

Subcommittee on Housing and Community Opportunity

Hearing – May 3, 2004

“Improving Housing Opportunities for Native Americans”

Testimony

“The Impact of Insurance on Indian Housing Mortgages”

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Thank you for the opportunity to share my concerns regarding the significant impediments to improving housing opportunities for Native Americans. My name is Kent Paul and I am the Chief Executive Officer of AMERIND Risk Management Corporation - a federal corporation owned and operated by a consortium of Indian Tribes and Indian Housing Authorities, which pool their financial resources to provide self-insurance coverage to protect Indian housing, infrastructure and individuals and families in Indian Country.

My testimony will address two specific topics. First, the inadequacy of affordable and available insurance coverage for homeowners in Indian Country and its impact on home mortgages. Second, the important role that AMERIND plays in protecting Indian housing and the impediments restricting AMERIND's ability to provide even more protection.

I will also respond specifically to the four questions posed by the Subcommittee relating to homeownership in Indian Country.

I. Lack of affordable or available insurance coverage

In urban and suburban America, insurance, for the most part, is readily available from over 1,600 insurance companies. The opposite is true in rural America, especially in Indian Country. To date, less than five insurance companies provide products or services that meet the needs of Indian communities, Tribal governments, reservation businesses, and Indian housing. Since September 11, 2001, the affordability and availability of insurance in Indian country has gotten worse. In our society, insurance is the oil that lubricates and protects our economic engine. Without insurance, banks will not loan money, consequently, money for investing in new economic enterprises would stay in the bank rather than becoming risk capital; businesses owners would be hesitant to conduct business; and autos would remain parked in the garage


Why does the private insurance sector turn its back on Indian Country? Several of the reasons would be:

1. Perceived lack of profit potential due to remoteness of Indian communities, lack of water and inadequate fire protection.
2. Insufficient number of insurance agents servicing Indian country.
3. Misunderstanding and fear of Tribal sovereignty and Tribal courts.
4. Lack of tribal commercial laws or business codes among the 550+ federally recognized Indian tribes.
5. Overall perception of Native Americans as poor, unemployed, uneducated, unhealthy, and addicted to alcohol and drugs.

In any given month, various federal agencies, lending institutions or Indian organizations will provide a seminar or technical assistance programs on the topic of homeownership, mortgage lending, HUD 184, or Title VI programs or tax credit projects. Few, if any of these seminars or programs discuss the role of insurance and financial protection in homeownership. Yet, without such coverage, lending will never be provided. In my opinion, this has been one of the major stumbling blocks to homeownership in Indian Country.

In response to the Subcommittee's 4 specific questions, I offer the following testimony:

1. What initiatives or partnerships have you taken part in or have knowledge of that are designed to contribute to the development of more housing for Native Americans and for tribal areas?

Answer: AMERIND has been very active as a sponsor or participant in a majority of the HUD Summits on Homeownership and homebuyer education. AMERIND also participates in programs underwritten by Fannie Mae and is active in programs promoted by USDA-Rural Development. AMERIND also assists the National American Indian Housing Council in homeownership technical assistance seminars, and conducts two national seminars that focus on financial protection and homeownership issues. AMERIND is very active in the process but seldom are we asked to focus on the issue of financial responsibility through the purchase of insurance. 

Although all of these seminars and technical assistance seminars have value, most do not attract the very people that buy the homes. For the most part, attendees of these meetings are tribal leaders, housing professionals and others that administrate the lending process, but that do not actual borrow the money. A great deal of effort and money is being spent in the area of homebuyer education, but little effort is being made to actually assist the homebuyer through the maze of forms, credit reports, fees and procedures of securing a loan. It is for this reason that I believe predatory lending continues to be a problem in Indian Country. It is not enough to provide knowledge at a seminar and then expect a Native American consumer to be wise to the ways of business within the lending industry. More must be done to assist the consumer through the actual process, not just tell them how to do it.

2. Is AMERIND aware of the One-Stop Mortgage initiative and has it been effective?

Answer: AMERIND is very aware of the One-Stop Mortgage initiative and we have tried diligently to participate in discussions on this initiative without success. We support uniformity between departments of the governments as it leads to reduced costs and improved service. To my knowledge, there has been limited involvement of the private sector in the One-Stop Mortgage initiative and it is the private sector that will ultimately decide to loan or conduct business in Indian Country. I believe the initiative has minimized the confusion of homeownership in Indian Country, but it has not increased the actual number of loans.

Three areas of concern that are not being specifically addressed to date in the One-Stop Mortgage initiative are: 1) the computer restrictions placed on the BIA as a result of the *Cobell v. Norton* trust case make it extremely difficult to validate clear title to Indian land held in trust in a timely manner. 2) the cost of title insurance (if available) is often prohibitive in Indian country because of the inability of the title company to assure the accuracy of the title through the BIA. In my opinion, the trust responsibility of the federal government is the guaranty of clear title and the cost for title insurance should be much less expensive in Indian Country than in the rest of country. 3) the failure of the

BIA, HUD, USDA, VA, or Freddie Mac to recognize AMERIND as a provider of hazard protection for home mortgages in Indian Country. Recently, Fannie Mae granted AMERIND a national letter of approval as a recognized insurance provider for Indian Country and will purchase any mortgages protected by our Indian housing self-insurance risk pool. This national recognition must be part of the One-Stop Mortgage initiative if there is to be improved success. In most Indian communities there are no other options than the products and services provided by AMERIND. Despite repeated requests, little action has been taken to develop a "Memo of Understanding" (MOU) between the other federal agencies to recognize Fannie Mae's approval of AMERIND as an approved provider of hazard protection for home mortgages in Indian Country. Without an MOU, Indian country will continue to be neglected.

3. Trust land status and impediments to homeownership. How does this affect the private sector's ability to provide housing assistance?

Answer: Trust status of Indian land has been and will continue to be an impediment to the private sector unless the following occurs:

- a. The BIA should encourage Tribes to adopt a uniform commercial code specific to Indian Country that levels the playing field for all parties to a real estate financing transaction. Banks and lending institutions find it much to cumbersome to work the differing laws of over 500. A uniform set of rules would make it more desirable for lending institutions to lend in Indian Country.
 - b. Provide more autonomy to Tribes in making decisions relating to lands held in Trust without bureaucratic oversight. Tribal leaders and administrators are far more educated today than when paternalistic policies were invoked in the 1800's. Tribes are desirous to be self-determinant and self-governing; consequently they should have a greater control over the lands within their communities.
 - c. Tribal sovereignty needs to be clarified so that the Tribes can work unencumbered within their territories. There is a unique relationship between Tribes, the federal government and State governments. This relationship is both a boon and a curse for Tribes. Tribal sovereignty was exercised to its fullest extent for generations before European colonists arrived. By treaty, Tribes were permitted to exercise limited sovereignty by the federal government in exchange for their lands and resources, and relocation. The limit and scope of Tribal sovereignty continues to be debated and adjudicated by our federal court systems. The private sector must be educated on Tribal sovereignty and the rules of business engagement in Indian Country. Always requiring a waiver of sovereignty as a condition to do business in Indian Country (lending for housing located on trust land) will be an ineffective method for increasing homeownership.
4. Limited number of conventional mortgages made from 1992 to 1996. What changes are necessary to encourage investment in Indian Country?

Answer: My comments in the preceding three questions address many of the issues that prevent the private sector from lending to Native Americans. As a recap, specific changes to encourage private lending are:

- a. Streamline the lending process. Banks unfairly perceive too much difficulty in lending to Native Americans than to non-Natives.
- b. Establish a uniform set of rules or procedures.
- c. Find ways to minimize the Tribes need to waive sovereignty.
- d. Allow Tribes to validate clear title to trust land within their communities with the BIA providing a supporting role rather than a primary role.

The second topic of my testimony is the important role AMERIND has played to encourage homeownership and protect Indian communities.

As I mentioned earlier, AMERIND is a federal corporation owned and operated by consortium of Indian Tribes and Indian Housing Authorities that are dedicated to protecting themselves and their Tribal families.

AMERIND is owned by 217 IHAs, which represent over 500 federally-recognized Indian tribes located within 32 states. AMERIND operates on a purely non-profit basis.

Since its formation, AMERIND has:

- Paid over \$125 million in Indian housing related liability and property claims.
- Saved Indian tribes, IHAs, and HUD over \$100 million in premiums.
- Protected over \$6.5 billion of federally-subsidized Indian housing.
- Provided better terms, conditions, and coverage at nearly one-third the cost of comparable commercial insurance.
- Remained financially stable during difficult market conditions.
- Provided self-insurance coverage for Indian tribes and IHAs located in rural Indian communities where commercial insurance companies have refused to provide coverage.
- Created employment in Indian country.

AMERIND, therefore, is an example of the kind of tribal self-determination that Congress intended to foster when it enacted NAHASDA. *See* 25 U.S.C. § 4131(a)(2).

AMERIND Historical Perspective

NON-PROFIT SELF-FUNDED INDIAN HOUSING RISK POOLS

I. Legislative and Administrative History of Indian Housing Pools

Congress' treatment of the United States Housing Act of 1937 ("1937 Act") and the regulations issued under that Act demonstrated Congress' continuing commitment to promote the ability of Tribes and their Tribally Designated Housing Entities ("TDHEs") or Indian Housing Authorities ("IHAs") to provide alternative low-cost self-insurance coverage for federally-subsidized Indian housing through their wholly owned and controlled non-profit self-funded risk pools. The corresponding administrative history further shows that the Department of Housing and Urban Development ("HUD") fostered this congressional commitment by actively encouraging the formation of, and in fact financing a non-profit self-funded Indian housing risk pool to provide protection for federally-subsidized Indian housing. Congress has since recognized that in order to support the activities of non-profit self-funded Indian housing risk pools, it must protect those pools from burdensome state and federal requirements that might impair their ability to continue to provide low-cost self-insurance coverage.

The Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), enacted against the backdrop of this congressional and administrative history, specifically requires the Secretary of HUD to issue regulations for the provision of adequate insurance coverage for federally-subsidized Indian housing. NAHASDA, therefore, provides a legal basis for HUD to issue a regulation preempting burdensome and counterproductive state and tribal regulations in furtherance of Congress' longstanding policy of protecting the ability of non-profit self-funded Indian housing risk pools to provide low-cost self-insurance coverage to IHAs for federally-subsidized Indian housing.

A. United States Housing Act of 1937

The 1937 Act authorized the Secretary of HUD to make annual contributions to IHAs for low-income Indian housing projects. 42 U.S.C. § 1437c. The 1937 Act further empowered the Secretary to set the terms of these annual contributions in contracts, known as Annual Contribution Contracts ("ACCs"), between HUD and IHAs. *Id.* at § 1437d.

Section 305 of the standard ACC required IHAs to obtain liability and property insurance for federally-subsidized Indian housing projects from a "financially sound and responsible *insurance company*" on a competitive bidding basis. Notwithstanding this contractual provision, HUD provided insurance directly to IHAs through a master policy issued by a commercial insurance company. HUD then billed IHAs for the insurance on a *pro rata* basis, which IHAs paid using the annual contributions from HUD.

But in 1986, the proposal of the only insurance company willing to provide coverage for Indian housing under a master policy was rejected because the company was willing to provide *only* property coverage, and would provide that limited coverage upon payment of exorbitant premiums. Seeking an alternative to these excessive premiums, HUD encouraged the National American Indian Housing Council (“NAIHC”), the advocacy group for IHAs, to form a non-profit self-funded Indian housing risk pool. HUD advanced subsidy funds to 175 IHAs for this purpose.

NAIHC responded by incorporating a non-profit self-funded Indian housing risk pool known as AMERIND Risk Management Corporation (“AMERIND”) under the laws of the Red Lake Band of Chippewa Indians in Minnesota.

On May 17, 1988, HUD approved AMERIND as “substantially equivalent” to a “financially sound and responsible insurance company.” In doing so, HUD waived for the pool the insurance-company and the competitive-bidding requirements set forth in Section 305 of the standard ACC. The IHAs have owned and operated AMERIND under this arrangement since then and in doing so, have protected over \$6.9 billion in Indian housing property at nearly one-third the cost of comparable commercial insurance.

B. 1989 Proposed HUD Rule

In the early to mid-1980’s, many insurance companies became insolvent, thereby “depriving the [Public Housing Authorities] of payments to cover their losses and the return of unearned premiums.” 54 Fed. Reg. 52000, 52004 (Dec. 19, 1989). In response, HUD proposed a rule that would clarify its policy on “what constitutes adequate insurance coverage under the ACC.” *Id.*, 52000. That proposed rule set forth standards for a “financially sound and responsible insurance company” or a substantial equivalent, such as a non-profit self-funded Indian housing risk pool like AMERIND. *Id.* at 52006-7. For whatever reason, the proposed rule was never finalized.

C. 1991 HUD Appropriations Act

In the early 1990’s, HUD proposed a regulation to revoke the competitive-bidding waiver for risk pools. In response, Public Housing Authorities (“PHAs”) and IHAs asked Congress to prohibit HUD from revoking the waiver. Congress did so in the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill of 1991 (“1991 HUD Appropriations Act”). In doing so, Congress sought to protect the ability of IHA and PHA risk pools to continue to provide low-cost self-insurance coverage for federally-subsidized public and Indian housing from counterproductive state and federal requirements.

The Senate Committee on Appropriations stated that while it supported HUD’s effort to impose “reasonable limitations and standards” for pools, it also supported PHAs’ efforts “to establish captive entities when due to market conditions such commercially available coverage was either unavailable or exorbitantly expensive.” Sen. Rep. No. 101-474, 73-4 (Sept. 26, 1990). Ultimately, the Committee felt that HUD’s revocation of the waiver could “unwittingly jeopardize continued availability of insurance coverage from alternative sources, such as captives, and over the longer term may lead to higher costs.” *Id.*

The Conference Committee also agreed that HUD should not revoke the waiver, recognizing that the pools had been successfully providing low cost insurance for IHAs and PHAs for many years:

In the mid-1980's, many public housing authorities were unable to obtain liability or property insurance or were required to pay very large premiums to obtain minimal coverage. In response to that crisis, a number of public housing authorities banded together and formed nonprofit insurance pools and risk retention groups under State intragovernmental cooperation laws or the Federal Risk Retention Act of 1986. *All of these groups were formed at the encouragement, and in many instances, with the assistance of the Department of Housing and Urban Development.* When HUD approved the formation and operating plans of these groups, it granted a waiver from the requirement that insurance be procured only by competitive bidding to public housing authorities that joined such groups. *These groups have been extremely successful in providing low cost insurances [sic] to public and Indian housing authorities.* The Department has proposed regulation that would revoke the waiver. The committee on conference agrees that the waiver should be continued and has included language to permit that. Housing Authorities will still be able to make the decision from which company they wish to obtain insurance coverage.

H.R. Conf. Rep. No. 101-900, 28 (Oct. 18, 1990) (emphasis added).

The 1991 HUD Appropriations Act prohibited federal agencies and states from requiring IHAs or PHAs to seek competitive bids for insurance for federally-subsidized housing “when such public housing agency or Indian housing authority purchases any line of insurance from a nonprofit insurance entity, owned and controlled by public housing agencies or Indian housing authorities, and approved by the Secretary.” The 1991 HUD Appropriations Act also required the Secretary to establish standards to ensure the solvency of these nonprofit insurance entities, but Secretary never did so.

D. 1992 HUD Appropriations Act

Thereafter, a dispute arose as to whether the 1991 Appropriations Act made the competitive-bidding waiver permanent. To settle that dispute, Congress enacted the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill of 1992 (“1992 Appropriations Act”).

In the 1992 Appropriations Act, the Senate Appropriations Committee restated its belief “that these nonprofit, PHA and IHA-controlled insurance entities are providing an effective and cost-saving alternative to conventional insurance carriers.” Sen. Rep. No. 102-107, 77 (July 11, 1991).

The 1992 Appropriations Act, which is now codified at 42 U.S.C. § 1436c, permits an IHA or a PHA to obtain coverage from a “nonprofit insurance entity” owned and controlled by IHAs or PHAs without regard to any state or federal competitive-bidding requirement. Section 1436c further directs the Secretary to issue regulations providing standards for the solvency of these nonprofit insurance entities.

Accordingly, HUD issued comprehensive regulatory standards for the approval and oversight of IHA and PHA pools, similar to those first set forth in the 1989 Proposed HUD

Regulation. See 24 C.F.R. § 950.190 (1995) (IHA risk pools); 24 C.F.R. § 965.205 (2002) (PHA risk pools). IHAs operated their risk pool in accordance with 24 C.F.R. § 950.190 until 1997.

The 1991 and 1992 HUD Appropriations Acts make evident Congress' commitment to support non-profit self-funded Indian housing risk pools and to protect them from counterproductive and burdensome state and federal requirements that might impair their ability to provide low-cost self-insurance coverage for federally-subsidized housing.

E. **Native American Housing Assistance and Self-Determination Act of 1996**

In 1996, Congress passed NAHASDA, which (i) carved out for special treatment Indian housing that had previously been governed exclusively by the 1937 Act, and (ii) created a new statutory regime specifically for the regulation of Indian housing. Two of NAHASDA's primary national objectives are "to assist and promote affordable housing activities," including the financing of affordable low-income Indian housing, and "to promote self-sufficiency of Indian tribes and their members." 25 U.S.C. § 4131(a)(1), (2).

Unlike the 1937 Act, NAHASDA specifically requires IHAs to carry insurance for federally-subsidized Indian housing, and specifically requires the Secretary to establish requirements for that insurance. For example, NAHASDA requires IHAs to certify that they:

will maintain adequate insurance coverage for housing units that are owned and operated or assisted with grant amounts provided under this chapter, *in compliance with such requirements as may be established by the Secretary.*

25 U.S.C. § 4112(c)(5)(B) (emphasis added).

In addition, NAHASDA requires, as a program requirement, that IHAs "maintain adequate insurance coverage for housing units that are owned and operated or assisted with grant amounts provided under this chapter." *Id.* at § 4133(c). NAHASDA further requires the Secretary to issue final regulations (on a negotiated rulemaking basis) "necessary to carry out this chapter." *Id.* at § 4116(b).

In 1997, HUD issued new regulations implementing NAHASDA, such as 24 C.F.R. § 1000.138. That section gives IHAs the option of providing coverage for Indian housing either through (i) "a plan of self-insurance" or (ii) an insurance policy purchased from an insurance company. HUD also repealed all former Indian housing regulations, including 24 C.F.R. § 950.190 (which implemented 42 U.S.C. § 1436c).

Unfortunately, HUD did not provide any regulatory guidance or standards for "a plan of self-insurance" of which non-profit self-funded Indian housing risk pools are a well-recognized form.

Impediments to Expanding AMERIND Products and Services

In Indian country, insurance coverage is often unavailable because the commercial insurance industry (for various unstated reasons) has generally chosen not to do business there. IHAs recently demonstrated to HUD Assistant Secretary Michael Liu that, but for AMERIND, insurance for federally-subsidized Indian housing in Indian country would be either unavailable or exorbitantly expensive. This finding corresponds to the reasons why Congress, in the 1991 and 1992 HUD Appropriations Act, chose to support Indian housing risk pools and to remove counterproductive regulatory barriers to their ability to provide low-cost self-insurance coverage for federally-subsidized Indian housing.

1. Lack of Housing Risk Pool Regulations

AMERIND is the only Indian Housing Risk Pool in existence and has the distinct status of operating as a federal corporation under Section 17 of the Indian Reorganization Act. All other housing risk pools are creatures of State law and oversight. As indicated in the previous historical remarks, Congress intended the creation of housing risk pools as an alternative insurance mechanism and instructed the HUD Secretary to issue regulations regarding the same. To date, no such regulations exist

AMERIND has been working with the HUD Assistant Secretary and staff to re-institute rules that were in place under the 1937 Housing Act. AMERIND consistently complied with those rules and regulations until they were withdrawn in 1997 with the passage of NAHASDA. Since 1997 there have been no specific rules that address the requirements of an “approved” plan of self-insurance for an Indian Housing Risk Pool, which places AMERIND in a difficult position. Having no standards by which to be judged causes Banks, lending institutions and others to question our viability as a provider of property protection even with HUD’s recognition and approval of AMERIND as a provider of self-insurance for Indian housing.

2. Federal Pre-emption of State Insurance Law

Currently, the greatest threat to the continued existence of non-profit self-funded Indian housing risk pools, such as AMERIND, is not state or federal competitive-bidding requirements, but is unbridled state and tribal insurance regulation.

AMERIND currently serves IHAs located on over 500 Indian reservations and in “Indian areas” located in 32 States. If these states and Indian tribes are permitted to impose their conflicting regulatory schemes and taxes on non-profit self-funded Indian housing risk pools, the ability of those pools to carry out their congressional mandate to provide low-cost coverage for federally-subsidized Indian housing will be seriously impaired, if not destroyed. To be sure, IHAs would be forced to divert scarce federal grant funds for Indian housing to pay for the increased state and tribal regulatory costs, thereby frustrating Congress’ intent to provide affordable low-income housing for Indian people.

AMERIND and NAIHC have therefore requested that HUD implement a new regulation establishing uniform federal standards for plans of self-insurance, such as non-profit self-funded Indian housing risk pools, and expressly preempting the authority of States and Indian tribes to enact or enforce any requirements that would conflict with those standards.

AMERIND has taken the position that through NAHASDA, Congress has delegated to HUD ample authority to preempt conflicting state and tribal risk pool or insurance laws. In addition, AMERIND asserts that Congress has preempted the entire field of Indian housing—a field within which self-insurance coverage provided by non-profit self-funded Indian housing risk pools plays a critical role. Thus, the position of AMERIND is that HUD has been granted the power, either through congressional delegation, or through the federal government’s occupation of the field of Indian housing, to preempt state and tribal regulation of non-profit self-funded Indian housing risk pools to further Congress’ longstanding goal of ensuring the availability of low-cost housing for Indian people.

Unfortunately, Indian Country is not created equal. A majority of Tribes have defined reservations and it is abundantly clear where State and Tribal authority start and stop. In States like Alaska and Oklahoma, there are no formal land based reservations (the Metlakatla Indian Community in Alaska excepted). These two States have recognized “people” reservations and it is difficult to define State and Tribal jurisdiction. Both Alaska and Oklahoma Tribes play a significant role in AMERIND and it is unclear under present law whether these Tribes have the authority to participate in a federally approved plan of self-insurance. The establishment of clear regulations with specific language that pre-empts state interference in the administration and operation of an Indian Housing Risk Pool would greatly enhance AMERIND’s ability to serve the Tribes and their members in those two respective States. As of this date, AMERIND provides no products or services to individual Alaska Natives striving for homeownership.

3. Memo of Understanding

A great deal of effort has been made to develop coordination between federal departments regarding the One Stop Shop Mortgage initiative. One failure of the initiative has been to recognize approved providers among the various departments. As indicated in earlier testimony, AMERIND is the “market of last resort” in many Indian Communities. Very few, if any, for-profit insurance companies readily offer affordable insurance products in Indian Country. For this reason AMERIND is forced to try and respond to the ever increasing need. We would strongly encourage a Memo of Understanding between the various federal departments, Fannie Mae and Freddie Mac that approve the hazard protection afforded by AMERIND. Once specific regulations are established by HUD and AMERIND is deemed to be an approved plan of self-insurance, this approval should be adequate for USDA-Rural Development, Veteran’s Administration and the two largest buyers of mortgages, Fannie Mae and Freddie Mac.

This concludes my testimony regarding improving housing opportunities for Native Americans. Thank you for the opportunity to testify and to inform the committee on the importance of insurance in the lending process as well as the significant role played by AMERIND Risk Management Corporation.

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