



MEMORANDUM

December 10, 2020

TO: HOUSING CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legal Symposium and Legislative Committee*

This memo reports on the National American Indian Housing Council (NAIHC) Legal Symposium and Legislative Committee meeting held virtually from December 8 to December 10, 2020.

1. Day One, December 8

a. Plenary Session: Day One

NAIHC Executive Director Tony Walters. Mr. Walters gave the opening remarks, introducing participants to the new, virtual format. This has been a difficult year for many of us who have been impacted by COVID-19. Housing professionals are seeing and responding to the situations created by COVID-19. NAIHC is seeking to provide assistance in the ways it can, much of it through virtual forums like this one. They are also ready to assist and continue to work in Washington D.C. to lobby on behalf of NAIHC's members. It has been a year of significant change. At NAIHC, Gary Cooper, the Board Chair, resigned last week, and the Vice Chair stepped into the leadership role as Acting Chair and now as Chair. The NAIHC Board has been working hard and meeting to set priorities and improve NAIHC's delivery of services, particularly in this difficult time. NAIHC had two in-person events this past year before the restrictions from COVID-19 hit: the NAIHC Legislative Conference and the Crime Summit (in partnership with HUD). But NAIHC continued its training and outreach via online and virtual meetings. NAIHC has continued to carry out its legislative and administrative advocacy for increased appropriations, the U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) Program, Continuum of Care, and Native American Housing Assistance and Self Determination Act (NAHASDA) Reauthorization. We have already met with the transition team for the incoming Biden/Harris administration.

For the upcoming year, NAIHC is planning a HUD Office of Native American Programs (ONAP) summit. The NAIHC Annual Convention is currently scheduled to take place in Waikoloa, Hawaii, from May 24-27. Next year's Legal Symposium will take place in Las Vegas from December 6-8. The Legislative Conference has not yet been scheduled;

NAIHC is still monitoring the situation with COVID-19. Be on the lookout for information regarding that event.

Adrian Stevens, NAIHC Chair, Seneca Nation Housing Director. He began by thanking Mr. Cooper for his years of service to NAIHC. The Legal Symposium was the second NAIHC event impacted by COVID-19. The Annual Meeting and Convention this year was cancelled outright. Tribes across the country have been impacted severely by COVID-19. Seneca Nation has lost several members. One of the big obstacles is getting full compliance with safety protocols. We are working hard to protect our elders. We are hoping that in the coming year we can return to in-person meetings. The election for the NAIHC Chair will also be held in the coming year.

HUD Assistant Secretary Hunter Kurtz. Mr. Walters introduced the keynote speaker, Hunter Kurtz, the Assistant Secretary for the HUD Office of Public and Indian Housing (OPIH). Secretary Kurtz began by thanking Mr. Walters for his leadership and support. He has been working with Mr. Walters on a regular basis with weekly conference calls to address COVID-19 issues. He announced that Gary Cooper, who has left Cherokee Nation Housing and had to step down from the NAIHC Board as a result, is now part of the HUD OPIH Leadership Team.

The last public event that Secretary Kurtz attended was the NAIHC Legislative Conference. We have all had to adjust to working remotely. Since the pandemic began we have made it our priority to keep you up to date regarding funding and other resources to address the COVID-19 pandemic. Once the CARES Act was signed into law, HUD began an “all hands on deck” effort to get that funding out and to develop the appropriate guidance and FAQs. He thanked Mr. Walters for his cooperation and coordination, which was critical to HUD getting the funding out in a very timely manner. HUD was able to get this funding out one month after the bill was signed, which is very fast for HUD. This funding provided support for tribal housing programs to get equipment and services to their communities necessary for addressing the pandemic.

He also announced that the Notice of Funding Availability (NOFA) for HUD-VASH funding is working its way through the approval process, and we should see that soon. This NOFA will involve HUD expanding the HUD-VASH program, so that more Native Veterans can receive necessary services.

The FY 2020 Indian Housing Block Grant (IHBG) Competitive grant application deadline was extended for four months, in response to Indian Country asking for time in light of the pandemic. Secretary Kurtz wanted to remind everyone at the session that the deadline is this Thursday, December 10.

One of the best ways to help mitigate the spread of COVID-19 is to make sure that everyone has safe, secure, and sanitary housing. He commended the work that the NAIHC membership has been doing.

Fawn Sharp, NCAI President. NCAI is a key partner of NAIHC. President Sharp is the President of Quinault Indian Tribe and has been on the NCAI Board for many years. She

commended NAIHC for the critical work it has done in the face of the COVID-19 pandemic. We are living in a “sacred moment”—there is going to be a day of reckoning. What we see across the world are symptoms of deeper crises, economic distress, public health challenges, and housing insufficiency, all which Indian Country has had to contend with for many years. It is an important and sacred time, because Indian Country has been prepared for it for many years, and it forces us to call on the brain trust within Indian Country as well as to work with partners outside of Indian Country. The crises that Indian Country has been facing for years are now impacting people across the world.

COVID-19 is also demonstrating racial inequities that tribes have been aware of. It will be important to take advantage of this moment to bring about truth and reconciliation around social justice issues. President Sharp pointed to the U.N. declarations regarding human rights and indigenous rights. There are people around the world watching the disparate impact to indigenous communities.

President Sharp has been in discussions with Speaker Pelosi and Senator Minority Leader Chuck Schumer to urge that appropriate levels of funding be brought to Indian Country. Tribal programs, including housing programs, have been underfunded for years. The lack of appropriate levels of support for public health and housing has exacerbated the crisis of COVID-19 in Indian Country.

Derek Valdo, Amerind CEO. Mr. Valdo expressed his appreciation for the long partnership with NAIHC, who created Amerind. Amerind has been developing and growing over the years to address the needs for insurance in Indian Country. Their latest product expansion is the provision of auto insurance. Amerind’s goals are to be effective, sustainable, affordable, and efficient. They understand that they work with 100% tribal funding, so their goal is to be a good caretaker and carry out their mission of “tribes protecting tribes” and keeping tribal money in Indian Country. Amerind has many years of clean financial audits. Amerind’s costs have always exceeded the revenues that have come in, but Amerind has managed the situation to keep costs down. However, the insurance industry is going through some significant changes, and Amerind is going to be making changes in response. Climate change, for example, is impacting coverage and claims activity. Cybercrime has also created an area for increased claims. Finally, Mr. Valdo noted that the annual NAIHC/Amerind conference for 2021 is supposed to take place in Hawaii, and he hopes we are still able to meet there.

Connie Wright, Senior Vice President, Wells Fargo. Vice President Wright works in the affordable housing component of Wells Fargo, which has been a great partner for NAIHC. Environmental sustainability and social justice/inclusion are key parts of their approach to Indian Country. Over the past few years they have substantially increased their giving to Indian Country. They are addressing those issues that tribal leaders have identified as priorities, including increasing homeownership opportunities, economic development and sustainability, and environmental protection and justice. Over the past two years, Wells Fargo has provided \$1.3 million to NAIHC. As we transition into 2021, we face a global public health and economic crisis, and Wells Fargo has committed \$175 million to addressing the crises created by COVID-19. Wells Fargo has additionally just committed to another \$1 million contribution to NAIHC, aimed to help renters and homebuyers on reservation lands to

keep Native people housed. The funding will help provide permanent or temporary housing, equipment and supplies, and other support to address the impacts of COVID-19 in Indian Country.

Patricia Zell, Zell and Cox, NAIHC 2019 Lawyer of the Year (Ms. Zell was not able to attend last year). Ms. Zell worked on the Senate Committee on Indian Affairs for many years. In that capacity, she had the opportunity to work with then-Senator, now President-Elect Joe Biden, and she says he will be a strong advocate for Indian Country in the White House. President-Elect Biden was always an important ally while he was in the Senate.

Brian Mann, NAIHC Training and Technical Assistance Manager. Mr. Mann announced that the Pathways Home modules will be fully available for online training. Individual homebuyers will be able to access this program directly online (it used to be available only to tribes or TDHEs). It is a very popular and useful program. It will help individual homebuyers understand and carry out their responsibilities as homebuyers. NAIHC had already been developing its capacity for online and virtual training, which positioned NAIHC well for providing training and technical assistance in the COVID-19 world of restricted meetings and travel.

b. Breakout Session: Navigating COVID-19 Occupancy Guidelines

Mike Price and Crystal Banks-Mann of Travois presented the COVID-19 Occupancy Guidelines. Mr. Price began by providing links to the various sources of information: HUD, USDA, and Travois.

CARES Act IHBG funding was appropriated in the amount of \$200 million. There was an additional \$100 million in Indian Community Development Block Grant (ICDBG) Imminent Threat funding. Both of these appropriations came with certain requirements on how they can be spent. The requirements are pretty broad, but they were also refined in subsequent HUD ONAP guidance and FAQs.

The presentation then turned to the CDC eviction moratorium, which expires on December 31, 2020. That moratorium only applies to evictions for non-payment of rent and only if the tenant has submitted the CDC declaration. You can still evict tenants for drug-related criminal activity, disturbances, etc. While the moratorium expires at the end of the year, it is possible that it may be extended.

There are also some waivers and extensions for LIHTC programs. While income verification is still required, it may be difficult to get original documentation from third-party sources. You are allowed to use alternative sources, such as tax returns. For students, you will still need verification of full-time student status. Electronic signatures are also permitted in most cases. It will be important to get as much documentation as you can and put it in the relevant files. Travois advises that you put a memo into the file explaining why you were not able to get all the documentation you would otherwise need.

Inspections on LIHTC projects were held up for most of the year and continue to be on hold. But most investors are wanting to do some kind of “virtual” inspection by viewing

files online. Some investors are trying to do site inspections. Travois is urging them to accept photographs of the outside of units and push back against having staff going into tenants' homes. When things do return to normal, there will be a significant amount of catch-up involved.

There was also a discussion of rental abatement. Travois suggested that rather than waiving the rent, grant it as a credit or rental concession. This way, you can document your actual losses from not charging rents.

The discussion then turned to positive tests for COVID-19 among tenants, including the question of how to balance information to other tenants with protections for tenant privacy. One way to deal with this balance is to provide numbers of positive diagnoses but not provide unit numbers or names of those who have tested positive. You should have policies and procedures in place so that employees and tenants understand what the protocols and standards will be. Transparency is important.

c. Breakout Session: Tribal HUD-VASH Program

Robin Thorne of RTHawk made a presentation on opportunities to use the Tribal HUD-VASH program. The goal of the Tribal HUD-VASH program is to provide housing assistance to Native Veterans who are homeless or at imminent risk of homelessness. In 2015 Congress set aside funds specifically for Native Veterans to provide housing "subsidies" (Ms. Thorne is avoiding using the term "voucher" for reasons she explained later).

Funds can be also be used for development costs when you are building a project that will have Native Veteran preference, because the subsidy would be used for offsetting operating costs. You can use the funding as a tenant-based or project-based subsidy. You must use the funding for projects within your tribe's or TDHE's service area.

Whether a person is a "Native Veteran" is jointly determined by HUD and by the Tribe/TDHE. The VA has to determine that the person meets the definition of veteran and that the person is homeless or at risk for homelessness; the determination is made by the VA case manager. The person need not be living on the street to be determined homeless; they could be couch-surfing or living in unsafe/overcrowded living conditions without stability. The Tribe/TDHE makes the determination about income and Indian eligibility.

Fair Market Rents (FMR) are relevant in the Tribal HUD-VASH program, because they allow you to keep some of your IHBG contribution and replace it with the Tribal HUD-VASH funding. FMR is used to calculate the amount of subsidy being provided by the Tribal HUD-VASH. FMRs are updated by HUD each year, in October. Tribes/TDHEs should update annually using the HUD updates.

The tenant's contribution cannot exceed 30 percent of the tenant's gross adjusted monthly income. You do not have to use a utility allowance deduction; that is up to the discretion of the Tribe/TDHE. But you cannot use the Tribal HUD-VASH funds to directly pay utilities. You need to have a written policy explaining how you are going to apply the tenant-paid portion.

d. NAIHC Legislative Committee

NAIHC Executive Director Tony Walters presided over the meeting and presented the information.

1. *Recap of 116th Congress*

The session began with a 35-day government shutdown. Following that there was the third impeachment of a U.S. President. Then, in 2020, the COVID-19 pandemic hit. There have been three bills passed to date to address COVID-19.

NAHASDA appropriations were pretty much the same in FY 2019 and FY 2020: \$655 million for IHBG, and another \$100 million for IHBG Competitive grants. ICDBG was increased for FY 2020 to \$70 million. Then, in the CARES Act, Congress appropriated an additional \$200 million for IHBG and \$100 million for ICDBG Imminent Threat grants.

2. *Congressional Updates*

A. *FY 2021 Appropriations and the “Lame Duck” Session.*

Congress is currently in what is known as a “lame duck session,” the period of time after the elections but before January when new Members of Congress (and/or a new Administration) are sworn in. Congress will attempt to finish their work by next week before most staff leave for the holidays. Congress will then return in January for a new session. The Continuing Resolution (CR) that the House of Representatives and the Senate passed (H.R. 8337) to provide funding to keep federal agencies running ends on December 11, 2020. As that deadline looms, the most pressing deadline for Congress during the lame duck session is passing a measure to keep the government open after December 11, 2020, either through passing full-year appropriations bills or through another CR. There has been some discussion on both sides of the aisle to get a full-year funding agreement finalized and adopted, but the prospects of doing so are still not clear, particularly with Congress’ additional focus of passing another COVID-19 relief package. Given the short amount of time left this year, it is likely that funding for tribal housing will remain the same as it was for FY 2020. Any increases in funding for tribal housing would likely be seen through a COVID-19 relief bill.

With this 116th Congress ending, all tribal housing bills that are not passed before Congress adjourns for good would need to be re-introduced next session. NAIHC will continue its efforts to advocate that funding for tribal housing is increased for the next year, in addition to its efforts to advocate that other tribal housing bills are passed. NAIHC will send out emails through its listserve on any congressional updates that occur in the next week and will also post the updates on the NAIHC website. Mr. Walters encouraged callers to reach to him or other NAIHC staff with any questions they may have regarding these congressional updates.

B. *Coronavirus Relief.*

The other main congressional focus right now is a new Phase 4 COVID-19 relief package. With the recent surge in COVID-19 cases, it appears that both congressional chambers have recognized a need for additional relief. Most recently there has been discussion of a \$900 billion COVID-19 relief bill proposed by a bipartisan working group. It is significantly below the \$2.3 trillion contained in the House's COVID-19 package (the HEROES Act bill) but higher than the Senate's "skinny" bill proposed earlier this fall (the HEALS Act bill). The specific text of the bipartisan effort has not been released in full, but Mr. Walters noted it is likely that provisions providing for mortgage and rental relief would still be included in this bill, along with a tribal set aside. As noted in our previous memo, the House HEROES Act provided for a \$1 billion tribal set aside, which included mortgage and rental assistance and funding for the IHBG Program and ICDBG Program (see our memo of November 5, 2020). In contrast, the Senate HEALS Act did not include any tribal housing funding or tribal set aside. NAIHC will continue its efforts to make sure the new versions of the COVID-19 relief bill includes funding for tribal housing.

Congress is also working on providing for extensions of deadlines for use of CARES Act Coronavirus Relief Fund (CRF) funding for both states and tribes, since the original and current deadline is December 30, 2020. The CARES Act IHBG and ICDBG funding provided through HUD have a much further deadline than the CRF funding (September 2024). NAIHC will determine what the deadlines are for various CARES Act funding and will provide an update in the coming weeks. One caller asked what the extended deadline for use of CRF funding would be if Congress did provide for an extension. Mr. Walters noted that he was not currently aware of when the extended deadline would be but that it may be set for September 2021, the end of the next fiscal year, or the end of the 2021 calendar year.

Mr. Walters also commented on the increase of tribal housing programs shutting down, reducing services, or working under limited capacity due to the recent surge in COVID-19 cases. He noted that the shutdowns and reductions in services have increased the need for funding relief for tribal housing. One caller asked if NAIHC was aware of exactly how many tribal housing authorities are currently shut down. Mr. Walters noted that he was not aware of the number but will look for this information and release it in the coming weeks if available.

C. *Indian Housing Legislation*

The NAHASDA reauthorization bills in both the House and Senate have not moved forward since our last update. Mr. Walters said that neither bills have gone through a committee review, so it is unlikely that a NAHASDA reauthorization bill will be passed during this Congress. The NAHASDA bills will then need to be reintroduced in 2021.

There has also been little progress on the Tribal HUD-VASH bill or the Continuum of Care bill. The Tribal HUD-VASH bill passed the Senate twice and is being considered in the House. NAIHC is continue to push to have the Tribal HUD-VASH bill pass in the House as a standalone bill during the lame duck session. As part of that, NAIHC is working with NCAI to send a letter to Congress advocating for the Tribal HUD-VASH bill. Additionally,

the Continuum of Care bill (H.R. 4029) has not progressed since February 2020. The bill passed the House and is still being considered by the Senate. The bill would make tribes eligible for the HUD Continuum of Care Program. NAIHC is continuing its advocacy efforts on both bills and will be reaching out to HUD to see what support NAIHC can provide to move the bills forward.

D. Section 184 Program

Mr. Walters reported that the Section 184 bill is moving forward. Section 184 is a statutory loan guaranty program through which HUD provides a guaranty of loans originating from private lenders to purchase a home (a tribal member or tribal housing program can get such a guaranty). The Section 184 bill provides for tribal court jurisdiction for Section 184 foreclosures. NAIHC will continue to track the progress of this bill and provides updates as they become available.

3. Questions

One participant asked a question about HUD's position that tribes/TDHEs cannot use IHBG funds for rental assistance in housing developed with NAHASDA or other federal funds. Mr. Walters raised this concern on the Hill. Tribes are in a unique position in that they are often developers, funders, and landlords.

Another question concerned whether IHBG CARES funds will have to be paid back if not expended by the deadline. Mr. Walters clarified that the IHBG CARES funds deadline is not for several years, so there is no exigent issue at present. The IHBG CRF money has an expenditure deadline of December 30, 2020.

4. Election Update

As many are aware, former Vice President Joe Biden has been elected as the next United States President. The NAIHC Board of Directors has already had a meeting with the transition team of President-Elect Biden to highlight issues important to Indian housing. Mr. Walters noted that NAIHC has maintained a good relationship with HUD throughout the Trump administration and looks forward to continuing that relationship during the next four years under the Biden administration. We do not yet know who President-Elect Biden will name for leadership at HUD.

New Congressional session begins in January. Democrats will still be in the majority in the House. Since Rep. Denny Heck has retired, NAIHC will need to find a new sponsor for NAHASDA reauthorization. Fortunately, there are a number of Representatives who are interested. The Senate Majority is still up the air and depends on the outcome of the two Senate run-off elections in Georgia. If the two Democratic candidates both win, the Senate will be in Democratic control; otherwise, it will remain in Republican control. Either way, we will have new leadership on the Senate Committee on Indian Affairs. The two likely candidates are Senator Schatz (D-HI) if the Senate is in Democratic control and Senator Murkowski (R-AK) if it remains under Republican control.

5. *NAIHC's Big Issues for the Next Congress*

NAHASDA reauthorization will remain the top priority, along with increasing annual appropriations for Indian housing. Also, NAIHC will be looking for ways to expand eligibility for tribes for other programs, such as Section 8, Homelessness Assistance, USDA, and Housing Counseling programs.

Some other issues that NAIHC will be working on: drug risk and remediation funding; housing and infrastructure connection; homeownership program improvements (USDA Section 502 and VA Native American Direct Loan programs); and Section 8 and LIHTC improvements.

Currently, there is no Legislative Conference scheduled for 2021. NAIHC is looking at its options: partnering with another organization; virtual conference; or postponing until later in the year. The Annual Convention is still scheduled for May in Hawaii and the Legal Symposium for December in Las Vegas.

2. Day Two, December 9

a. Plenary Session

HUD ONAP Deputy Assistant Secretary Heidi Frechette. DAS Frechette said that she has authorized a lot of ONAP staff to attend the Legal Symposium. This is an important forum for meeting and learning. HUD ONAP feels that NAIHC is an important partner. Ms. Frechette then turned to COVID-19 and the impacts on Indian tribes and Indian housing. We have all had to restructure how we do our work. HUD ONAP is very grateful for the efforts of Indian housing practitioners, because Ms. Frechette has heard from a medical expert that “having a safe home is the best medicine” for halting the spread of COVID-19, and she agrees with that. She also pointed out that there have been a lot of losses to Indian Country and specifically mentioned Elena Bassett of Yakama Nation Housing Authority.

DAS Frechette then spoke about goals and vision for moving forward. She began by announcing that Gary Cooper has joined the HUD ONAP senior management team. He brings a great deal of experience and wisdom to the role. She then mentioned that next year is the 25th anniversary of the passage of NAHASDA and talked about how much has been achieved under NAHASDA. HUD ONAP plans to highlight the anniversary with photos and success stories.

DAS Frechette turned to annual appropriations and pointed out that the current Continuing Resolution expires at the end of this week, but she is optimistic that Congress will extend funding and avoid a shutdown. She emphasized that the FY 2020 IHBG Competitive Grant application is tomorrow. She also reiterated that HUD will shortly be issuing the NOFA for the Tribal HUD-VASH program.

Dee Alexander, Tribal Affairs Coordinator, U.S. Census Bureau. 2020 has been a very difficult year to carry out the census due to COVID-19. But the Census Bureau has been preparing for 2020 since the 2010 Census, and they started early with their Tribal

Consultation work in 2015. They hired the first tribal coordinator in 2015-16. She laid out some 2020 Census “fun facts”: the Census Bureau mailed out 600 million pieces of mail; received over 13 million phone calls; hired 450,000 people for their non-response follow-up; partnered with 400,000 organizations and non-profits; and purchased \$26.2 million in personal protective equipment (PPE) for COVID-19. There were a number of other data points on her PowerPoint, which was not made immediately available. Participation in the 2020 Census was significant, and even though COVID-19 was a limitation, the Bureau followed CDC recommendations for carrying out the non-response follow-up.

Now that the data has been collected, Census is going to start analyzing that data. The first product will be the population and apportionment counts, to be delivered to the President and Congress as close to December 31 as possible. After that the more detailed analysis and assessment will be carried out. We will continue to work with tribes and providing information and analysis as it comes out. There will be ongoing coordination with tribes to review and to carry out test and preparation work for Census 2030.

Census has been seeking input from tribes on data protection and use by tribes. There is a consultation scheduled next week to update tribes on Disclosure Avoidance System, data collection, and follow-up. The Director has sent out a list of questions for input for tribes who cannot attend the consultation next week.

Panel Discussion: Honorable Melissa Pope, Chief Judge, Nottawaseppi Huron Band of Potawatomi Tribal Court and Oscar “OJ” Flores, Chief Prosecutor, Pascua Yaqui Prosecutor’s Office. The discussion focused on crime prevention and the interrelation between tribal courts, tribal prosecutions, and tribal housing. Judge Pope spoke about using the tribal courts for prosecuting violence against women using the Violence Against Women Act (VAWA) Tribal jurisdiction amendments. Both Judge Pope and Mr. Flores discussed the Special Domestic Violence Criminal Jurisdiction restored to tribes over non-Indians. They explained the connection between courts, prosecution, and housing, because the housing departments have a lot of information about what kinds of things were occurring in various households and about the composition of households. This information helped determine what needed to be included in the courts’ and prosecutors’ programs for addressing domestic violence. Housing programs also have information on the social services that are available or that are needed, which are also critical in addressing domestic violence. It makes for a more “fleshed out” criminal justice system to create safer communities for tribal membership.

The discussion then turned to the adverse impacts to tribes from the *Oliphant v. Suquamish Indian Tribe* United States Supreme Court decision, which removed criminal jurisdiction from tribes over non-Indians, and the impact of restoring such jurisdiction in the domestic violence context through the VAWA special criminal jurisdiction amendments. Mr. Flores pointed out that for 40 years there was an epidemic of this type of crime in Indian Country without any real enforcement against it, and this allowed for the “acceptance” of such criminal activity in Indian Country. Criminal actors knew that the boundaries of Indian Country created a barrier to enforcement against them. VAWA’s restoration of such jurisdiction has allowed tribes to finally address the threats and create safer communities. A lot of hard work has been put in to correct the wrongs from these 40 years of non-accountability.

Mr. Walters asked whether there have been any successful challenges to tribal court jurisdiction based on the requirements of the VAWA Special Domestic Violence Criminal Jurisdiction provisions. Judge Pope pointed out that those provisions are very strict, and some are unfair (such as requiring that non-Indians be part of the jury pool). There are requirements and limits imposed on the judiciary that should be reevaluated and removed in future reauthorizations. Judge Pope urged that full criminal jurisdiction be restored to tribes. There was some discussion about the likelihood of such amendments, which at present does not look high, but there are a lot of people making the push.

The discussion ended with a discussion of COVID-19. Mr. Flores said that we have seen an increase in domestic violence during the pandemic. But it also requires creativity to incarcerate people and avoid transmission and infection of prisoners and law enforcement officials. They are looking at diversionary programs and other means of keeping people out of jails and prisons during COVID-19 while still holding people accountable to ensure that crimes do not escalate. Housing programs are key parts of this effort.

b. Breakout Session: Monetizing Rights of Way

This session covered the recently revised BIA Rights of Way regulations. The focus was on explaining how tribes can strengthen tribal sovereignty and create new revenue streams through enactment of right-of-way (ROW), property tax, and trespass ordinances. The most typical users of ROWs are gas and electric utilities, telecommunications companies, and oil pipelines, and all would need proper ROWs to place their infrastructure across tribal lands. The new regulations require these entities to work more closely with tribes and give tribes more leverage than a private landowner off reservation (because, off reservation, these entities can ask for condemnation of private land). They have gotten used to getting ROWs for relatively low cost. The requirements of the new regulations change the calculus, in that they give tribes more leverage in the process.

Until 2015, ROW approvals across Indian lands were pretty much rubber-stamped by the BIA and simply presented a ROW as a done deal to the tribal council (because the underlying statute does require tribal approval). The Obama Administration, consistent with the policies that informed the HEARTH Act, wanted to provide tribes with more authority and power to approve ROWs and so adopted the 25 CFR Part 169 regulations. The regulations promote tribal self-determination, require tribal consultation and consent, and leave the consultations to the tribes. The regulation states that BIA will defer to the tribe's determination of value and the compensation to be required. The regulations authorize tribes to tax the entity using the ROW. It further defines that any entity that is crossing tribal land without a ROW is deemed to be trespassing and can be enforced by BIA or by suit brought by the tribe.

How can tribes utilize these regulations? Tribes can adopt pro-sovereignty, revenue-generating strategies using the new ROW regulations. First, the tribe should adopt its own ROW ordinance setting out the standards and process to be used by the tribe, including how the tribe determines the value that should be provided for consent to the ROW. It can include compensation (based on width, length, and risks of the ROW), administrative fees, and

“catch-up” compensation for expired ROWs or ones for which the tribe was significantly underpaid or not paid at all.

The goal is not to be punitive, but to ensure effective and reasonable compensation for the tribe. You might need to consider the value of the utility, etc., to the tribe. The ordinances that they have worked on allow for some flexibility for the tribe to waive certain charges and for indemnity. They also suggested that the utilities will be resistant at first, so have patience, within reason. Further, instruments of consent (the way in which the tribe grants its consent to BIA granting the ROW) under the ordinances they have drafted are ROW Agreements that set out all the requirements and indemnifications of utilizing the ROW.

c. Breakout Session: *Lewis v. Clarke* and Sovereign Immunity

Ed Goodman presented this session along with Dave Heisterkamp and Kelly Rudd. The focus was on the U.S. Supreme Court’s *Lewis v. Clarke* decision from 2017 (which allowed a suit against a tribal casino shuttle driver in his individual capacity, even though the tribe was indemnifying him) and how subsequent cases have implemented that decision. The PowerPoint for that presentation is attached to this memo.

3. Day Three, December 10

a. Plenary Session

The plenary session was devoted to a Litigation and Regulatory Update provided by Ed Goodman. A copy of the PowerPoint for that presentation is attached to this memo. It was also then announced that Ed Goodman had received the 2020 NAIHC Lawyer of the Year award, a very humbling experience.

b. Breakout Session: Hot Topics as Amerind Sees Them.

Geoff Blackwell, Amerind’s general counsel, provided an update of legal issues that Amerind sees as critical. He began by discussing the Biden transition. NCAI has developed a set of priorities for Indian Country for the Biden team (a 90-page document). It contains a section on housing issues. Physical infrastructure and housing affordability top the list, along with rehabilitation. The document also sets out transition plan priorities. The first is to elevate the position of DAS to the political appointment as Assistant Secretary. The second is to establish a task force to identify resources and administrative policy changes to provide additional housing options for essential personnel. Other recommendations included Indian preference at HUD ONAP and placing a renewed emphasis on encouraging homeownership in Indian Country. Still others included establishing a technical advisory committee at HUD, initiating a national assessment of Indian housing needs, and restoring training and technical assistance to NAIHC.

Mr. Blackwell then turned to the reinsurance market and tribal insurance programs. Reinsurance is insurance for insurance companies, with larger scale insurance companies and syndicates. Amerind currently purchases reinsurance from U.S., Germany, and United

Kingdom based companies, as well as with Lloyd's of London. The purpose is to protect Amerind's assets in the case of catastrophic claims. There are challenges facing the worldwide reinsurance market: catastrophic losses are on the rise (large fires and large weather and climate events such as hurricanes and floods); "social inflation" (higher jury awards and rising litigation costs) is greatly changing the claims environment and driving claims values much higher. As a result, reinsurance capacity is down while pricing is up, which works its way down to the costs of direct insurance. Mr. Blackwell showed several charts and graphs illustrating these trends. As a result, pricing is going up from 5-15%, where reinsurance is available; many companies have limited capacity this year.

Mr. Blackwell then turned to the liability outlook. There has been a prolonged soft market, but it is looking up. There has been an increase in the frequency of severe claims. Liability related to COVID-19 is a significant unknown, although there may be some limitations on COVID-related liability coming in the next COVID relief bill (being requested by Senate Majority Leader McConnell). There is also a changing legal landscape leading to additional litigation and claims, including a well-organized plaintiffs' bar and third-party financing. The impacts on the reinsurance markets will affect rates and underwriting. Amerind has not raised IHBG rates in over 14 years. They are receiving quotes right now, and are considering deploying its own capital for Amerind reinsurance.

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.