewees expressed concern that a regulatory negotiation would simply provide "window dressing" on decisions that the Bureau has already made about how to address these issues. Some interviewees noted that such a process should not be about simply learning, education, or understanding, but a formal, structured negotiation in good faith to revise and improve the current system regarding these issues. Consequently, these interviewees stressed the importance of the process of being able to generate options and new ideas, consider a range of choices, and to collectively undertake the work rather than to be dictated to by the Bureau. Broader distrust and doubts about the effectiveness of formal government-to-government consultation and the long history of BIA-Tribal interactions certainly influence how individuals view the potential of regulatory negotiation on these specific matters. Several comments suggested that any decisions on which the group could not reach consensus not automatically default to the Federal viewpoint, but rather be considered objectively, or even set aside for further discussion at a future point.

- **The regulatory negotiation must be tied to broader outreach**. Some interviewees noted that a regulatory negotiation alone, with a limited number of representatives, is necessary but not sufficient for reaching an effective consensus approach to these issues. These interviewees encouraged the Bureau to find ways to ensure that the regulatory negotiation is tied to broader tribal participation, engagement, and outreach. Suggestions included holding meetings in diverse geographic locations, hosting websites, newsletters, a national workshop, update conference calls, and linking formal, typical tribal consultation or more broad public outreach on these issues with the regulatory negotiation. Some suggested the meetings should at least be held in Arizona, New Mexico, North Dakota, and South Dakota.

- **The Department and/or Bureau must commit to providing full financial support**. Interviews and comments noted that a strong commitment is needed to fund all of the costs associated with an effective process. Costs included by interviewees and commenters include dedicated logistical support; facilities and logistics for all Committee meetings; travel and per diem for all Committee members, alternates and possibly support personnel; materials; and consultants, advisors and experts on the key issues. One comment suggested that the budget be incorporated into the National Budget.

IV. REVIEW AND ANALYSIS OF THE REQUIREMENTS FOR A REGULATORY NEGOTIATION

The federal Negotiated Rulemaking Act of 1996 (for more information, see http://www.archives.gov/federal_register/public_laws/ negotiated_rulemaking_act/561.html) outlines the following criteria for determination of need for a negotiated rulemaking committee.

1) There is a need for the rule;
2) There are a limited number of identifiable interests that will be significantly affected by the rule;
3) There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who: (a) can adequately represent the identified interests; and (b) are willing to negotiate in good faith to reach a consensus on the final rule;
4) There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
5) The negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
6) The agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
7) The federal agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

Below we summarize CBI's findings, based on the above-mentioned criteria, in relation to the particular issues of BIE-funded schools and their repair, renovation, and replacement.

A. IS THERE A NEED FOR A RULE?

The NCLB Act clearly calls for a rule on these issues. The Act also calls for a "report" on these issues, which is not a rule or regulation. However, a rule can be developed for making formulas and processes for priority and funding for school repair, renovation, replacement, and new construction. It is not likely to develop a rule that is a "catalogue" of school facilities. However, the Committee would have to take up the question of the adequacy of the FMIS as a proxy for that catalogue, the GAO report, and other findings on whether an adequate inventory or catalogue exists through some current document, database, or other means. It is our understanding the issues pertaining to national criteria for home-living situations has already been addressed in previous NCLB Act negotiated rulemakings and final rules will be forthcoming from the Bureau.

B. IS THERE A LIMITED NUMBER OF IDENTIFIABLE INTERESTS?

This criterion involves two key issues. First, the subject matter must be sufficiently focused, and second, there should be identifiable interests who can organize and discuss that subject. We conclude that the subject matter is focused, specific, and limited, and thus provides a sufficiently constrained scope. We are concerned that the Act requires the committee to prepare and submit a

"catalogue" of the conditions of schools; this would be a daunting and detailed task for a large committee. In scoping the regulatory negotiation, we believe that the BIA, in concert with the Committee, would have to further scope and refine this issue.

Second, pertaining to identifiable interests (not individuals or specific groups), we conclude that general interests are identifiable: these are the school officials, parents, students, tribes, and government officials who are affected by or manage school facilities, as well as the BIA, BIE and OFMC. Given the number of schools, the number of tribes being served, the diversity and complexity of school administration, effectively representing these identifiable but diverse interests on a Committee limited in number will require creativity, some coalitions, and negotiation. The representation issue is discussed below.

C. Can a balanced, representative committee be formed?

We believe that this criterion is most difficult to meet given the unique context of Bureau funded schools and their stakeholders. The Bureau's 187 schools serve over two hundred tribes. Each tribe is unique and sovereign, with its own interests, governance, and relationship to its schools. Some tribes simply send some of their children to schools operated fully by other tribes or by BIE on other tribal land. Some large tribes, such as the Navajo, have their own overarching department of education. A committee manageable in size (FACA calls out for no more than 25, though that limitation can be relaxed) and also representative of those many tribes is not practically possible. One tribe cannot be asked to represent completely the interests of other Tribes, and their schools, parents, and tribal council. Each school is governed slightly differently. In some schools, BIE employees are the final decision makers. In other cases, Tribes maintain strong control, hire and fire, and make final decisions. Because the tribes are located across the U.S., geographic breadth is also difficult to obtain in a representative and balanced way. We believe it is not possible to convene a practically sized, workable committee that fully and adequately allows representation across all Tribes. The NCLB spells out a formula for addressing this challenge, based on each tribe's proportional share of students in the BIE system, and thus, provides some guidance. Further recommendations in Section VI address this challenge.

D. Is there likelihood of reaching consensus?

Given that the subject matter is focused, specific, and limited, and, all interviewees expressed a desire to improve the current methods for prioritizing and funding facility repair, renovation, and replacement, we believe there is a likelihood of reaching some useful consensus. Consensus will not be easy to achieve. Limited funds force hard choices and thus any formulas and processes laid out, however fairly they intend to be, will affect schools and Tribes differently. Competition for limited funds can set small and large schools and different tribes against one another. Managing a system as diverse and diffuse as the Bureau-funded schools (or any complex school system) must balance individual needs against system-wide policies, goals, and constraints. The long and historic relationship between the Bureau (federal government) and the tribes makes any negotiation between them difficult and complicated. Nonetheless, based on our interviews we conclude that there is strong interest, a Congressional mandate, and a strong desire among all parties to improve the current approach to these issues. These factors may help a negotiated rulemaking committee achieve some meaningful consensus.

E. WILL THE NEGOTIATION PROCESS UNREASONABLY DELAY RULEMAKING?

It is difficult to ascertain if negotiated rulemaking will "unreasonably" delay standard rulemaking. Considering, convening, and managing a regulatory negotiation process takes significant time: sometimes from 2 to 3 years from start to finish. Upon completion of that process, the federal agency still has to draft final rules and move them through the formal administrative promulgation process (listing in the federal register, public comment, and in this case, some form of government-to-tribal government consultation, response to comment, and issuance of the final rule). The aspiration of negotiated rulemaking is that by involving stakeholders in the making of the rule, the ultimate rule will be better informed, more appropriate to the needs of diverse stakeholders, better understood by those stakeholders, more likely to be implemented effectively, and less likely to be legally challenged. However, there is no guarantee that all of these aspirations will be met. It is possible that simply promulgating a rule through the standard process may be more efficient in terms of time, money, and resources spent on the process. However, given that Congress mandated negotiated rulemaking on this issue, one can assume Congress has deemed that any potential delays are outweighed by the benefits of undertaking the process.

F. ARE THERE ADEQUATE RESOURCES TO SUPPORT THE PROCESS?

Given the challenges of representation noted above, our recommendations include additional outreach necessary to make the process robust and effective. This additional outreach along with the extensive amount of time needed for Bureau employees and tribal representatives, to prepare, participate, caucus, consider, and strategize, is substantial. Thus, this regulatory process will require an extensive investment of time, money, and personnel by all. Given constrained budgets and the tremendous needs of facilities, we want all parties to carefully balance the costs and benefits of undertaking a negotiated rulemaking with the ways in which the same resources might be spent on other activities such as direct repair and renovation. At the same time, Congress has mandated this regulatory negotiation and thus requires the Bureau to find adequate resources. Furthermore, most interviewees, despite their specific facility needs, expressed a desire for the process to proceed because it could make long-term predictability a reality.

G. DOES THE AGENCY COMMIT TO USE CONSENSUS IF REACHED?

Though we cannot speak for the Bureau, it is our understanding, and it is a requirement of the Negotiated Rulemaking Act, that federal agencies that undertake such processes will abide by the consensus of the group as long as: 1) the agency is a party to the negotiations and any resulting agreements; 2) consensus is clearly defined in the ground rules or protocols for the process; and, 3) the consensus reached is legal and implementable.

H. SUMMARY

The following table provides a summary of our findings for each of the criteria. While we believe this to be a useful analysis, we note that the NCLB Act explicitly calls out for a negotiated rulemaking on these issues and, to some degree, thus preempts any analysis.

CHART 1: Criteria for Initiating Negotiated Rulemaking

CRITERIA AND DISCUSSION	YES	NO	MAY-BE
1. Need for a Rule	X		
2. Limited number of Identifiable Interests?	X		
3. Balanced, Representative Committee?			X
4. Likelihood of Reaching Consensus?	X		
5. Not unreasonably delay rulemaking?			X
6. Adequate resources to support process?			X
7. Commits to use Consensus if reached?	X		

VI. RECOMMENDATIONS

The section below details our draft recommendations, based on our interviews, regarding regulatory negotiation pertaining to the repair, renovation, and replacement of BIE-funded schools.

A. INITIATE THE REGULATORY NEGOTIATION (REG NEG)

In our best professional judgment, we conclude that a consensus-based negotiation to develop proposed regulations should be initiated. This recommendation is based on the following rationale (and further detailed according to the Negotiated Rulemaking Act in the section above).

- The regulatory negotiation has been mandated by law and is clearly detailed in the No Child Left Behind Act.
- Almost all interviewees expressed a strong desire to have a say in and influence the prioritization and allocation of school construction funding.
- A regulatory negotiation will provide a formal, structured process for tribes and their representatives to engage with the Bureau on these issues.
- The issues for discussion are focused, specific, and narrow enough to be managed within a reasonable number of meetings over a reasonable period of time.
- Representatives of diverse schools and tribes can likely be convened (though full representation of all tribes remains a concern).

For the Bureau to establish a negotiated rulemaking committee, it must first issue in the Federal Register a Notice of Intent to Proceed with Regulatory Negotiation. Often, though not always, that Notice includes a rationale for the negotiated rulemaking, some general sense of its goals and objectives, and calls for nominations to a Committee. The public (tribes, schools, others) may comment on this Notice during a public comment period, and as nominations for Committee membership are sought in the Notice, tribes may nominate representatives to the potential Committee.

B. PROCEED WITH THE REGULATORY NEGOTIATION. OBTAIN SUFFICIENT FUNDING AND SEEK PUBLIC SUPPORT ON COMMITTEE MEMBERSHIP.

Comments noted that NCLB requires that the regulatory negotiation occur, and that therefore, BIE should be required find the necessary funds to make it happen. The BIA should proceed with the regulatory negotiation, and work to obtain sufficient funds for a robust, inclusive, and thorough process. They also need to ensure that they convene a reasonably balanced Committee in the view of tribes and schools. In order for the process to be as robust, inclusive and thorough as possible, the process will not be inexpensive in terms of time, staff resources nor costs. Funding travel for representatives from across the country, possibly providing them resources to caucus with tribal representatives not at the table, organizing associated public outreach in tribal communities that will be needed to supplement a limited Committee membership, and covering the costs of mediation will be substantial. Without sufficient funding, the process will likely be too cursory, limited, and unsatisfying to most participants.

Second, the Bureau needs to put additional effort into ensuring that representatives of tribes, schools, and the public are able to accept the composition of the Committee. As noted in our discussion of the Negotiated Rulemaking Act criteria, we believe it is not fully possible to convene a practically sized, workable committee that fully allows complete representation *across all Tribes*. However, the NCLB spells out a formula for addressing this challenge, and thus, provides some guidance. Furthermore, we set forth additional recommendations below on how the Committee might be convened and structured to increase transparency, inclusion, and accountability. Comments on our draft recommendations on the distribution of seats for the Committee suggest that it should be possible to construct a " "balanced, representative" committee, even if not all stakeholders are in full agreement on the detailed composition.

Once the Bureau determines the composition of the Committee from nominations obtained in response to the request in the Notice of Intent, the Bureau must work with the Department of the Interior, and the White House liaison, to obtain formal approval of the membership. The Secretary of the Interior then approves the final committee membership, designates a federal official to serve as the formal coordinator/point of contact for the process, and approves a charter that, among other things, defines: the Committee's objectives and the scope of its authority; sets forth the estimated number and frequency of Committee meetings; and identifies the period of time necessary for the Committee to carry out its work. The White House approval process can take time (sometimes six to twelve months) to complete and is subject to the final and sole discretion of the White House (for membership), Secretary of the Interior (for membership and charter) and the Office of Management and Budget (for compliance with FACA). If the BIA ultimately decides to proceed, the final charter, Committee membership, and the date and location of the first meeting of the Committee are published in the Federal Register at least 15 days prior to the first meeting of the Committee.

Please note that it is our understanding that the typical reg-neg process does not require public comment on the final Committee composition (i.e., membership). However, given the complexity of convening a Committee for such diverse interests, we strongly encourage the Bureau to find a means through the Federal Register or other processes to allow tribes and schools to comment on the draft composition of the Committee.

C. ESTABLISH CLEAR AND ACHIEVABLE GOALS FOR THE PROCESS.

The BIA, in conjunction with the BIE and tribes and schools should establish clear and achievable goals for the process. We encourage the BIA to offer a draft set of goals for the process in its Notice of Intent to Proceed with Negotiated Rulemaking (should the Bureau decide to implement these recommendations) and to take comment on such goals. We conclude that a regulatory negotiation on these issues might seek to reach several goals. First and foremost, the goal of all participants ought to be to improve the education of Native American children through improving school facilities in which they are educated by improving the system by which these facilities are repaired, renovated, and replaced. Second, the negotiation should strive to meet the goals laid out in the NCLB Act. These include reaching agreement on:

- Deciding how to address the call for a catalogue of the conditions of schools
- Determining formulas for priority and funding for school replacement construction and new construction

- Determining formulas for priority and funding for school renovation and repair;

Third, even if full agreement is not reached, we conclude that a negotiated rulemaking might also achieve the following additional goals:

- Increase the understanding of all participants/actors in the system, from local school officials to BIA and BIE staff, in how the overall process for facilities' funding practically and actually works;
- Increase the number of ideas and options for how to prioritize school facilities' funding generally by seeking the input of diverse parties who have a wealth of experience in seeking to manage and improve Indian school facilities;
- Increase dialogue among the disparate and diverse participants/actors within the overall BIE school system about the range of issues, challenges, and solutions facing school facilities' management, from the linkages of operations and maintenance budgets to OFMC-funded projects to the management and oversight of projects, contracts, and contractors; and
- Integrate negotiated rulemaking with broader tribal government and school engagement to create a process that better meets the unique needs of Native Americans.

D. ESTABLISH A FAIR, STRUCTURED, AND TRANSPARENT CONVENING PROCESS FOR SELECTING TRIBAL REPRESENTATIVES.

Given the NCLB Act, the information obtained in our interviews, and the challenges of convening a truly representative Committee among the diverse BIE schools, we recommend a specific, structured process for obtaining nominations for membership. We recommend the following process for convening the Negotiated Rulemaking Committee.

- The Bureau should seek nominations through a Notice of Intent to initiate negotiated rulemaking.
- The Bureau should lay out the general criteria for representatives:
  - With the exception of federal BIA, BIE, and DOI representatives, all representatives must be nominated by Tribes and done so via the official mechanisms of that Tribe for such decisions;
  - To the greatest extent possible, nominees should:

    1) have knowledge of school facilities and their repair, renovation, and construction (this may include knowledge and skills of construction project management, school facilities operation and management, construction cost estimation, education program space needs, budgeting and appropriation, engineering);
    2) be past or present superintendents, principals, facility managers, teachers, or school board members or direct experience with school construction projects;
    3) have the authority to represent tribal views, communicate with, and have a clear means to reach agreement on behalf of the tribe(s) they are representing;
    4) be able to coordinate, to the extent possible, with other tribes and schools who may not be represented on the Committee;

5) be able to negotiated effectively on behalf of their constituents;
6) be able to commit the time and effort required to attend and prepare for meetings and,
7) be able to collaborate among diverse parties in a consensus-seeking process.

- The Bureau should allow the Committee to exceed twenty-five members. The Federal Advisory Committee Act (FACA) requires that committees convened be no more than twenty-five members with some exceptions. However, we conclude that it is not possible to form a representative and balanced Committee without exceeding that number by some modest margin (6 to 8 seats). FACA allows an agency to waive this limitation with a rationale and we strongly encourage BIA to do so.
- Once the draft membership is identified, the Bureau should ensure, as noted above, that tribes, schools, and the interested public have a chance to comment on the draft Committee composition to ensure that it is as reflective of diverse tribal interests as possible.

E. TO THE MAXIMUM EXTENT POSSIBLE, ASSIGN TRIBAL SEATS ACCORDING TO THE PROPORTIONAL SHARE OF STUDENTS FROM TRIBES SERVED BY FEDERAL FUNDS.

The NCLB Act states: "ensure, to the maximum extent possible, that the tribal representative membership on the committee reflects the proportionate share of students from tribes served by the Bureau-funded school system." We recommend that the Bureau be specific about how they would assign seats according to this Congressional mandate, and seek nominations for these seats through the Notice of Intent to initiate a negotiated rulemaking.

Our proposal in the chart below, presented for the purpose of discussion and comment, is that the Bureau might assign twenty one seats to Tribes according to their proportionate share of students. Because the proportionate share of students, when allocated across 20 to 25 seats, quickly falls below "1" seat for numerous tribes (relatively few tribes represent the largest number of students), some tribes similar in affiliation or geography are grouped together for one seat. In general, the Bureau would leave nomination decisions to the discretion of the Tribes. Nominating tribes would seek to achieve internal consensus so that they nominate only the number of representatives for the seats allocated, thus assuring that the Bureau was not given any responsibility for selecting among nominees for a given seat.

The following chart seeks to assign Committee seats according to the Congressional mandate using student enrollment figures from 2006. The chart includes the tribes with the greatest number of students across the whole system, the percentage or proportion of students that these raw numbers represent, and how seats might be assigned for individual or "grouped" tribes (recognizing that tribes are autonomous, independent, sovereign entities and so tribes would have to either agree to nominate and thus share a representative across tribal jurisdictions or each at least have the opportunity to nominate a member for that particular seat). It also suggests seats for other tribes and tribal entities to maximize representation

TABLE 2: ASSIGNING COMMITTEE MEMBERSHIP BY PROPORTIONATE SHARE OF STUDENTS AND NEED FOR DIVERSITY

TRIBE	NUMBERS OF STUDENTS	% OF TOTAL STUDENTS	% TIMES 20 SEATS TOTAL	SUGGES-TED SEATS
Navajo	17,545	35.26%	8.81	9
Oglala Sioux	3,701	7.44%	1.86	2
Turtle Mountain Chippewa	2,071	4.16%	1.04	1
Mississippi Choctaw	2,028	4.08%	1.02	1
Hopi	1,530	3.07%	0.77	1
Cheyenne River Sioux	1,449	2.91%	0.73	1
Eastern Cherokee	1,235	2.48%	0.62	1
Rosebud Sioux	1,126	2.26%	0.57	1
Standing Rock Sioux	1,123	2.26%	0.56	
Sisseton Wah. Sioux	784	1.58%	0.39	
Spirit Lake Sioux	489	0.98%	0.25	
Crow Creek Sioux	408	0.82%	0.20	1
Yankton Sioux Tribe of South Dakota	402	0.81%	0.20	
3 Affiliated Tribes	454	0.91%	0.23	
Gila River	874	1.76%	0.44	1
Tohono Odham	759	1.53%	0.38	
White Mountain Apache	1,069	2.15%	0.54	1
Mecalero Apache	490	0.98%	0.25	
Pueblo Laguna	503	1.01%	0.25	1
Pueblo San Felipe	462	0.93%	0.23	
Other Tribes, Specialized School Types, and Tribal Organizations (see criteria below)	11,259	22.63%		5-7
Federal Government (see criteria below				4-5
TOTAL STUDENTS	49,761			30 - 33
TOTAL TRIBES	242			

As noted in our earlier discussion, convening a fairly balanced and inclusive membership given the diversity of tribes and schools is difficult. As a concrete, numeric example, if some 21 seats are allocated according to the proportionate share approach, 75% of students and their schools would be represented. However, 25% of students served by other tribal schools would not be represented, and some 220 tribes would have no direct representation. While recognizing that no representation approach will resolve this challenge perfectly and given that the size of a

Committee is a limiting factor for practical purposes, we nonetheless recommend creating a committee of 30 to 33 people, with 5 to 7 additional seats for tribes, schools, and tribal organizations, including the kinds of schools that are not covered under the proportionate representation. The goal of this recommendation is to abide by the Congressional mandate, allow for participation by schools and tribes not otherwise represented by the proportionate share of students, and to abide by the FACA and Negotiated Rulemaking Act criteria for creating a balanced and representative group.

For tribes and schools not represented under the proportionate assignment of seats, we suggest that the BIA, in addition to taking nominations under the proportionate approach, also seek nominations from interested tribes for those who are not represented by the suggested 20 to 21 allocated seats by tribes and student enrollment. To the extent possible within these guidelines, we recommend that at least one tribe from each BIA region with a school be represented on the Committee. The Department might set aside 5 to 7 seats and ask for broad nominations from the following parties of individuals that also fit the criteria named in the recommendation above.

- Tribes served by Bureau-funded schools not represented by the Tribes allocated seats according to share of student enrollment.
- Tribes or schools who will help to increase the geographic diversity of representation on the Committee.
- Representatives who will help to increase the diversity of types of schools represented (i.e, Off-reservation boarding schools, dorms, and schools serving multiple tribes)
- Representatives who might be nominated by multiple Tribes and have ability to coordinate and represent a coalition or group of like-minded tribes and schools.
- Representatives of regional or national Indian Education organizations..

Once all nominations were received, the BIA would review the applications for these additional 5 to 7 seats and would seek to select these additional nominees so as to increase representation and balance on the Committee overall.

F. ASSIGN APPROXIMATELY FIVE (5) SEATS TO PROVIDE FOR REPRESENTATION BY THE FEDERAL GOVERNMENT.

The federal government needs to select its own representatives. While that determination should and will be up to the Department and Bureaus, we recommended that the federal government consider representatives who: 1) represent a mix of the interests of the Office of Facilities Management and Construction, the Bureau of Indian Education, and the BIE-operated schools; 2) represent the interests of Indian education more broadly, especially to link facility and space needs with educational program needs; 3) are knowledgeable about federal rules and regulations; and, 4) are knowledgeable about how the current system of prioritizing and funding school repair, renovation, and construction functions. We estimate that the federal government might need 4 to 5 representatives in total.

G. INTEGRATE THE NEGOTIATED RULEMAKING PROCESS WITH ROBUST TRIBAL AND SCHOOL ENGAGEMENT.

In order to be effective in Indian Country, given the diversity and independence of many tribes and their schools, we recommend a process that integrates typical negotiated rulemaking with robust and inclusive tribal, school, and other stakeholder engagement. Please note that such a process would be dependent on the funding and budget of the Department and Bureaus. This process would entail significant logistical costs ranging from travel to facilities rental to hosting a national conference. We recommend the following general process steps and summarize the process in the attached chart.

1. *Convene the Committee*: The BIA would convene the Committee as described previously.

2. *Hold the First Committee Meeting*: We suggest the BIA convene a first meeting of the Committee to: 1) review and finalize ground rules; 2) explain the charter and negotiated rulemaking process; 3) review the NCLB charge; 4) develop the initial list of sub-issues that will need to be addressed in the negotiation, and, 5) review and revise the process for a national workshop on these issues.

3. *Sponsor a National Workshop on School Facilities*: We suggest that the BIA, BIE, and the Negotiated Rulemaking Committee jointly sponsor a national workshop on the repair, renovation, and replacement of school facilities. The workshop would allow participation by every school in the system and allow them to provide input on the issues at hand early in the process. The BIA could fund travel and expenses for one representative from each school in the system, as well as the Negotiated Rulemaking Committee members, to participate in the conference in a geographically central location near a hub airport to provide for ease of travel. At this workshop, both plenary and breakout sessions would discuss and offer input on the range of issues raised in this assessment. Ideas for how to improve any number of issues from repair, renovation and new construction funding formulas to project management might be covered, in addition to the specific topics of the regulatory negotiation. This workshop and its proceedings would provide initial detailed input to the Negotiated Rulemaking Committee. In summary, the workshop would seek to: 1) provide the Committee input from every school; 2) allow participants to talk "across the system" about a range of facilities issues and concerns; 3) allow for broad and early participation in the process.

4. *Provide Detailed Briefings on Key Topics*: Comments noted that work was needed to bring all representatives on the Committee up to a shared level of knowledge on essential topics, particularly regarding the current system. Initial meetings of the Committee would need to include presentations on FMIS, the selection/ranking processes used for school renovation, repair, and replacement, and formulas for O&M allocation. Other informational needs may be determined by the group.

5. *Conduct Negotiations*: Once the initial feedback is obtained from the broader universe of schools, the Committee would proceed with its deliberations. The goal would be to uncover the members' specific interests and concerns, identify both problems and possible solutions, brainstorm ideas and options, prioritize those options, and seek to identify one or a few final, preferred approaches to the formula for prioritizing and funding school repair, renovation, and replacement. This work might take place over several Committee meetings, two or three days in length (since extensive travel will be required, it may make sense to minimize travel

costs by maximizing the time together to do the work). We suggest that the Committee meetings take place in geographically diverse areas each time so that interested Tribes, schools, and other stakeholders can attend and observe, if they wish. Strategies would need to be developed to help educate observers at different meetings about the progress and deliberations of previous meetings. Subcommittees (responsible to the full committee and without final decision-making authority) may also be constituted to make in-depth progress on specific issues.

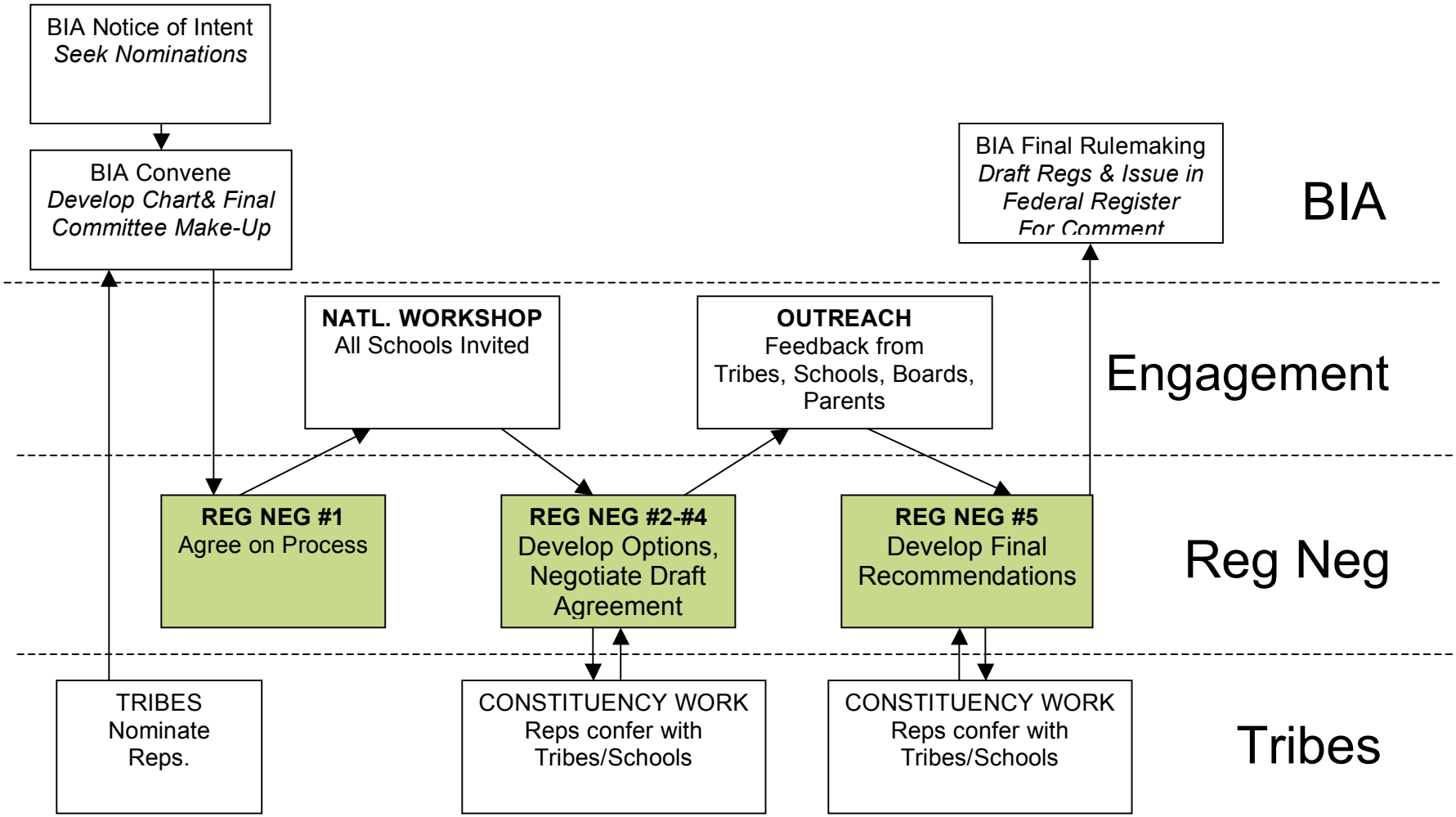
6. *Sponsor Regional Outreach Workshops on Draft Recommendations*: Once the Committee reaches a consensus on their draft recommendations, or, the final, prioritized options for consideration, the BIA, BIE, and Committee would hold several (4 to 5) regional workshops to obtain feedback from diverse constituents on the draft ideas and/or recommendations. These workshops would again provide opportunities for a larger range of tribes, schools, and stakeholders to participate in and influence the process. Each workshop might be held at a central regional location, be held at times convenient for participants, and involve the Committee presenting its draft findings and recommendations in order to receive comments and feedback. In order to record comments, a meeting summary of the discussions would be prepared and made available to the Committee for review.

7. *Conclude Negotiations*. Upon receipt of the comments and input from the regional workshops, the Negotiated Rulemaking Committee would reconvene to consider the input, deliberate, and seek to reach a final consensus on the regulations governing the funding of school repair, renovation, and replacement across Indian Country. If the Committee reached consensus, the Bureau would then be obligated to commit to promulgating the agreed-upon regulations in the standard, final, formal administrative rulemaking process (i.e., publish draft regulations in the Federal Register, take comments, finalize comments, finalize and promulgate final regulations). If the Committee did not reach consensus on all issues, the BIA could still take the best collective advice of the group and its hard work and incorporate that into its own final draft rule for administrative approval and normal public comment and consultation. Comments requested that, in the case of non-consensus, the BIA commit a transparent process of analysis of all opposing views before making a final decision.

To further enhance broad stakeholder engagement, the Bureau and the Committee may want to consider additional outreach tools. Tools might include, dependent on funding and interest:

- A dedicated website, with the potential to accept and organize comments on the process, draft documents, etc, with links from the BIE website.
- An extensive listserv to keep a broad audience informed of the Committee's work.
- Occasional broadcast-style, structured conference calls that allow for broad participation by interested parties.
- Webcasts of meetings, presentations, or other actions of the Committee
- Other outreach tools to reach tribes and schools without robust electronic access, such as notification of tribal newspapers, and clarity in points of contact for stakeholders to obtain additional information or provide input.

CHART 3: Process Diagram for Negotiated Rulemaking and Stakeholder Engagement



H. SUPPORT TRIBAL CONSTITUENCY WORK.

To the extent possible, we encourage the Bureau to help support outreach and constituency work within tribes and groups of tribes, should they share representatives. Dependent on funding, the Bureau might support a modest travel budget for each Committee member to conduct outreach efforts to Tribal Councils, school boards, school staff, and other appropriate stakeholders within a constituency. The representative might be asked to file a short report outlining who they updated, on what topic, along with their travel reimbursements. This kind of modest travel budget would probably be limited to driving, not more expensive airline flights, but would support and encourage representatives to do active outreach to their constituents. Comments noted that this recommendation would not fully provide for the needs of remote tribes.

APPENDIX A
BIE/CBI LETTER OF INTRODUCTION

238 Main Street
Suite 400
Cambridge, MA 02142
telephone (617) 492-1414
fax (617) 492-1919

1601 Connecticut Avenue, NW
Suite 200
Washington, DC 20009
telephone (202) 543-4585
fax (202) 232-6718

http://www.cbuilding.org

23 February 2007

Dear Tribal Leader and School Leader:

We are writing to ask your assistance. We would greatly appreciate if you could attend an interview session, convened by the Education Line Office in your region.

The Department of Interior has retained us, the Consensus Building Institute, to develop a convening report for the negotiated rulemaking on Bureau-funded school facilities construction. As you may recall, this negotiated rulemaking was called for under the No Child Left Behind Act of 2001. The convening report is described in the Negotiated Rulemaking Act and is often the first step used by federal agencies in organizing a regulatory negotiation.

This assessment will be based on numerous interviews with those with an interest in and knowledge of school facilities repair, renovation, and replacement. The convening report will assess the opportunities for a negotiated rulemaking process, the challenges to convening such an effort, and the possible ways in which a committee might be assembled. The report is intended for all tribes interested in these issues, along with the Bureau of Indian Affairs and Bureau of Indian Education.

We are an independent, impartial convening team from the Consensus Building Institute (CBI), working through the U.S. Institute for Environmental Conflict Resolution. We will be conducting the assessment. CBI is a non-profit organization providing mediation, facilitation and process design services to numerous federal agencies and their stakeholders. The CBI team includes individuals with experience in education, construction, as well as in designing, convening, and facilitating collaborative processes such as regulatory negotiations.

CBI has worked with many Tribes across the United States and Canada. CBI's role is to serve as independent, objective process experts and remain non-partisan on substantive issues. Without exception, CBI abides by the code of ethics of The Association for Conflict Resolution, which states: "The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party" regardless of who pays for the services.

The scope of the convening report includes soliciting views on the school facility topics identified from the No Child Left Behind Act. The topics include:

A. Methods to catalog the conditions of school facilities;
B. Determining formulas for priority and funding for school replacement construction and new construction
C. Determining formulas for priority and funding for school renovation and repair;
D. Facilities standards for home living (dormitory) situations.

To understand the range of perspective (or interests) on these topics, the convening team will conduct confidential interviews with tribal officials (or their designees), representatives of BIA and grant-funded tribal schools, and others with an interest in Bureau funded school facilities construction. The interviews will be confidential in the sense that the CBI team will not attribute statements or perspectives to specific individuals or organizations, but rather will assemble, categorize, and summarize the perspectives of all the interviewees, attributing views only to broad stakeholder categories. We are expected to hold up to 100 confidential interviews, seeking input from individuals or groups on the following:

- Interviewees' views on the substantive issues listed above;
- Suggestions for how diverse geographic, size, and tribal interests can best be represented on a Negotiated Rulemaking Committee;
- Any concerns or barriers to the establishment of and successful execution of a Negotiated Rulemaking Committee on these topics; and
- Consultative activities and potential approaches to consultation that the Bureau might undertake regarding these issues.

We will analyze this interview information and prepare a report that reflects back to those interviewed the range of views and issues, the advantages and disadvantages of collaborative process options, and our recommendations on how the Bureau and tribes might proceed. We will prepare a draft convening report of their findings, which will be made available to all interviewees for comment. Upon collection of comments, we will prepare a final report for the Department of the Interior, Bureau of Indian Affairs and Bureau of Indian Education. That final report will also be made available to the interviewees, as well as all interested tribes and the general public, upon request.

In addition to the group interview with all interested schools and tribes in your region, we are more than happy to make ourselves available before or after that scheduled group interview for individual conversations, as needed and if you wish. Just let us know ahead of time to schedule a specific time on the day of the group interview.

We greatly appreciate your participation.

Sincerely,

Patrick Field CBI	Stacie Nicole Smith CBI	Suzanne Ornstein CBI

Cc: School Superintendent(s)
School Principal(s)

APPENDIX B
INTERVIEW PROTOCOL

BIA No Child Left Behind School Facility Financing
Interview Protocol

Background:

Tell me about the history/conditions of your school(s).

- Do you have school replacement or repair needs?
- Are you on the priority list? Where?
- What has your tribe/school's involvement been on school construction policy?
- How is the relationship with the Office of Facilities Management and Construction working?

Issues/Topics:

Please share your views on the key issues called out for in the No Child Left Behind Act regarding school facilities.

A. Methods to catalog of school facilities;
B. Determining formulas for priority and funding for school replacement construction and new construction
C. Determining formulas for priority and funding for school renovation and repair;
D. Facilities standards for home living (dormitory) situations.

Prompting Questions might include:

- Is the current approach adequate? If not, why not?
- What ideas do you have for improving the current approach?
- Do you need to know more about the issue to weigh in?
- What further kinds of information would be helpful to better understand this topic?

Process:

As you may be aware, the NCLB required a negotiated rulemaking process for recommending proposed regulations on priorities and funding for school replacement and renovation projects. We have a few questions.

- What do you think are the advantages of addressing these issues through a reg neg?
- What are the potential barriers or obstacles to doing so?
- What would happen, in your view, if a reg neg was not convened?
- Do you have any ideas for a consultation process that might be better than a reg neg, or, need to supplement the reg neg?

As you may know, regulatory negotiations require federal agencies to follow the Federal Advisory Committee Act and Negotiated Rulemaking Act. FACA, as it is called, calls out for such committees to be no more than 25 representatives who can provide a fair and balanced representation of stakeholders, who in this case, are obviously tribes. Given that there are some 180 different schools across the U.S. that fall within the purview of this potential reg neg, it may be challenging to identify fair, balanced, effective, and appropriate representatives.

- What ideas do you have for how to achieve a balance of geographic, tribal, school population size, and other considerations?
- Who typically from your tribe could best represent your interests in such a process (principal, superintendent, etc.)?
- If you had to join with other "like" tribes in selecting a joint representative, who might those "joint" tribes be and how best might they select a joint representative?
- If a Committee of 25 or so members was formed, where should it meet should it have to meet several times?
- If a Committee is formed, what additional consultation with tribes and tribal members as a whole might be necessary?

APPENDIX C
LIST OF INTERVIEWEES

Arizona South
Patty K. Cook,
Casa Blanca Community School

Arizona South
John J. Uhlik,
Casa Blanca Community School

Arizona South
Keith R. Seaman,
Santa Rosa Boarding School

Arizona South
Karen Dawson,
Santa Rosa Boarding School

Arizona South
Michael Bragiel, Principal
John F. Kennedy School

Arizona South
Mary E. Rule,
Theodore Roosevelt School

Arizona South
Erwin L. Thompson,
Theodore Roosevelt School

Arizona South -NISBA
Ramon Rilky, School Board
Theodore Roosevelt School

BIA
Joe Bitsie, Navajo Manager
Capital Region Facilities Office, Facilities Management Office

BIE
Stanley Holder, Chief
Division of Compliance, Monitoring, & Accountability

BIE
Kevin Skinador, Acting Deputy Director

BIE
Dale Keel, Facility Management Officer

BIE
Gayle Dixon, Facility Management Specialist

BIE - NISBA
Karlisa Shomour,
BIE Facilities

Billings
Lyle MacDonald, Senior Homeliving Specialist
Blackfeet Dormitory

Billings
Bob Sobotta, Superintendent and Principal
Coeur d'Alene Tribal

Billings
Wanda Belgarde, Superintendent
Northern Cheyenne Tribal School

Billings
Jon Hussman, Principal
Shoshone-Bannock Fort Hall Elementary
Billings
Jody Crowe, Superintendent
Shoshone-Bannock School

Billings
Louie Headly, Superintendent
St. Stephens Indian School

Billings - NISBA
Victoria Enos, School Board
St. Stephens Indian School

Billings - NISBA
Gina Enos, School Board
St. Stephens Indian School

Central Navajo
Zonnie Sombrero,
Central Navajo Education Line Office

Central Navajo
Gregory Mooring, Principal
Chinle Boarding School

Central Navajo
Dwayne Thompson, Facilities Manager
Chinle Boarding School

Central Navajo
Rachel Yonnie,
Lukachukai Community School

Central Navajo
Clarence C. Begay, Federal Programs Director
Lukachukai Community School

Central Navajo
Brian Dillon, Principal
Many Farms High School

Central Navajo - NISBA
Vincent Vicenty, School Board
Lukachukai Community School

Central Navajo -NISBA
Stanley Kedelty,
Lukachukai Community School

Central Navajo -NISBA
Marjorie Greyhair, School Board
Lukachukai Community School

Cheyenne River
Cherie Farlee, Education Line Officer
Cheyenne River Education Line Office

Cheyenne River
Shirley Gross, Program Coordinator
Pierre Indian Learning Center

Cheyenne River
Gilbert Robertson, Chairman
Pierre Indian Learning Center

Cheyenne River
Darrell F. Jeanotte, Superintendent
Pierre Indian Learning Center

Cheyenne River
Dana LaClaire, Maintenance Supervisor
Takini School

Crow Creek/Lower Brule
Dan Shroyer, Education Line Officer
Crow Creek/Lower Brule Education Line Office

Crow Creek/Lower Brule
Steven Sechert, Superintendent
Lower Brule Day School

Crow Creek/Lower Brule -NISBA
Roger Bordeaux, Superintendent
Wayawa Tipi Tiobosdati Alternative

Department of the Interior
Edith Blackwell
Solicitor's Office

Eastern Navajo
Cindy Howe, Board member
Baca/Dlo'ay Azhi Community School

Eastern Navajo
Anna Descheen, Board Member and Vice Chair
Bread Springs Day School

Eastern Navajo
Louise Mariano, Board chair
Crownpoint Community School

Eastern Navajo
McGarrett Pablo, Board member
Crownpoint Community School

Eastern Navajo
Charlotte Garcia, Acting Education Line Officer
Eastern Navajo Education Line Office

Eastern Navajo
Betsy Dennison, Board member
Lake Valley Navajo School

Eastern Navajo
Maria Inledo, Board member
Na'Neelzhiin Ji Olta (Torreon)

Eastern Navajo
Sue Willeto, Board member
Ojo Encino

Eastern Navajo
Jackie Gilman, Principal
Ojo Encino

Eastern Navajo
Bertha Bruce, Board member
To'Hajilee-He Community School (Canoncito)

Eastern Navajo
Sharon A. Williams, Parent
Tse' ii'ahi Community School (Standing Rock)

Eastern Navajo
Chee Bobby Thompson, Board member
Tse' ii'ahi Community School (Standing Rock)

Eastern Navajo
Robert Ortiz, Board member
Wingate High School
Eastern Navajo - NISBA
Rebecca Vesely, Principal
Tse'ii'ahi Community School

Eastern Navajo - NISBA
Judy Quesenberry, Principal
Wingate High School

Eastern Navajo -NISBA
Kenneth Toledo,
Na' Neelzhein Ji Olta'

Ft. Defiance
Jeremiah Begay,
Ch'ooshgai Community School

Ft. Defiance
Johanson Phillips, Principal
Ch'ooshgai Community School

Ft. Defiance
Shawna Castillo, Principal
Crystal Boarding School

Ft. Defiance
Jacqueline Wade, Education Line Officer
Ft. Defiance Education Line Office

Ft. Defiance
Naomi Gibson,
Ft. Defiance Office of Facilities Management

Ft. Defiance
Gail Gorman,
Ft. Defiance Office of Facilities Management

Ft. Defiance
Desmond Jones,
Ft. Defiance Office of Facilities Management

Ft. Defiance
Victor Puente, Facilities Manager
Greasewood Springs Community Schools Inc

Ft. Defiance
Albert Becenti, Facilities Manager
Hunters Point Boarding School

Ft. Defiance
Anna D'Alesandro, Principal
Hunters Point Boarding School

Ft. Defiance
Gordon Gorman, Facilities Manager
Kin Dah Lichii Olta

Ft. Defiance
Ora James, Principal
Kin Dah Lichii Olta'

Hopi - NISBA
Alma Sinquah,
Hotevilla Bacavi Community School

Hopi - NISBA
Leon Fred,
Hotevilla Bacavi Community School

Hopi - NISBA
Karen Shupla,
Hotevilla Bacavi Community School

Hopi - NISBA
Bryan Williams, School Board
Keams Canyon Boarding School

Hopi - NISBA
Leroy Sakiestewa,
Moencopi Day School

Hopi -NISBA
Eric Tewa,
Hotevilla Bacavi Community School

Minneapolis
Rochelle Johnson, Principal
Bug-O-Nay-Ge-Shig School

Minneapolis
Mitch Vogt, Superintendent
Circle of Life School

Minneapolis
Betty Belkham, Superintendent
Flandreau Indian Boarding School

Minneapolis
Lynne Methner, Principal
JKL Bahweting Anishnabe School

Minneapolis - NISBA
Mike Schmid,
Bug O Nay Ge Shig School

Minneapolis - NISBA
Ed Bunday, Facilities
Flandreau Indian Boarding School

Minneapolis - NISBA
Tom Miller,
Hannahville Indian School

NISBA
Gehl Tucker,
Attorney for multiple schools

NISBA
Reuben McCabe,
Dept. of Dine Education

NISBA
Greg Begay, Sr. Education Specialist,
Office of Monitoring, Evaluation and
Technical Assistance
Dept. of Dine Education

NISBA
Brenda Riel,
DOI Solicitor's Office
New Mexico North - NISBA
Edna Rainese, School Board
Taos Day School

Northern Navajo/Shiprock
Vickie Thomas, Principal
Aneth Community School

Northern Navajo/Shiprock
Cordella Begay, Facilities Manager
Aneth Community School

Northern Navajo/Shiprock
Don Sosnowski, Principal
Bellabito Say School

Northern Navajo/Shiprock
Bernadette Todacheene, Principal
Cove Day School

Northern Navajo/Shiprock
Douglas Smith, Facilities Manager
Nenahnezad Community School

Northern Navajo/Shiprock
Sylvia Ashley, Principal
Nenahnezad Community School

Northern Navajo/Shiprock
Joel D. Longie, Education Line Officer
Northern Navajo Education Line Office

Northern Navajo/Shiprock
Leo Johnson, Principal
Red Rock Day School

Northern Navajo/Shiprock
Virgil Wood, Facilities Manager
Sanostee Day School

Northern Navajo/Shiprock
Jeanne Haskie, Principal
Sanostee Day School

Northern Navajo/Shiprock
Melissa Culler, Executive Director
Shiprock Associated Schools Inc.

Northern Navajo/Shiprock
Treva Rosenburg, Facilities Management
Shiprock Associated Schools Inc.

Northern Navajo/Shiprock
Carol Fokey, Facilities Management
Shiprock Associated Schools Inc.

Northern Navajo/Shiprock
Michael Aaron, Principal
Tiis Nazbas Community School

Northern Navajo/Shiprock
Delores Bitsilly, Principal
Tohaali Community School

Northern Navajo/Shiprock - NISBA
Dan Sosnowski,
Beclabito Day School

New Mexico North
Ben Atencio, Education Line Officer
New Mexico North Education Line Office

New Mexico North
Robin Rodar, Principal
Santa Clara Day School

New Mexico North
Pat Kessler, Principal
Taos Day School

New Mexico North - NISBA
Gil Vigil,
Santa Fe Indian School

OFMC
Norman Suazo,
Contractor OFCM

OFMC
Emerson Eskeets, Supervisory General Engineer
Division of Program Planning

OFMC
Margie Morin,
Division of Program Planning

OFMC
Jack Rever, Director, Facilities,
Environmental, Safety and Cultural
Resources Management - Indian Affairs

OFMC
Boyd Robinson, Deputy Director
Office of the Director

Oklahoma
Greg Anderson, Superintendent
Eufala Boarding School

Oklahoma
Joy Martin, Education Line Officer
Oklahoma Education Line Office

Oklahoma
Tony L. Dearman, Superintendent
Riverside Indian School

Oklahoma
Karl Bearbow, Faculty Manager
Riverside Indian School

Oklahoma -NISBA
Peggy Wahkinney, School Board
Riverside Indian School

Oklahoma -NISBA
Shirley Janmohammad, School Board
Riverside Indian School

Pine Ridge
Clint May, Facilities Supervisor
Little Wound School

Pine Ridge
Taylor Little Whiten, Board Member
Little Wound School

Pine Ridge
Deborah Bordeaux, Principal
Loneman Day School

Pine Ridge
Martha Two Bulls, School Board
Loneman Day School

Pine Ridge
Rodney Clark, Faculty Manager
Pine Education Line Office

Pine Ridge
Norma Tibbitts, Education Line Officer
Pine Ridge Education Line Office

Pine Ridge
Christopher Bordeaux, Principal
Wounded Knee District School

Pine Ridge
Fred Colhoff, Facilities Manager
Wounded Knee District School

Portland
Norm Dorpat, Director of Special Services
Chief Leschi School

Portland
Ray Lorton, Superintendent
Chief Leschi School

Portland
Larry Byers, Superintendent
Lummi Nation School

Portland
Bernard Baptiste, Director
Muckleshoot Tribal School

Portland
Mike Smith, Education Line Officer
Portland Education Line Office

Portland
Brenda Lovin, Administrator
Wa HeLut Indian School

Portland - NISBA
Ted Mack,
Chemawa Indian School

Portland - NISBA
Jan Claymore,
Chemawa Indian School

Portland -NISBA
Larry Byers,
Lummi Nation School

Rosebud
Everdell Wright, Superintendent
Marty Indian School

Rosebud
Ronald Reynolds, Co-faculty Manager
Marty Indian School

Rosebud
Neva Sherwood, Education Line Officer
Rosebud Education Line Office

Rosebud
Nancy Keller-Hernandez, Executive Director
Sicangu Owayawa Oti

Rosebud
James A. Hogan, School Expansion Liaison
St. Francis Indian School

Rosebud - NISBA
Donna Hollow Horn Bear,
Sicangu Owayawa Oti

Sacramento
Donovan Post, Principal
Noli School

Sacramento
Don Sims, Principal
Sherman Indian High School

Sacramento -NISBA
Clyde Peacock, Education Line Officer
Sacramento Education Line Office

Sacramento -NISBA
Rocky Whitman, School Board
Sherman Indian School

Southern & Eastern
Ervin Faumed, Maintenance Supervisor
Choctaw Tribal Schools

Southern & Eastern
Benson Lewis, Project Manager
Choctaw Tribal Schools

Southern & Eastern
Paul A. Peterson, Business Manager
Indian Island School

Southern & Eastern
Bobby Boone, Principal
Red Water Elementary School

Southern & Eastern
Johnny Parham, Regional Facility Manager
Southern & Eastern States Education Line Office

Southern & Eastern
Roxanne Brown, Education Line Officer
Southern & Eastern States Education Line Office

New Mexico South
Joe Robledo III, Principal
Isleta Elementary School

New Mexico South
Freddie Cardenas , Principal
Jemez Pueblo Day School

New Mexico South
Brenda Kofahl, Principal
Laguna Pueblo Elementary

New Mexico South
Reanna Albert, Education Program Specialist
New Mexico South Education Line Office

New Mexico South
Bart Stevens, Education Line Officer
New Mexico South Education Line Office

New Mexico South
Ralph Paiz , Staff
San Felipe Pueblo Elementary

New Mexico South
JC Whitman, Principal
San Felipe Pueblo Elementary

New Mexico South
Loretta C. Vallo, Staff
Sky City Community School

New Mexico South
Alexis Jimenez, Acting Principal
Tsiya Pueblo Elementary and Middle School

Standing Rock
Milton Brown Otter,
Rock Creek Grant School

Standing Rock
Larry Brown, Board Member
Rock Creek Grant School

Standing Rock
Harold Larson, Superintendent
Standing Rock Community School

Standing Rock
Jana Shields Gipp, Business Manager
Standing Rock Community School

Standing Rock
Robert W. McLaughlin, Program Manager
Standing Rock Community School

Standing Rock
Emma Jean Blue Earth, Education Line Officer
Standing Rock Education Line Office

Standing Rock
Galen Robertson, Board Member
Tate Topa Tribal Grant School (Four Wind)

Standing Rock
Shelly Lugar, Council Member
Tate Topa Tribal Grant School (Four Wind)

Standing Rock
Perry Kofp, Business Manager
Tate Topa Tribal Grant School (Four Wind)

Turtle Mountain
Kevin Davis, Impact Aide Technician
Belcourt School District High School

Turtle Mountain
Donald O. Olson, Counselor
Dunseith Day

Turtle Mountain
Yvonne St. Claire, Principal
Dunseith Day

Turtle Mountain
Ann Joranstad, Special Education
Dunseith Day School

Turtle Mountain
Connie White Bear
Mandaree Public School

Turtle Mountain
Carolyn Bluestone, Superintendent
Mandaree Public School

Turtle Mountain
Michael Blue, Principal
Ojihwa Indian School

Turtle Mountain
David Gourueau, Principal
Turtle Mountain Community Elementary School

Turtle Mountain
Betty Davis, Teacher
Turtle Mountain Community Middle School

Turtle Mountain
Louis Dauphinais, Principal
Turtle Mountain Community Middle School

Turtle Mountain
Roman F. Marcellai, Assistant Superintendent
Turtle Mountain Community School

Turtle Mountain
Rose-Marie Davis, Education Line Officer
Turtle Mountain Education Line Office

Turtle Mountain
Doris McCloud, Education Specialist
Turtle Mountain Education Line Office

Turtle Mountain
Clayton Lavallie, Facility Management
Turtle Mountain Education Line Office

Turtle Mountain
Chad Dahlen, Principal
Twin Buttes Day School

Turtle Mountain
Bobbi Shegrud
White Shield School

Western Navajo
Doretta Ruffell, Principal
Dennehotso Boarding School

Western Navajo
Velma D. Eisenberger, Principal
Kayenta Community School

Western Navajo
Lola S. Cody, Finance Manager
Leupp Schools, Inc

Western Navajo
Gloria Johns, Principal
Leupp Schools, Inc

Western Navajo
Tim Clashin, Principal
Naatsis'aan Community School

Western Navajo
Rachel Maho, Principal
Rocky Ridge Boarding School

Western Navajo
Eddie D. Toledo,
Tonalea Day School

Western Navajo
Javier Brown, Acting Assistant Principal
Tuba City Boarding School

Western Navajo
Lemual Adson, Assistant Principal/ Education Line Officer
Tuba City Boarding School/ Western Navajo Agency

Western Navajo - NISBA
Loretta Hoschais, School Board
Shonto Preparatory School

Western Navajo - NISBA
Marie Acothley, School Board
Greyhills Academy High School

Western Navajo -NISBA
Helen Bonnalis,
Kaibeto Boarding School

APPENDIX D
SPIDR CODE OF ETHICS

SPIDR's Ethical Standards of Professional Responsibility (adopted June 1986) and Assumed by the Association of Conflict Resolution (ACR)

Introduction
The Society of Professionals in Dispute Resolution (SPIDR) was established in 1972 to promote the peaceful resolution of disputes. Members of the Society believe that resolving disputes through negotiation, mediation, arbitration and other neutral interventions can be of great benefit to disputing parties and to society. In 1983, the SPIDR Board of Directors charged the SPIDR Ethics Committee with the task of developing ethical standards of professional responsibility. The Committee membership represented all the various sectors and disciplines within SPIDR. This document, adopted by the Board on June 2, 1986, is the result of that charge.

The purpose of this document is to promote among SPIDR Members and Associates ethical conduct and a high level of competency among SPIDR members, including honesty, integrity, impartiality and the exercise of good judgment in their dispute resolution efforts. It is hoped that this document also will help to (1) define the profession of dispute resolution, (2) educate the public, and (3) inform users of dispute resolution services.

Application of Standards
Adherence to these ethical standards by SPIDR Members and Associates is basic to professional responsibility. SPIDR Members and Associates commit themselves to be guided in their professional conduct by these standards. The SPIDR Board of Directors or its designee is available to advise Members and Associates about the interpretation of these standards. Other neutral practitioners and organizations are welcome to follow these standards.

Scope
It is recognized that SPIDR Members and Associates resolve disputes in various sectors within the disciplines of dispute resolution and have their own codes of professional conduct. These standards have been developed as general guidelines of practice for neutral disciplines represented in the SPIDR membership. Ethical considerations relevant to some, but not to all, of these disciplines are not covered by these standards.

General Responsibilities
Neutrals have a duty to the parties, to the professions, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties'.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias towards individuals and institutions involved in the dispute, be reasonably

available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

Responsibilities to the Parties

1. *Impartiality*. The neutral must maintain impartiality toward all parties. Impartiality means freedom from favouritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

2. *Informed Consent.* The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

3. *Confidentiality*. Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honoured.

4. *Conflict of Interest*. The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstances that may reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation throughout the process.

5. *Promptness*. The neutral shall exert every reasonable effort to expedite the process.

6. *The Settlement and its Consequences.* The dispute resolution process belongs to the parties. The neutral has no vested interests in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3, confidentiality, of these standards.

Unrepresented Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where I his or her judgment the needs of parties dictate, to assure that such interests have been considered by the principal parties.

Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

Background and Qualifications

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

Disclosure of Fees

It is the duty of the neutral to explain to the parties at the outset of the process the basis of compensation, fees, and charges, if any.

Support of the Profession

The experienced neutral should participate in the development of new practitioners in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide pro bono services, where appropriate.

Responsibilities of Neutrals Working on the Same Case

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitations are inappropriate and in some conflict resolution disciplines, such as labour arbitration, are impermissible. All advertising must honestly represent the services to the rendered. No claims of specific results or promises which imply favour of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

APPENDIX E
LIST OF SCHOOL CONDITIONS GATHERED THROUGH CBI INTERVIEWS

Facility Conditions

Environment, Health and Safety

- Asbestos in tiles on floor, around heating pipes
- Mold and wet conditions
- Mice and rodents
- We've had our cafeteria condemned and closed. Luckily, we have the high school kitchen that can accommodate the kids. But they have to be bused for breakfast and lunch, which takes large amounts of time out of the regular school day.
- We have boiler room with a main water line and a 480 volt distribution electric panel all in close proximity to one another. Think of the danger and it's not fixed yet.
- We've had water in conduit lines, causing an electrical fire and thus had to close school for two days.
- We've had old ballasts from fixtures leak, causing contamination, which means we have to close down a part of the library while it is cleaned up.
- We have very old kitchen traps that don't work.
- We have lot so asbestos floor tiles that need removed and replaced.
- Our kitchen had to shut down three times because of gas leaks.
- We have 9 un-connected buildings, requiring elementary age students to put on and take of multiple layers of clothing many times a day, and to cross a busy road.

HVAC

- No air conditioning, causing unbearably hot rooms during late spring and early fall classes.
- Boilers outdated if you turn off too soon, school freezes, if you turn off too late, school boils.
- Depend on swamp coolers or small window units per room.
- We have no cooling in the gym. Imagine high school graduation, maybe the biggest community event of the year, 1,200 people, late May or early June. It's miserable.
- HVAC is lacking. Old windows don't even open up for ventilation.
- We have no zones so that means the heat ranges from 65 to 90, depending on where you are in the building.
- Ventilation is simply non-existent in lots of our buildings.
- Our boilers are obsolete.
- It is either roasting or freezing, and we have no ventilation.
- Received new HVAC but they were sited on the outdoor basketball court leaving the kids no place to play.

Bathrooms, Plumbing, Water and Sewer

- Pipes very aged in some cases and in older buildings, difficult to get through without major work (historic buildings of stone, primarily)
- Some cases school sewage feeds into Tribal sewage treatment that is inadequate, causing backups, etc.

- We have only one main shut off to our water system, so have to shut it all down if we need to work on only a part.
- Our offices flood in a good rain storm, causing not only water damage, but long term potential mold problems. We've asked for help, but received none to date.
- In some cases, school water quality is terrible. High iron, poor quality water. There may be old clay pipes with roots throughout them. There may be lead due to old lead pipes. May have to boil water to ensure safety.

Structural
- Foundation is shifting and hydraulic jacks have been put in place to keep it up.
- Masonry and stone walls have significant cracks (can see the daylight through them in some cases).
- We had a building literally sink due to a leak beneath it and we were in modulars for 10 to 12 years before it was replaced.
- Overhangs on buildings are sagging severely. The schools is simply older than its planned useful life expectancy.
- The foundation and landing of the entrance one building shifted, and we have had to close two of our classrooms as a result.

Electrical
- The schools were not designed to take on the current electric load, from chillers to computers, copy machines, printers. The system is maxed out.
- Cannot access E-rate program (which provides matching funds for electronic infrastructure) due to lack of funding for electrical infrastructure
- We have a large space for classrooms with one light switch and one heating zone – either its on for all or off for all.

Roofing
- Leaking roofs due to age or poor installation
- One BIA school built ten years ago has leaked since the day it opened despite numerous attempts to fix it
- Our roof is leaking in the gym, onto our new wood floor. If we could fix it immediately, it would be inexpensive, but we can't get the money and approval, and soon it is going to wreak the new floor, which will cost much more to fix.

Windows and Doors
- Windows aging, not weather proof in many cases, not energy efficient (most are single-paned), and can no longer be opened in some cases.
- Front doors are a no brainer to fix, but can't get money.
- External doors on elementary school are vintage 1965 and are in rough shape. We are in a bind: if we lock them for security, kids can't get out the way they are design. If we don't, then there's easy access into the school.
- Our old windows wouldn't open and we were also afraid they would fall out of their frames.

Security
- Cannot lock exterior doors if need be.

- Don't have security fences.
- Substantial windows make security difficult in case of security emergency.
- Intercoms don't work so no way to get in touch with principle of others if needed.
- The mandates for locked gates and a secure perimeter are proving difficult to meet. Our 3 to 4 foot fence around campus wasn't ever meant to keep people out.
- The 1960's design of many schools is terrible for today's security needs/requirements.
- You have to remember many of these schools are in remote, rural areas. We have to deal, really, with bats, bears, snakes, spiders, and other wildlife.
- The security definitions need to be revised; there is not enough funding available for any real security
- We need cameras, security guards. We have to find outside grant money for it, no funding is available.

Recreation
- Playgrounds have gravel which spills on to sidewalks, kids slip and get hurt.
- We have a major prairie dog problem on the playing fields.
- Wood chips aren't great where we are. Kids get splinters and large bugs like centipedes like to live in them.
- Playgrounds are unsafe with old equipment, splintering wood.

Siting
- Some schools sited in the floodplain, so constantly must deal with floods and water damage during high water times
- During renovation the road to the school was realigned resulting in flooding of the playground.

Programming and Design
- Build architecture outdated, built for schools of the 1960's
- Schools not built for today's technologies like computers
- Design guidelines do not allow for expansion for admin space, increasing enrollment, other unexpected needs.

Codes
- We are held accountable for meeting codes, but the buildings are totally obsolete. No way to meet ADA without tearing down and rebuilding.

Historic Preservation
- Numerous buildings have historic preservation designation, so can do little to repair and replace even though they may be inappropriate for today's classrooms, difficult and expensive to maintain, and may have severe structural problems (cracked foundations, walls).
- We can't even change the appearance of these structures, let along their major structural flaws.

Surplus Property
- Many buildings, past their useful life, sit on campuses boarded up, unused, and in need of tearing down. But, they may have asbestos or other problems so Tribes do not want to take ownership, even though they may have a use like a community center. Or, they need torn down, but no money to do so.

- We have a number of buildings that need to be demolished. They pose safety in terms of collapsing over time, asbestos/environmental issues, and keeping kids away and out of them.
- Transfer of surplus properties to tribes is so difficult because who wants them unless they are safe, clean, and free of contamination (from asbestos to mold)?

Space

- We have severe overcrowding. Have been waiting for portables for years.
- We have needed a new dorm since 1999. Our high school boys and girls are sharing a dorm, built in 1932.
- Our new High School was built in 1994 for 270 kids, we have over 500 in there now.
- Middle school has 19 portable classrooms.
- We have one dining room/kitchen that fits 500 kids, but over 1000 students who need to eat 2-3 meals a day.
- We have no gym, no cafeteria. We have to take all our kids over to the high school to eat their meals.

Need for New Facility Components

- We have a critical need for residential facilities, as some students travel very long distances and we are their nearest school.
- Housing for teachers is greatly needed, but isn't included in the categories of things that are funded.
- We live in a blizzard-prone area, and lack a bus garage.

APPENDIX F
ATTACHMENT OF COMMENTS RECEIVED ON DRAFT REPORT

Comments received from:
Rodney Clark
Pine Ridge Agency, BIE
Facilities Manager

Conditions of Schools:
WINDOWS, DOORS, ROOFING, ETC. SHOULD BE CLASSIFIED AS ENERGY PROJECTS AS THIS IS ONE OF THEIR MAIN FUNCTIONS.

- Operations & Maintenance needs are not matched by O&M annual funding.

FOR EXAMPLE FOR THE SEVEN SCHOOLS ON THE PINE RIDGE RESERVATION OPERATIONS FOR FY07 WAS FUNDED AT ONLY 445 OF WHAT WAS ACTUALLY NEEDED TO OPERATE THE FACLITIES.

THE CALCULATION OF THE NUMBER OF SQUARE FEET PER SCHOOL IS A FUNCTION OF THE FMIS. IT IS DERIVED FROM THE INVENTORIED SQUARE FOOT OF ALL FLOORS WITHIN A BUILDING. IT IS ATOMATICALLY CALCULATED BASED ON PHYSICAL INVENTORY. IF THE INVENTORY IS NOT CORRECT, THE FUNDING IS NOT CORRECT. THIS WAS ALSO ANOTHER VALIDATION CONTRACT WITH AME THROUGH OFMC, WHICH IS SUPPOSED TO BE COMPLETED ON A THREE YEAR ROTATING CYCLE, BUT HAS STILL NOT PRODUCED AN ACCURATE INVENTORY FOR THE LOCATIONS.

Methods Used to Catalogue School Facilities:

- FMIS doesn't sufficiently allow for educational programming needs

FMIS WAS PROGRAMED TO MAINTAIN A BACKLOG OF REPAIR AND CONSTRUCTION NEEDS BASED ON BACKLOG ITEMS GENERATED THROUGH SAFETY, ENVIRONMENTAL, PRESSURE VESSAL AND GENERAL FACILITIES AND SITE INSPETIONS. PROGRAM ISSUES WAS NEVER THE MAIN GOAL OF THE SYSTEM. AN AREA FOR PROGRAM ISSUES COULD BE ADDED AND GIVEN WEIGHT WITHIN THE SYSTEM THE SAME AS REPAIR ISSUES.

- The FMIS is, in general, working as a catalog of conditions

THERE ARE MANY LOCATIONS THROUGHOUT THE US THAT DO NOT HAVE CONNECTIVTY TO FMIS AND HAVE TO RELY ON OTHERS TO MAINTAIN THE INFORMATION THIS IS NOT A CORRECT STATEMENT. OFMC HAS CONTRACTED WITH APPLIED MANAGEMENT ENGINEERING (AME) FOR THE PAST SEVERAL YEARS TO VALIDATE EACH SITES' BACKLOG ON A ROTATING THREE YEAR SCHEDULE. ALTHOUGH THERE HAS BEEN MILLIONS OF DOLLARS SPENT ON THIS EFFORT THE BACKLOG STILL REMAINS INACCURATE FOR MANY LOCATIONS. THE ORIGINAL CONCEPT FOR BACKLOG VALIDATION WITHIN FMIS WAS TO MAKE SURE THE DATA BEING TRANSFERRED FROM FACCOM TO FMIS WAS ACCURATE. NOW THE CONTRACT HAS BEEN IN PLACE FOR ALMOST TEN YEARS AND THE BAKLOG IS STILL INACCURATE. THIS MAKES THE INFORMATION USED BY OFMC FOR PRIORITIZING PROJECTS SKEWED AT BEST AND UNFAIR AT WORST. ALSO WHEN A PROJECT IS AWARDED VERY FEW TIMES DO MANAGERS FROM OFMC COME TO THE SITE TO VALIDATE WORK NEEDED BUT SEND OUTSIDE CONTRACTORS WHO HAVE ONLY A PO9 REPORT TO GO OFF OF FOR VALIDATIION OF THE PROJECT. MANY TIME THE P09 REPORT IS INCOMPLETE OR HAS OTHER INACCURACIES AND CANNOT TRULY BE VALIDATED TO SHOW WHAT THE SCHOOL REALY NEEDS FOR REPAIR OR CONSTRUCTION.

- FMIS data entry is laborious, and skill- and time-intensive

IF A LOCATION IS TO USE FMIS AS A MANAGEMENT TOOL AS DESIGNED. EACH LOCATION WOULD NEED AT LEAST ONE IF NOT TWO DATA ENTRY PERSONNEL TO MAINTAIN ALL OF THE DATA REQURED IN FMIS. ORIGANALLY THE SYSTEM WAS TO BE A WORKTICKET, INVENTORY AND BACKLOG TOOL FOR THE LOCATIONS AND OFMC. IT GREW TO ITS CURRENT STATUS BECAUSE OF POOR MANAGEMENT DECISSIONS AND LACK OF KNOWLEDGE AS TO HOW

FACILITIES MANAGEMENT PROGRAMS ARE MANAGED AT THE LOCATIONS AND WHAT IS TRULY NEEDED AS A MANAGEMENT TOOL. ONE MUST UNDERSTAND, THROUGHOUT THE OFMC ORGANIZATION THERE ARE VERY FEW MANAGERS AND ENGINEERS WHO HAVE OPERATED A PROGRAM ON THE RESERVATION AT THE LOCATION LEVEL.

- Pressing needs can overwhelm the careful, rationalized planning of FMIS

PRESSING NEEDS DEVELOP DUE TO THE LACK OF ACCESS IN MANY AREAS TO THE SYSTEM. THIS LACK OF ACCESS CAUSES LOCATIONS TO NOT HAVE UP TODATE BACKLOG DATA AND THERE FOR THE LOCATION MAY OR MAY NOT RECEIVE FUNDING NEEDED FOR MINOR REPAIRS. IF THEY DO NOT RECEIVE TH EFUNDING FOR MINOR REPAIRS, THE REPAIRS BECOME MAJOR FACILITIES ISSUES AND FINALLY EMERGENCIES. THIS IS PART OF WHY IT LOOKS AS THOUGH THE SYSTEM IS OVERWHELMED. IN ADDITION, THE POLITICAL POWER OF CERTAIN TRIBES AND THEIR ACCESS TO CONGRESIONAL DELIGATES HELPS TO SKEW THE PROCESS.

Priority and Funding for Repair and Renovation:

- The overall annual repair and renovation budget is insufficient

AT ONE TIME THE FUNDING FOR NEW SCHOOLS AND MAJOR FI&R HAD BEEN SUBSTANTIALLY INCREASED. WHEN THE ADDITIONAL FUNDING WAS NOT EXPENDED IN A REASONABLE AMOUNT OF TIME OVER A PERIOD OF APPROXIMATELY THREE YEARS OFMC'S CONSTRUCTION FUNDING WAS DECREASE TO ITS CURRENT LEVEL. ALTHOUGH MANY BIE MANAGERS AND DIRECTORS HAVE FIRST HAND KNOWLEDGE OR HAVE BEEN INFORMED OF FACILITY CONDITION AND LACK OF FUNDING ONE NEVER HEARS OF THEM FIGHTING FOR ADDITIONAL FUNDING.

- Any system will have to deal with structural conflicts of interest

THE FUNDING PROCESS IS SLOW DUE TO THE LACK OF PROPER PLANING ON EVERYONE'S PART. OFMC BECAUSE OF COGRESSIONAL ALLOCATIONS NOT BEING REVIEVED IN A TIMELY MANNER, PROJECT MANAGERS DUE TO THE WORK LOAD THEY HAVE, THE TRIBES BECAUSE OF INFIGHTING AND INDECISSION AND THE PROCESS MANY OF THEM MUST GO THROUGH DUE TO TRIBAL CONSTITUIONS AND BYLAWS. THE COORDINATING IS NOT DONE PROPERLY MANY TIMES DUE TO THE PROJECT MANAGERS BEING SO FAR FROM THE PROJECTS. IF THE PROJECT MANAGERS WERE WITH THE PROJECT THEY COULD DO A BETTER JOB OF PLANING AND SCHEDULEING. MANY TIME SEQUENCEING IS NOT DONE PROPERLY DUE TO THE FACT THAT RARLY ARE THE PROJECT MANAGER, A/E FIRM AND CONSTRUCTION CONTRACTOR FROM THE SAME AREA AS THE SCHOOL.

Priority and Funding for the New Construction and Replacement

- Critical needs are left out of new schools

CRITICAL NEEDS ARE LEFT OUT OF THE SCHOOL BECAUSE REQUIRED USE DOCUMENTS SUCH AS BIA SPACE REQUIREMENTS DO NOT TAKE INTO CONSIDERATION ALL OF THE PROGRAMS AND PROGRAM NEEDS OF A SCHOOL. MANY TIMES THE BUDGET FOR A PROJECT IS NOT SUFFICIEANT BECAUSE OF THE 5-YEAR PLANNING DONE BY OFMC WITHOUT FIRST CONSULTING WITH THE SCHOOLS OR THEY PLAN THE BUDGET FOR A PROJECT BEFORE THEY HAVE TRULY VALIDATED THE BACKLOG AND ITS TRUE COST.

Recommendations:

D. ESTABLISH A FAIR, STRUCTURED, AND TRANSPARENT CONVENING PROCESS FOR SELECTING TRIBAL REPRESENTATIVES.

- The Bureau should allow the Committee to exceed twenty-five members.

WHAT IS THE MAXIMUM NUMBER OF COMMITTEE MEMBERS THAT WILL SET ON THE COMMITTEE? READING THE DOCUMENTS IT SHOWS AT LEAST 37 MEMBERS. IF YOU ARE TO REACH CONCENSOUS, IT COULD TAKE AN INORDINANT AMOUNT OF TIME WITH THAT SIZE OF A COMMITTEE.

F. ASSIGN APPROXIMATELY FIVE (5) SEATS TO PROVIDE FOR REPRESENTATION BY THE FEDERAL GOVERNMENT. 3 THAT ARE FROM BIE AND CHOSEN BY THE DIRECTOR

To Whom It May Concern:

Here are just a few of comments regarding the draft report.

1. The Negotiated Rule Making Committee must become a reality as noted in the NCLB. Otherwise the delays will continue as before for any new projects.

2. The number of representatives from each Tribe will probably be a big issue, but your proposed plan on page 37 seems the most logical since the majority of the schools are on Navajo.

3. At least two of the meeting locations should be held within the vicinity of Navajo, like in Albuquerque and Flagstaff to accommodate a lot of the Navajo Schools. We still have a lot of school in dire need of replacement.

4. The budget for the NRM committee meetings should be budgeted into the National Budget for the travels and meetings that will be needed.

5. The new school replacement concept needs to be revamped completely and should be such that there is accountability for all entities involved. Arizona State University's Del E. Webb School of Construction utilizes some of these "most efficient" systems that allows participants (vendors) to get the construction done a lot faster but still provide quality workmanship in the final result (completion of the construction activity). As it is now, there are too many delays due to change orders, which causes other problems like safety issues and everyone from the A & E firms to contractors to Owners to OFMC Safety not being in agreement. In the meantime material prices escalate and discussions for design cuts start surfacing, which has a great emotional effect on the students, staff and community members. THE CURRENT METHODS ARE NOT WORKING... CHANGES NEED TO BE MADE ON THE WHOLE PROCESS!

6. Another factor that seems to be overlooked is the fact that about (at least) 95% of the schools on Navajo are located in remote locations, and contractors and other vendors end up raising the price of their services due to the long distances for the delivery of material or disposal of material. As a result, shortfalls occur. This would be a different story if all of these schools were located in urban or suburban communities where access to material and disposal sites are readily available within ten miles or less.

7. OFMC staff need to send out highly-qualified personnel to all school locations (schools that have not received any construction funds) and visually assess the conditions and use that information for the next round of selection for new school replacement. Everyone needs to start being actively be involved in the whole new school construction process. After all, we are talking about our children's future here.

8. We have submitted a listing of people we would like to be nominated to serve on the NRM Committee. There are a couple more names that came up; these two are very knowledgeable in the area of school construction. Therefore, we would like to submit a revised list, if and when the need for them arises.

9. Hopefully there will be a website made available to view the outcome of the comments, or that we will be contacted with such information.

Thank you for the opportunity to provide some input.

Greg Begay
Dept. of Diné Education
Window Rock, AZ

SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY
10005 East Osborn Road / Scottsdale, Arizona 85256-9722 / Phone (480) 362-7400 / Fax (480) 362-7593

February 1, 2008

Via electronic mail and airmail

Consensus Building Institute
Attn: BIE Convening Draft Report Comment
238 Main Street, Suite 400
Cambridge, MA 02142
bie@cbuilding.org

RE: Comments on Draft Convening Report Regarding Negotiated Rulemaking and Bureau of Indian Affairs Funded School Facilities Repair, Renovation and Construction

Dear Sir or Madam:

The Salt River Pima-Maricopa Indian Community ("SRP-MIC") submits the following comments in response to the above-mentioned Draft Convening Report and CBI's proposed recommendations as invited in FR Doc.07-5187 published on October 22, 2007.

A. INITIATE THE REGULATORY NEGOTIATION PROCESS (REG NEG)

We concur that the BIA and BIE initiate a Regulatory Negotiation process as required in the No Child Left Behind ("NCLB")Act. A recommendation for a consensus-based negotiation should be fair across the board. If a decision cannot be wholly supported and agreed to by consensus, it should be set aside for later discussion and further consultation. The final decision should not be automatically defaulted to the Federal agency's particular view.

Another item presented in this recommendation is the diversity among tribal groups. The differences in tribal needs, resources and priorities must be taken into account. Larger tribes have more members seated and often present a more specific viewpoint that may be counter to the views and needs of other tribes, e.g., how they manage their school facilities in relation to and in connection with their specific tribal facilities management system that are separate from BIA funded facilities.

B. PROCEED WITH THE REG NEG IF TWO CONDITIONS ARE MET: IF SUFFICIENT FUNDS ARE AVAILABLE TO ASSIST IN TRIBAL REPRESENTATION; AND, IF THE COMMITTEE MEMBERSHIP IS GENERALLY SUPPORT

Small tribes and tribes that operate only with Federal funds generally do not have sufficient funds to assist members by providing travel and per diem expenses to those who are appointed to national committees. This can hinder tribal representation. By including the conditional term, "if they are able to obtain sufficient funds" the idea that the Bureau of Indian Education does not have the funds to assist tribes is promoted. However, the latest budget shows that the BIE was able to obtain "new funds" to increase their personnel budget for their new management level in education $15 million. While it is understandable that personnel needs are important, they cannot outweigh the need of tribal representation in negotiated rulemaking.

Also included in this recommendation is a condition that a proceeding should take place only if "representatives of tribes, schools and public" make "supportive comments" during the comment period. This condition is contrary to the Tribal Education Consultation process. This consultation process is utilized by the Bureau of Indian Affairs ("BIA") and the BIE to conduct a government-to-government dialog for education issues that have a direct effect on Indian tribes. Facilities are one such issue because they involve the environment in which Indian children are educated. It has been the experience of the SRP-MIC that most efforts by the Bureau do start out with the intent of being "fair and effective" but somehow those efforts generally fail in the end.

Additionally, we fail to understand who would constitute "others" in forming approval for membership, since the ultimate decision will be made by the Secretary of DOI as to membership, the formal coordinator or point of contact, and the ultimate scope for the committee's work. There is no clarity as to who composes the "others" necessary for approval.

Again, a conditional "if" is stated allowing BIA discretionary action as to whether or not to proceed with the negotiated rulemaking process. This again aligns with uncertainty when the NCLB Act requires an action to take place formally by the BIA. Failing to do so violates the Public Law.

C. ESTABLISH CLEAR AND ACHIEVABLE GOALS FOR THE PROCESS

We concur that clear and achievable goals should be established for this process. The BIA should draft a set of goals based on the findings and views set forth in the Draft Convening Report by CBI. The findings are based on the conditions of the schools, methods to catalogue school facilities, determining funding formulas for priority for repair and replacement, funding priority for new construction and replacement, contracting and project management.

Again, by including small tribes as part of the diversity effort the dialogue for discussion is increased. This overall inclusion will allow better insight for tribes and school boards in contracting and providing management for construction projects involving their school facilities either for renovation or replacement.

D. ESTABLISH A FAIR, STRUCTURED, AND TRANSPARENT CONVENING PROCESS FOR SELECTING TRIBAL REPRESENTATIVES

We agree that the selection should be fair and transparent for tribal representation. We are concerned that BIE operated schools on tribal reservations sometimes nominate BIE employees to become part of the tribal representation. There is conflict with this type of selection as BIE personnel on the Tribal side are sometimes directed by their upper administrators within the BIE Central Office to infuse a particular viewpoint that is or may not be transparent to tribal representatives who are not part of the BIE system. Even if not directly mandated to promote such views, a person employed by one "side" cannot truly be expected to maintain an objective perspective if and when his/her employer or office is questioned. Therefore, the BIE personnel could potentially induce a counter-focus of what tribes actually desire for their children's learning environment.

We also agree that nominees must be able to meet at least five of the six qualifications identified. However, with regards to qualification #2, which asserts that a nominee should "be past or present superintendents, principals, facility managers, teachers, or school board members", we encourage additional qualifications in tribal representation for persons who have had experience as Capital Improvement Project managers, or tribal agents who experienced construction projects involving school facilities. These tribal agents recommended by tribes are among key stakeholders for education facility needs affecting their tribe's children. We also concur that the BIA should allow membership to exceed twenty-five members and seek a waiver to do so.

E. TO THE MAXIMUM EXTENT POSSIBLE, ASSIGN TRIBAL SEATS ACCORDING TO THE PROPORTIONAL SHARE OF STUDENTS FROM TRIBES SERVED BY FEDERAL FUNDS

This recommendation and CBI's proposal is one of the most difficult for tribes to comment on. The NCLB Act requirement to "ensure, to the maximum extent possible, that the tribal representative membership on the committee reflects the proportionate share of students from tribes served by the Bureau-funded school system," makes diverse tribal membership unequal. However, the phrase "to the maximum extent possible" allows for a diverse membership for tribes. There will also be a disproportionate representation on the Committee as recommended by CBI as larger tribes will have more seats allotted to them and thus outweigh the input of smaller tribes.

We concur with the recommendation by CBI that the BIA be specific about how assignments are made and to open a nomination process through a Notice of Intent to initiate a negotiated rulemaking process.

If the suggestion that the Bureau to seek a waiver to increase membership on the Committee is not granted, then our suggestion for memberships to reflect a proportionate student share for tribes is to reduce the recommended number of representation for larger tribes. For instance, the Navajo Nation membership, according to the Table assigning membership based on proportionate share of students, is nine (9). A request is made to reduce that membership to five, one from each of the Navajo Agencies and one from the Dine Department of Education. This suggestion for a reduction in Navajo representation still allows for the intent of the directive "to the maximum extent possible" to be carried out as representation is still proportionate to the share of its Nation's students.

This suggestion for reduction opens seats to tribes not listed in the recommendation, i.e., tribes from Oklahoma, the Northeast, and in the Rocky Mountain region. Most of these tribes have small schools but are just as important and vital to the negotiated rulemaking process.

F. ASSIGN APPROXIMATELY FIVE (5) SEATS TO PROVIDE FOR REPRESENTATION BY THE FEDERAL GOVERNMENT

SRP-MIC concurs with this recommendation.

G. INTEGRATE THE NEGOTIATED RULEMAKING PROCESS WITH ROBUST TRIBAL AND SCHOOL ENGAGEMENT

We support the recommendation that the negotiated rulemaking process be robust and inclusive for the benefit of all stakeholders represented by the Committee membership.

SRP-MIC concurs with the general process outlined in "Chart 3: Process Diagram for Negotiated Rulemaking and Stakeholder Engagement" in the CBI Convening Report. The National Workshop on School Facilities is an important workshop for all schools and provides added insight that can assist the Committee in meeting the scope of its assignment. The regional workshops can be part of the Tribal Education Consultation process near the conclusion of the Committee's assignment.

It has been the experience of SRP-MIC that any outreach program by the BIA that utilizes a website to disseminate information is predominately unsuccessful. Unfortunately, updates to websites by the Bureau have not been timely. The utilization of a listserv to send email notifications may be an alternative option. Web casts tend to be expensive and meeting locations for the Committee may be in areas where service is not adequate. However, bear in mind that some areas of Indian Country are too remote for electronic access, or the Indian Community may not have the resources to have electronic access.

One recommendation is for the Bureau to notify tribal newspapers and Indian news websites about the ongoing activity of the Committee, including in the notice a point of contact where schools, parents, teachers, school administrators, facility managers, and tribal officials go to obtain additional information.

H. SUPPORT TRIBAL CONSTITUENCY WORK

SRP-MIC concurs that this recommendation is important but does have limitations. Financial support by the Bureau is a must if this recommendation is to work. Communication is necessary to keep tribes informed. However, membership as recommended by CBI is not conducive for this recommendation to work. Many tribes are in remote locations and have great distances to travel. Financing this recommendation becomes cumbersome, if not impossible. The last recommendation as suggested in Recommendation G is to have a point of contact where all tribes not represented can obtain information.

The SRP-MIC also agrees with the recommendation to have each representative file a brief report outlining their efforts to their leadership and constituents in their region and what they promote in their approach for consensus building within the Committee for effective outcomes in the negotiate rulemaking process.

I. FINAL COMMENT

The conditional term "if" is included throughout the Notice. It implies that if the response and the action of the Negotiated Rulemaking Committee is not accepted by the BIA and the BIE which they (implicdly) are allowed to do, then all the actions, interests, and responses given by school board members, parents of BIE school children, teachers, facility managers, school administrators, and Tribal leaders and measures taken to elicit such information become acts of futility. Such action or non-action will only continue the on-going feelings of frustration felt by people throughout "Indian Country". We therefore strongly urge you to take this opportunity to stop the inaction and lack of innovative response by BIE employees.

Thank you for allowing the SRPMIC to comment on the Draft Report. Please contact Ms. Vivian Saunders, SRPMIC Special Assistant on Congressional and Legislative Affairs at 480 362-7528 if you have any questions or need further information.

Sincerely,

Diane Enos

DIANE ENOS
President

Xc: V. Saunders, SRPMIC Special Assistant on Congressional and Legislative Affairs
F. Berry, Director, SRPMIC Division of Education
C. Aragon, Asst General Counsel

Tse Nitsaa Deez'ahi Dine Bi'olta'
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January 15, 2008

Consensus Building Institute
Attn: BIE Convening Draft Report Comment
238 Main Street, Suite 400
Cambridge, MA 02142

To Whom It May Concern:

Thank you for giving Rock Point Community School the opportunity to comment on the Draft Convening Report for the Negotiated Rulemaking Committee on Bureau of Indian Affairs-Funded School Facilities Construction. We share many of the comments represented in the report, especially with regards to the findings on the conditions of schools.

The Rock Point Community School campus consists of numerous buildings that are in varying degrees of disrepair and dilapidation. Our primary area of concern is that the majority of our buildings were constructed using asbestos-containing materials (ACMs). We have had two major disasters in which asbestos was released, posing great health risks for everyone. Our most recent incident occurred in July 2006. We have reported this risk in FMIS and to numerous agency and governmental personnel. Although after 13 months we finally regained the use of the affected area of 2006, we have not received any assistance in abating all the other buildings that have ACMs. We share this concern about our housing units as well, which are in horrible disrepair and pose great health risks from ACMs. The asbestos issue is our most extreme example, but it underscores perhaps more than any other example the weaknesses within the current system for funding facilities projects. We need assistance and we are not getting any despite our efforts.

We also share the interviewees' perspectives on the methods used to catalog school facilities in FMIS. The current system is cumbersome. We do not understand how or by whom priority decisions are made. What we do know is that we do not receive funding unless it is on an emergency basis. We place requests into the system as we become aware of problems and areas of noncompliance. We receive repeat citations and all we can say is that the request is in the backlog. Our problems persist year after year after year.

I struggle with the notion of which is the best course of action: 1) reconstruct a new system; or 2) provide more thorough, consistent, and on-going training on the current system. Like most rural

BIE schools, we experience a relatively high degree of staff turnovers. Unfortunately, information is taken away every time a staff member leaves, placing untold burden on schools to pick up and carry on with their operations. Our most knowledgeable individual did not return this year, leaving us with two individuals who have only a basic knowledge of FMIS and facilities funding and budgeting. I think that the best course of action at this point would be to provide schools with extensive training on FMIS so that we know exactly what steps to take to secure funding for all our projects, including MI&R and FI&R projects.

With regards to the representatives that would serve on the committee, we have a couple of comments. Naturally, as representatives of a Navajo school, we initially were delighted that such a large number of individuals would represent the Navajo Nation. However, we believe that all tribes need to be represented equally, despite the size of the tribe. Configuring the committee based on a tribe's size seems akin to other systems that place an unfair advantage in favor of the wealthy. All children are valuable and deserve an equal opportunity to have improved facilities. The committee should, therefore, have one representative for a tribe or geographic clustering of tribes. Further, the representatives need to be chosen carefully. Schools need representatives that are knowledgeable about facilities and FMIS and who will advocate strongly for us. They also need to communicate with schools and share information with us on a frequent basis. We don't want our representatives and this negotiated rulemaking process to be as mysterious and opaque as the system we are trying to change.

There is no easy solution here and I applaud your efforts to search out an equitable, effective system that will benefit our schools and ultimately our students. Thank you again for providing us and all other BIE-funded schools an opportunity to voice our suggestions, concerns, and frustrations. We are all dedicated to serving our schools as best we can and you taking an important step toward improving our ability to provide a safe, healthful environment that is conducive to student learning and achievement.

Sincerely,

Carol Schneider
Executive Director

Comments of the
DZIL-NA-O-DITH-HLE COMMUNITY SCHOOL BOARD
in response to
Draft Convening Report Regarding Negotiated Rulemaking for
Bureau of Indian Affairs-Funded School Facilities Repair, Renovation & Construction
Pursuant to the October 22, 2007 FEDERAL REGISTER notice

Introduction

The School Board of the Dzilth-Na-O-Dith-Hle Community School is a Bureau of Indian Education-funded Grant school of the Navajo Nation located near Bloomfield, NM. The School offers both academic and residential programs for Indian students in grades K-8, and residential programs for Indian students in grades 9-12 who attend local public school. For School Year 2007-08, 260 students enrolled in the academic program, and 57 students are housed in the campus dormitories.

The School Board offers these comments in response to the October 22, 2007 FEDERAL REGISTER notice identified above.

General Support for Commencing a Negotiated Rulemaking Proceeding

The School Board generally supports convening a Negotiated Rulemaking Committee to examine school facilities related issues as called for in the No Child Left Behind Act [specifically, Sec. 1125 (a) (5) of the Education Amendments of 1978, as revised by the NCLBA and codified at 25 USC 2005 (a) (5)]. We agree that such a Committee should be comprised of both tribal and federal representatives.

But in order for such a Committee to be effective and capable of producing valid and useful recommendations, important commitments are needed from the Secretary of the Interior and from tribal participants. Unless firm commitments are made prior to the Committee's work and are kept throughout the proceedings, we are doubtful that the Committee can succeed as intended. Our specific recommendations are described below.

Commitments needed from the Secretary of the Interior

Financial resources. First and foremost, the Secretary must commit to providing full financial support to cover the costs of the Committee's work. This must include covering the costs of Committee meetings/conference calls; travel and per diem for Committee members and support for personnel; materials; consultants (federal and non-federal) to advise the Committee on matters requiring special expertise; and what the Convening Report calls "constituency services work."

Use of Committee products; objective consideration of non-consensus issues. The Secretary must also commit to support the decision/recommendations of the Committee reached by consensus, and to act quickly to implement these recommendations. To the extent that there are non-consensus issues, the Secretary should commit in advance to fairly and objectively consider

opposing views before making the final decision on such issues. In other words, on unresolved matters, the automatic default should not be to a federal view where the federal representatives espouse a particular position.

Commitment needed from Tribes and tribal representatives

Full and meaningful participation. As the Convening Report recognizes, service on a Negotiated Rulemaking Committee demands a significant amount of time and effort from its members, both inside and outside of the Committee meeting room. Persons who accept appointment must be willing to commit to faithfully attend and prepare meetings, perform drafting and research assignments in and out of meetings, and make good-faith efforts to reach consensus.

Tribal employers. The employers of Committee members must be willing to commit to allow their employees to devote the time needed to fulfill Committee responsibilities. This would include time away from the job to attend meetings, and time during the business day to perform Committee-related work, including constituent services work.

Committee composition

Expertise. The School Board believes that each person appointed to the Committee should demonstrate experience or expertise in one or more skill areas the Committee will need, such as construction project management; school facilities operation and management; construction cost estimating; education program space needs; budgeting and appropriations; engineering; formula development; or hands-on knowledge of the BIA's Facilities Management Information System (FMIS). Possessing relevant expertise will enable each member to make a contribution to the Committee's work products, and of equal or even greater importance, will prevent the Committee's work from being dominated by the federal representatives.

These experience/expertise requirements should also apply to persons appointed as federal Committee members.

Distribution of seats. While the Convening Report's recommendation that Committee membership be apportioned among tribes according to the proportion of students in the BIA system is a reasonable approach, this necessarily leaves many tribes and regions without any direct representation. Care should be taken to apportion the "additional 5-7 seats so that every region that has BIA-funded schools is represented on the Committee. This is needed to help assure that the Committee's work is perceived as fairly taking into account the needs of the entire BIA-funded school system, not just the interests of some tribes, and to give credibility to the Committee's products.

It would also be good to consider providing seats to representatives of national or regional Indian organizations --- both those that focus on Indian education (such as NIEA) and those that represent broader Indian tribal interests (such as NCAI and organizations of tribes from various geographic areas). Of course, these representatives should also possess experience or expertise in skill areas relevant to the Committee's work.

Suggestions for Committee Work

The Neg Reg Committee will face an enormous, multi-faceted task and members will come with varying degrees of knowledge of how the BIA school facilities procedures work now. There is no widespread knowledge about how BIA makes decisions about which school facilities projects get funded and which do not. All must know the details, strengths and weaknesses of the current system before they can evaluate them and recommend changes. Thus, we recommend the Committee's work be separated into at least two phases, as follows:

Phase I – Detailed Briefings on Current BIA Processes.

- FMIS – information it is intended to include (and does or does not include); timelines, usefulness and completeness of the information; strengths and weaknesses; persons responsible for providing data; methods for validating, up-dating information; barriers to usage at the school levels.
- Selection/ranking process for replacement school projects – applications; validation; cost estimating methodologies; criteria for ranking projects and justification for criteria used
- Selection/ranking process for individual building ("complimentary education facilities") projects – same considerations as noted for replacement school projects
- Selection/ranking process for facilities improvement and repair (FI&R) projects – same considerations
- Formulas for allotting annual facilities operation and facilities funds – Note that the NCLBA provision requires the Committee to establish routine maintenance schedules and to project the funding needed to keep each school viable. These tasks necessarily involve an examination of how facilities operation and maintenance funds are now allotted.

Phase II – Evaluation and Recommendations. Armed with a thorough knowledge of current practices, the Committee will be equipped to perform the most significant tasks Congress assigned, that is, to develop formulas for the rational and equitable distribution of funds that truly address the facilities-related needs of the BIA-funded school system.

Conclusion

The Dzilth-Na-O-Dith-Hle Community School Board appreciates the opportunity to offer comments on the proposal to convene a Negotiated Rulemaking Committee.