



806 SW Broadway, Suite 900  
Portland, OR 97205

T 503.242.1745  
F 503.242.1072

HOBBSSTRAUS.COM

## MEMORANDUM

December 8, 2016

To: Housing Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legislative Committee Meeting and Legal Symposium*

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This memo reports on the monthly NAIHC Legislative Committee meeting, and on the NAIHC Legal Symposium, December 5 – 7, 2016, both held in Las Vegas, Nevada.

### 1. NAIHC Legislative Committee Meeting

The Legislative Committee met the afternoon of December 5, 2016, with a very full agenda.

#### *a. Congressional and NAHASDA Reauthorization Update*

Paul Moorehead, NAIHC's lobbyist, gave an update on NAHASDA reauthorization. He first provided a post-election snapshot of the current and incoming administrations. The second week of December will likely be the final week for the second session of the 114th Congress. There is a current Continuing Resolution funding U.S. Government agencies through December 8. Congress is planning to adjourn on December 9, so there will need to be a new Continuing Resolution passed. A proposed Continuing Resolution was filed on December 5, and was passed in the House and sent to the Senate. The Continuing Resolution would fund the government at FY 2016 levels through April, or perhaps as late as May. As of December 7, Senator Joe Manchin III (D-WV) has threatened to block the unanimous consent required to pass the Continuing Resolution quickly, because it does not provide a long-term fix for health care and pension issues for coal miners.

Donald Trump will be sworn into office as President on January 20. The House and Senate will be controlled by Republicans. The first session of the 115th Congress begins January 3, 2017. The incoming Senate will have 52 Republicans, 46 Democrats and 2 Independent members (both of whom caucus with the Democrats), while the House will have 239 Republicans and 194 Democrats, with two seats still too close to call. In the House, Paul Ryan (R-WI) will be Speaker, and Nancy Pelosi (D-CA) will be Minority Leader. The Committee on Financial Services will be chaired by John Hensarling (R-

TX). The Majority Leader of the Senate will be Mitch McConnell (R-KY). The Committee on Banking will be chaired by Richard Shelby (R-AL).

Other Congressional leadership changes in the House: Rodney Frelinghuysen (R-NJ) will be the new Chair of the House Appropriations Committee, and Tom Price (R-GA) was set to be Chair of the Budget Committee, but Representative Price has been named by President-Elect Trump to be HHS Secretary. On the Senate side, Richard Shelby (R-AL) will be chair of Banking/HUD Committee. Orrin Hatch (R-UT) will be Chair of the Finance Committee. John Hoeven (R-ND) will be the new Chair of the Committee on Indian Affairs.

Mr. Moorehead also provided background and updates on NAHASDA reauthorization. NAHASDA was originally passed in 1996 (by a Republican Congress and a Democratic President). In 2000, NAHASDA was amended to add a Native Hawaiian Housing block grant program. The latest reauthorization of NAHASDA occurred in 2008 (it included a number of amendments, but did not include the Native Hawaiian provisions). NAHASDA and its subsequent reauthorizations have historically had strong bi-partisan support. NAHASDA expired in 2013.

NAIHC has been seeking reauthorization since that time. In December 2014 the House passed HR 4329 to reauthorize NAHASDA. In January 2014 Senator Maria Cantwell (D-WA) introduced a bill in the Senate but it never reached the floor. Both bills contained language to reauthorize the Native Hawaiian block grant program. Since the Senate did not pass a bill, Congress never sent a NAHASDA reauthorization bill to President Obama.

In the current Congress, the House once again passed a NAHASDA reauthorization bill (HR 360). A Senate bill was introduced (S. 710) and passed out of committee, but did not come to the floor for a vote and could not pass by unanimous consent. Both bills, in addition to containing a number of amendments sought by NAIHC, contained a Title VIII, which would have reauthorized the Native Hawaiian block grant program. The inclusion of the Native Hawaiian block grant led Senator Mike Lee (R-UT), to oppose the bill and withhold unanimous consent. Senator Lee and others believe the Native Hawaiian provisions violate the Constitution's Equal Protection clause. Due to the Senate rules, one Senator can throw up a significant procedural roadblock, and Senator Lee has done so. The likelihood for NAHASDA to be adopted before the end of the current session of Congress is very small. Participants discussed attaching NAHASDA to a must-pass bill by the end of the session, but success appears unlikely based on the objections of Senator Lee.

Looking forward, NAIHC members will have to work with the same advocates in Congress who have pushed the prior bills to get NAHASDA reauthorization moving again. NAIHC members will need to look for a creative solution to address Senator Lee's concerns. There was some discussion about whether Senator Lee might be nominated to the Supreme Court, and, if so, whether the opposition would end. Mr. Moorehead said there are likely other Senators who have the same concern with the Native Hawaiian

provisions, and who may put up the same opposition should Senator Lee leave the Senate. There are, however, some positive signs for expedited consideration of NAHASDA in the next session. The same advocates who moved the bill forward before are still in Congress: Steve Pearce (R-NM), Don Young (R-AK), Tom Cole (R-OK), Maria Cantwell and John Barrasso.

On December 5, President-Elect Trump named Ben Carson as nominee to be Secretary of HUD. Dr. Carson has no background in housing or running a federal agency, but grew up in a one-parent, poverty-stricken household in an inner city. We expect that under his leadership HUD will have a heavy focus on revitalizing inner cities and urban areas.

*b. Mike Andrews and John Simmermeyer: Senate Committee on Indian Affairs*

Mike Andrews, staff director for the majority on the Senate Committee on Indian Affairs (“SCIA”), provided an update on the work of the SCIA. He was joined by John Simmermeyer, counsel for the SCIA. Senator Barrasso will be transitioning out as Chairman, replaced by Senator John Hoeven (R-ND). Senator Jon Tester (D-MT) will no longer serve as Vice Chair. The new Vice Chair will be Senator Udall (D-NM). The rest of the Committee will remain the same.

Mr. Andrews is looking forward to working with HUD under Secretary Ben Carson. While Dr. Carson does not have experience in housing, he has “transferable skills” and will be ready to hit the ground running. Mr. Andrews explained that Indian Country will need to explain to Dr. Carson that HUD is separate from Public Housing. There is some concern that he does not see Indian housing as something separate, and would want to treat Indian housing as a public housing program like Section 8.

Candidate Trump promised to “drain the swamp” and get rid of programs that are not critical. Mr. Andrews said Congress needs to move quickly to get NAHASDA reauthorized, to mitigate some of the risk to Indian housing (since there will be some in Congress and within the new Administration who might seek to get rid of funding for unauthorized programs). Education of the new Administration will be very important, and needs to be done quickly and effectively.

Mr. Andrews has heard that there are others in both the House and Senate that oppose NAHASDA reauthorization because of the Native Hawaiian provisions, and want those dropped. The bill might have been able to pass through the current Congress if those provisions had been dropped. However, Mr. Andrews was unwilling to push the bill forward without those provisions until he heard back from NAIHC.

Mr. Andrews recommended NAIHC consider whether to leave off the controversial items in a reauthorization bill, as well as many other changes. While he thinks the provisions in the current reauthorization bill were great improvements over the past bill, it is much easier to pass a bill with fewer “bells and whistles,” particularly where those provisions might increase the cost of implementing the bill. The

Congressional Budget Office has a lot of say over bills, and often can undermine the bill if it determines there are extra costs.

Mr. Andrews reiterated his encouragement to get NAHASDA reauthorized as quickly as possible, so that when the new budget talks get under way, Indian Country has the momentum to support keeping funding levels at the same amounts or possibly higher. He encourage the introduction of an identical bill in both the House and Senate.

Mr. Andrews also called on HUD to get the Indian Country housing needs assessment completed, because having that data in hand would be useful in arguing for an increase in funding.

Mr. Andrews also spoke to the recently adopted IHBG allocation rule. He is interested in hearing back from Indian Country on the rule. If Indian Country opposes the rule, there is a mechanism in Congress to challenge recently adopted regulations. If Congress votes to withdraw the rule, it would go the President for final signature. There will be a number of regulations challenged and potentially overturned in this way during the early days of the Trump Administration. Mr. Andrews says if there is a loud enough outcry from Indian Country against the rule, it could be withdrawn through this process. If there is not a strong opposition to the rule, it will stand.

One participant asked about the “budgetary headwinds” that we are facing in the upcoming session. There may be discretionary spending caps in place. How likely are they to impact Indian housing? Mr. Andrews says it is not clear at present, but we may know soon. When the new Congress comes into session on January 3, there will be two budgets presented (finishing up FY 2017, and a new one for FY 2018). One issue that will drive the availability of funding is what happens with the Affordable Care Act (Obamacare), which the Republican leadership intends to “repeal and replace.” Depending on what the “replacement” looks like, we will have a better sense of what the funding availability looks like.

Mr. Andrews said that we will hear sometime after December 14 about a “listening session” from the incoming Administration’s transition team to get information from Indian Country. He will disseminate any information he receives to NAIHC.

Mr. Andrews was asked whether it was likely that NAHASDA reauthorization might be added to one of the currently pending “must-pass” bills or the Continuing Resolution. He said it will be very unlikely.

*c. NAHASDA Reauthorization for 2017*

Based on the discussion from Mr. Moorehead and Mr. Andrews regarding reauthorization, the Committee discussed the NAHASDA Reauthorization bills (HR 360 and S 710) to try and develop a unified bill to go to Congress early in the next session.

One participant mentioned that he understood there was a compromise draft negotiated in December 2015 between the House and Senate Committees, and asked whether NAIHC should use such a draft as our template for moving forward. Mr. Moorehead said he did not think that would necessarily be beneficial in moving a NAHASDA reauthorization bill forward, as the draft was not considered beyond the small groups, and because the draft had not been released to the public.

Participants debated the best process for how the Legislative Committee should draft a bill to present to Congress. Participants determined that because one of the representatives of the Department of Hawaiian Homelands was present, it would be wise to discuss the obstacle of the Native Hawaiian provisions together. The Native Hawaiian representative stated that if there is no Native Hawaiian NAHASDA, the Native Hawaiian housing program will be “dead,” and will not be resurrected. Native Hawaiians need to be included in NAHASDA to ensure that they continue to get funding. She expressed the concern that this is a “divide and conquer” approach, and if the Native Hawaiians are separated out, then will Alaska Natives be next? That being said, the Native Hawaiians do not want to be the reason that NAHASDA reauthorization fails.

Several speakers got up and said that NAIHC should not leave anyone behind. Speakers said that NAIHC should insist that the Native Hawaiian provisions remain in the bill, because Native people need to show Congress and the new Administration that a divide and conquer strategy will fail. Further, if inclusion of the Native Hawaiian provisions means that a NAHASDA reauthorization bill does not go forward, then “so be it,” and Indian Country needs to be unified.

NAIHC Chair Sami Jo Difuntorum said that she hears the people attending the meeting strongly supporting the continued inclusion of Native Hawaiians, but that the issue needs to be addressed at the regional level – each region needs to discuss the issue, because not everyone with a stake in the issue is in the room. She said the regions should discuss and communicate to each regional representative on the Board. Ms. Difuntorum stated that she would like to have an NAIHC Board meeting prior to January 3, 2017, so that we can move forward with a draft bill as soon as the new Congress goes into session. Therefore, each member was asked to present the issue to its leadership in the next weeks, and report back to NAIHC regional leadership before December 22. Then, the regional representatives will report input from all regions during the NAIHC Legislative Committee conference call meeting on December 29.

The other issue that was contentious in Congress was the elevation of the ONAP Deputy Assistant Secretary to an Assistant Secretary position. Chairman Hensarling indicated his opposition to that provision. The Committee agreed that this was a provision that NAIHC could let go of, and leave it to fight another day.

*d. HUD VASH*

Ms. Difuntorum discussed implementation of the HUD VASH pilot program. Congress is looking for input on how the HUD VASH program can be improved. One of

the main concerns raised was the challenge of getting two different agencies to work together on the program (HUD and the VA). Several participants raised the issue of the rigid MSW requirements for case workers on the program. Several other participants talked about pushback and other difficulties created by the VA.

*e. NAIHC Legislative Priorities Setting*

NAIHC has initiated the process of setting legislative priorities for the organization to advocate for in 2017 and beyond. The first step was to solicit input from the various regional Indian housing associations on their ideas for legislative priorities. That information was organized and presented as a full list of legislative priorities to the Legislative Committee for consideration. The Committee reviewed those priorities, and agreed on setting the following priorities for NAIHC's legislative advocacy agenda for the upcoming session and beyond.

1. NAHASDA reauthorization
2. Increase IHBG annual appropriations
3. Improve federal consultation process
4. Deliver Training and Technical Assistance funds in accordance with NAHASDA, and retain the office of Training and Technical Assistance within HUD ONAP
5. Advocacy for a single agency source of funding for infrastructure and site development
6. Increase backing for "supportive services" for housing to enable wrap around housing services, including but not limited to relaxing restrictions on affordable housing
7. Extend time for rebuilding demolished buildings
8. Extend/expand the BIA HIP, ensure transparent application and evaluation process
9. Funding for homelessness evaluation programs
10. Direct TDHE grant eligibility for other HUD programs, such as HOME
11. Include case management in HUD/VASH programs
12. Allocate \$100 million a year (in non-IHBG funds) to combat methamphetamine issues in Indian Country

Some members also suggested that the list be kept open to add other issues. In addition, one member stated that the NAIHC membership voted to advocate for adding tribes back into the overall HUD Section 8 program, and that this issue should be put on the list as well.

There was also some discussion as to whether NAIHC might be able to push for increased IHBG funding without a reauthorized NAHASDA. NAIHC can continue to push for higher funding, but the lack of reauthorization means the program is at risk, not only for flatlined appropriations, but for reductions or even zero-ing out. Each year certain members of Congress ask for a list of programs that are not authorized to consider zero-ing out their funding, and since 2013 NAHASDA has been on that list.

Mr. Cooper suggested that representatives of the regions go back to their regions and consider this list and try to whittle it down to five. The regions will rank each of these issues 1 through 5, and then bring the top priorities back to the next Legislative Committee meeting. NAIHC can then begin working on those key issues, including developing white papers and an advocacy strategy. Mr. Cooper stressed that determining the top five priorities does not mean that NAIHC will not work toward all of the issues on the list, but that as an organization it must take a focused approach.

## 2. NAIHC Legal Symposium Plenary Session

The NAIHC Legal Symposium met in plenary session the morning of December 6. Chairperson Sami Jo Difuntorum provided the opening remarks. She spoke of the transition to the new administration, and encouraged Indian housing stakeholders to seek to serve in the new administration so that Indian Country issues have a voice, particularly during the transition.

Deputy Assistant Secretary of the Office of Native American Programs Heidi Frechette was unable to attend the meeting due to her need to work on the transition. She passed on her remarks through Chair Difuntorum. The Intertribal Advisory Committee will be up and running soon, and NAIHC members should expect a Federal Register notice seeking nominations sometime in December. This Committee will not take the place of negotiated rulemaking team. Transition work is under way for the new administration, and Ms. Frechette is heavily involved. Shawn Pensoneau, NAIHC's Director of the Office of Governmental Affairs, has also been consulted. An executive summary of the HUD Housing Needs assessment is due out in December. Additionally, listening sessions are being planned by HUD for "streamlining" the administrative processes (environmental review, etc.) in February and March (in conjunction with NCAI and the NAIHC Legislative Conference).

Paul Moorehead, counsel for NAIHC, spoke about things Indian Country might expect from a Trump Administration that could present opportunities: expedited permitting and construction of physical infrastructure (roads, bridges, oil and gas pipelines), which tribes can try to connect to for develop of Indian housing and infrastructure; reform of the federal tax code, which could include some reforms being proposed for Indian Country (Indian Tribal Tax and Investment Act); economic growth and job creation; repeal or amendment of the Affordable Care Act (which included the Indian Health Care Improvement Act); federal ethics and lobbying reform; and immigration reform. Representative Tom Cole (R-OK) has started an effort to hold the Indian Health Care Improvement Act harmless from any change or repeal of the Affordable Care Act.

In the upcoming session there will be a number of Indian bills introduced:

- NAHASDA Reauthorization;
- *Carciari* "fix";

- Tribal Labor Sovereignty Act (protects Tribes from NLRB jurisdiction);
- Indian Tribal Energy Act;
- Irrigation Rehabilitation and Renovation for Indian Tribal Governments and Their Economies Act (IRRIGATE Act);
- Interior Self-Governance Act Amendments;
- A long list of Indian tax related legislation.

The next speaker was Diana Holshue, Director of Branch Operations and Regional Outreach, Federal Reserve Bank of Minneapolis. She spoke about the Center for Indian Country Development at the Federal Reserve Bank. It was established in 2015 with the mission of developing Indian Country homes and infrastructure. Its mission is to be a thought leader and a clearinghouse for information. It has developed a strategic framework for development in Indian Country. There are four areas of focus: tribal lands, business and entrepreneurship, education and early childhood development, and homeownership. On the last item, the Bank is developing a proposed National Native Homeownership Coalition among various stakeholders and key players. The objectives include expanding access to credit and other elements necessary for developing Indian homeownership.

Tony Hernandez, the Administrator of the USDA Rural Housing, gave some brief remarks on the challenges to lending in Indian Country and provided some examples of the USDA Section 502 loan guaranty program (which can be done without a downpayment). The 502 program can also extend the loan repayment period to 38 years and with low interest rates. The program has been successful for developing homeownership in rural Alaska, where there are many challenges to obtaining lending. USDA Rural Housing still has \$2.2 billion available for loan guarantees in its Section 502 program. They also have a direct loan program.

Ed Goodman of Hobbs Straus gave a brief regulatory update, covering the recent changes to the IHBG formula allocation rule, the HUD government-to-government policy, the Tribal Intergovernmental Advisory Committee, HUD's Equal Access rule for transgender persons, the Department of Labor regulation on exempt employees, and the recent decision by the U.S. Supreme Court to hear the appeal of the *Lewis v. Clarke* decision (addressing whether or not tribal employees and officers have sovereign immunity for suits against them in their individual capacity).

### 3. USDA Rural Development

Tedd Buelow and Lynn Trujillo, both Native American Coordinators at USDA Rural Development, presented on the work of the USDA to increase flexible lending programs in Indian Country. Mr. Buelow is concerned with ways to help USDA become more effective, despite constraints of the applicable regulations and law. To date, only about 500 loans under the USDA programs have been made on tribal trust land. Mr. Buelow noted that borrowers are now allowed to use BIA Home Improvement Program money for additional downpayment assistance.



Mr. Buelow described several new strategies to increase lending on trust land. One method to implement MOUs between tribes and lenders to clarify processes when loans go into default. Ms. Trujillo said that the USDA approves ordinances with tribal court jurisdiction of foreclosure proceedings.

Another method that has been successful in pilot programs is establishing a mechanism to use Native Community Development Financial Institutions as intermediary lenders through the 502 program for homeownership loans on trust lands. USDA has also approved a mechanism to allow direct lending to tribes and TDHEs through the 502 program.

Mr. Buelow also discussed efforts to make internal improvements to deliver improved programs, which included meetings between the rural development staff and the Center for Indian Country Development. USDA is proactively working to improve relationships and collaboration with BIA staff. The moderators encouraged attendees to reach out to USDA state directors, and also asked attendees to consider putting their names up for consideration for political appointments, even if in future administrations. All state directors for USDA are political appointees, and all will be replaced with new administration.

USDA does not currently conduct trainings with tribes and TDHEs. Participants suggested USDA conduct regional trainings, including piggybacking on other trainings and tribal meetings, such as UNAHA. It was also recommended that USDA attend NAIHC regional caucus meetings.

#### **4. Closing Assembly**

The NAIHC Legal Symposium held a closing plenary session the afternoon of December 7. The NAIHC Lawyer of the Year award was presented to Tina Glory-Jordan, the in-house counsel for the Cherokee Nation Housing Authority. Ms. Glory-Jordan has been a law professor and a Tribal Court judge for the Cherokee Nation as well. She also served on the Cherokee Nation Tribal Council, including time as Speaker of the Council. The award was presented by Gary Cooper, the Executive Director of the Cherokee Nation Housing Authority. Ms. Glory-Jordan gave a short speech accepting the award, talking about the history of housing programs on the Cherokee Nation and how those programs were life-changing.

Miriam Jorgensen, Research Director at the Native Nations Institute of the University of Arizona, gave a talk entitled Mortgage Finance in Indian Country: A Data Review. She first gave an overview of the labor market overall in the U.S. during the Great Recession. During that time the job market demand went down significantly. At the same time, the credit score needed to get into the housing market went up significantly after having dropped in the mid-2000s. Mainstream banks were lending less, with lending coming more and more from large banks. But smaller community banks and credit unions share began to rise. Also, the number of bank branches dropped during that period.

In Indian Country, even during the recession, real per capita income has been growing. Indian Country economic indicators have been growing faster than elsewhere, although overall income is lower. Breaking down the data in more detail, the male part of the Indian Country labor force mirrored the mainstream trends, but the growth in Indian Country was more female than male.

As a result, there is a growing middle class in Indian Country, and who want to purchase homes on the reservation. But there are barriers to such homeownership that are not tied to family income, but rather availability of lending capital. Many of these individuals and families live just off the reservation. These are individuals who are able to buy land and homes off-reservation.

Ms. Jorgensen began digging into the data to see why this might be the case. One of the factors is that credit scores on reservation are lower, but that does not seem to be the main driving factor. Nor is the number of available bank branches the driving factor, since the number of branches has not dropped to the same degree as off-reservation.

The Section 184 program, which was initially developed to help stimulate on-reservation homeownership, was subsequently expanded to cover Indian homebuyers off reservation. The Section 184 program usage subsequently expanded substantially, with nearly all the growth off-reservation. Section 184 guaranties on trust land have remained flat.

The preference by lenders is for lending on fee-simple lands. There need to be some adjustment to the on-reservation lending process and structure to create more incentives for on-reservation lending: develop tribal trust land leasing codes; speed up TSR process; develop tribal mortgage codes; better education for lenders. There needs to be work to get lenders interested and comfortable in lending money in Indian Country.

## **5. Additional Items**

The Legal Symposium involved a number of other breakout sessions regarding specific subject matter areas. Many of the sessions involved overview or trainings in specific areas related to housing and financing, but several of the more well-attended sessions involved current developments in the law impacting Indian Housing: (1) Wrap around services in Indian Housing (by Hobbs Straus); (2) developments in HUD fair housing, (3) Methamphetamine in Indian Country; (4) Introduction to Low Income Housing Tax Credits; and (5) marijuana in Indian housing in light of legalization efforts. NAIHC will shortly post the power point presentations on its website.

The next NAIHC Legislative Committee meeting will be held via teleconference, on December 29. The next NAIHC event is the Legislative Conference, to be held at the Washington Court hotel in Washington, D.C., March 6-8, 2017.

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.