



## MEMORANDUM

April 2, 2021

To: TRIBAL HOUSING CLIENTS

From: Ed Clay Goodman  
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legislative Committee Meeting – April, 2021; Other Updates*

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On April 1, 2021, the Native American Indian Housing Council ("NAIHC") convened its monthly Legislative Committee Call via Zoom. NAIHC Executive Director Tony Walters presided over the meeting. The updates below are a synthesis of information provided during the calls and other updates we have received regarding COVID-19 relief.

### I. Congressional Updates

#### *a. New Congress and Fiscal Year 2022 Appropriations*

Congress has begun the Fiscal Year ("FY") 2022 Appropriations process. Congress was delayed in starting the appropriations due to focusing most of its efforts on the confirmation hearings for President Biden's cabinet members and the American Rescue Plan Act of 2021 ("ARP Act"), the latest coronavirus ("COVID-19") relief bill. NAIHC is continuing to work with Congress to ensure the FY 2022 Appropriations include as much money as possible for Tribes.

On March 15, 2021, Representative Debra Haaland (D-N.M.) was confirmed as Secretary of the Department of Interior. Representative Haaland is the first Native American to join a presidential cabinet.

#### *b. New Coronavirus Relief*

On March 11, 2021, President Biden signed the APR Act into law, the new COVID-19 relief package. The ARP Act provides over \$1.2 billion for tribal housing programs, including \$750 million in funding for programs funded under the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), allocated as follows:

- **NAHASDA Funding** - \$750 million
  - Indian Housing Block Grant ("IHBG") - \$450 million
  - Native Hawaiian Housing Block Grant ("NHHBG") - \$5 million

- Indian Community Development Block Grant ("ICDBG") - \$280 million (non-competitive) (similar to the Imminent Threat grants issued last summer; the Department of Housing and Urban Development ("HUD") Office of Native American Programs is currently conducting consultation on how to administer this)
- Technical Training and Assistance & Administration - \$10M & \$5M, respectively

The ICDBG funding under the ARP Act will be application-based. The U.S. Department of Treasury ("Treasury") is still determining the application process for the ICDBG funding, but it will likely be similar to an imminent threat type of application. NAIHC will try to send out information on the application process as soon as it is available. HUD is hosting a consultation with tribes regarding how tribes can best use the ICDBG funding under the ARP Act.

The ARP Act also provides for approximately \$500 million in funding to tribes for the Homeowner Assistance Program. The Homeowner Assistance Program will provide mortgage assistance to homeowners to prevent foreclosure or post-foreclosure eviction of a homeowner due to the COVID-19 pandemic. The Homeowner Assistance Program will be operated in a manner similar to Treasury's Emergency Rental Assistance ("ERA") Program, but will be focused on homeowners in economic distress at risk of losing their homes. However, unlike the ERA Program, the Homeowner Assistance Program does provide for use of the higher of either the local or national area median income ("AMI").

While the funding for the Homeowner Assistance Program will be allocated through the Treasury for distribution, HUD has been advising Treasury on how to work with tribes and tribal housing programs. Allocations will be based on the IHBG formula. Treasury has not yet indicated whether tribes will need to apply for it as they did for the ERA Program. NAIHC will try to send out information on the application process as soon as it is available. Payments should go out to tribal grantees within 45 days.

One participant asked whether there is any indication about whether the Homeowner Assistance Program funding can be used for new homebuyers as well as mortgage relief for existing homeowners. Mr. Walters replied it is not yet clear, but as long as the funding provided for new homebuyers is somehow tied to alleviating COVID-19 conditions, it will likely be alright. NAIHC will work with Treasury to obtain a clearer answer on the use of the Homeowner Assistance Program funding.

The ARP Act legislation further provides \$20 billion for tribes through the Tribal Relief Fund, which will be similar to the Coronavirus Aid, Relief, and Economic Security ("CARES") Act funding provided to tribes in 2020. However, Treasury is consulting with tribes on how to allocate this funding to tribes. This new funding will not be allocated using the IHBG formula, unlike the CARES Act funding allocated last year. The ARP Act also provided a second round of ERA Program funding; however, there was no tribal set-aside. Instead, funding for tribes was allocated through the supplemental IHBG and ICDBG funding described above, which provides more flexibility for tribes than the ERA Program. Finally, the legislation includes \$1,400 additional stimulus payments for individuals.

*c. NAHASDA Reauthorization*

The Senate Committee on Indian Affairs is turning its attention once again to reauthorization of NAHASDA. Chairman of the Committee Sen. Brian Schatz (D-HI) and Vice Chairman of the Committee Sen. Lisa Murkowski (R-AK), as well as other Committee members, are trying to move the NAHASDA bill out of committee and onto the Senate floor for consideration. NAIHC is in the midst of conversations with congressional members on the bill, advocating that the bill look similar to the bi-partisan one last year.

*d. Infrastructure bill*

The main issue Congress is currently working on is an infrastructure bill, the general outlines of which were released by the Biden/Harris Administration earlier this week. The Biden/Harris proposal would appropriate \$2 trillion in funding for infrastructure. Under the narrative of the bill released by the Administration on March 31, 2021, the bill would provide \$213 billion for the development of affordable housing and will likely include a tribal set-aside. President Biden's statement did not provide clear information on how the \$213 billion for housing would be structured. It mentioned the Low-Income Housing Tax Credit ("LIHTC") program, which subsidizes the acquisition, construction, and rehabilitation of affordable rental housing for low- and moderate-income tenants. While some tribes use LIHTC, others find it unsuited to their population needs. The most useful way for the infrastructure funding to be structured would be through block grants, which provide more flexibility to tribes than the LIHTC program. NAIHC is working with congressional members to make sure tribes are included in the infrastructure bill and that the funding is structured as block grants. NAIHC will also push for the tribal set-aside to be five percent (5%). Details on the infrastructure bill can be found [here](#).

## **II. Grants and Administration**

*a. Emergency Rental Assistance Program*

As we noted in our March memorandum, on December 27, 2020, as part of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020) (the "Act"), Congress passed, and the President signed, an updated COVID-19 relief package that included \$25 billion for the ERA Program. Tribes received an \$800 million set-aside from this fund to assist eligible households who are facing eviction due to unpaid rents and utilities, or the inability to pay prospective rents and utilities. While the allocation of tribal funding was determined by the annual IHBG formula operated by HUD, the ERA Program itself is overseen by Treasury.

Noel Andrés Poyo, Deputy Assistant Secretary of the Treasury Office of Community and Economic Development, joined the call as a guest to provide information on the ERA Program. Mr. Poyo has oversight over the ERA Program, as well as the Homeowner Assistance Program in ARP Act.

Mr. Poyo commented that he is looking forward to ongoing conversations about the ERA Program. Mr. Poyo joined Treasury on February 1, 2021. He noted the Biden administration inherited the ERA Program Frequently Asked Questions ("FAQs") published January 19, 2021, under the previous Administration. Mr. Poyo remarked that he and his staff acted quickly to overturn the previously issued FAQs and released new FAQs on February 22, 2021, which were intended to replace and supersede the prior version. He also noted that on March 16, 2021, and again on March 26, 2021, Treasury released additional updates to the FAQs. Further, on March 26, 2021, Treasury released an amended set of ERA Program grantee award terms ("Amended Award Terms") which include further information on the applicable limitations on administrative expenses.

Under the Act, grantees may only use ten percent (10%) or less of the ERA Program funding they receive on administrative costs attributable to providing financial assistance and housing stability services to eligible households under the Program. The updated FAQs state grantees may use ERA Program funds to cover both direct and indirect costs, provided that the total administrative costs not exceed ten percent of the funding received. The updated FAQs also provide that under the Amended Award Terms, grantees are no longer required to deduct administrative costs charged to the funding award from the amount available for housing stability services. Instead, direct or indirect administrative costs must be allocated to either providing financial assistance or housing stability services. If administrative costs are not easily allocable to financial assistance or housing stability services, the grantee may assume "an allocation of the relevant costs of 90 percent to financial assistance and 10 percent to housing stability services."

The award terms had previously stated that funds provided under the ERA Program would only remain available through December 31, 2021. The ARP Act extended this deadline to September 30, 2022, unless Treasury makes a reallocation and the grantee requests and receives an extension of up to 90 days. However, the deadline for expending 65 percent (65%) of the ERA Program funding remains September 30, 2021. Consistent with the updated FAQs, the Amended Award Terms also provide that for the ten percent (10%) of funding allowed for administrative costs, recipients may use ERA Program funds to cover both direct and indirect costs.

The full Amended Award Terms and updated FAQs, may be found [here](#).

Mr. Poyo commented that he and his staff at Treasury are focused on trying to facilitate operation of the ERA Program by grantees. He stated Treasury wants to hear about any challenges or issues tribes are running into in operating their programs. Mr. Poyo commented that Treasury intends to work with tribes to help facilitate any collaborations between tribes and other entities formed for implementing and running their ERA programs. Treasury will be offering more hands-on technical assistance, in collaboration with HUD. Treasury will also be releasing guidance on reporting and is focusing on structuring the reporting systems in a way that does not create further complications for tribes. Mr. Poyo remarked an interim reporting will be required in the near future, with full reporting required at the end of the second quarter.

Mr. Walters noted he has received many questions regarding how the ERA Program applies to tribal rent-to-own programs. Mr. Poyo remarked that Treasury has had discussions on rent-to-own programs and may release further guidance on these programs in the future. He also remarked

that Treasury is open to discussing issues with the ERA Program through individual phone calls with tribes if that is the most useful way to address the issues. Mr. Poyo stated Treasury has released guidance on the ERA Program, as well as defined the flexibilities and restrictions of the Program. He remarked that it will now be up to grantees to implement their own policies and procedures within those restrictions. However, he is open to digging into the details with individual grantees and encouraged tribes to email him with questions and comments. Tribes may email [tribal.consult@treasury.gov](mailto:tribal.consult@treasury.gov) or Mr. Poyo's specific email, [noel.poyo@treasury.gov](mailto:noel.poyo@treasury.gov), with questions. Mr. Poyo noted that while responses to emails may not be quick, someone will respond to the emails at some point.

Mr. Walters noted many tribes have concerns about being able to meet the milestones and deadlines of the ERA Program. He asked whether the ARP Act extended the September 30, 2021, deadline by which tribes are required to expend 65 percent (65%) of the ERA Program funding they received. If this 65 percent (65%) expenditure target is not met, Treasury will recapture any excess funds. Mr. Poyo responded that the ARP Act extended the date through which funds will be available from December 31, 2021, to September 30, 2022. However, the deadline for reallocation of unused funds will still be September 30, 2021. Mr. Poyo noted the purpose of keeping this deadline is not to pull back money from tribes but to make sure funding is directed to where it is needed the most. However, he stated he understood that tribes are often providing assistance to tribal members living both on and off their reservations, which may make implementation of the Program difficult. He also stated if a tribe has a good reason for an extended timeline for expending the money, and is in good faith serving its tribal members, Treasury will take that into consideration. Mr. Poyo remarked that further Treasury guidance will be released soon.

Mr. Walters asked whether the ten percent (10%) of funding allowed for administrative and housing stability costs will count towards the 65 percent (65%) allocation threshold. Mr. Poyo responded that further information on the reallocation requirements will be provided in future Treasury guidance.

The Act provides that grantees may only provide assistance to a specific eligible household for a total of twelve months. Mr. Walters raised the question of whether two types of assistance provided in the same month would count as two months of assistance for purposes of the twelve-month timeframe. Mr. Poyo responded that he will look into providing guidance on this question, but noted if grantees address this issue in their policies and procedures, and apply the rule consistently to all households, it will likely be acceptable.

Mr. Walters asked whether there is a deadline for tribes to respond to the survey Treasury sent to each tribal contact regarding the Homeowner Assistance Program. Mr. Poyo responded that Treasury is working quickly to develop the Homeowner Assistance Program and will release information on the details and allocation of the program soon. He encouraged all tribal contacts to take the survey so Treasury has a better idea of what is happening with homeowners impacted by COVID-19. He said Treasury is also interested in hearing tribal success stories of the funding having met the needs of tribal members and encouraged tribes to share the stories with Treasury.

One participant on the call asked whether security deposits are deemed "other expenses" as defined by the Secretary of Treasury. Another participant noted Question 7 of the FAQs addresses rental security deposits. The Act provides that ERA Program funds may be used for "other expenses related to housing incurred due, directly or indirectly, to" the COVID-19 outbreak, as defined by the Secretary. The FAQs provide that "other expenses" include relocation expenses, which may include rental security deposits.

Treasury continues to seek input and guidance for the ERA Program and encourages stakeholders to submit inquiries to [EmergencyRentalAssistance@treasury.gov](mailto:EmergencyRentalAssistance@treasury.gov).

*b. HUD Tribal Consultation*

HUD has been conducting tribal consultation sessions to obtain feedback on a number of different topics. The first tribal consultation concerns HUD's Tribal Consultation Policy. On January 26, 2021, President Biden issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships that affirmed the Administration's commitment to Tribal sovereignty and to fulfilling its Federal trust responsibility. The Memorandum also reaffirmed the policy announced in the Presidential Memorandum of November 5, 2009, (Tribal Consultation), which directed Federal agencies to develop and periodically revise their tribal consultation policies to ensure Federal agencies consider Tribal feedback when developing policies that have Tribal implications, consistent with Executive Order 13175.

On February 25, 2021, HUD hosted a consultation with tribes regarding the current HUD Tribal Consultation Policy. (Numerous other federal agencies have also been conducting similar consultations with tribes.) The call was recorded and will be uploaded to the HUD Office of Native American Programs ("ONAP") website. HUD is now developing a plan of action to implement the policies and directives of Executive Order 13175. To develop its plan, HUD is seeking feedback from tribal leaders on how it may strengthen tribal consultation with tribes. HUD has directed anyone who has any recommendations or comments on how HUD can improve its tribal consultation practices and policy to submit their feedback via email to [tribalconsultationpolicy@hud.gov](mailto:tribalconsultationpolicy@hud.gov). **HUD has asked tribal members and leaders to provide feedback by April 5, 2021**, as HUD's action plan is due to the U.S. Office of Management and Budget by April 26, 2021. The current HUD consultation policy, last revised in 2016, is found here: [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/regs/govtogov\\_tcp](https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogov_tcp).

The second HUD consultation concerns implementation of the \$280 million in ICDBG funding under the Act. HUD held a consultation on March 31, 2021. **The deadline for comments is April 2, 2021**. ONAP is seeking feedback on how ICDBG-ARP funds should be awarded. Specifically, ONAP is interested in Tribal feedback regarding the following questions:

1. Should the maximum grant ceilings for the ICDBG-ARP grants be higher than the maximum grant ceilings that HUD set for the ICDBG-CARES grants?
2. Should different priority considerations be given to Indian tribes based on applications received for the ICDBG-CARES program?
  - a. HUD is strongly considering giving first priority to Indian tribes that applied for an ICDBG-CARES Act grant and were not awarded a grant due to lack of funding. If HUD establishes this priority, how should that be done?

- b. Should Indian tribes that were awarded an ICDBG-CARES grant be eligible to receive an ICDBG-ARP grant? If so, should other applicants be prioritized over these applicants?
3. Are there any other things ONAP should consider as it develops the ICDBG-ARP Implementation Notice and establishes funding criteria and other program requirements?

Tribes should submit their feedback electronically to [Codetalk@hud.gov](mailto:Codetalk@hud.gov).

The third topic on which HUD is engaging in tribal consultation is the Continuum of Care Program. The Consolidated Appropriations Act, 2021 (Public Law 116-260, approved December 27, 2020) included language allowing participation of Indian Tribes and Tribally Designated Housing Entities ("TDHE") in the Continuum of Care ("CoC") Program. The CoC Program is designed to promote community-wide commitment to end homelessness; provide funding for efforts by nonprofit providers and state and local governments to quickly rehouse homeless individuals and families while minimizing the trauma and dislocation caused to homeless individuals, families, and communities by homelessness; promote access to and effect utilization of mainstream programs by homeless individuals and families; and optimize self-sufficiency among individuals and families experiencing homelessness. HUD published a Dear Tribal Leader letter on March 1, 2021, discussing the CoC Program and seeking feedback from tribal leaders. HUD also hosted a tribal consultation on the CoC Program on March 24, 2021. HUD is seeking comments on the following points:

- Participation in the upcoming FY 2021 CoC Program Competition process and availability to coordinate with neighboring CoCs;
- Homeless needs within tribal areas and how CoC Program funds can help address homelessness;
- Challenges related to homelessness and recommendations where CoC Program funds can assist with housing and services; and
- Based on the statutory and regulatory requirements and restrictions, what obstacles are anticipated along with recommendations to assist Indian Tribes and TDHEs towards addressing, reducing, and ending homelessness.

The full text of the Dear Tribal Leader letter is available on the HUD Codetalk website and [here](#). HUD encourages tribal leaders and TDHEs to send written comments via email to [CoCTribalConsult@hud.gov](mailto:CoCTribalConsult@hud.gov) and enter "Tribal Consultation" in the subject line of the email.

*c. Extension of Eviction Moratorium*

On March 29, 2021, the Centers for Disease Control ("CDC") issued an Order extending the COVID-19 residential eviction moratorium through June 30, 2021. A copy of that Order is attached. The eviction moratorium, first put in place on September 4, 2020, was set to expire on March 31, 2021. The new Order includes the same basic requirements as the initial order: it only applies to evictions for non-payment of rent, it requires that tenants who seek protection under the Order submit a declaration to their landlords, and it establishes criminal penalties for violations. However, the new Order modifies the declaration requirement: tenants do not have to use the form declaration or the exact declaration language contained in the Order, but must simply attest to the

facts that would establish they are a "covered person" under the Order (the definition of "covered person" starts at the bottom of page 1 of the attached), and must include a statement that the declaration is submitted under penalty of perjury. The Order also includes revisions to the "applicability" language intended to address certain legal challenges to the Order.

### **III. Other Matters**

The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month. The next NAIHC Legislative Committee meeting will be held May 6, 2021. Given the ongoing issues with the ERA Program and the upcoming Homeowner Assistance Program, NAIHC is willing to host a second call before the regular May 6, 2021, call if requested. Anyone who would like to submit questions prior to the calls may do so through the link provided in the NAIHC email sent out prior to each call. Sending in questions and comments ahead of time allows NAIHC to provide detailed responses during the call. NAIHC will continue to host the calls via a Zoom platform. Mr. Walters encouraged participants to reach out to NAIHC staff with any questions or comments. Participants may do so by sending an email to [Twalters@naihc.net](mailto:Twalters@naihc.net). NAIHC will be providing the Power Point and recording of this call on its website.

NAIHC will continue to provide virtual trainings. Mr. Walters encourages NAIHC members to use the virtual trainings and provide feedback.

### ***Conclusion***

If you have any questions about this memorandum, please contact Ed Clay Goodman at 503-242-1745 or at [egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com).