



U. S. Department of Housing and Urban Development Public and Indian Housing

Special Attention of:
ONAP Administrators;
Tribes; and Tribally
Designated Housing Entities

Notice PIH 2008 - 8 (ONAP)

Issued: January 25, 2008

Expires: January 31, 2009

Cross Reference(s):
24 CFR PART 1000
PIH Notice 2006-34
PIH Notice 2005-19

Subject: Limiting Housing to Indian Families or Tribal Members when using Indian Housing Block Grant (IHBG) funds.

1. Purpose.

This Notice reissues Notice PIH-2006-34 (TDHEs) and explains when tribes or tribally designated housing entities (TDHEs) (referred to in this Notice as ‘Tribe’) may limit housing assistance to Indian families or tribal members. This notice outlines how the requirements are different if only IHBG funds are used or if IHBG funds are leveraged or combined with funds from other sources.

2. Background.

The IHBG program, created by the Native American Housing Assistance and Self-Determination Act (NAHASDA), authorizes annual formula block grants to Indian tribes for affordable housing activities, to primarily benefit low-income Indian families. Section 201(b)(5) of NAHASDA permits a preference to serve tribal members.

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from excluding from participation, denying benefits, or otherwise subjecting to discrimination a person on the ground of race, color, or national origin in the program or activity receiving such assistance. Title VIII of the Civil Rights Act of 1968, as amended, is called the Fair Housing Act. It prohibits discrimination in the sale, rental or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate related transactions because of race, color, national origin, religion, sex, familial status, or disability. Residential real estate related transactions include making loans or providing financial assistance for the purchase of residential real estate.

However, Section 201(b)(6) of NAHASDA states that Title VI of the Civil Rights Act of 1964, and the Fair Housing Act “shall not apply to actions by federally recognized tribes and

the tribally designated housing entities of those tribes under this Act.” This provision also applies to recipients established under the Alaska Native Claims Settlement Act and to State-recognized tribes that receive grants under NAHASDA.

3. Definitions.

Affordable housing: Housing that meets the requirements of Title II of NAHASDA, including housing units developed under the United States Housing Act of 1937, housing units developed under NAHASDA, and other housing units that are not assisted under NAHASDA, but which meet the requirements of Title II of NAHASDA.

Combined Funds: For purpose of this notice, funds are considered combined when IHBG funds are used with other funds for both eligible affordable housing for low-income Indian families and other housing that may not meet the requirements of NAHASDA.

Fair Housing Act: Title VIII of the Civil Rights Act of 1968, as amended, is also called the Fair Housing Act. It prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status, or disability.

Indian Area: The area within which an Indian tribe or its TDHE, as authorized by one or more Indian tribes, provides assistance under NAHASDA for affordable housing as stated in its Indian Housing Plan (IHP).

Leveraging Funds: Leveraged funds, in the context of section 102(c)(3) of NAHASDA, are additional resources used with IHBG funds for affordable housing activities under NAHASDA for low-income Indian families.

Low-income family: A family whose income does not exceed 80 percent of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families, except that the Secretary may, for purposes of this paragraph, establish income ceilings higher or lower than 80 percent of the median for the area on the basis of the findings of the Secretary or the agency that such variations are necessary because of prevailing levels of construction costs or unusually high or low family incomes.

NAHASDA: The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.), as amended.

Sovereignty/civil jurisdiction: Authority to exercise governmental powers within a limited area.

Title VI of the Civil Rights Act of 1964 (Title VI): This law prohibits discrimination against beneficiaries of federally assisted programs based on race, color, or national origin (42 U.S.C. 2000 (d)).

4. Applicability of the Civil Rights Act of 1964 and Fair Housing Act regarding NAHASDA.

Under NAHASDA, IHBG recipients do not violate Title VI of the Civil Rights Act or the Fair Housing Act when limiting assistance to low-income Indian families or providing preference to tribal members if:

- the affordable housing-project is on land where the tribe has sovereignty/civil jurisdiction regardless of any other funding that may have been used;
- the affordable housing project is funded solely with IHBG funds and is located on land subject to State or local law; or
- the affordable housing project is funded with IHBG funds and leveraged with non-federal funds and located on land subject to State or local law.

5. Housing Activity Outside of land governed by Tribal sovereignty/civil jurisdiction.

If the Tribe uses NAHASDA funds for a housing activity with other funds and the project is on land where the Tribe has no sovereignty/civil jurisdiction and some of the housing units in the project do not meet NAHASDA affordable housing requirements, then the Tribe can only designate a proportionate percentage of the housing units, which must be NAHASDA-assisted units, in the project for Indian families or Tribal members only.

If the funds used with NAHASDA are combined from Federal program funds that have statutory program-specific non-discrimination requirements, such as HOME Investment Partnership (HOME) and Community Development Block Grant (CDBG) funds, then only the NAHASDA-assisted housing units in the project can be set aside for Indian families or Tribal members. The Tribe and/or its TDHE must comply with NAHASDA requirements and all other applicable Federal requirements, whether the housing programs are funded solely with IHBG funds under NAHASDA.

6. Role of the Recipient.

The tribe and/or its TDHE must comply with NAHASDA requirements and all other applicable federal requirements, whether its housing programs are funded solely with IHBG funds under NAHASDA, or with IHBG funds and other funding sources.

7. Tribal Sovereignty.

There exists a unique relationship between the United States and Indian tribes. Indian tribes have sovereignty and exercise jurisdiction over their territory and their members.

On lands where an Indian tribe exercises sovereignty, the tribe can limit housing to Indian families or tribal members regardless of the funds used to construct or otherwise assist the housing.

HUD recognizes tribal sovereignty/civil jurisdiction over tribal trust land within a reservation, other tribal trust land, individual trust or allotted land, and fee land reacquired by the tribe within the boundaries of the reservation.

8. Location of Housing Funded with IHBG Funds under NAHASDA.

NAHASDA authorizes affordable housing activities in Indian areas. Assistance is not limited to reservations. Essentially, an “Indian area” under NAHASDA is anywhere a tribe undertakes affordable housing activities.

9. Ownership of Housing Assisted under NAHASDA.

NAHASDA encourages the involvement of the private sector in affordable housing activities. NAHASDA’s requirement to primarily limit beneficiaries to low-income Indian families applies to all housing assisted with IHBG funds, regardless of who or what entity owns the housing.

10. Leveraged Funds.

NAHASDA encourages using IHBG funding with other funds for affordable housing activities. When IHBG funds and other funds are used for affordable housing in accordance with NAHASDA requirements, the funds are said to be “leveraged.”

When housing is located on land where the tribe has sovereignty/civil jurisdiction, and the housing is funded with IHBG and other federal funds (such as HOME and USDA Rural Housing Development funds), the housing can be limited to Indian families or tribal members without violating nondiscrimination requirements.

However, when housing is located on land where the tribe **does not** have sovereignty/civil jurisdiction, and such housing is funded with IHBG and other federal funds, tribes are limited in their authority to designate such housing as Indian-only, if the other federal funds have program-specific nondiscrimination requirements in their program statute, i.e., CDBG and HOME programs.

If this is the case, the funds are combined funds and the tribe must determine which units are funded by each program, and can only designate the NAHASDA-assisted units as restricted to Indian families or tribal members. (If the units are similar in size and features, the number of units funded by each source can be determined on a pro-rata basis. Pro-rating examples can be found below.)

Private funds for Low Income Housing Tax Credit (LIHTC) projects and the credits themselves are not federal financial assistance, therefore, are not subject to Title VI. The use of IHBG funds with private funds for LIHTC projects would be considered leveraging, and Indian preference applies.

11. Combined Funds.

If other funds are combined with IHBG funds but are not used for eligible affordable housing for low-income Indian families, the tribe must determine how it will meet the requirements of NAHASDA to serve only Indian families and also meet the requirements of the other programs which may require that all families must be served. The housing units funded under each program must be determined. If the housing units are located on land where the tribe has sovereignty/civil jurisdiction, there is no need to be concerned about different program requirements because the housing may be limited to Indian families or tribal members and there is no violation of Title VI of the Civil Rights Act or the Fair Housing Act.

12. Leveraged or Combined Funds

If the housing is located on land where the Tribe does not have sovereignty/civil jurisdiction and the Tribe will use other funds for the project, it must determine if the other funds will be leveraged or combined funds. When housing is located on land where the Tribe does not have sovereignty/civil jurisdiction and the housing is funded with IHBG and other Federal funds with statutory program-specific nondiscrimination requirements, the funds are considered combined funds. HOME and CDBG funds will always be considered combined funds when used on non-Tribal sovereign land. The housing units funded under each program must be determined. The Tribe can only designate the NAHASDA-assisted units restricted for Indian families or Tribal members. If the units are similar in size and features, the number of units funded by each source can be determined on a pro-rata basis.

In other cases, where the Federal funds do not have statutory program-specific nondiscrimination requirements, but are instead subject to Title VI and Fair Housing Act, the Tribe and the source of the other funds determines if the funds will be combined or leveraged. If other funds are combined with IHBG funds, but are not used for affordable housing for low-income Indian families, the Tribe must determine how it will meet the requirements of NAHASDA to serve Indian families and meet the requirements of the other programs which may require that all families must be served.

13. Determining if funds without statutory nondiscrimination requirements used from different sources are leveraged or combined.

This decision will generally be based on the goals of the housing. For example, where due to great need, all housing units in a rental project will be occupied by low-income Indian families in accordance with NAHASDA requirements, the funds will be leveraged. Where the goal is to not isolate Indian families from non-Indian families and the rental project will be occupied by both low-income Indian and non-Indian families, the funds will be combined. Where the goal is to integrate families of different incomes and the housing in a rental project will be occupied by both low-income Indian families and families who are not low income (mixed income project), the funds will be

combined. Of course, the use of the other funds will be subject to whatever requirements apply to the funds, but at minimum, the housing will be subject to the Fair Housing Act.

NAHASDA encourages the involvement of the private sector in affordable housing activities. The requirement to primarily limit beneficiaries to low-income Indian families assisted with IHBG funds regardless of the entity that owns the housing. Private funds for LIHTC projects and the credits themselves are not considered Federal financial assistance and not subject to Title VI. The use of IHBG funds with private funds for LIHTC projects would be considered leveraging and Indian preference applies.

14. Allocating Costs and Identifying NAHASDA-Assisted Units in Rental and Homeownership Projects.

Following are instructions on how to use IHBG funds, in combination with other funds, to develop housing projects that meet the requirements of each program. The examples show how to determine the minimum number of NAHASDA-assisted units in a project and how to allocate costs to the IHBG program. The tribe can start with either the number of housing units it wants to assist with IHBG funds (and determine the total amount of IHBG funds for the housing) or start with the total amount of IHBG for the housing (and determine the minimum number of NAHASDA-assisted units).

The IHBG program distinguishes between those units in a project that have been assisted with IHBG funds and those that have not.

IHBG funds may only be expended for units that are or will be occupied by low-income Indian families. Therefore, IHBG funds may be used in a mixed-funding project to assist the units in the project that will be occupied by low-income Indian families.

A. “Fixed” and “Floating” NAHASDA Designations for Housing Units.

A tribe must determine the minimum number of units that will be designated NAHASDA-assisted. In general, this designation must be based on the actual NAHASDA investment in a unit or project. A tribe may choose to require that a greater number of units be designated as NAHASDA-assisted to maximize the number of affordable units in the jurisdiction over time. A tribe may, on a project-by-project basis, choose to use either a fixed or a floating NAHASDA-assisted designation to track housing units.

- A “fixed designation” means that the tribe determines from the outset which housing units are NAHASDA-assisted. For instance, in a 10-unit housing project, if the tribe designates units 1, 2, 3, 4, and 5 as the NAHASDA-assisted units, these specific units (1 through 5) remain NAHASDA-assisted units throughout the useful life and must be occupied by NAHASDA income-eligible families.

- A “floating designation” gives a tribe the flexibility to maintain a certain number of NAHASDA-assisted units throughout the useful life, although the specific units so designated may vary with availability. For example, the tribe could designate five units as NAHASDA-assisted units, and at any given point in time throughout the useful life, five units must have the NAHASDA-assisted designation, and be occupied by NAHASDA income-eligible families. Substituted units must be comparable in size and features to the originally designated units.

A system of floating units is advantageous when a tribe wants to ensure that assisted units are indistinguishable from and interchangeable with market-rate units. In addition, the system of floating units provides consistency with the system required in projects developed with LIHTC.

B. NAHASDA Project Rules

NAHASDA projects are subject to rent/homebuyer payment and occupancy requirements. A recipient shall not charge a low-income tenant or homebuyer rent/homebuyer payments that exceed 30 percent of the adjusted income of the family.

Noncompliance with the project income-targeting requirement is permissible when the non-compliance is caused by an increase in a family’s income. For example, in rental housing, if a unit is made available for occupancy by a family that is a low-income family, and the tribe’s policies and the tenant’s lease require the family to move out if they are no longer low-income, then the family would have to move. Otherwise, the family would be permitted to stay in the unit. In a lease-purchase agreement for existing housing or housing to be constructed, if the family is low-income at the time the agreement is entered into and the family’s income increases, the family may stay in the unit.

When a project has floating NAHASDA-assisted designations, the next comparable unit that becomes available in the project must be provided to a NAHASDA income-eligible family. That unit then becomes the NAHASDA-assisted unit, and the rent/homebuyer payment must be structured accordingly. When the income of a family in a NAHASDA-assisted unit rises above 80 percent of the area median, that family may be required to pay more than 30 percent of its income for the monthly payment, except that, in projects where NAHASDA units float, the family’s monthly payment may not exceed the fair market rent or the value of the unit.

C. Allocating costs to NAHASDA-Assisted Units.

IHBG funds may only pay actual costs of NAHASDA-assisted housing.

If the units in a project are comparable (in terms of size, features, and number of bedrooms), then the actual costs can be determined by pro-rating total (NAHASDA-eligible) development costs. IHBG funds can only pay the pro-rated share of the NAHASDA-assisted units.

When units are not comparable, the tribe must allocate the NAHASDA costs on a unit-by-unit basis, charging only actual costs to the IHBG program, as described below. Because units in projects with the floating NAHASDA designation must be comparable, a tribe should always pro-rate costs in these projects. When units are generally comparable but vary slightly in size or amenities, a combination of the two approaches may be used.

The basic considerations for allocation costs to NAHASDA-assisted units are as follows:

- (1) *Comparability in Unit Size.* Comparability in size is defined by the bedroom count and square footage of individual units. Not all units with the same number of bedrooms are comparable in size. If there is a substantial difference in the square footage of two units with the same number of bedrooms, the units are not considered comparable.
- (2) *Amenities.* Comparability in amenities means similar fixtures, appliances and other features. In many mixed-income projects, to demand varying rents, the quality and types of amenities may vary among units. For instance, a project manager can demand a higher rent for a unit with wall-to-wall carpeting, garbage disposal, dishwasher and finer fixtures than for a unit without these amenities. This type of project does not typically have comparability of units, unless there is an equal distribution of assisted and non-assisted units that have these amenities.
- (3) *Common Costs.* Common costs are costs incurred for acquisition of improved or unimproved real property that benefit all residents of units in a project; rehabilitation or construction of shared systems (heating, plumbing, roofing) or shared facilities (community rooms, laundry facilities located in residential buildings); and on-site improvements. Costs associated with a project's on-site management office or the apartment of a resident manager may also be counted as common costs. The manner in which the costs for common elements of a project may be charged is dictated by the method chosen for allocating costs.

D. Pro-Rating Cost Allocation Method.

To use the pro-rating method of allocating costs, there must be comparability between the total inventory of NAHASDA-assisted and non-assisted units in a project.

For example, consider a 12-unit building in which 6 of the units have 1 bedroom and 6 have 2 bedrooms. The one-bedroom units are all comparable to each other and the two-bedroom units are all comparable to each other. Half of the building is NAHASDA-assisted. In this case, there should be an equal proportion of one- and two-bedroom units designated as assisted and non-assisted—three one-bedroom units, and three two-bedroom units.

Another example: consider the same 12-unit building in which one-third of the units are NAHASDA-assisted. You would need a total of four units designated (one-third of 12), so you must designate two one-bedroom units, and two two-bedroom units.

When assisted and non-assisted units are comparable, total eligible development costs (including acquisition, development hard costs to construct or rehabilitate the unit, and project soft costs), may be pro-rated to determine the NAHASDA share of the total costs.

Thus, all eligible project costs may be distributed between the IHBG program and other funding sources, provided that the NAHASDA share does not exceed the maximum per unit limit. This means NAHASDA can pay any eligible cost, and the tribe can pro-rate the NAHASDA share in relation to the total eligible costs to determine the minimum number of NAHASDA-assisted units.

For example, consider a tribe that buys land with \$100,000 in IHBG funds. Then, that Tribe uses \$900,000 of private funds to construct a housing project on that land. The total cost of the project is \$1 million. A minimum of one-tenth of the units in the project must be designated as NAHASDA-assisted, because IHBG funds provided one-tenth of the total funding. If the assisted and non-assisted units are comparable in size and distribution, a prorated share of the cost of common elements attributable to the NAHASDA-assisted units may be paid with IHBG funds.

For example, consider a tribe with a 24-unit building with 8 NAHASDA-assisted units (one-third of the units). The assisted units are comparable to the non-assisted units. The tribe replaces the heating system and the roof. In this case, the tribe may pay one-third of these total common costs with NAHASDA funds because one-third of the units are NAHASDA-assisted.

The ratio of the NAHASDA investment to the total eligible development cost is equivalent to the ratio of the minimum number of units that must be NAHASDA-assisted to the total number of units.

E. Unit-by-Unit Cost Allocation Method.

When NAHASDA-assisted and non-assisted units in a project are NOT comparable, the tribe must determine and charge the IHBG program for the actual costs incurred for the acquisition and development of the NAHASDA units, plus any common costs that can be attributed to the NAHASDA portion of the project.

To allocate these costs, the tribe must designate the NAHASDA-assisted units and track the costs for each unit.

Common costs attributable to NAHASDA-assisted units are determined by calculating the total square feet in NAHASDA units as a percentage of the total square feet in the project. IHBG funds can pay for that percentage of the common costs.

The actual cost for each unit is charged to the IHBG program. The actual cost is charged, regardless of whether it is more or less than the pro-rated cost would be.

For example, a tribe proposes to construct a new 60-unit, mixed-income development:

- One-third, or 20, of the units will be deluxe units, with total development costs of \$2 million.
- Another third, 20 upgraded units, will be marketed to middle-income families (between 100 and 120 percent of the area median income), with total development costs of \$1.5 million.
- The final third will be 20 basic units with few amenities and will be marketed to low-income families; the total development costs are \$1 million.

Because the units in this project are not comparable, the tribe may only use IHBG funds for the cost of the units that will meet the NAHASDA requirements. Therefore, it may invest up to \$1 million in IHBG funds to construct the 20 units for eligible low-income families, provided that the tribe's per unit limit equals at least \$50,000. All 20 units will be designated as NAHASDA-assisted.

In another example, a tribe proposes to use IHBG funds and local funds to rehabilitate a 15-unit building it already owns. Ten units are two-bedroom and are non-assisted; five units are efficiencies and are NAHASDA-assisted. In this case, NAHASDA can only pay the actual rehabilitation costs, up to the per unit limit, of the units designated as NAHASDA-assisted.

F. Maximum Per Unit Cost.

Housing developed, acquired, or assisted under NAHASDA is subject to limitations on cost or design standards. IHBG-assisted housing must meet the moderate design requirements.

15. Additional Information

If you have any questions, or require further information, please contact your Area Office of Native American Programs.

/s/

Paula O. Blunt, General Deputy Assistant Secretary
for Public and Indian Housing