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MEMORANDUM

December 11, 2019

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 on December 9-10, 2019, held in Las Vegas, NV.

1. Plenary Session

a. Chairman Gary Cooper

Chairman Cooper (Cherokee Nation Housing Authority) gave the opening remarks. He announced that Representative Denny Heck has introduced, with a bi-partisan group of Representatives, HR 5319, a bill to reauthorize NAHASDA (discussed in detail on our December 9, 2019 update memo). NAIHC is also working to get the Tribal HUD-VASH bill passed. The Senate has already passed that bill, waiting for House action. Similarly, NAIHC is working on the Continuum of Care bill, which will give tribes and TDHEs the ability to access funds to address homelessness, which has also passed the Senate and is awaiting action in the House.

b. Executive Director Tony Walters

Mr. Walters gave a brief introduction to NAIHC and its legislative advocacy activities. NAIHC is continuing to work with the co-sponsors of the NAHASDA reauthorization bill to help move that legislation through Congress.

c. Senator Jacky Rosen (D-NV)

A key staff person for Senator Rosen gave a welcome to the NAIHC plenary session. He encouraged reaching out to Senator Rosen. She supports Indian tribes and would like to hear how she can help.

d. Congressman Denny Heck (D-WA) (video presentation)

Representative Heck provided an update on NAHASDA reauthorization and other bills. He introduced a NAHASDA reauthorization bill on December 5, with a bi-partisan

group of co-sponsors. He says that he takes housing on and off tribal lands very personally. It is a critical issue to bring Native Americans out of poverty and provide them with stability. NAHASDA must be passed. It is Congress's trust responsibility to pass this bill. It is a key tool that Congress has to provide tribes with the help they need.

e. HUD ONAP Deputy Assistant Secretary Heidi Frechette

DAS Frechette (Menominee and Brothertown) spoke of the government-to-government relationship as being a critical piece of recognizing tribal sovereignty. Twenty-five years ago, HUD issued a policy statement supporting a tribal-specific housing program, which led to the development and passage of NAHASDA. Since then, 40,000 homes have been built and 100,000 homes have been rehabbed since then. Tribes have also developed community centers, clinics, playgrounds, etc., to support Tribal housing. 2020 will be a big year for Tribal housing. She also said that HUD will announce the IHBG competitive funding awards "very, very soon." (The awards were announced during the second day of the Symposium, as discussed below.) HUD received many very strong applications, and the ONAP staff has been working diligently through the applications. She is looking forward to seeing the impact of releasing this funding. For those tribes that do not receive funding this round, she wanted to note that Congress is likely to include another \$100 million in IHBG competitive funding, and all are encouraged to apply. She also noted that FY 2020 is still being operated under a Continuing Resolution, but HUD can provide "interim funding," and you should contact your regional Grants Management staff for information on how to obtain such funding as a bridge until full year funding is passed (C.R. runs out on December 20, and we hope that full-year funding bills will be finalized and adopted by then.) She also noted that the NOFA for the FY 2019 Indian Community Development Block Grant has been published, and the deadline for applications is February 3, 2020.

DAS Frechette then turned to discussing the Section 184 program. This is a critical program for developing homeownership in Indian Country. She has met with CDFIs to facilitate their involvement. HUD is also working on Section 184 regulations, holding 19 different consultations around the country. The regulations are currently in clearance within HUD, and they hope to publish them soon for public comment. She then began talking about the need to find housing for professionals and skilled workers in Indian Country. There is a provision within Section 184 to provide housing for such families, and HUD will provide more information on this provision at its breakout session later in the day.

HUD is also working hard to provide training and technical assistance to tribes and TDHEs. They are also posting "best practices" on the ONAP website; please contact DAS Frechette if you have projects that you think should get some publicity. ONAP also has a twitter account that includes posting about critical developments.

Finally, DAS Frechette spoke about conferences that ONAP has been involved. The first was last month's Native Asset Building conference. The second was the Crime Prevention Summit, which will be held in Denver on February 4 – 6.

f. Ed Clay Goodman, Hobbs Straus Dean & Walker, LLP (Litigation and Regulatory Update)

I was asked to provide the Legislative and Regulatory Update. I have attached the power point slide show that I used for that presentation, which covered major developments impacting Indian tribes over the past year.

g. Dee Alexander, Tribal Affairs Coordinator for the U.S. Census Bureau

Ms. Alexander (Cheyenne and Arapaho) gave an update on the 2020 Census and how the Census is trying to reach out to and get accurate counts in Indian Country. Census has an MOU with NAIHC to get an annual survey out to tribes regarding lands and boundaries. She presented a power point slide show, which will be available on the NAIHC website. The first slide showed the increase in each Census of the number of American Indians and Alaska Natives. The slides also provided background on the Census, including the provision of the Constitution that authorizes it, how the information is used, how the information is collected. For 2020, it will be the first time the Census will be self-response, in which you can provide information online or on your smartphone. If you don't fill out the information, Census will follow-up to encourage completing the forms. Prior to the 2020 Census there was significant outreach to and consultation with the tribes about the best ways to reach tribal members. The question for "race" includes a box to check for "American Indian or Alaska Native," and you can include the names of the tribe or tribes that you are identified with. In order to be counted as an "American Indian/Alaska Native household (which is important for a number of programs), the head of household needs to be listed as American Indian/Alaska Native.

You can also visit the Census website for information about the Census, as well as to sign up to be a Census taker in your tribal community. Census has contracted with a consultant specifically to reach out to Indian Country. Census is also partnering with a number of tribal organizations, such as NAIHC, to facilitate such outreach.

Ms. Alexander also played a video urging the importance of American Indian and Alaska Native participation in the Census. It is very important for funding and for designing Congressional districts to the benefit of Indian tribes. The video also emphasized that the information collected will be used only for specific purposes limited to the Census, and will otherwise be kept confidential.

h. Tawny Brunsch, Executive Director, Lakota Funds

Lakota Funds is a Native-owned CDFI, and she provided an updated on the USDA Section 502 Home Loan Relending Pilot program. Lakota Funds was the first Native CDFI in the country (almost 34 years old). They serve the Oglala Sioux (Pine Ridge) Reservation. There are no other lenders on the Reservation. They have a hard time finding banks to serve Tribal members. They are a business lender, and have a \$5 million portfolio. They also provide technical assistance and financial literacy training. They also

built and managed a LIHTC project on the Reservation. In 2012, they chartered a bank on the Reservation to make direct loans.

They got involved with a coalition to develop the use of USDA Section 502 direct loans. There had been no Section 502 loans in South Dakota. This was operated as a pilot project, and was very successful. To continue it, however, will require legislation to make it permanent. NAIHC will consider supporting legislation to make this program permanent. There will be some pushback from other rural housing programs, whose share of the pie may get smaller.

i. Cora Ganne, Wells Fargo, Senior Vice President

Cora Ganne, the Senior Relationship manager and Tribal Advocate at Wells Fargo spoke after recognition as a primary sponsor. She shared news about the \$50 million native community builder grant program. The benefit will be expanded to include Native Hawaiians as well. The program now focuses on housing affordability, financial health, and small business growth. One of the areas of focus is grants to CDFIs for capacity building, asset building, and homebuyer counseling grants. Wells Fargo has also provided a grant to NAIHC for \$767,400 for elders and military veterans for rehabbing homes. Eligible households may receive up to \$10,000 under this program.

j. Derek Valdo, CEO Amerind Risk

CEO Valdo gave a brief update on Amerind, and its history. It was started in response to an emergency in Indian Country in 1986. HUD and NAIHC worked together to set up Amerind on an expedited basis, and by the end of the year Amerind had \$5 million in the bank to begin providing casualty insurance to Indian housing. Over the past 34 years Amerind has continued to grow, keeping its funds in Indian Country. Recently Amerind started a “social impact fund” to keep money flowing back into Indian Country.

2. Legislative Committee

Tony Walters, the NAIHC Executive Director, convened and ran the Legislative Committee meeting. He began with an overview of Congress in 2019 and into 2020. The 116th Congress began with the longest government shutdown ever (35 days). Since then the focus of the Senate has been focused on confirming judges, and not much else. Now Washington DC is consumed with the impeachment proceedings. Finally, there is always the possibility of another shutdown. The current Continuing Resolution goes through December 20. There does not appear to be much appetite for another government shutdown, and one is not expected. However, the shutdown from earlier this year was not expected either, since there had been an agreement between House and Senate leadership prior to the President announcing he would not sign the funding bills that were the product of that agreement. So while there will likely be a resolution that avoids a shutdown, in the current political environment nothing can be predicted with certainty.

For FY 2020, we expect to see level funding for Indian housing, either through a new full funding bill, through “mini-bus” spending bills, or through another, longer-term Continuing Resolution. That will include \$650 million for the IHBG and another \$100 million for the competitive grant. We should see an Administration budget released in February 2021, to kick off the FY 2021 appropriations process.

Tribal HUD-VASH has passed the Senate (S. 723), and is currently pending in the House Financial Services Committee (HR 2999). The one hold-up on the House side is the flexibility in this bill; the House leadership has concerns with giving the Administration too much discretion in any area involving funding. The Tribal Access to Homeless Assistance Bill has passed the House (making tribes eligible for Continuum of Care bill) (HR 4029); it is pending with the Senate Banking Committee (S 2282).

The Native American Housing Affordability Act (S. 2725) was introduced in the Senate on October 29 (by a bi-partisan group of Senators). It would allow HUD to issue its loan guarantees prior to getting a final certified TSR from the BIA. This bill addresses a longstanding problem with the delays in getting BIA to issue certified TSRs, which has resulted in inordinate hold-ups to approving such loans. The bill has been referred to the Senate Banking Committee. The prospects for passage of this bill are favorable. It has bi-partisan support and it is narrowly targeted at a specific problem with implementing an already-existing loan guarantee program. This bill, as well as the Tribal HUD-VASH, demonstrate the Senate’s approach to Indian housing issues; in light of the struggles to get NAHASDA reauthorized, the Senate is looking at addressing important matters in a more issue-by-issue approach.

The American Housing and Economic Mobility Act (S. 787 and HR 1737) would provide a 10-year reauthorization for NAHASDA and \$2.5 billion annually for IHBG. It would also remove the restriction on tribes accessing Section 8 vouchers. This bill has been introduced in the last two sessions. The likelihood of passage is small, but it is a reminder of the need to take more substantial action to address housing issues in Indian Country.

The big news is the introduction last week of HR 5319 (described in our December 9, 2019 memo). The bill now has nine co-sponsors, five Democrats and four Republicans. The bill is largely based on prior NAHASDA reauthorization bills that NAIHC had previously advocated for. One issue that Mr. Walters discussed was the fact that the bill has fixed funding amounts in the bill (beginning with \$680 million in FY 2020 and increasing to \$820 million in FY 2024). If passed, those funding amounts would not be binding on future appropriators. As a practical matter, Mr. Walters noted, appropriators treat those kinds of authorizing funding amounts as the highest amount that they will consider (thus, they function as a “soft cap”). It does not mean that future appropriations bills will have these amounts, but those bills would not likely *exceed* these amounts.

The next steps for the NAHASDA bill are, first, a Committee hearing and a markup on the House bill, then, if the bill is passed out of Committee, to the floor for a

full vote of the House. Once that happens and if the bill passes the House, the bill would move to the Senate for the same process. Some of the issues that the bill faces are the Native Hawaiian provisions and the Cherokee Freedmen question. There are also some questions with the maximum 30% rule in the Tribal HUS-VASH. What can tribes do: ask for additional co-sponsors both in the House and in the Senate. NAIHC will be moving forward and coordinating these efforts.

The Legislative Committee will meet by phone again on January 9, February 6, and then in person on Monday February 24 at the NAIHC Legislative Conference in Washington, DC. Mr. Walters urged that tribes and TDHEs attend the Legislative Conference, as it is a valuable opportunity to meet with members of your Congressional delegation.

3. Breakout Sessions

The breakout sessions this year were largely focused on financing and asset-building, and there were very few addressing legal issues. One of the sessions that did address such issues concerned the ongoing impacts of the U.S. Supreme Court's 2017 decision in *Lewis v. Clarke*, which held that tribal employees and officials could be sued in their "individual capacity" for actions that took place while in the scope of their employment. This case arose out of an automobile accident, in which a limousine operated by the Mohegan Sun casino rear-ended another vehicle, injuring the occupants of that other vehicle (Brian and Michelle Lewis). The limousine driver, William Clarke, was sued in his individual capacity, and moved to dismiss, arguing that because he was acting within the scope of his employment with a tribal entity, sovereign immunity barred the suit. The record also showed that the casino would indemnify Mr. Clark, which meant that the financial impacts would lie ultimately against the Tribe. The Supreme Court rejected these arguments, and allowed the suit to proceed. In the three years since the decision, there have been a number of cases in the lower courts that have relied on *Lewis v. Clarke* to allow suits to proceed against employees of tribal enterprises named in their "individual capacities." The panel discussion summarized eight of those cases that came out in 2019. The power point slide show of that presentation is attached.

Other breakout sessions included discussions of the Low Income Housing Tax Credit program, both generally and the options available to tribes and TDHEs at year 15 (the end of the initial compliance period), supportive housing programs, how to use Section 184 for housing skilled workers, and financing for alternative energy sources. The power point presentations and other materials from these presentations will be available in the near future on the NAIHC website.

4. Closing Session

The closing session was another plenary meeting of the Symposium, with a number of speakers and an award ceremony.

a. Tony Walters, Executive Director

Mr. Walters provided a summary of NAIHC's non-legislative activities. Over the past year, NAIHC has provided technical assistance through 62 separate assignments, assisting over 200 tribes and TDHEs. They have also presented 19 regional trainings, serving an additional 40 tribes and TDHEs. NAIHC is continuing its leadership institute, with seven classes, as well as its "Pathways Home: Train the Trainers" program.

Mr. Walters also spoke of NAIHC's web-based training programs. The Leadership Institute Program is now available as an e-learning course, and NAIHC has plans to eventually make all of its trainings available online. The next course will be the Pathways Home course. NAIHC's online offerings will continue to expand. There is already a substantial library of materials available online, as well as links to in-person trainings and other events.

For 2020, NAIHC is going to expand its training and technical assistance offerings, with 50 regional trainings planned. Other upcoming NAIHC events include the Crime Prevention Summit (co-sponsored with HUD ONAP) in Denver on February 4 – 6, the Legislative Conference in Washington DC on February 24 – 26, a National Housing Summit (also co-sponsored with HUD ONAP) in San Diego on March 24 – 26, and the Annual Convention and Trade Show (co-sponsored with Amerind) in Seattle on May 5 – 7.

b. Indian Country Housing Development Handbook

Brian Pearson, an attorney with the law firm Godfrey and Kahn, announced that an updated version of NAIHC's Indian Country Housing Development Handbook has been prepared, and the updated version will soon be made available on the NAIHC website. The Handbook is a resource for tribes and TDHEs, and can be provided to contractors and others who are doing business in Indian housing and need an overview of the landscape. It contains detailed discussions of the legal infrastructure around Indian housing, as well as the various financing options available.

c. Lawyer of the Year

The NAIHC Lawyer of the Year award recipient was Steve Hutchings, an attorney based in Anchorage, Alaska. Mr. Hutchings has represented many different tribal housing entities in Alaska, including AVCP and Cook Inlet Housing Authority.

d. Secretary Ben Carson

HUD Secretary Ben Carson made a brief video presentation, in which he announced that the award allocations for the FY 2019 and 2020 IHBG competitive grants were being published. 52 tribes/TDHEs were selected during this round, which will involve a total of 1200 units to be constructed or rehabbed within 16 different states. The recipients also plan to use these funds to leverage an additional \$90 million in funding. The notices of awards are being sent out, and they are also being published on the HUD

ONAP “Code Talk” website. The award list was also published online by *Indian Country Today* and the HUD ONAP twitter feed.

e. Marcus Denetdale, Construction in Indian Country

Mr. Denetdale is the Program Manager of Construction in Indian Country, a program operated through Arizona State University. Mr. Denetdale noted that CIIC is the “best kept secret in Indian Country,” and wants to get the word out about what CIIC is and how it can assist tribal housing programs.

CIIC was created with guidance from the Advisor to the Office of the President of Arizona State University for American Indian Affairs and a Committee of individuals from Arizona and New Mexico Indian tribes. They convened to determine to enhance the quality of tribally sponsored or tribal entity sponsored construction projects in construction management occurring on tribal lands. The Committee teamed with the Del E. Webb School of Construction, a program committed to excellence in teaching, research and service in and for the construction industry. Together this group defined construction to include a range of normal to significant aspects of law, business, engineering, architecture, planning and management.

CIIC has a 19-member advisory council composed of members of the construction industry, and they are looking to expand. The goal of CIIC is to provide services to Indian Country as well as to develop careers for Indian people in the construction industry. One program seeks specifically to assist individuals who have criminal records, and who might otherwise be barred from developing the necessary experience, to gain entry into the field. CIIC also has a student endowment fund and a student engagement program.

CIIC will be holding its National Conference on October 28-30, 2020, at the Wild Horse Pass Resort in Chandler, AZ. It is also holding a “network mixer” in Scottsdale, AZ on January 16, 2020.

Mr. Denetdale encouraged the NAIHC membership to contact him to find out more of what CIIC can offer. He can be reached by phone at (480) 727-3105, or by email at ciic@asu.edu. The CIIC website is at <https://ciic.construction.asu.edu/about>.

f. Rollin Wood, Native Partnership for Housing

The final speaker was Rollin Wood, the Executive Director of the Native Partnership for Housing (NPH), located in Gallup, NM. NPH serves the housing and homeownership needs of Native and non-Native clients in the Four Corners region in both remote and urban areas. NPH provides financial education and counseling for home buyers, offers mortgage lending products, and, with its subsidiary Clear Water Construction Partners, delivers design, build and remodel services.

NPH is a free-standing CDFI, and it is not dedicated to a specific tribe or tribal market. NPH is a charter member of NeighborWorks and a Certified HUD Approved Counseling Organization.

NPH provides services in three areas: homebuyer education, financing for home construction, and construction services. It was formed in 1996 as a non-profit, and subsequently obtained status as a CDFI. Mr. Wood can be contacted at (505) 722-0551. The NPH website is at <https://nativepfh.org/>.

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.