



215 SW Washington Street, Suite 200
Portland, OR 97204

T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

August 5, 2021

To: TRIBAL HOUSING CLIENTS

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

Re: *NAIHC Legislative Forum – August, 2021; Other Updates*

This memo provides a synthesis of information presented during a Native American Indian Housing Council ("NAIHC") Legislative Forum and of other developments in housing matters related to the coronavirus ("COVID-19") pandemic.

I. NAIHC Legislative Forum

a. Updates from HUD, Federal Partners, and Congress

On August 4, 2021, the NAIHC convened its virtual Legislative Forum via Zoom. NAIHC Executive Director Tony Walters and NAIHC Board of Directors Chairman Adrien Stevens presided over the meeting and discussed important updates regarding legislative and policy issues affecting Indian Country.

The Forum began by presenting recorded remarks by the U.S. Department of Housing and Urban Development ("HUD") Secretary Marcia L. Fudge and certain Congressional leaders. Secretary Fudge discussed President Biden's dedication to housing investments, including building affordable homes and increasing access to broadband in Tribal communities. Senator Brian Schatz (D-HI) remarked that he and other Senators introduced a bipartisan Native American Rural Homeownership Improvement Act that would permanently authorize the Native Community Development Financial Institutions ("CDFI") lending program of the U.S. Department of Agriculture ("USDA"), and would improve access to affordable capital for tribal housing.

Senator Lisa Murkowski (R-AK) emphasized the critical need for more affordable tribal housing to address overcrowding. Senators Murkowski and Schatz introduced the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA") reauthorization bill (S. 2264), which will include provisions reducing environmental review requirements, empowering Tribes to develop rental housing laws, and elevating a position for a new assistant secretary of the HUD Office of Native American Programs ("ONAP").

The Forum also presented recorded remarks from Representative Tom Cole (R-OK), member of Chickasaw Nation, Representative Don Young (R-AK), Representative Sharice Davids (D-KS), member of Ho Chunk Nation of Wisconsin, and Senator Tina Smith (D-MN). Heidi Frechette, Deputy Assistant Secretary of HUD's Office of Native American Programs ("ONAP") then gave remarks and commented on HUD's tribal housing programs. She encouraged Tribes and TDHEs to share housing success stories with ONAP.

Ms. Frechette commented that ONAP will be providing guidance on the extension of the Eviction Moratorium ("Moratorium") that the U.S. Centers for Disease Control and Prevention ("CDC") issued on August 2, 2021 (*see below for more information*). HUD also extended the moratorium on foreclosure-related evictions for Section 184/184 loans through September 30, 2021. HUD is continuing to track the spread of the COVID-19 delta variant and may provide further extension in the future.

Ms. Frechette remarked that HUD is currently determining how tribal housing will fit into the proposed infrastructure legislation that Congress is debating. She noted that since the bipartisan infrastructure legislation currently moving through the Senate does not contain provisions for tribal housing, the U.S. House of Representatives will likely include a tribal housing infrastructure proposal in a budget reconciliation process.

Noel Poyo, U.S. Department of Treasury ("Treasury") Deputy Assistant Secretary for Community and Economic Development, gave comments on Treasury's efforts to support Tribal housing during the COVID-19 pandemic. He noted that Treasury is working to make sure that the Emergency Rental Assistance program ("ERA Program") and Homeowner Assistance Fund Program ("HAF Program") address the needs of renters and homeowners. He remarked that Treasury's updated HAF Program guidelines include feedback received through Treasury's consultation with tribes. Mr. Poyo also commented that Treasury appreciates the opportunity to hold consultations with Tribes and hopes to receive continued feedback from Tribes. He emphasized that Treasury has recognized the need to develop policies that are responsive to the feedback received from Tribes and the need to improve programs on an ongoing basis during an emergency such as the COVID-19 pandemic. Mr. Poyo specifically addressed the feedback that Treasury has received regarding the burden of reporting and document, noting that Treasury will work to reduce the reporting requirements for tribes.

Jackson Brossy, Executive Director of Native Community Development Financial Institutions Fund ("CDFI") Network, joined the Forum to comment on the resources available to tribal housing through the Native CDFI program. He remarked that the Native CDFI is dedicated to serving Native Americans and providing access to capital, financial literacy, and assistance for micro business lending. Further information can be found at [NativeCDFI.net](https://www.nativecdfi.net). On June 15, 2021, Treasury awarded \$1.25 billion in COVID-19 relief funds to CDFIs through Treasury's CDFI Rapid Response Program. Approximately \$55 million of this amount was allocated to tribes. Additionally, Mr. Brossy noted that \$1.75 billion in funds for minority lending institution will likely be included in the supplemental appropriations proposed this fall. Tribes are eligible for this funding and Native CDFI is working with Treasury to make sure this funding is allocated to tribes.

Jamal Habibi, Chief of Staff of the USDA Rural Housing Service, provided comments on the USDA's resources available for tribal housing. He highlighted the USDA 502 Direct Loan Program, which provides home loan assistance to rural families with low or modest income. In 2018, the USDA launched a 502 lending pilot program, in partnership with Native CDFIs, to help Native American families obtain home ownership. Senators Tina Smith and Mike Rounds (R-SD) recently introduced a bill to make this pilot program permanent. Mr. Habibi also commented that under the American Rescue Plan Act of 2021 ("ARP Act"), the latest COVID-19 relief bill, the USDA received \$500 million for a community facilities program through which it will help develop rural health care systems. The USDA will use the funding to help build COVID-19 testing sites, reimburse revenue lost during the pandemic, and help stabilize rural health care systems, such as by improving access to and use of telehealth.

Mr. Habibi remarked that out of \$100 million received for rental assistance, the USDA has already distributed \$78 million for USDA housing. Additionally, the USDA has received \$39 million in budgeted authority to refinance housing direct loans and is currently conducting outreach to provide individuals who are in forbearance the opportunity to refinance their loans. Finally, the USDA Rural Housing Service is partnering with the USDA Farm Service Agency to ensure that information on housing assistance is available at all regional USDA Farm Service Agency offices.

b. Panel on Successful Housing Programs During COVID-19

Chairman Stevens then turned the Forum to a panel of Tribal Housing representatives who shared information on the successes and challenges of operating tribal housing programs during the COVID-19 pandemic. The panel was moderated by NAIHC Deputy Director Bill Picotte.

Joni Talentino, Director of the Sault Tribe Housing Authority, and Mariea Mongene Assistance Housing Director of the Sault Tribe Housing Authority, remarked that they implemented social distancing and other health safety measures recommended by the CDC. They also changed their employment policies to allow staff to work remotely. The Sault Tribe Housing Authority is also constructing additional housing program offices and a drive thru area for their housing office to help with social distancing. Ms. Talentino commented that their Tribe created a new Emergency Rental Assistance program in order to use the ERA Program funds. The Sault Tribe Housing Authority also transitioned its housing application and management processes to be online in order to more efficiently operate the program during the pandemic.

Bobby Yandell, Executive Director of Choctaw Nation, noted that they temporarily closed the housing offices at the beginning of the pandemic. Once they reopened the offices, they instituted social distancing measures. The Choctaw Nation already had an Emergency Rental Assistance program, but they were able to expand the program to serve a greater number of tribal members. Mr. Yandell noted that advertising to a wider number of tribal members allowed the program to be a success and to reach tribal members in need. They also simplified the application process for the Emergency Rental Assistance program.

II. Legislative Committee Meeting

a. Congressional Updates: 117th Congress Fiscal Year 2022 Appropriations and the Presidents 2022 Budget

Congress is continuing its work on the Fiscal Year ("FY") 2022 Appropriations process. The Biden Administration released its proposed FY 2022 budget on May 28th, 2021. The HUD component of the budget contains proposed funding levels for Indian housing. Overall, the budget requests \$1 billion for Indian housing programs, over \$175 million more than the amounts appropriated for FY 2021. Below is a breakdown of the proposed amounts compared to prior years.

Programs	FY 2020	FY 2021	FY 2022 Budget Request	NAIHC Recommendation
Indian Housing Block Grants ("IHBG")	\$646 million	\$647 million	\$723 million	\$966 million, at least \$755 million
Competitive IHBG	\$100 million	\$100 million	\$100 million	
Climate Initiative			\$100 million	
Training and Technical Assistance Grants	\$7 million	\$7 million	\$7 million	\$7 million
Indian Community Development Block Grant ("ICDBG")	\$70 million	\$70 million	\$70 million	\$100 million
Title VI Loan Guarantee	\$2 million	\$1 million	\$0 **	\$2 million
Section 184 Loan Guarantee	\$1.6 million	\$2 million	\$3.5 million	\$10 million
Native Hawaiian Housing Block Grant ("NHHBG")	\$2 million	\$2 million	\$7 million	\$20 million
Tribal HUD Veterans Affairs Supportive Housing ("HUD-VASH")	\$1 million	\$5 million	\$5 million	\$7 million
Housing Improvement Program ("HIP")	\$11.7 million	\$11.7 million	\$11.7 million	\$23 million
USDA Rural Development 502 Single Family Direct Loan	\$1 billion *general, not Tribal specific	\$1 billion * general, not Tribal specific	\$1 billion * general, not Tribal specific	\$1 billion (general) with Tribal set-aside

(** HUD indicates that existing program funds are sufficient to carry out these activities)

The House budget package proposes \$950 million for tribal housing, which includes \$722 million for IHBG formula grants and \$150 million for IHBG competitive grants. The Senate is still working on its proposed budget resolution.

Mr. Walters commented that the proposed amount for Tribal housing still does not meet the amount of funding needed to meet current needs, but it is an improvement compared to funding amounts in past years. NAIHC is pleased to see a reverse of the trend of stagnant NAHASDA numbers. NAIHC continues to welcome feedback from Tribes and TDHEs on how the proposed budget does or does not meet Tribal needs. NAIHC wants to make sure that HUD housing programs work well for Tribal needs and will advocate for these needs in its work with Congress.

In the coming weeks, NAIHC will be sending out requests for letters from Tribes on any feedback on or concerns about the proposed budget. Mr. Walters encouraged Tribes to email them about any specific issues they would like addressed.

The bi-partisan infrastructure bill that is currently moving through the Senate does not include any funding for housing. Mr. Walters commented that any proposed provisions that are not included in the final bill will likely be included in the budget reconciliation, which is a process by which Congress can pass bills without having to meet the Senate's 60 vote supermajority (required to end filibusters). The House Committee on Financial Services draft included \$2 billion for IHBG and NAIHC is hopeful that the House will include this amount in the budget reconciliation.

b. Update on Other Tribal Housing Bills

The Senate Committee on Indian Affairs ("Committee on Indian Affairs") is still focusing on the reauthorization of NAHASDA. Senator Brian Schatz (D-HI), and Senator 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. Mr. Walters noted that it is unlikely that the bill will move forward before Congress' August recess, but he expects it to make it out of the Committee on Indian Affairs during the next session. Because the NAHASDA bill is too small to be passed as a standalone measure, it must be passed as part of a larger bill, which may make it more difficult for the full Senate to agree to approve it.

Mr. Walters noted that the House still has not released its version of a NAHASDA reauthorization bill. NAIHC continues to look for Representatives to sponsor the bill. The House is holding a hearing on NAHASDA next week, which will hopefully help move a NAHASDA bill forward.

Congress is also working on another bill that would include funding for Tribal housing, the American Housing and Economic Mobility Act (S.1368, HR. 2768). This bill includes a provision that reauthorizes NAHASDA for ten (10) years and provides \$2.5 billion in funding for NAHASDA in the first year. The bill would also allow Tribes to access the HUD Section 8 housing vouchers, which provide additional housing assistance to eligible families. Tribes are

not currently eligible to access Section 8 housing vouchers. NAIHC is continuing to advocate that Congress remove any restrictions that keep Tribes from participating in various HUD programs such as the Section 8 Voucher Assistance.

There has been little progress on the Tribal HUD-VASH program since our last update, as the 117th Congress has yet to introduce a bill. The Tribal HUD-VASH would provide assistance and supportive services to Native American veterans who are homeless or at risk of homelessness. The Tribal HUD-VASH bill would codify and make permanent the Tribal HUD-VASH program within the larger HUD-VASH program and ensure adequate funding for the program. The bill would also make all Tribal nations and their Tribal housing programs eligible for the HUD-VASH program. NAIHC expects the Tribal HUD-VASH to be included in Senate NAHASDA bill.

The Native American Rural Homeownership Improvement Act (S. 2092) is a bipartisan bill being co-sponsored by eight Senators. It would provide \$50 million from the USDA single family home loan program to Native CDFIS to provide home loans in tribal communities. It is based on the success of the USDA 502 pilot program and would expand that program to be accessible to tribes across the country.

c. Emergency Rental Assistance Program

As we have noted in our prior memorandums, on December 27, 2020, as part of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020), 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 U.S. Department of Treasury ("Treasury").

On January 19, 2021, Treasury published an initial set of Frequently Asked Questions ("FAQs") to serve as guidance for the ERA Program. On February 22, 2021, Treasury published a revised set of FAQs that replaced and superseded the prior version. 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. The most recent update on the FAQs was issued on June 24, 2021. The updated FAQs are available here: https://home.treasury.gov/system/files/136/ERA_FAQs_6-24-21.pdf

Participants on the call then discussed the statutory provision that states that the Secretary of Treasury will reallocate any funds not expended by September 30, 2021 to those ERA Program grantees that have obligated 65% of their funding. Mr. Walters remarked that Treasury indicated through informal discussions that while the Secretary has the discretion to reallocate funding to tribes that have obligated 65%, that does not necessarily mean that the Secretary will recapture funds from any tribe that has not obligated 65% by September 30, 2021. Treasury

informally indicated that the Secretary intends to exercise her discretion to not recapture funds from tribes right away. The NAIHC PowerPoint on-screen contained a bullet point that stated that tribes do not need to expend 65% of the ERA program funds by September 30, 2021.

Despite that bullet point and these informal reassurances from Treasury, we strongly advise our clients to seek to obligate at least 65% of the ERA Program funds by September 30.

One participant commented that because many tribes have not yet submitted reports on the ERA Program, Treasury does not yet have enough data to determine which tribes have or have not obligated 65%. Mr. Walters noted that we should hear more from Treasury regarding their intent to recapture funds once tribes report more data.

While Treasury may have informally indicated that it does not intend to recapture funds from tribes that have not obligated 65% by the September 30, 2021 deadline, we still advise our clients to aim at meeting that deadline. We advise tribes not to count on Treasury exercising its discretion regarding that deadline, particularly given that the political landscape could change significantly in the coming weeks as Congress continues its work on the FY 2022 appropriations.

Another participant asked whether there has been any discussion about utilizing the unexpended ERA Program funds to create permanent ERA Programs. Mr. Walters responded that using funds in that way would take an act of Congress, and Congress has not indicated any such intent. However, that may change between now and the September 30, 2022 expenditure deadline.

d. Treasury's Homeowner Assistance Fund

As we have reported in prior memos, the ARP Act also provides approximately \$498 million in funding to Tribes for the HAF Program. The HAF Program will provide mortgage assistance to homeowners to prevent the foreclosure or post-foreclosure eviction of a homeowner due to the COVID-19 pandemic. The HAF Program will be operated in a manner similar to Treasury's ERA Program, but will be focused on homeowners in economic distress at risk of losing their homes.

Funding for the HAF Program will be allocated through the Treasury for distribution. Allocations will be based on the IHBG formula for FY 2021. Tribes or TDHEs that want to receive HAF funding must submit a Notice of Request for HAF funding. A copy of that form is available at the following link: <https://home.treasury.gov/system/files/136/HAF-Notice-of-Funds-Request.pdf>. The deadline for Tribes or TDHEs to submit that Notice is **September 30, 2021**. Treasury will also require that the Tribe or TDHE, as a condition of receiving the funds, sign a Financial Assistance Agreement: https://home.treasury.gov/system/files/136/HAF-Financial-Assist-Agmt_0.pdf.

Treasury will make initial payments to Tribes or TDHEs in the amount of ten percent (10%) of the allocated HAF funds. In order to receive the remaining 90 percent (90%) of HAF funds, the Tribe or TDHE must submit a plan for its use of the HAF Program funds. Treasury

recently published the templates for HAF participants to use in developing their HAF plans, which can be found [here](#). Tribes must go to a Treasury portal to submit the completed plan and claim their allocation of HAF Program funds. The portal went live on May 5, 2021 and the portal website link can be found in the portal instruction manual ("Instruction Manual") that Treasury issued. Treasury is still fixing some early issues with the portal website link, so if you are unable to access the site, check back again in a few days.

On April 14, 2021, Treasury released its initial guidance ("HAF Guidance") on the HAF Program. Treasury recently updated its HAF guidance (as we reported yesterday) and a summary of those changes is found on the attached document. The full HAF Guidance can be found [here](#).

One participant commented that through her recent communications with Treasury staff, their response made her feel as if Treasury does not welcome Tribal communications. She commented that, in light of this, receiving any information about the HAF Program through NAIHC would be helpful. Mr. Walters responded that NAIHC will make sure to communicate any information received by Treasury. He also noted that Treasury has been sharing information sporadically, so NAIHC will encourage Treasury to increase the frequency of its communications.

Mr. Walters commented that NAIHC will provide training and technical assistance in partnership with Treasury and HUD on the HAF Program. NAIHC is also sharing HAF Program plans that it has received from tribes. NAIHC will continue to support tribes and TDHEs to help them implement the HAF Program.

e. HUD Programs

The ARP Act further provides \$450 million for the IHBG program ("IHBG-ARPA"), \$280 million for the ICDBG program ("ICDBG-ARPA"), \$5 million for the Native Hawaiian Housing Block Grant program ("NHHBG-ARPA"), and \$10 million for related technical assistance resources. The allocations for the IHBG-ARP funding are based on the 2021 IHBG formula. HUD-ONAP has released a chart showing the allocations of such funding, which is available [here](#). Additional information on the HUD programs funded through the ARP Act can be found on the HUD-ONAP website and [here](#).

Ms. Frechette recommended that any Tribes and TDHEs that have not yet submitted their IHBG-ARP Indian Health Plans ("IHPs") should do so soon, so that they can receive funding. Ms. Frechette encouraged Tribes and TDHEs to contact ONAP if they need help in drafting their IHPs.

ICDBG-ARP grants are available to prevent, prepare for, or respond to COVID-19—the same purpose as the ICDBG funds provided under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, or "ICDBG-CARES" funds. On July 20, 2021, HUD published an Implementation Notice for the ICDBG-ARP funding, which can be found [here](#). The ICDBG-

ARP grants will be awarded in three phases. Under Phase I, HUD will prioritize ICDBG-CARES applications that were not funded due to limited appropriations.

Under Phase II, HUD will begin accepting Phase II, ICDBG-ARP grant applications starting on September 3, 2021, at 3pm EDT. The application period close date is October 18, 2021, at 6 pm EDT. All Phase Two applications will be sorted into two tiers:

First Tier- Applications from grantees that did not receive an award under the ICDBG-CARES program and are not listed in the Phase One Priority List (or are listed but failed to apply timely under Phase One).

Second Tier- Applications from grantees that did receive a fully funded award under the ICDBG-CARES program. This does not include grantees that were partially funded under ICDBG-CARES, which are included under Phase One.

Under Phase III, any applications received after the Phase Two applications deadline will be considered on a first come, first-served basis. ONAP will be hosting an ICDBG-ARP Implementation Training on August 18, 2021 from 1:00 to 3:00 p.m. EDT.

HUD is prioritizing its work on future tribal housing grants in the following order: (1) IHBG-ARP and ICDBG-ARP grants; (2) ICDBG FY 21 grants (\$70 million); and (3) IHBG Competitive FY 21 grants (\$100 million). HUD is on track to get these grants out this year. HUD has not yet published the Notice of Funding Availability ("NOFA") for the ICDBG FY 21 grant.

One participant asked what the status is of the Section 184 revised regulations and whether anyone is aware of foreclosure cases being filed in federal court. Mr. Walters responded that he has not received any updates on either issues. However, he referred to Ms. Frechette's earlier comment that the eviction moratorium is being extended for Section 184 loan foreclosures, noting that we may receive additional information on the Section 184 revised regulations after the moratorium ends.

f. Other Matters

The next in-person NAIHC event will be a legal symposium held in December 6-8, 2021 in Mirage, Las Vegas, NV. The registration is currently open. If NAIHC decides to hold the symposium virtually due to changes in the COVID-19 pandemic, any registration will be refunded. NAIHC sends out a native housing newsletter every two (2) weeks. Mr. Walters recommends that any Tribe who does not currently receive the newsletter to go to the NAIHC website to sign up.

The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month. The next NAIHC Legislative Committee meetings will be held on the first Thursday of September. 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. NAIHC will be providing the PowerPoint and recording of this call on its website.

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

III. CDC Eviction Moratorium Extension

On September 4, 2020, the CDC published an Eviction Moratorium Order in response to the COVID-19 pandemic. The Moratorium prohibits all private and public landlords and property owners from evicting individuals from residential properties for failure to make rental or housing payments, so long as the tenant submits a declaration to the landlord. The eviction Moratorium was originally set to expire on December 31, 2020, but the CDC extended it through July 31, 2021.

On August 3, 2021, the CDC issued an order extending its eviction moratorium through October 3, but only for persons located in counties that have “substantial” or “high” transmission levels of COVID-19. The terms of the order remain the same as before, including limiting the moratorium for evictions based on nonpayment of rent.

- The Order defines “substantial transmission levels” as (1) 50.99-99.99 new cases in the county in the past seven days divided by the population in the county multiplied by 100,000; and (2) 8.00-9.99% positive nucleic acid amplification tests in the last seven days (number of positive tests in the county during the past seven days divided by the total number of tests performed during the past seven days).
- The Order defines “high transmission levels” as (1) greater than or equal to 100 new cases in the county in the past seven days divided by the population in the county multiplied by 100,000; and (2) greater than or equal to 10% positive nucleic acid amplification tests in the last seven days (number of positive tests in the county during the past seven days divided by the total number of tests performed during the past seven days).

The order is an ongoing one. If the county in which you are located is not in a “substantial” or a “high” transmission level this week, but moves into that situation in the future, the order will apply to individuals in your county at the point when the county moves into that new level.

You can find out information about the county where your tribe is located by clicking on the following link and inserting the name of the state and county where you are located:

<https://covid.cdc.gov/covid-data-tracker/#county-view>.

Note that we expect that the CDC extension to be challenged in court, where it may be overturned. We note that earlier this summer, the Supreme Court upheld the CDC's eviction moratorium by a 5-4 vote. However, Justice Kavanaugh, who was one of the justices in the majority, indicated his vote in favor was reluctant, and only because there was only a month left (at that time). His concurring opinion was a strong signal that he might not vote in support of an additional extension if the matter were to return to the Supreme Court.

Conclusion

If you have any questions about this memorandum, please contact Ed Clay Goodman at 503-242-1745 or at egoodman@hobbsstrauss.com or Cari Baermann at 503-242-1745 or at cbaermann@hobbsstrauss.com.