

TESTIMONY OF

**CHESTER CARL,
CHAIRMAN**

NATIONAL AMERICAN INDIAN HOUSING COUNCIL

BEFORE THE

SENATE COMMITTEE ON INDIAN AFFAIRS

HEARING ON NAHASDA IMPLEMENTATIONS AND S.400

MARCH 17, 1999

Chairman Campbell, Vice Chairman Inouye, distinguished members of the Indian Affairs Committee, thank you for this opportunity to address you regarding the Native American Housing Assistance and Self-Determination Act of 1996. As you have stated previously, S. 400 was meant to be a beginning for discussions on NAHASDA, therefore my testimony today will cover two main topics: first, problems with the implementation of the law and possible remedies and second, specific comments regarding the NAHASDA . amendments bill, S. 400.

Unbeknownst to the authors of NAHASDA, the title of the Act, while widely considered to be just another Washington acronym, is very similar to a Navajo word meaning "one who has gone to war." Often, that is the way we in Indian Country feel. The process of implementing the law, of drafting rules under negotiated rulemaking, has been arduous, time consuming, and often full of conflict. On many occasions, it has become obvious that the support tribes need exists within the Department of Housing and Urban Development, but the pace of change has been faster than the capacity of those implementing the law can adapt to.

NAHASDA is also similar to another Navajo word that means "one who sits and patiently waits." We are now waiting for our chance to be treated on a government-to-government basis by the Department, but our patience is being tested. This is not a typical HUD program - NAHASDA is about self-determination and tribal empowerment. The old bureaucratic way of thinking should be gone, but all too often, it is not.

CONSULTATION:

Almost a year ago, President Clinton signed an Executive Order requiring that every Federal Department have a formal consultation policy for their interaction with tribal governments. This is an affirmation of the government-to-government relationship of tribes and the federal government.

HUD's failure to produce such a consultation policy is clearly alarming, especially after the long and largely successful process of negotiated rulemaking that concluded last year. The progress we made in educating the Department should not be lost. As representatives of NAIHC have stated before this committee recently, the phrase "self-determination" was not supposed to be removed from the title of NAHASDA once regulations were published. There must be an ongoing formal process for tribal consultation or we can expect continuing dissatisfaction on the part of the tribes concerning HUD's unwillingness to adequately include the concerns of tribes in their implementation of NAHASDA or any other program.

NAIHC's members were recently joined by the members of the National Congress of American Indians to reconstitute the Negotiated Rulemaking Committee to fill this role. Unfortunately, letters from both NAIHC and NCAI requesting a meeting with the Secretary to discuss these matters have been entirely ignored. We hope that this committee will intervene before the situation deteriorates further. Tribes should not be ignored by a cabinet secretary unless the Administration is willing to admit that its own policy of the government to government relationship is no longer in force.

Consultation is clearly the only way that we can ensure an effective, tribally based program. The current implementation of the HUD block grant program in comparison to other tribal block grant programs, such as Indian Health Service and Bureau of Indian Affairs, is very restrictive and its implementation is not in accordance with the tribal self-determination policy.

ENVIRONMENTAL REVIEW:

As my colleague, NAIHC Vice-Chairman John Williamson of the Lower Elwha Housing Authority will point out, environmental review concerns may be the most serious issue we face in NAHASDA implementation,

The environmental review provisions under NAHASDA outline very specific requirements tribes or TDHEs must follow. HUD has advised if a mistake is made in complying with these requirements, no matter how small, the entire project becomes ineligible for any federal funding. Any money received from HUD for that project shall be reclaimed by the Department and no future HUD funds may go to the project.

This is of special concern because these environmental regulations state that tribes may have HUD perform the environmental assessments, but FM asserts it does not have the resources to perform environmental assessments. This forces tribes to perform the environmental assessment with its own limited resources. This unfunded mandate shifts a federal responsibility to Indian tribes and unfairly penalizes Indian tribes for minor technical mistakes. It is critical you know that prior to the enactment of NAHASDA, HUD did not require tribes to strictly follow the environmental review procedures under the 1937 Housing Act assistance. Only recently has the Department begun requiring strict compliance. We appreciate your assistance by requesting HUD Secretary Andrew Cuomo for a waiver and reconsideration of HUD's new position on strict enforcement of the statutory environmental provision, yet to date this issue remains unresolved.

Our recommendations to ensure the block grant funds are not jeopardized and comply with environmental requirements are that HUD:

- 1) train its staff and provide training to Indian tribes on the environmental review requirements;
- 2) provide a Guidance Notice to tribes on how NM will enforce the environmental review provisions and provide a transition period to the new HUD enforcement policy; and
- 3) request that Congress eliminate the outdated, paternalistic federal relationship with Indian tribes and replace it with a new one emphasizing tribal self-determination.

This recommended policy would be consistent with the congressional findings of the NAHASDA legislation.

Currently, the 24 CFR Part 50 environmental regulations by which HLTD performs environmental reviews are regulatory in nature; thus HUD is able to waive its own mistakes. In HUD's view, the 24 CFR Part 58 environmental regulations that govern tribal review is statutory, so a tribal

mistake, no matter how small, becomes detrimental to the tribe and cannot be waived. 24 CFR Part 58 regulations also require the tribes to waive their sovereign immunity before they can receive federal funds. Tribes can be sued in federal courts for non-compliance with environmental requirements.

INDIAN HOUSING PLANS:

The first problem was clearly the late approval for the plans to go into effect. It was only after six months of constant nagging by tribes and the threat of a lawsuit by NAIHC on behalf of its members that the regulations were published allowing NAHASDA to go forward, despite glaringly clear language in the law. In a survey conducted by NAIHC of IHPS, we discovered that two-thirds of TDHEs reviewed actually had to deplete their reserve accounts just to keep operating in the time between when the old program ceased to exist and the eventual implementation of NAHASDA.

In one instance, an Indian housing plan (IHP) submitted by a tribe included the statement that a regional housing authority would visit villages within its jurisdiction on an annual basis to check on the condition of units. HUD staff, in reviewing the plan, actually asked to see on which dates these visits would take place. That HUD staffer failed to recognize the fundamental point of the IHP: it is not for HUD to approve and to be used to dictate policies, it is only for HUD staff to ensure it does not violate the law or regulations - the rest is up to the tribes.

Other problems tribes have with the IHP include HUD's violation of the statutory 60-day review and approval deadline for a plan. HUD asked for clarification and more information on an item in a tribe's IHP and then restarted the 60-day clock. No goals or activities were changed, just formatting and clarification. Another tribe actually had HUD revoke a prior approval of a plan six months after it had gone into effect in order to change a program listed in the statute as an eligible affordable housing activity to a "model program" needing separate approval.

TITLE VI LOAN GUARANTEE IMPLEMENTATION:

The Title VI program provides a loan guarantee when the long-term aspects of housing development collide with the short-term realities of grant administration. Title VI is crucial to the success of Indian housing programs. Under the old system, tribes could apply for development grants, allowing for competitive applications for additional money. Under NAHASDA, all money is distributed through the formula, meaning tribes and TDHEs with smaller allocations must have some other means to undertake major construction projects. Title VI is the means to accomplish this: tribes can borrow or

issue bonded debt for up to five times their annual allocation in order to secure substantial funding for large scale housing projects. It is patterned closely on the highly successful Section 108 program that operates with the Community Development Block Grant system.

Well into the second year of NAHASDA the program is still not in place. A demonstration program is being introduced by HUD with several unexpected strings and quite possibly a fatal flaw introduced by OMB. Some of the unexpected strings include:

- An additional construction standard of "visitability". This may be a good idea in some circumstances, but it is not a requirement of the law, the regulations, the ADA, or common to the building industry. HUD just decided to add this requirement to the Title VI program without basis in law or following the benefit of tribal consultation.
- A requirement for additional security for every guarantee. The law provides that the Secretary may deem additional security necessary for a guarantee -- HUD has determined that every guarantee requires additional security.
- NAHASDA recipients that wish to participate in the Title VI demonstration program must have "experience with complex financial transactions". When asked if this meant that a recipient which had never borrowed before could not participate in the demonstration program the response was that "it is likely that tribes/TDHEs without experience would be denied a Title VI demonstration program loan." There are many Tribes and NAHASDA recipients with the experience and skill to benefit from the Title VI program which have never had to borrow a dime.
- The affordable housing activities for which the guarantee may be used have been pared down from those specifically established by law for the purposes of the demonstration program.
- Finally, the fatal flaw is the OMB requirement to provide only an 80% guarantee. Our Association was advised last week that such a limitation will, for all practical purposes, rule out participation in the domestic bond market. Title VI must be a 100% guarantee.

DAVIS - BACON & HUD DETERMINED WAGES.

The per project threshold of \$2,000 and the HUD determination that if a project uses one dollar of NAHASDA funds, then the entire project is subject to Davis-Bacon Act (DBA) requirements is already creating problems. The benefit and promise of NAHASDA to leverage and coordinate funding is being adversely impacted and even having the opposite results.

Projects using other federal and state funds which could complement each other are being avoided because of this wage standard. It seems that this "one dollar" interpretation is extreme. The original drafts of NAHASDA included a 12-unit exemption from DBA requirements, making it equivalent to the HOME block grant at HUD. NAIHC supports this exemption because it will allow for greater coordination and decrease the cost of housing. Ultimately, the wage rates paid for Indian housing should be determined by Indian tribes.

HUD PROJECT REVIEW:

A twist on the continuing need for tribal consultation, HUD/ONAP has a need to expand their thinking about affordable housing activities. Although we have not seen or heard of a wide-spread practice of HUD "denial" of proposed activities by the Tribes, there is a sense of discouragement offered by some HUD staff. HUD needs to include Tribal participation in the continuous (and healthy) discussions over what constitutes an affordable housing activity. In addition, there is a need to promote those activities and to "spread the word" about the innovative and creative uses of NAHASDA funds throughout Indian Country.

MORTGAGE LENDING:

Because one of the goals of NAHASDA is to spur the development of private mortgage markets in Indian Country, we would like to work with the Committee to include additional provisions in S. 400 dealing with this issue.

As a member of the Fannie Mae Impact Advisory Council, I recently chaired a meeting and urged the company officials to continue its commitment to stamp out redlining on Indian reservations. Only 91 conventional mortgages were made in Indian country between 1992-1996, yet over forty percent of tribal housing is considered substandard and twenty-one percent of homes in tribal lands are overcrowded, which is ten times more than the national average. One of the keys to getting lenders involved in greater activity on trust-held land is to amend the 1992 Housing and Community Development Act to include additional affordable housing targets for Fannie Mae and Freddie Mac. These two federally chartered entities have unique access to the federal treasury and in return agree to meet Congressionally mandated goals for affordable housing. There should be no question as to the fact that Indian Country is more in need of Congress' support in this area than in any other community in the United States. Once Fannie Mae and Freddie Mac have a target, they will work to meet it, meaning that lenders know these entities will buy their mortgages. Fannie Mae and Freddie Mac's commitment will allow lenders to finally accept Indian Country as a viable market.

SECTION BY SECTION ANALYSIS OF S. 400:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS

No comments.

SECTION 2. RESTRICTIONS ON WAIVER AUTHORITY

This provisions does not substantially alter the act and NAIHC does not anticipate it will cause any undue hardships.

SECTION 3. ORGANIZATIONAL CAPACITY; ASSISTANCE TO FAMILIES THAT ARE NOT LOW-INCOME

(a) Organizational Capacity

NAIHC believes that the re-ordering of the subsections will not affect the legal implications, but we are concerned that the undefined terms "management structure" and "financial control mechanisms" could allow for broad interpretation by HUD in the H-IP, which is already burdensome in many respects.

(b) Assistance to Families that are not Low Income

This provision should not affect current reporting requirements in the IHP.

SECTION 4. ELIMINATION OF WAIVER AUTHORITY FOR SMALL TRIBES

The NAHASDA regulation already makes it clear that there is no distinction and therefore this provision will not affect the current program.

SECTION 5. EXPANDED AUTHORITY TO REVIEW INDIAN HOUSING PLANS

While striking the word "limited" and the second sentence may not seem to alter the enforcement of the law, NAIHC is very concerned that HUD is already overzealous in their interpretation of what constitutes review. This could send a message to HUD that they should take an even more active role in the IHP process, which is clearly contrary, both to good policy-making and the intentions of Congress.

Section 6. Oversight

(a) Repayment

NAIHC strongly agrees with the intent of this section. HUD has proven all too willing to avoid the reporting and remedy opportunities provided tribes in Section 401 of the law by simply claiming it is not taking action under that provision, but under others. The authors of NAHASDA believed strongly that HUD should be governed by Section 401 of NAHASDA in any situation in which HLTD's actions could be considered adverse to a NAHASDA recipient.

(b) Audits and Reviews

While the intention of this subsection would seem to clear up perceived inconsistencies within the audit requirements of the law, it would also appear to give the Secretary unlimited authority to conduct audits at any time HUD staff see fit. While the Congress clearly wants to allow the Secretary to conduct necessary audits, the protection of the single audit act should be that tribes do not spend all of their time on audits as opposed to providing housing for their members. NAIHC would be happy to work with Committee staff to clear up this concern.

SECTION 7. ALLOCATION FORMULA

The NAHASDA regulation agreed upon by all parties who originally expressed concern over the formula provisions of the law, would seem to have taken care of the problem this section attempts to solve. NAIHC would ask the committee to focus its attention on making sure enough funding is provided to the NAHASDA block grant in appropriations so that there is enough money in the program to avoid the need for such protection measures. The basic concept of this provision appears fair if we are faced with a less than sufficient appropriations level.

SECTION 8. BEARING REQUIREMENT

NAIHC-does not oppose this provision if, as Congress intends, it is used only in the most extreme of circumstances. Our support, however, also depends on whether the Committee will apply the protections offered to tribes and TDHEs to all actions taken by the Secretary that could adversely affect tribes (see comments on Section 6(a)).

SECTION 9. PERFORMANCE AGREEMENT TIME LIMIT

The intent of this section would appear to be good, but it is rather confusing. Simply put, performance agreements, if they include restrictions on a tribe or TDHE, should not be allowed to continue *ad infinitum* simply as a way of giving control over a tribal program to federal bureaucrats. A performance agreement should be a way of assisting a tribe or TDHE in order to get the program functioning without placing harmful penalties on a program whose principal concern could be a lack of expertise or training, not theft or flagrant mismanagement. Performance agreements exist in the current regulation.

SECTION 10. BLOCK GRANTS AND GUARANTEES NOT FEDERAL SUBSIDIES FOR LOW-INCOME HOUSING TAX CREDIT

This section is very important to the availability to the Low-Income Housing Tax Credit program in Indian Country. Already included in legislation introduced independently by Senator Johnson (D-SD) and Congressman J.D. Hayworth (R-Arizona), NAIHC strongly endorses this provision.

SECTION II - TECHNICAL AND CONFORMING AMENDMENTS

(a) Table of Contents

No comments.

(b) Authorization of Appropriations

The Department already has funds available for disasters, but NAIHC does not strongly oppose this provision if it does not negatively affect appropriations levels for Indian housing programs.

(c) Certification of Compliance with Subsidy Layering Requirements

NAIHC recognizes eliminating this provision of NAHASDA will not change reporting requirements, merely remove a duplicative provision of law that could complicate matters if the underlying statute of the provision were itself amended or repealed. NAIHC supports this provision.

(d) Terminations

Section 8 vouchers, while not widely used by Indian tribes or TDHEs, are important parts of the housing strategies of some tribes. As in other areas where the Congress and Department are working together to prevent needless dislocation of families receiving section 8 assistance, terminating these contracts without providing funding to continue the assistance to these families could force families onto the streets. The underlying principle of the formula, that families served today should be able to be served tomorrow, is fundamentally sound and should be maintained. This provision allows that to happen, but may have already been dealt with more effectively in the regulatory negotiations.

CONCLUSION:

As you now know, the few months of NAHASDA have not been easy for tribes and those that support tribal self-sufficiency, self-determination and sovereign immunity. Unfortunately, these battles are not over. NAHASDA creates new opportunities and roles for both the tribes and the federal government because it creates a partnership that recognizes the importance of tribal responsibility and eliminates federal involvement in tribal programs. We all have much hard work ahead. In the coming months and years, we will continue to actively assert our voices into the debate that we are sure will continue. We hope that the information we provide of the successes we achieve as well as the challenges we face will assist your committee in its continuing work improve the communities and lives of Native families.