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## MEMORANDUM

June 30, 2017

To: Housing Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legislative Committee Meeting and NAIHC Annual Convention*

This memo reports on the NAIHC Legislative Committee meeting and the NAIHC Annual Convention held in Nashville, TN, held on June 26 - 29, 2017.

### 1. Legislative Committee

The Legislative Committee held its monthly meeting in person at the NAIHC Legislative Conference. The Chairman of the Legislative Committee, Gary Cooper, and the new NAIHC Executive Director, Tony Walters, presided over the meeting.

#### *A. Call to Order and Recap of Prior Meetings*

Chairman Cooper gave a brief recap of prior meetings, including the establishment of a funding task force. He also re-introduced Tony Walters, who was hired by NAIHC earlier this year (April 2017). Mr. Walters gave his background, which involved a lot of work on Capitol Hill, although not with a primary focus on housing. However, he has worked a lot with Congress and agencies on Indian affairs and issues, which has given him useful background and contacts. He is now getting up to speed on housing issues working with the NAIHC board, staff, and membership.

#### *B. Status Report on Legislative Issues*

Mr. Walters gave the Legislative Update. He began with the FY 2018 budget request from the Trump Administration. That proposal eliminates and cuts a number of programs important to Indian tribes, such as ICDBG. It is not a budget proposal that is friendly to Indian Country. The IHBG appropriation is proposed to be cut to \$600 million. But it is important to note that this is just a request, and the budget is ultimately drafted and passed by Congress. Our allies on the Hill have expressed their disagreement with the Administration's proposals, and we will continue to stay in touch and work with them to protect funding for key tribal programs including the ICDBG and IHBG. There is still a lot of time to have input and to engage in advocacy, but it is important to get your comments in soon. NAIHC will be gearing up a strong advocacy plan for early July. Chairwoman Sami Jo Difuntorum has already been meeting with relevant Congressional



staff. Mr. Walters encouraged the participants at this meeting to have their elected tribal leadership reach out directly to members of Congress. While meetings with staff are important, meeting with the representatives and Senators is critical. NAIHC is developing white papers on key issues to use in individual members' advocacy efforts.

The BUIILD Act was introduced at the end of May, and there was an oversight hearing at the Senate Committee on Indian Affairs on June 12 (that we reported on in a previous memo). The BUIILD Act reauthorizes the NAHASDA block grant and contains a few amendments to NAHASDA. The next step will be a markup of that bill, which we expect to take place sometime in July. Your representatives and Senators will then be heading home for August recess, which is a good time to try and meet with them in their districts/states.

The Tribal HUD-VASH program was also discussed at the SCIA hearing. There are some tribes that have put a HUD-VASH program in place. There have been some hiccups with some of the tribes, although others are using it very successfully. NAIHC is a clearinghouse for information on best practices and other issues. The Tribal HUD-VASH bill is a bi-partisan bill, and has a lot of traction because it is bi-partisan and because it assists veterans. The bill would give VA and HUD greater flexibility in administering the program, including waiving certain requirements that have proven to be obstacles to effective implementation (such as restrictions on providing vouchers for tribal 1937 Act housing).

NAIHC is working on a series of white papers that can be used for legislative advocacy. NAIHC is still looking for information and volunteers to work on the white papers. The white papers will contain not just text, but also photos and graphs. The various media in the white papers are helpful in bringing the issues to the fore and making the arguments more memorable. For example, the white paper on funding has charts showing how the IHBG appropriations are actually losing ground because the amounts have remained flat while inflation makes purchasing power less. NAIHC is about a month off from having these finalized. They will be available online and at the NAIHC office to pick up if you are in D.C. and heading to Capitol Hill.

### *C. Mike Andrews, Staff Director of Senate Committee on Indian Affairs*

Mr. Andrews gave his perspective on the BUIILD Act and other activities in D.C. He first gave an overview of what will be going on with the Committee. For the remainder of July, they will be taking up a series of bills: two land builds from Oregon; Johnson O'Malley reauthorization. On July 7 there will be a field hearing in Santa Fe, and it will focus on counterfeiting of cultural items (involves overseas counterfeit reproduction of cultural items which are then brought back to the U.S. and sold as originals). Then they will have an oversight hearing on Indian gaming. Then by the end of the month they will have a hearing on human trafficking, which is on the rise across the U.S., including Indian Country. After that will be the August recess. When Congress comes back in September, the focus will be on appropriations. The Committee Chairman, John Hoeven (R-ND), has a lot of focus on appropriations. That will take up most of



September. He also expects a number of Administration appointments for key positions in IHS and BIA.

More specifically with regard to Indian Housing, the Committee had an oversight hearing a couple of weeks together, which turned out to be lengthy and contentious. The discussion of the BUIILD Act was “spirited.” Mr. Andrews had hoped the hearing would have a robust discussion of the key issues in the bill of importance to Indian Country (Section 184, ICDBG), but the hearing mostly focused on the dispute between Senators on funding the Native Hawaiian block grant. The hearing also included a brief discussion of the recently introduced Tribal HUD-VASH legislation. The HUD-VASH legislation is targeted at providing housing assistance for homeless or at-risk Indian veterans. It establishes a 5% set-aside from the existing HUD-VASH to be used specifically for Indian Country. The bill will extend the demonstration project that has been operating for a couple years, and provide more teeth and administrative support.

Senator Hoeven wants feedback from Indian Country on the BUIILD Act. He is proud to have put a reauthorization bill on the table for this session of Congress, the first one introduced this session. He wants to know whether Indian Country can support this version of reauthorization. If not, they need to know sooner rather than later, so a different approach can be taken. Mr. Andrews did caution that we are already running out of time for the first half of this session. While the BUIILD Act is not nearly as robust as prior versions of NAHASDA reauthorization, it is a start, and the hope is that it can get the process started while avoiding the more contentious issues that held up and ultimately prevented reauthorization in prior sessions. If we cannot get this moving, Mr. Andrews suggests that we might have to do some “serious re-thinking” about NAHASDA overall. He again reiterated that he wants to have feedback from Indian Country so that they can have it in time for mark-up in July. If all goes well, the idea would be to get the bill passed via unanimous consent sometime before the end of the year. He still does not know what the plan is on the House side to address NAHASDA reauthorization, but getting the BUIILD Act passed will get a bill over to the House side and hopefully jump-start the process on that side of Capitol Hill.

The approach using the BUIILD Act dovetails with the strategy that NAIHC has been putting in place for reauthorization. NAIHC’s strategy, developed in the weeks since the legal symposium in December and on the call in early January, is two-pronged. The first is to seek a one-line provision in some must-pass, fast-tracked bill that would simply reauthorize the Indian Housing Block Grant for a period of years. That would allow tribes to continue operating under the existing NAHASDA statute, and head off the questions that certain House appropriators might ask about why an unauthorized program should be funded at all. This prong is essentially embodied in the BUIILD Act.

The second prong would be to continue to push forward a more detailed NAHASDA reauthorization bill, using the “consensus bill” that had been negotiated between the House and Senate staffers late in the last session. In late January, the NAIHC Chair sent a letter to Congressional leaders, outlining this strategy and including a



NAHASDA reauthorization bill that is very similar to, but not identical to the bill passed by the House during the last two sessions.

## 2. NAIHC Annual Convention

### *A. Plenary Session*

The meeting opened with a presentation by the host organization, USET. Development Director, Brandon Stephens, welcomed the participants to the plenary session. USET is located in Nashville, which is an important hub for tribal advocacy in the Eastern region. IHS and BIA regional offices for the Eastern region are located in Nashville.

*NAIHC Chairwoman Sami Jo Difuntorum* spoke about NAIHC's advocacy efforts. The primary focus of NAIHC is reauthorization of NAHASDA, along with attempting to secure adequate appropriations. She summarized the BUILD Act and the tribal HUD-VASH legislation. Chairwoman Difuntorum also honored Pamala Silas, who served as NAIHC Executive Director for the past few years during a difficult transition period. She helped get NAIHC on a better financial footing.

She then introduced the new NAIHC Executive Director, Tony Walters, NAIHC wanted to enhance its advocacy, and his background on Capitol Hill, most recently working for Senator Tester, was the kind of experience that NAIHC needed.

*Tony Walters*, NAIHC Executive Director, spoke about the advocacy efforts that NAIHC is kicking off under his tenure. He has a lot of relationships in Congress and in the administration due to his background. But NAIHC will also be a resource to Indian tribes and housing programs to assist individual advocacy efforts. NAIHC will be working on advocacy tools (such as white papers), can serve as an information clearinghouse, and can assist navigating D.C. and setting up meetings when you come to town for meetings with Congress and the administration.

*Greg Borene* (Enterprise Rancheria), the Amerind Chairman, gave his introductory remarks. He also presented a check for \$200,000 from Amerind to NAIHC. Derek Valdo, the CEO of Amerind, also gave opening remarks. He explained that he grew up in HUD housing, and he understands and appreciates the work that the NAIHC membership does. Having had a stable and affordable home is key to his success. He stated that Amerind has had its most successful year ever, even though it paid out more in claims than it ever had in any prior year (\$27.5 million). He also spoke about Amerind's high-speed internet venture, to try to bring high-speed internet to Indian Country. They have been successful in their initial efforts to bring broadband infrastructure to several pueblos in New Mexico, relying on grant funds. This effort will not be a profit-making center for Amerind, but helps the communities that Amerind serves.

*Norman Hildebrand* (Wyandotte Nation), NCAI Area Vice-President, gave an update on NCAI's advocacy efforts. NCAI passed a resolution calling on Congress to



oppose elimination of proposed funding cuts to key tribal programs set out in the Administration's proposed budget – including cuts to IHBG, and the elimination of funding for ICDBG. The resolution is based on the United States' trust obligation to Indian Country, and the promises made in numerous treaties. NCAI also provided testimony in support of the tribal HUD-VASH legislation. NCAI also opposes the removal of Native Hawaiian provisions from NAHASDA and the elimination of the Native Hawaiian housing block grant. NCAI is also working on health care in Indian Country. The ACA repeal bills working through Congress involve significant cuts to Medicare and Medicaid, which cuts would have substantial adverse impacts to Indian Country. The bill passed by the House would preserve the Indian Health Care Improvement Act, but the Senate bill is not clear regarding its impacts to IHCA. NCAI is also working to get to the table for any discussions on infrastructure development. The Trump Administration has proposed changes to FCC wireless development to exempt them from consultation under Section 106 of the National Historic Preservation Act, which NCAI is also opposing.

**Gary Cooper**, Executive Director of Cherokee Nation Housing Authority and Chair of the Legislative Committee, gave an update on the discussion by the Legislative Committee yesterday (see first section of this memo).

**Senator John Hoeven** (R-ND) sent a video statement. He spoke about his efforts to get the BUIILD Act and HUD-VASH introduced and passed. The video was very brief.

**Mike Andrews** gave a summary of the remarks he gave yesterday. But he began with some more general comments on political issues impacting Indian Country. He first wanted to clarify that the Indian Health Care Improvement Act is not “touched” by the Senate version of the ACA (in response to comments by a previous speaker). He also gave an update regarding the Administration. He addressed the “signing statement” on the FY 2017 appropriations bill by the Administration. He disagreed with that statement and hopes that the President will clarify that tribes have a unique legal status based on the trust responsibility and political relationship, and that it is not race-based. He also addressed FY 2018 appropriations. The Committee heard testimony from the Administration officials, who defended the Administration's budget proposal “to the best of their ability.” He was disappointed in the proposed cuts to Indian programs. He stressed the importance of advocacy to Congress, and that it is critical to engage in such advocacy right now while appropriation process is under way. Senator Hoeven is on the appropriations committee, so he will play a significant role in the appropriations process. Next month will be critical, because the appropriators will be meeting to discuss budget issues. You need to come to D.C. and to write letters and make phone calls to argue that Indian Country programs be sufficiently funded. He did mention that the White House will continue the White House Council for Indian Country, but will reorganize it into a task force that will contain tribal leadership in order to support a true government-to-government relationship.



Mr. Andrews noted again that Senator Hoeven is the first member of Congress to draft and introduce a NAHASDA reauthorization bill in this Congress. The bill reauthorizes the NAHASDA block grant program, but it does not contain a “fictitious” cap on the block grant (which has been a part of the past two House bills reauthorizing NAHASDA). The bill will also reauthorize Section 184, streamline environmental reviews, and allow for greater flexibility to leverage IHBG funds. He also emphasized his prior points that this bill is a “Chevy” compared to the previous iterations of NAHASDA reauthorization (which he compared to a “Cadillac”). Senator Hoeven wanted to craft a bill that had a better chance of “getting across the finish line.” It, therefore, does not include all the items that NAIHC and Indian Country has supported. But he also stated he is ready to work with any Senator to fit the bill to what Indian Country wants and needs, and finding a path forward. Mr. Andrews then wanted to talk about the contentious nature of the oversight hearing earlier this month. The arguments that occurred at the hearing largely focused on the decision not to include the Native Hawaiian block grant provisions in the BUILD Act. Mr. Andrews noted that the Native Hawaiian block grant was not in the original NAHASDA, but was added through separate legislation in 2000. According to Mr. Andrews, in 2002 and in 2008 NAHASDA was reauthorized without the Native Hawaiian block grant. The bill that added Title VIII in 2000 expired in 2005. The most recent efforts to reauthorize NAHASDA have tried to reauthorize the Native Hawaiian block grant as part of NAHASDA – but those efforts have failed. Senator Hoeven supports funding for Native Hawaiian housing, and as an appropriator he will continue to advocate for funding the Native Hawaiian housing block grant. But he has learned from the failure to get NAHASDA reauthorized in the last two sessions, and wants to get a NAHASDA reauthorization bill across the finish line.

Mr. Andrews then laid out what he sees as the options. There are two options, with option one having three different variants. Option 1a is just to “straight up” support the BUILD Act; Option 1b is to support the BUILD Act but ask that it include the Native Hawaiian block grant; and Option 1c is to support the BUILD Act through unanimous consent and then work on the other, harder issues. Option two is what he refers to as the “wait and see” approach – to see what the House will do. We do not know what will happen and may wind up at the end of this session with no NAHASDA reauthorization bill yet again.

Mr. Andrews briefly addressed the Tribal HUD-VASH bill, and noted that passing both NAHASDA reauthorization and the Tribal HUD-VASH bills are priorities for Senator Hoeven. He also asked that NAIHC membership support efforts to address the opioid addiction crisis, since that crisis impacts Indian Country. It is also a priority of Senator Hoeven to deal with that issue.

The next presentation was a video from *Senator Catherine Cortez Masto* (D-NV). She spoke about her work with Indian tribes as Nevada attorney general. She is now on the Committee on Indian Affairs and the Banking and Finance Committee, where she can assist on Indian issues on a national level. She will work for developing infrastructure and housing in Indian Country, as well as for housing assistance for Indian veterans.



*Diana Holshue, Federal Reserve Bank, Helena Montana*, spoke about the Center for Indian Country Development, established in 2015. One of the goals is improving Native homeownership. They also have a Native youth internship program, with six interns currently working at the Helena branch.

### ***B. Presentation on BIA Mortgage Handbook***

The BIA has developed and will shortly be publishing a Mortgage Handbook to guide review and approval of mortgages and leasehold mortgages on trust lands. Frieda Satepehtaw, a program specialist with the BIA Division of Realty, was the key staff person drafting the handbook. BIA hopes to have the Handbook completed by the end of the year. After that, there will be training, both internal and external, on the Handbook. The Handbook will have guidelines as well as sample forms. BIA approves about 1100 leasehold mortgages for trust land every year, but they also approve approximately 200 straight mortgages of trust land annually. Ms. Satepehtaw expects that, with the publication of the Handbook, the number of straight mortgages will increase substantially.

### ***C. Presentations on Lewis v. Clarke Litigation and Aftermath***

Three presenters from Amerind, Geoff Blackwell, Ken Black and Terry Shull, gave presentations on various trends in insurance in Indian Country, and focused on the Supreme Court's recent decision in *Lewis v. Clarke*, which has the potential to have significant impacts across Indian Country and in Indian housing programs. The case arose out of an automobile accident off-reservation, in which a shuttle driver working for Mohegan Sun was transporting clients when he rear-ended another vehicle, causing damage and harming the occupants. The occupants of the other vehicle did not sue the Mohegan Tribe (because they knew the suit would be dismissed due to sovereign immunity), but instead sued the driver in his individual capacity. The Tribe, pursuant to Tribal law, had agreed to indemnify the driver, and moved to dismiss the case, arguing that the driver – who was operating within the course and scope of employment for the Tribe – was also shielded from suit by the Tribe's sovereign immunity. The lower court denied the motion to dismiss, but the Connecticut Supreme Court ultimately held that the case should be dismissed. The case was appealed to the United States Supreme Court, which agreed to hear the case.

In a unanimous decision, the Supreme Court ruled against the Tribal position. The Court held that an individual tribal employee could be sued in his individual capacity for a tort committed within the scope and course of his employment. The Court rejected the defense of tribal sovereign immunity, even though the tribe was going to be financially liable (since it had agreed to indemnify the employee as part of the terms of employment), on the theory that the “real party in interest” was the individual being sued and not the tribe.

Plaintiffs' attorneys around the country view this decision as a watershed event, that allows them to be able to bring suit in instances where individuals are harmed by



torts committed by tribal employees. Sovereign immunity had been a significant bar to such suits, but now the suits will be brought against the employees, and the tribes will likely be on the hook. The advice that the presenters gave was two-fold: (1) seek to reduce accidents by using best practices for whatever activities you are engaged in; and (2) purchase additional liability insurance, including excess coverage where warranted.

The repercussions of the *Lewis v. Clarke* decision will be significant, although we still do not know the full scope until we see the cases that follow in its wake. We will continue to monitor and report on this issue.

#### ***D. Business Meeting***

The NAIHC Business Meeting was set for Thursday morning. At the initial roll call there was no quorum.

Since there was no quorum, no business could be conducted. The reports were still presented on an informational basis. The first report was by Chairwoman Sami Jo Difuntorum. She said that due to financial and organization struggles, NAIHC had to restructure. They hired Pamala Silas to help with the transition, and recently hired Tony Walters as the Executive Director. Mr. Walters' experience is with legislative and administrative advocacy, so that NAIHC can restructure and enhance its advocacy focus. However, the organization will still have a capacity-building component. NAIHC is continuing to advocate for NAHASDA reauthorization and for increased appropriations. Chairwoman Difuntorum explained the current climate regarding reauthorization, and said she does not expect reauthorization to move all that quickly, particularly with no action yet on the House side. NAIHC also has posted a response on its website to the President's signing statement on the FY 2017 appropriations bill, which suggested that the Indian Housing Block Grant, among other Indian programs, might be race-based. The FY 2018 appropriations process is under way, and it is now time to contact your delegation to weigh in and oppose any cuts (as proposed by the Administration's budget request). She does not think there is a lot of support in Congress for such cuts, but advocacy is important. Chairwoman Difuntorum mentioned that HUD is setting up an intergovernmental advisory committee. This will not replace government-to-government consultation or negotiated rulemaking. There have been some delays by HUD in getting this committee set up, and the NAIHC Board has called on them to get moving on appointing this Committee. It will be composed of elected tribal officials.

Carol Gore, Chair of the NAIHC Finance Committee, provided the audit report for FY 2016. NAIHC is in a strong financial position with no long term debt, and its assets are more than sufficient to cover any potential liabilities. In 2016 NAIHC increased its cash position by \$460,000, and expenses were held flat. NAIHC delivered \$1.8 million in training and technical assistance to its members. There were no findings in the audit. Because there was no quorum, there was no vote to accept the audit, which would be standard.



Tony Walters, the Executive Director, promised to look at some ways to increase attendance at the Business Meeting. He feels good having stepped into NAIHC at the position it is in. Everything is trending positive in the organization. Aside from the Business Meeting portion of this Convention, the two conferences he has been part of since he began have been well-attended. He promised to continue the tradition of effective advocacy and capacity building that is NAIHC's legacy.

### **Announcements**

The next NAIHC event is the Legal Symposium, to be held at the Palazzo/Venetian hotel in Las Vegas, NV, December 3-5, 2017.

The Legislative Committee will hold its monthly call the first Thursday of each month, at 1:00 PM Eastern. There will not be a call in July, since the NAIHC meeting will have just taken place. However, if there are any urgent legislative developments, a meeting will be called.

If you have any questions about the items in this memorandum, please do not hesitate to contact Edmund Clay Goodman at [EGoodman@hobbsstrauss.com](mailto:EGoodman@hobbsstrauss.com) or by phone at (503) 242-1745.