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MEMORANDUM

December 7, 2017

To: Housing Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legislative Committee Meeting and NAIHC Legal Symposium*

This memo reports on the NAIHC Legislative Committee meeting and the NAIHC Legal Symposium held in Las Vegas, NV, on December 3-5, 2017.

1. Legislative Committee

The Legislative Committee held its monthly meeting in person in conjunction with the NAIHC Legal Symposium. The Chairman of the Legislative Committee, Gary Cooper, and the 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). Chairman Cooper also introduced NAIHC Chair Sami Jo Difuntorum and HUD ONAP Deputy Assistant Secretary Heidi Frechette.

B. Announcements

Mr. Walters began with a few announcements. He urged participants to sign up for the NAIHC Native Housing Update, a bi-weekly email newsletter on Native Housing issues. He also announced that the NAIHC Legislative Conference will be held the first week in March 2018 in Washington D.C. The next NAIHC Legislative Committee meeting will be on the second Thursday in January (January 11, 2018).

C. V.A. Native American Direct Loan Program

The South Dakota Native Homeownership Coalition is operating a demonstration project providing direct loans for Native Veterans. The Sisseton-Wahpeton Sioux tribe is the lead for this project, and they have closed on 22 loans this past year (J.C. Crawford gave a brief overview). They are working with the Section 502 and Section 184 direct loan programs. This project has been in the works for many years, but is now beginning to bear fruit.

Joanna Donahoe is one the co-facilitators at the Coalition. She knows that there are lot a of questions about and interest in the Native American Direct Loan program. The V.A. is actively working on this issue, but they are understaffed. The Coalition and the V.A. are looking at ways to improve the program. Since the V.A. is understaffed, they are considering contracting with third parties to do the work on the ground. Many veterans correctly see the NADL as a V.A. benefit to which they are entitled, but are confused about the credit application and approval process, and need assistance in navigating that process. The third party could assist with that work, paid for by the V.A. and not the veterans. They are looking at Native CDFIs borrowing from the V.A., and then re-lending to the veterans, since the CDFIs have more contacts on the ground and work in the community.

The Coalition is working with V.A. to see whether these changes can be done administratively, but if not they are also working with their Congressional delegation to see if the issues can be resolved legislatively in the absence of authority to carry it out via administrative changes.

Mr. Walters followed up by noting that USDA is looking at similar fixes for the Section 502 USDA loan program.

D. Duty to Serve Underserved Markets – Fannie Mae and Freddie Mac

Kellie Coffey, a Product Developer for Fannie Mae. She leads all the single-family initiatives for Fannie Mae, including the “duty to serve” regulation. Fannie Mae is not a governmental entity, but they are highly regulated. Nor are they a bank. Rather, they are charged with providing liquidity for mortgage lending. Fannie Mae covers the entire U.S., and is regulated by the Federal Housing Finance Agency (FHFA).

Ms. Coffey began with an explanation of the duty to serve regulation, which was issued by FHFA in December 2016, driven by the Housing and Economic Recovery Act of 2008. The duty to serve regulation aims at helping homeowners and communities of low, very-low, and moderate income. The rule requires focus on underserved or underutilized markets. It requires Fannie Mae and Freddie Mac to improve access to mortgage financing for families of modest means in three housing markets posing persistent challenges: (1) manufactured housing; (2) affordable housing preservation; and (3) rural housing (includes Indian Country). It has been very difficult to get private investment in these markets. Fannie Mae submitted a plan to FHFA earlier this year to meet this regulatory obligation, and that plan is going through several iterations. Part of Fannie Mae’s role is to develop more capital and liquidity into these areas, in part through creating or enhancing a secondary market in these underserved areas. They are trying to develop a conventional type loan product to serve these markets.

Ms. Coffey described some of the other proposed actions under these three areas:

- **Manufactured housing:** increase purchase volume of conventional manufactured homes; test loan product changes; provide enhancements to existing programs; purchase chattel manufactured housing loans as part of a pilot program to study their performance; develop financing strategies for government, non-profit, and resident owned manufactured home communities.
- **Affordable housing preservation:** increase participation in shared equity lending such as community land trusts and resale of restricted properties; enhance and increase financing options for single-family energy efficiency improvements and rehabilitation of distressed properties; explore preservation strategies under programs such as HUD Section 8, USDA 515, HUD Section 202, etc.
- **Rural housing:** work with local and regional lenders to explore ways to provide more liquidity for rural housing credit; increase collaboration with non-profit and government entities working in these areas; dedicate staff to high-needs rural areas; share technologies; increase outreach and loan purchases in rural regions; increase purchases of rural loans from small financial institutions; explore LIHTC investments in rural markets.

Ms. Coffey has been personally involved with outreach in Indian Country this past year, and will continue to lead Fannie Mae's efforts in this area. She is looking for partnerships and collaboration. This year Fannie Mae received approval to purchase HUD Section 184 guaranteed loans in Indian Country. They are also working with their internal legal department to develop an MOU with tribes for lending (or buying loans) in Indian Country. Once that is worked out, Fannie Mae has a variety of products that it can deploy. Fannie Mae's goal is to be able to bring conventional lending to Indian Country, where such lending has been a major challenge. But they are only at the beginning of a three-year process.

E. Flood Mapping and Section 184 Update

Allen Zuni, the Executive Director of the Isleta Pueblo IHA, provided the update on these issues. Without its knowledge or participation, Isleta Pueblo got included in the FEMA flood mapping for the surrounding counties, which identified the Pueblo as located in a FEMA floodplain. Such designation means that the Pueblo cannot use federal funds – including IHBG funds – to build, rehabilitate, or acquire homes in those areas unless it complies with strict, and expensive, regulatory requirements. This prohibition applies even if such funds could have been and were used to build or acquire homes in those same areas. The Pueblo has tried to get FEMA to reconsider and to remove the Isleta lands, but FEMA has refused to change the designation. FEMA is pushing the Pueblo to join the National Flood Insurance Programs, which provides certain mechanisms to allow for use of federal funds in these areas again (only 37 tribes are a part of this program). But these mechanisms are burdensome and expensive (estimates are that it would add \$15,000 to \$20,000 to the cost of building a home), and Isleta

Pueblo chose not to join. Many of the New Mexico pueblos are now facing the same issues.

The Isleta Pueblo has brought this issue to NAIHC's attention, and asked for NAIHC to put this on its legislative agenda for a fix. They have met with their Congressional delegation, who were supportive of a legislative fix to this issue. The Pueblo has submitted a white paper to NAIHC on this issue. The Pueblo urges other tribes to read the white paper and to contact their delegations to request support of a legislative fix. Mr. Zuni pointed out that states are exempted from this requirement. The legislative fix the Pueblo are seeking would be to get the same type of exemption to be applied towards other tribes (like treatment as states under the Clean Water Act).

F. Senate Committee on Indian Affairs (SCIA) Update

John Simmermeyer, counsel for the SCIA (he works for the Committee Chairman, Senator Hoeven (R-N.D.)), gave the update on tribal housing bills in Congress.

The SCIA is currently looking at two issues relevant to Indian Housing and the NAIHC membership. First, SCIA is reviewing appointments to several key positions in the Administration that will have jurisdiction of Indian Country issues, including nominees at HUD, BIA, and IHS. The key appointment for Indian Housing issues is the Assistant Secretary for the HUD Office of Public and Indian Housing.

The nominee for this position is Hunter Kurtz. The SCIA took notice of this appointment because of mostly positive comments he made during his nomination hearing. Mr. Kurtz said a one-size-fits-all approach does not apply to housing in public and Indian housing. This statement was encouraging, because it fits in with the self-determination aspects of NAHASDA. He also affirmed his intent to work with Indian tribes and TDHEs to address housing issues in Indian Country.

Mr. Simmermeyer then began discussing the second housing-related issue on SCIA's agenda: legislation specific to Indian housing. SCIA is considering the two bills that have been introduced to reauthorize NAHASDA (Senator Hoeven's BUIILD Act and Senator Udall's version of the bill introduced in the House by Congressman Pearce). We have covered these bills in prior memos, and they are discussed in the next section of this memo.

The SCIA is also taking action on S 1333, the HUD Native American VASH bill (a voucher program specifically for Native Veterans). The bill has been passed out of Committee, and SCIA is drafting a report. That report is expected to be completed shortly. These kind of reports are useful in gauging support among other Senators. S 1333 is a bi-partisan bill: of its four co-sponsors, two are Republicans and two are Democrats. The HUD Native American VASH bill has several key components: direct V.A., HUD and IHS to begin working together to provide wrap-around services; making funding directly available for vouchers for Native Veterans to obtain housing. 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 such vouchers for tribal 1937 Act housing).

Senator Hoeven has also given direction to staff to become engaged in USDA issues, as well as on Census issues.

Wendy Lawrence raised a concern about some changes in the recently passed Senate bill for tax reform, which will create disincentives for LIHTC investments in Indian Country. Mr. Simmermeyer stated that Senator Hoeven has introduced a bill to fix this issue (regarding private activity bonds), but could not get it included in the tax bill. Senator Hoeven will continue to advocate for this issue in separate legislation.

The Committee also has hearings coming up on tribal water rights and on crime victim's rights.

G. NAHASDA Reauthorization

Mr. Walters lead a discussion about the specific bills introduced to reauthorize NAHASDA. There are three bills currently in Congress: HR 3864, S 1895, and S 1275.

HR 3864 is Congressman Pearce's bi-partisan reauthorization bill that is very similar to the bills that passed out of the House in the past two sessions. They are still working on getting this out of Committee: it is more of a timing issue. There may be some opportunities to add amendments at mark-up, such as an amendment dealing with the FEMA mapping issue discussed above.

S 1865 is the companion bill introduced in the Senate by Senator Udall. It has no Republican co-sponsors. There are only two differences: (1) the House Bill contains a cap on the annual IHBG appropriations (\$650 million), and the Senate bill contains no such cap; (2) the Senate Bill contains a slightly different mechanism for accounting for the HUD VASH voucher program.

S 1275 is Senator Hoeven's NAHASDA reauthorization bill known as the BUIILD Act. It is a stripped-down version of NAHASDA reauthorization. The BUIILD Act was introduced at the end of May 2017, and there was an oversight hearing at the Senate Committee on Indian Affairs on June 12, 2017 (that we reported on in a previous memo). It has not yet been marked up or passed out of Committee. The BUIILD Act reauthorizes the NAHASDA block grant and contains a few amendments to NAHASDA. There will be discussions between Senator Udall and Senator Hoeven to see if the two Senate bills can be reconciled and a bill moved forward in the Senate.

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.

2. NAIHC Legal Symposium Plenary Session

Chairwoman Sami Jo Difuntorum opened the plenary session by giving a short history of the NAIHC Legal Symposium, which began as a small gathering of HUD attorneys to discuss contract and regulatory issues. In the late 1990s, NAIHC took over the Symposium and has been operating it ever since. The Legal Symposium is one of the best-attended events that NAIHC organizes.

Chairwoman Difuntorum also noted that the NAIHC Board has recently undertaken strategic planning, and has made solid progress. The process involved looking at all the pieces of NAIHC and figuring out what NAIHC does that is unique so that NAIHC's strength can be leveraged. While NAIHC has an excellent and robust training program, NAIHC's unique function is advocacy for Indian housing issues. Thus, the Board made it a priority to hire an Executive Director who has skills and leadership in that area, which is how they ultimately decided to hire Tony Walters. Mr. Walters has a lot of experience on Capitol Hill, working most recently for Senator Tester (D-MT).

Chairwoman Difuntorum says that the organization is on good footing going forward, and plans to be around for a long time. She noted that her term is up and new leadership will be elected at the Annual Convention this coming June 2018 in San Diego, CA.

A. Video Message from Senator Tom Udall (D-NM)

Senator Udall is the Vice-Chair of the SCIA, and he is focused on supporting the development of Indian housing. Without much-needed housing, tribes cannot support its people, or attract police, doctors and other necessary professionals. Senator Udall says he stands committed to NAHASDA reauthorization; to underscore that point, he spoke of the NAHASDA reauthorization bill that he introduced.

He also spoke about homelessness among Native Veterans, and noted that he is also working to pass the Tribal HUD-VASH Act. The bill passed out of the SCIA with a unanimous vote. Senator Udall is working to get it to the floor of the Senate for a vote.

B. Cora Ganne, Wells Fargo

Ms. Ganne is the National Tribal Advocate and Senior Relationship Manager at Wells Fargo. She spoke about Tribal advocacy and philanthropy at Wells Fargo Bank. For many years Wells Fargo has engaged in dialogue with tribal leaders and housing professionals to get a better understanding of the need for investment in Indian Country.

She presented a summary of the needs that Wells Fargo has identified, including the need to get more private investment in Indian Country. Wells Fargo has provided \$16.6 million in grants to Indian Country since 2013, including grants for students to complete their education. This also includes free college preparation workshop funding. Wells Fargo hosts those workshops, and Native students can attend for free.

Ms. Ganne made the following announcement. For the next five years (2018-22), Wells Fargo is committing \$50 million in grants to Indian Country for environmental sustainability, economic development, housing, leadership developments, financial capacity training, leverage for existing programs and funding, marketing support, and wholesale and middle market banking support. This program will be implemented in partnership with the tribes.

C. Heidi Frechette, Deputy Assistant Secretary HUD ONAP

Ms. Frechette marked her one-year anniversary as Deputy Assistant Secretary in June 2017. Her goal with each action is to improve the lives of tribal members and tribal communities. ONAP has implemented the Tribal HUD VASH pilot program, with the goal of providing housing vouchers to 500 Native Veterans. ONAP saw an inequity in how the standard HUD VASH program was operating, which was geared toward urban areas and fee lands. As a result, while eligible, Native Veterans were unable to access the services. ONAP worked with the VA and Congress to make the program more accessible to Native Veterans, taking a program set up for urban areas and making it fit Indian Country. The pilot project has been successful, and the Tribal HUD VASH Act is likely to become law, making it available nationwide.

She also spoke about the negotiation and ultimate development of amended IHBG formula allocation regulations. Those regulations were approved at the end of 2016, and went into effect for FY 2018 (beginning October 1, 2017). One of the main challenges was agreeing on the data source. HUD felt that the Census American Community Survey (ACS) as the most accurate source, and that source was built into the new formula regulations. Since there was no consensus on a data source at negotiated rulemaking, HUD exercised its discretion and adopted ACS as the data source. Ms. Frechette encouraged tribal leaders and housing professional who have questions about the formula and about ACS to contact the HUD IHBG Formula Center. HUD ONAP has sent out the new estimates for FY 2018, and they have been careful to make sure that information is accurate. She also noted that the regulation includes a stop-loss provision, meaning that no tribe or TDHE will see a loss of 10% over its prior year allocation.

Ms. Frechette also plans to keep up a steady pace of program improvement in FY 2018. There will be a new Assistant Secretary for OPIH. The nominee, Hunter Kurtz, has a wealth of experience, and he signaled a strong commitment to Indian housing and economic development. He has already attended a UNAHA meeting earlier this year.

ONAP is reviewing existing guidance under Section 184 and plans to update the program to meet the best practices being used in the banking industry. They are also

looking to increase lending on trust land, since the program so far has not supported much lending on trust land. There are obstacles coming from other agencies, but HUD ONAP can also update its regulations, and Ms. Frechette committed to involving tribes early on in that process. She is also supporting the development of the Section 184 Professionals loan guaranty program, which Congress authorized. This authorizes home loan guaranties for tribes to build housing for professionals in Indian Country.

ONAP is also committed to strengthening its training and technical assistance programs. Congress has expanded ONAP's authority in this area to cover Section 184 and Title VI.

One participant asked Ms. Frechette to comment on the idea of a National Tribal Survey to replace the census and ACS. She noted that she would entertain and consider alternative data sources. But there was no data source available that tribes all could have access to other than ACS. ONAP was transparent from the beginning that if the tribes could not reach consensus on a data source, then ONAP would use the ACS. Since there was not consensus on any other data source, ONAP did select the ACS.

D. Gary Cooper, Chair of Legislative Committee

Mr. Cooper gave the legislative update. He reiterated much of the legislative update that was discussed above at the Legislative Committee meeting. NAIHC will be putting out a side-by-side comparison of the various NAHASDA reauthorization bills up on its website.

E. Tony Walters, NAIHC Executive Director

Mr. Walters worked on the SCIA for Senators Tester and Cantwell, as well as at the U.S. Department of Interior. He is coming up to speed on the challenges facing Indian Country housing. Mr. Walters introduced the NAIHC staff. Shane Begay was not at the symposium because he and his wife just had a new baby.

NAIHC started up a new program through the United Tribes Technical College (out of North Dakota) to get educational credits for your professional development. Mr. Walters encouraged participants to sign up if interested.

F. James Castagneri, Geographic Coordinator, Census Bureau (Denver Regional Office)

Mr. Castagneri spoke about the Local Update of Census Addresses (LUCA) program, which is part of the lead-up to the 2020 Decennial Census. LUCA provides a voluntary opportunity for designated representatives of all Tribal, State and Local governments to review and comment on the addresses to be used to conduct the 2020 Census. The LUCA program treats address information as confidential (per federal law); the information will be used only for the Census process. All participants and partners who assist in the LUCA program must sign an enforceable confidentiality agreement.

Addresses are not just individual homes, but correctional facilities, group homes, and other facilities. Deadline for participation in LUCA is December 15, 2017.

Even if you choose not to participate in LUCA, you can still review the Address Block Count files (to make sure that the amount of housing units in a census block are accurate), test the Census Geocoder to geocode jurisdiction's address list, and view your boundaries using TIGERweb (to ensure that the Census has the correct boundaries for reservations and other jurisdictions).

The Census data is used to apportion representation, drawing congressional districts, and distributing federal dollars, so it is critical to ensure that the information is as accurate as possible.

G. Milo Booth, FEMA National Tribal Affairs Advisor

Mr. Booth is in charge of the regional tribal liaisons and on government-to-government consultation. Recent legislation gave tribes the ability to make their own disaster declarations. This led to building the FEMA tribal programs. There is a Tribal Declaration Pilot Guide, published in the Federal Register in January 2017. There have been 22 declaration requests on behalf of tribal governments, four requests since the Tribal pilot period began. The first declaration was made this year for the Seminole Tribe of Florida (resulting from the hurricanes in 2017).

There are two types of assistance that FEMA can distribute: (1) individual assistance for individuals harmed by a natural disaster; and (2) public assistance for public entities, such as tribes, who own and manage housing and other facilities. Mr. Booth's job is to get the word out to tribes as to how the program works and how tribes can access such assistance for floods, hurricanes, earthquake, and other storm damage.

The new FEMA Administrator is Brock Long, and he is committed to working with and supporting Indian Country. He has already visited two regional tribal summits.

H. Ed Clay Goodman, Hobbs Straus Dean & Walker, LLP

Mr. Goodman gave the litigation and regulatory update to the plenary session. That update covered major litigation impacting Indian Country as well as regulatory initiatives. Attached to this memo is a detailed update that was handed out to the membership covering these areas.

I. Susan Allen, Jacobson Law Group

Ms. Allen is also a representative in the Minnesota House, the first Native woman so elected. She spoke about her experience in a legislative that was 98% white when she was first elected. There are now four Native women in the Minnesota House, and 7% of the House is comprised of people of color, including the first Somali-American legislator in the United States. Ms. Allen is also the only "out" LGBT Native legislator in the U.S.

Ms. Allen has worked on a project to address homelessness among Minnesota youth. The number of youth of color who are homeless is disproportionate to the general population. Minnesota passed the Homeless Youth Act last year, which defines homelessness broadly and includes funding priorities for non-profits and tribal governments. It also funds outreach, training, drop-in centers (meals and crisis counseling and other services) and emergency shelters and transitional housing.

Ms. Allen also spoke about the “safe harbor” program. This bill decriminalizes prostitution for youth under 17, so they are not treated as criminals but rather as youth in need of services.

2. Breakout Sessions

There were numerous breakout sessions covering a variety of areas. We provide a summary of just a few of those. The materials handed out for every breakout session will be made available on the NAIHC website shortly.

A. *Presentations on Lewis v. Clarke Litigation and Aftermath*

A panel of three attorneys, including Ed Clay Goodman, gave a presentation on the *Lewis v. Clarke* litigation and its aftermath, 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 the Tribe and the driver 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 because it felt that the Tribe was the “real party at interest”. The case was appealed to the United States Supreme Court, which agreed to hear the case.

In a unanimous 8-0 decision (with Justice Gorsuch recusing himself because he was not on the court when arguments were heard), the Supreme Court ruled against the Tribal position. The Court held that Clarke, as 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 at 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, and yet still be able to access tribal resources through indemnification clauses. Sovereign immunity had been a significant bar to such suits, but now such suits may be brought against employees, and the potential for tribes to have to pay significant liability claims has increased.

The presenters discussed the background of the case, the repercussions going forward, and some ideas for limiting potential liability or covering for exposure. Tribes and TDHEs will need to examine their insurance policies and decide whether and to what extent to indemnify employees, and to develop robust tribal code provisions for the protections of official immunity, qualified (aka “good faith”) immunity, and absolute immunity. There is no one-size-fits-all approach; tribes have to examine their resources and their risk thresholds to determine the appropriate approach. It may take some time and additional litigation until this area of the law settles out further.

B. Construction Disputes Overview: Prevention to Resolution

This session focused on three main themes: (1) viewing construction contracts as part of an interrelated scheme; (2) preventing construction disputes through carefully crafted construction contracts; (3) resolving construction disputes when they do arise. Although some disputes and disagreements are an inevitable part of the process, the presentation noted that contract disputes can be reduced through a good planning and design process, compliance with the procurement requirements and development of good bid documents, and the involvement of diligent and experienced parties on both the contractor and owner sides. For example, TDHEs should make sure the scope of work included in the solicitation describes *all* the duties of the contractor and avoids ambiguities. It was also suggested that TDHEs have someone in charge of the construction process who will closely monitor compliance with the applicable requirements and contracts and hold the general contractor accountable in a timely and firm manner (to try and head off smaller issues expanding into larger ones). There was also discussion of the importance of having a capable and experienced contractor. With regard to construction contracts, the presentation stressed the importance of having a contract that covers the requirements of all the applicable laws (including the federal requirements for federally funded projects set out in 2 C.F.R. Part 200) and protects the interests of the TDHE. It was recommended that TDHEs use their own contract documents (i.e., not to sue documents provided by the contractor or the template AIA contracts), and that, if a TDHE agrees to use a contract provided by the contractor, the TDHE have their legal counsel review the contract so that the TDHE can request appropriate amendments. Some of the key contract provisions reviewed in the presentation were sovereign immunity provisions, liquidated damage clauses, termination clauses, and dispute resolution sections.

A wide range of potential disputes were discussed including disputes about the scope of work, the construction schedule, deviation from drawings or plans, change orders and unplanned-for work, and errors in contract documents. A good contract should specify the requirements and set out a process for addressing such disputes so that the parties can resolve such disputes “within the contract.” Further, the processes should

include deadlines for notification of disputes to preclude a contractor from raising all the disputes at the end of the contract. In addition, at the initial stage the owner (or owner representatives) should decide the dispute and the work should continue during the dispute resolution process. If a dispute cannot be resolved by the parties in accordance with the contract provisions, the owner may have to declare the contractor in default and terminate the contractor's right to proceed. In such cases, the owner may seek a remedy from the surety, and the parties may agree to mediate or arbitrate the dispute. If a dispute cannot be resolved through those processes, the parties may have to litigate the dispute, which will be very costly for both parties.

C. Mortgage Lenders' Forum: Exploring Risk Mitigation Strategies for Trust Mortgages

This session provided an opportunity for representatives from several mortgage lenders to discuss their top concerns regarding trust mortgage programs (HUD's § 184 program and USDA's § 502 program). It also provided an opportunity for the panel, other federal representatives, and members of the audience to discuss potential strategies to mitigate those concerns in order to facilitate future trust mortgages and the opportunities for home ownership on trust lands. This strategy session is part of an ongoing effort, and it is primarily intended to identify concerns and to discuss some potential steps that could be explored in future dialogues. The number one concern raised by the lenders was the BIA timeframes for securing approvals for the lease and the leasehold mortgage, and delivery of the title status reports (TSRs). The lenders noted that the BIA delays can be substantial and can hold up the closing of the loan for a year or more, during which time the rates and home costs may change and the homeowner will become ineligible for the loan needed to purchase the home. In which case, the loan falls through. In addition to the obvious harm to the homeowner, depending upon the lender's policies, the loan officer may not get paid for all the effort he or she put into the loan, which creates a chilling effect for loan officers. After a loan closes, the lenders stated that they need a second TSR in order to perfect their lien and secure HUD's loan guarantee, and those can also take more than a year to be issued, during which period the lender essentially has an unsecured loan. Additionally, the environmental reviews may lapse during these long BIA delays, which requires a new environmental review. Because of the number of BIA approvals required, the sale of a home from one tribal member to another tribal member is the most complicated type of loan, and is subject to the greatest delays. Ms. Frechette indicated that HUD is trying to work with the Department of the Interior (DOI) to replicate the regions where such delays have been reduced.

There was discussion about the steps that tribal governments may be able to take to reduce the problems arising from BIA delays, such as the development of tribal title plants, tribes contracting BIA realty functions under the Indian Self-Determination and Education Assistance Act (ISDEAA), and the approval of tribal leasing regulations under the HEARTH Act. However, it was noted that those steps involve a significant investment of tribal resources and time. The USDA representative indicated that a significant concern for USDA is the foreclosure process, because Department of Justice attorneys will not appear in tribal court, and that this has a chilling effect on USDA staff.

Several representatives from tribes or tribal organizations indicated that lenders should reach out to tribes earlier in the process, and there was discussion of whether TDHE's could help lenders work with delinquent loan holders. Tribal representatives expressed concern that some private lenders may not be making a sincere effort to save loans because the loan is guaranteed by a federal agency, and that tribes were being asked to assume the full value of defaulted loans, which may far exceed the value of the mortgaged home.

D. Protecting the Civil Rights of American Indians, Carrie Pagnucco

Ms. Pagnucco is a trial attorney in the U.S. Department of Justice Civil Rights Division. Her presentation is part of an ongoing outreach effort begun by the Division earlier this year to discover and prosecute civil rights violations against American Indians who face unlawful discrimination when seeking housing. Her supervisor met with several attorneys (including Mr. Goodman) at the NAIHC Annual Convention in June 2017, and Ms. Pagnucco followed up at the Legal Symposium by meeting with those same attorneys and further brainstorming about outreach and potential discrimination issues. Ms. Pagnucco emphasized that the Division is not looking at tribes or TDHEs as civil rights violators, but rather at private and public landlords, lenders, and local governments off-reservation who may be engaged in such discrimination.

During her presentation, Ms. Pagnucco discussed the various civil rights laws that provide protections for American Indians seeking housing. Those laws protect against discrimination not only in rental housing, but in mortgage lending and public accommodations. She also explained the enforcement authority of the Civil Rights Division, which can investigate, send out "testers" to identify patterns of discrimination, and file civil actions against violators. She noted that there was a similar effort in the mid- to late-1990s that uncovered and prosecuted discriminatory acts against American Indians, and that the Division was looking to follow up.

Ms. Pagnucco is the Division's lead attorney in this effort, and will continue her outreach to Indian Country. In her meeting with the Indian Housing attorneys, we suggested that she try and set up similar training and outreach sessions at the various regional Indian Housing Associations, and she was open to the idea of doing so.

4. NAIHC Legal Symposium Closing Session

A. Tony Walters

Mr. Walters provided an overview of the activities that NAIHC is planning to undertake in 2018. He spoke again about the efforts to get NAHASDA reauthorized. The NAIHC Chair just sent a letter to Chairman Jeb Hensarling (R-TX), Chair of the House Financial Services Committee. He also spoke about internal improvements that NAIHC is working on to enhance its advocacy efforts and training and technical assistance services.

B. Video Statement from Congresswoman Dina Titus (D-NV)

Representative Titus is from the Nevada First Congressional District (including Las Vegas). She stated that all people have a right to have a roof over their heads. She supports and continues to support tribes in operating housing in a manner that is consistent with the rights of self-determination. Representative Titus supports and will advocate for full funding for the IHBG appropriations. She wants to be known as an advocate not just for the one Tribe in her district (Las Vegas Paiute), but for tribes around the United States.

C. Closing Remarks by Chairwoman Sami Jo Difuntorum

The Legal Symposium this year was the highest attended one to date. The break out sessions were well-attended. The Annual Convention will be held May 30 through June 2, 2018 in San Diego, CA. There will be a golf tournament the day before.

Chairwoman Difuntorum and Vice-Chair Gary Cooper presented the Lawyer of the Year Award to Tim Humphrey from New Mexico.

D. Motivational Speaker: Tala Tootoosis

Ms. Tootoosis is a Native Canadian (Sturgeon Lake First Nation, Saskatoon, Canada). She told her life story. She was raised by a recovering alcoholic mother, who provide a good home and connection to ceremony and culture. However, her mother worked often, and provided babysitters, some of whom sexually abused Ms. Tootoosis. She eventually began using alcohol and drugs as a coping mechanisms. She also coped by hiding her pain from her family. Ms. Tootoosis ultimately was saved by her grandfather (a traditional pipe-carrier) and her mother, who took her back in when she finally committed to changing her life. She went back to school, got her degree in counseling, and has learned her Nation's traditional ways. She has taught her two children how to use healing medicines and to know their place in their traditional ceremonies. She emphasized the importance of housing and of the feeling of home as a means of healing.

E. Zoe LeBeau: Supportive Housing Project

Ms. LeBeau is working with tribes to develop supportive housing for tribal members in Indian Country as well as in urban areas. She has been working on these issues for 10 years. HUD has finally indicated support for this model and the work that she has been doing. The United Interagency Council on Homelessness recently signed an MOU to implement strategies set a path to end homelessness among Native Americans. Several federal agencies are parties: HUD, VA, Department of Labor, Health and Human Services, the Department of Education and the Department of Agriculture. As a result, HUD tasked NAIHC to facilitate an intensive technical assistance plan to address and decrease homelessness in Indian Country.

The purpose of this effort is intended to build and strengthen collaboration between tribal communities, urban native communities, homeless service systems, state and local partners, to increase access to housing and services for American Indians experiencing or at risk of experiencing homelessness both on and off tribal lands.

The program seeks to develop “permanent supportive housing,” which serves people who are high-risk and thus face great difficulty finding housing: drug addicts, alcoholics, and transitioning prisoners. The goal of such housing is to provide housing and supportive services for these at-risk populations to help them overcome these challenges. Ms. LeBeau went through several examples of such permanent supporting housing: Makah has developed a supportive housing project with LIHTC and other funds; Gmaajii Mino Bimaadiziyaan (Duluth, MN), an urban center; Fond du Lac Supportive Housing; and Ute Mountain Ute, which has developed an 11 unit permanent supportive housing project with caretakers quarters on site.

Technical assistance will also be a key part of this program, to create connections and partnerships between various agencies (IHS, BIA, HUD) and tribes, and the at-risk communities. Ms. LeBeau has a proposal for a technical assistance program, a five-month program with hands-on training and discussions. Ms. LeBeau is looking for feedback on the kind of TA to provide. The target is to start in late 2018 and to run through 2020.

5. Final Announcements

The next NAIHC event is the Legislative Conference, to be held in Washington, D.C., the first week in March 2018.

The Legislative Committee will hold its monthly call the first Thursday of each month, at 1:00 PM Eastern. The call in January 2018, however, will be held on the second Thursday, January 11.

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