



215 SW Washington Street, Suite 200
Portland, OR 97204

T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

July 9, 2020

TO: HOUSING CLIENTS

FROM: HOBBS, STRAUS, DEAN, & WALKER, LLP

Re: ***Analysis of S.B. 4090 - NAHASDA Reauthorization Bill Introduced in Senate***

On June 25, 2020, Senator John Hoeven (R-ND), along with co-sponsors Tom Udall (D-NM), John Barrasso (R-WY), Lisa Murkowski (R-AK), Martha McSally (R-AZ), Jon Tester (D-MT), Brian Schatz (D-HI), Kevin Cramer (R-ND), Tina Smith (D-MN), and Steve Daines (R-MT), introduced S.B. 4090, which would reauthorize the Native American Housing Assistance and Self Determination Act (NAHASDA) (copy attached). As you know, the latest version of NAHASDA to be adopted was in 2008, and it expired in 2013. There have been efforts to reauthorize NAHASDA in each session since 2013, but each time the bill hit a roadblock in the Senate regarding the Native Hawaiian provisions. A NAHASDA reauthorization bill has already been introduced in the House, and we compare the provisions of the two bills below, as well as discuss the strategies being discussed to try and get NAHASDA reauthorization passed this session.¹

Analysis of S.B. 4090 Provisions

Section 2 allows for consolidation of environmental review if more than one source of federal funding is used on a Tribal housing project. This provision allows for the NAHASDA environmental review to cover the other federal funding environmental review requirements if the NAHASDA grants constitute the largest single source of federal funds. This provision also discharges the responsibility of the applicable federal agency for environmental review, empowers the Tribe to certify compliance with review, and proscribes liability and sanctions for violations. This provision differs slightly from the House bill's environmental review amendment, Section 103 of HR 5319, which would apply where NAHASDA environmental review would cover the other federal funding environmental review requirements, so long as the other federal funding does not exceed 49% of the total costs of the project.

Section 3 provides for ten-year authorization through 2031 and simply amends the existing "such sums as may be necessary" appropriations authorization through 2031. By contrast, the House bill is only for a five year period, and contains specific appropriations amounts for each successive year.

¹ For more information on the House bill, HR 5319, please see our memorandum dated December 7, 2019.

Section 4 includes student housing assistance and education stipends as an affordable housing activity.

Section 5 amends the 30% maximum rent rule so that it applies only to units owned by tribe or Tribally Designated Housing Entities (TDHEs). Section 6 allows for tribes and TDHEs to adopt their own policies that would pre-empt the 30% rule, so long as the rental policy includes unspecified tenant protections. Neither of these provisions regarding the 30% rule are in the House bill.

Section 7 increases the *de minimis* procurement exception from \$5,000 to \$10,000.

Section 8, like its House counterpart,² allows for Tribes and TDHEs to execute a new homebuyer contract with an existing tenant for the same home, even if the tenant is no longer income-eligible.

Section 8, like its House counterpart,³ also removes the binding commitment requirement when Indian Housing Block Grant (IHBG) funds are used for improvements of privately-owned homes, if the cost of such improvements does not exceed 10 percent of the maximum total development cost for such home.

Section 9, similar to the House bill,⁴ adds a reasonable termination notice requirement for projects funded in part with IHBG funds.

Section 10, like its House counterpart,⁵ authorizes the use of Indian Health Service sanitation facilities funding by Tribes and TDHEs using IHBG funds in the same project.

Section 11 allows the Department of Housing and Urban Development (HUD) Secretary to immediately terminate grant funds for noncompliance, but provides for an expedited hearing and restricts the ability to withhold funds if no hearing is held within 180 days. This provision was apparently included at the request of HUD in response to the *Fort Peck Housing* litigation.

Section 12 requires the annual report to Congress to be provided to Senate Committee on Indian Affairs (SCIA), the Senate Committee on Banking, Housing, and Urban Affairs, and the House Financial Services Committee, and requires this report to be public. The House counterpart, Section 402, requires the report to be provided to the House Financial Services Committee, the House Natural Resources Committee, and the Senate Committee on Banking,

² HR 5319, Section 202.

³ HR 5319, Section 202.

⁴ HR 5319, Section 203.

⁵ HR 5319, Section 204.

Housing, and Urban Affairs, and to any subcommittees having jurisdiction with respect to American Indian or Alaska Native affairs.

Section 13, like its House counterpart,⁶ would increase the maximum time that trust land can be leased for NAHASDA-funded projects from 50 to 99 years.

Section 14 authorizes appropriations through 2031.

Section 15 increases the allowable the total project cost to no more than 20 percent of the total development maximum cost without Secretary approval.

Section 16 designates Tribes and TDHEs as community-based development organizations for purposes of Community Development Block Grants.

Section 17 makes Tribes and TDHEs eligible for HUD Homeownership and Rental Counseling Assistance.

Section 18 modifies the Section 184 loan guarantee program to add community development financial institutions as eligible lenders, and providing for a direct loan guarantee program.

Section 18 also authorizes Section 184 loan guarantee program appropriations for the next ten fiscal years “as may be necessary.” Unlike the House bill counterpart,⁷ Section 184 is **not** modified to include Tribal court jurisdictional provisions or specific monetary appropriations.

Section 19 reauthorizes appropriations for the Native Hawaiian Housing Loan Guarantee Program for the next ten fiscal years. As you know, this is the provision that has been the basis of obstruction in the Senate for the last several sessions.

Section 20 makes Tribes and TDHEs eligible for continuum of care grants.

Section 21 creates an Assistant Secretary for Native American Programs and defines the Assistant Secretary’s authority over coordinating Native American housing within HUD.

Section 22 establishes a new Drug Elimination Program, allowing the Secretary to allocate grant funds for reducing drug-related and violent crime in Tribal housing units. The grant may be used to increase security personnel, reimburse law enforcement officers for increased surveillance, security training and anti-drug programs, or to employ one investigator to work with law enforcement.

⁶ HR 5319, Section 602.

⁷ HR 5319, Section 502.

Section 23, like the House counterpart,⁸ includes language permanently authorizing the Tribal HUD-Veterans Affairs Supportive Housing (HUD-VASH) program, requiring a set-aside of 5% of the HUD-VASH funds overall for use by the Tribal program. The language also provides the HUD and Department of Veterans Affairs (VA) secretaries with flexibility to waive certain requirements otherwise applicable to the use of such funds.

Section 24 provides Tribes with the ability to leverage NAHASDA dollars to match other federal funding sources.

The following provisions were in the House bill but were not included in the Senate bill:

The Section 101 requirement that the Secretary act within 60 days on a waiver request for submitting an Indian Housing Plan (IHP) after the deadline.

The Section 102 requirement for recommendations regarding exceptions to the annual Indian housing plan.

The Section 103 requirement that the Secretary act within 60 days on waiver request regarding environmental review and documentation requirements.

The Section 104 requirement that the Secretary act within 60 days on a waiver request for exceeding the total development costs maximum on a project and the Section 104 definition for total development costs.

The Section 205 exemption to the total development costs cap for energy efficient housing, to the extent such exemption is necessary to provide energy efficiency upgrades to the project and “the cost of such upgrades does not exceed the average cost of such upgrades in the area in which the project is located.”

The Section 301 specific authorization of funding for the next five fiscal years, increasing approximately \$30-\$40 million each year, starting with \$680 million in FY 2020 and increasing each year to \$820 million in FY 2024. The Senate bill instead contains funding “as needed” for ten fiscal years.

The Section 302 process by which a Tribe or TDHE with a substantial amount of unexpended IHBG funds in Line of Credit Control System (LOCCS) would be denied subsequent years’ IHBG funding until the unexpended funds are spent down.

The Section 401 requirement that ONAP must issue its final monitoring report within 60 days after receiving comments from the Tribe or TDHE that is being monitored.

⁸ HR 5319, Section 501.

The Section 503 establishment of a 5% tribal set-aside for Department of Agriculture (USDA)-Rural Utilities Services funding.

The Section 505 reauthorization of IHBG competitive grants.

The Section 603 exemption for Tribes from the Federal Emergency Management Agency (FEMA) National Flood Insurance Program participation requirements.

Next Steps

Normally, the next steps would be review and hearings by both the SCIA and the Senate Committee on Banking, Housing, and Urban Affairs, which both have jurisdiction over NAHASDA. But the SCIA will take the lead. In a call with National American Indian Housing Council (NAIHC) Legislative Committee last week, SCIA staff noted that there are only a couple of months left in the 116th Congress, so they are doing what they can to ensure that the NAHASDA bill is moved forward as quickly as possible. For that reason, the SCIA Chair and Vice Chair will attempt to attach the NAHASDA bill to the National Defense Authorization Act (NDAA) bill, which is consistently passed every year. The SCIA staff encourage tribes that are communicating with their senators to emphasize the importance of the NAHASDA bill. NAIHC is working with the House to move forward the House version of the NAHASDA bill there is still a ways to go on that bill. SCIA staff also discussed the inclusion of the Native Hawaiian NAHASDA provision. The Committee staff noted that this provision remains in contention but the Committee is trying to move it forward through bipartisan discussion and the bipartisan support has helped with this progress.

At the NAIHC meeting, there were some questions about additional changes to the bill (specifically, adding a provision authorizing Tribal access to the Section 8 voucher program). While there is an opportunity to make changes to the Senate NAHASDA bill, the bill may be more likely to be passed as is without additional amendments, as members of Congress would be more comfortable with a bill without numerous markups given the short timeframe for passing it.

Conclusion

If you have any questions regarding this memo, or would like us to prepare comments or correspondence to your Congressional delegation on NAHASDA reauthorization, please contact Ed Clay Goodman at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.