



215 SW Washington Street, Suite 200
Portland, OR 97204

T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

November 5, 2021

TO: TRIBAL HOUSING CLIENTS

FROM: Edmund C. Goodman
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *Housing and COVID-19 Update*

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

I. Congressional Updates

a. 117th Congress Fiscal Year 2022 Appropriations

Congress is continuing its work on the Fiscal Year (FY) 2022 appropriations process. FY 2021 ended on September 30, 2021, but rather than passing detailed, full-year FY 2022 appropriations bills, Congress passed a short-term continuing resolution to keep the federal government funded through December 3, 2021, at largely FY 2021 funding levels and conditions.

On July 31, 2021, the House passed its appropriations package proposing \$950 million total for tribal housing. On October 19, 2021, the Senate released the text for the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act (THUD), which includes \$1 billion for tribal housing. Mr. Walters noted that it is great to see progress in the increase in THUD numbers for tribal housing. Below is a breakdown of the proposed amounts compared to prior years.

Programs	FY 2020	FY 2021	House Approps.	Senate Approps.	NAIHC Recommendation
Indian Housing Block Grants (IHBG)	\$646 million	\$647 million	\$722 million	\$772 million	\$966 million, at least \$755 million
Competitive IHBG	\$100 million	\$100 million	\$150 million	\$150 million	

Training and Technical Assistance Grants	\$7 million	\$7 million	\$7 million	\$7 million	\$7 million
Indian Community Development Block Grant (ICDBG)	\$70 million	\$70 million	\$70 million	\$70 million	\$100 million
Title VI Loan Guarantee	\$2 million	\$1 million	\$1 million	\$1 million	\$2 million
Section 184 Loan Guarantee	\$1.6 million	\$2 million	\$3 million	\$3 million	\$10 million
Native Hawaiian Housing Block Grant (NHHBG)	\$2 million	\$2 million	\$4 million	\$15 million	\$20 million
Tribal HUD Veterans Affairs Supportive Housing (HUD-VASH)	\$1 million	\$5 million			\$7 million
Housing Improvement Program (HIP)	\$11.7 million	\$11.7 million			\$23 million
U.S. Department of Agriculture (USDA) Rural Development 502 Single Family Direct Loan	\$1 billion *general, not Tribal specific	\$1 billion *general, not Tribal specific			\$1 billion (general) with Tribal set-aside

One participant asked whether NAIHC has any insight as to why the IHBG amount is comparatively low in the House bill, and how tribes can support increasing the proposed amount. Mr. Walters responded that NAIHC currently has a group advocating for the higher IHBG amount. In its advocacy efforts, NAIHC is highlighting how the lower IHBG amount makes it more difficult for tribes to accept IHBG funding, given that doing so increases the administrative burdens of meeting reporting requirements. He noted that tribes overall are under-utilizing IHBG funds because of these administrative burdens. NAIHC is also bringing in partners at the National Congress of American Indians (NCAI) to help advocate for higher amounts of funding to be allocated to tribal housing.

b. Infrastructure Bills

As you have seen in the news, there are two (2) separate tracks of infrastructure legislation. There is a bipartisan bill that recently passed the Senate. This legislation would appropriate approximately \$1 trillion for items traditionally considered as infrastructure: roads, bridges, water/sewer, and broadband. This bipartisan bill does not include any funding for housing, tribal or otherwise. The House Democratic leadership, largely driven by the progressive caucus, is holding up a vote on the bill in the House (at least for now) until progress is made and a vote held

on the much larger and much broader Democratic-only infrastructure bill. The House Democratic leadership is working on next steps.

The other track is the Democratic-only infrastructure bill. This bill was originally proposed by the Biden Administration as the “Build Back Better” Act, containing approximately \$3.5 trillion for a much broader set of infrastructure goals, including housing. The Democrats are trying to pass this legislation through the reconciliation process (to avoid a Republican filibuster in the Senate). The House could likely pass the bill as is, but there are a couple of centrist Democratic Senators who are trying to reduce the size and price tag of the bill. This legislation does include funding for housing. There are currently substantial negotiations going on between the White House, the progressive Democrats, and the centrist Democrats over what will be contained in that legislation.

The Biden Administration’s original proposal included \$2 billion for Indian housing: \$650 million for IHBG, \$350 million for ICDBG, and \$1 billion for IHBG competitive. However, the House draft currently only includes \$1 billion for tribal housing, broken down to \$278 million for IHBG, \$278 million for IHBG Competitive, \$200 million for ICDBG, \$200 million for NHHBG, and \$45 million for training and technical assistance and U.S. Department of Housing and Urban Development (HUD) administration. Budget reconciliation is a process by which Congress can pass bills without having to meet the Senate’s 60-vote supermajority (required to end filibusters). The amounts will likely decrease as Congress continues to negotiate this bill. NAIHC is continuing to advocate that tribal housing remain a priority and that tribes receive adequate funding. NAIHC is also advocating that Congress minimize the reporting requirements for these housing programs.

II. Update on Other Tribal Housing Bills

a. NAHASDA

The Senate Committee on Indian Affairs (“Committee on Indian Affairs”) is still focusing on the reauthorization of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). The NAHASDA reauthorization bill (S. 2264) has nine (9) bipartisan cosponsors: Senators Brian Schatz (D-HI), Lisa Murkowski (R-AK), John Tester (D-MT), John Hoeven (R-ND), Tina Smith (D-MN), Catherine Cortez Masto (D-NV), Ben Ray Lujan (D-NM), Mike Rounds (R-SD), and Elizabeth Warren (D-MA). The cosponsors are trying to move the NAHASDA reauthorization bill out of committee and onto the Senate floor for consideration. The next step is a vote by the Committee on Indian Affairs. The bill will then need to pass the full Senate. It has also been filed as an amendment to the National Defense Authorization Act (NDAA), which Congress views as a must-pass bill. Key provisions of the Senate version of the bill include:

- Authorizing NAHASDA programs through 2032;
- Creating an Assistant Secretary for Indian Housing at HUD;
- Re-establishing a Drug Elimination Program for tribal communities;

- Consolidating the environmental review requirements for housing;
- Recognizing tribal sovereignty to govern maximum rent requirements;
- Allowing tribal housing programs to access the Indian Health Service sanitation funding;
- Making tribes eligible for HUD Housing Counseling grants;
- Including HUD-VASH provisions; and
- Leveraging/using NAHASDA funding as a match for other federal grants.

The House has released its version of a NAHASDA reauthorization bill (H.R. 5195). The bill is similar to the House's NAHASDA draft bills released in past years. The bill was reported out of the House Financial Services Committee on September 15, 2021. The draft bill includes the following key provisions:

- Creating an Assistant Secretary for Indian Housing at HUD;
- TDC allowances for energy efficiency upgrades;
- Five percent (5%) tribal set-aside for USDA programs;
- Making tribes eligible for HUD Housing Counseling grants;
- HUD-VASH provisions;
- Exemption from the Flood Insurance Program; and
- Providing for tribal court jurisdiction over Section 184 loan foreclosures.

However, the House bill also contains some concerning provisions. First, it contains language that targets the five tribes ("Five Tribes") in Oklahoma (Cherokee Nation, Seminole Nation, Muscogee Nation, Chickasaw Nation, and Choctaw Nation), withholding NAHASDA funding from the Five Tribes unless they provide housing assistance to Freedman descendants. Mr. Walters commented that NAIHC does not support this provision and is working with the House to remove it.

An additional concern is that the House version of the NAHASDA reauthorization bill contains a funding authorization component that sets appropriations at \$680 million for FY 2022. That amount is lower than what the Biden Administration included in its budget proposal, and is of general concern because it could set what becomes perceived as a hard cap in subsequent appropriations cycles. NAIHC has commented on this to congressmembers, advocating that the amount be higher and that tribes are provided with the flexibility to obtain the resources they need. In the coming weeks, NAIHC will send out a letter requesting tribes to reach out to their congressional members on the House bill, especially to comment on the provision targeting the tribes.

One participant asked what the best strategy would be to advocate that the House increase the tribal housing funding amounts in the NAHASDA reauthorization bill to match those proposed by the Senate THUD appropriations. Mr. Walters responded that NAIHC has brought this funding disparity up with the House but the funding amounts have yet to be changed. He noted that it is important that tribes reach out to their Congress members to stress the critical importance of increased funding for tribal housing, given that NAHASDA funding amounts have remained flat for decades while inflation has continued to rise.

Because the NAHASDA bill is too small (in the larger scheme of legislative activity) to be passed as a standalone measure, it will likely be passed as an amendment to a larger bill. The NAHASDA bill is currently included in the American Housing and Economic Mobility Act (S.1368, H.R. 2768). This bill includes a provision that reauthorizes NAHASDA for ten (10) years through 2031 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. This bill, however, has only Democratic co-sponsors, and the likelihood of any action on this bill is very slim.

On October 26, 2021, HUD hosted a 25th anniversary event for NAHASDA, which focused on the importance of NAHASDA for tribal housing. NAIHC will also be focusing on NAHASDA throughout the next year as part of the anniversary celebration and will use it as a springboard to advocate to Congress the steps it can take to help tribal housing.

b. Tribal HUD-VASH

There has been little progress on the Tribal HUD-VASH program this year, although the Tribal HUD-VASH is included in both the Senate and House NAHASDA reauthorization bills. 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.

c. Native American Rural Homeownership Improvement Act

The Native American Rural Homeownership Improvement Act (S. 2092) is a bipartisan bill being co-sponsored by six (6) Senators: Tina Smith (D-MN), Mike Rounds (R-SD), John Tester (D-MT), John Thune (R-SD), Kevin Cramer (R-ND), and Brian Schatz (D-HI). It would provide \$50 million from the USDA single-family home loan program to Native Community Development Financial Institutions 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. If passed, the funding would increase the amount of loan funding for tribal communities.

III. HUD Programs

The American Rescue Plan Act (ARPA) 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-ARPA funding are based on the 2021 IHBG formula. The U.S. Department of Housing and Urban Development – Office of Native Programs (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 ARPA can be found on the HUD-ONAP website and [here](#).

ICDBG-ARPA 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-ARPA funding, which can be found [here](#). The ICDBG-ARPA grants will be awarded in three (3) phases. Under Phase I, HUD will prioritize ICDBG-CARES applications that were not funded due to limited appropriations. HUD will announce the Phase I awards soon.

HUD began accepting Phase II ICDBG-ARPA grant applications on September 3, 2021. The application period closed on October 18, 2021. All Phase II applications will be sorted into two (2) tiers:

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

Under Phase III, any applications received after the Phase II applications deadline will be considered on a first-come, first-served basis.

HUD is on track to release other grants this year as well, but it is prioritizing its work on future tribal housing grants in the following order:

- (1) IHBG-ARPA and ICDBG-ARPA grants;
- (2) ICDBG FY 2021 grants (\$76 million), deadline was October 25, 2021; and
- (3) IHBG Competitive FY 2021 grants (\$95 million), deadline is **December 1, 2021**.

Funding is also available under the Continuum of Care Program (\$2.6 billion) (deadline **November 6, 2021**). Tribes are eligible in FY 2021 as project applicants within existing Continuum of Care networks.

IV. Treasury Programs

a. Emergency Rental Assistance Program

As we have noted in our prior memoranda, on December 27, 2020, as part of the Consolidated Appropriations Act, 2021 (the “Act”) (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 Emergency Rental Assistance program (“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 the U.S. Department of the Treasury (“Treasury”).

One of the provisions of the ERA Program legislation states that, beginning on September 30, 2021, Treasury will begin recapturing “excess” funds and reallocating those funds to recipients who have already expended sixty-five (65%) or more of their ERA Program funding by that date. The statute does not define “excess” funds, leaving such definition to Treasury. In guidance that Treasury issued on October 4, Treasury stated that it will not recapture funds from Indian Tribes or Tribally Designated Housing Entities (TDHEs) prior to April 2022.

Treasury will be holding a Tribal ERA Program Consultation on Thursday, November 18, 2021, from 3:00–5:00 p.m. ET. The Consultation will address Treasury’s proposed methodology for reallocating ERA Program Funds for tribal governments and TDHEs. Tribal comments on the proposed methodology will be due November 30, 2021. Tribes and TDHEs can register [here](#) for the Consultation. Treasury is looking for tribal feedback on the following specific questions for the tribal consultation:

1. What factors should be considered when determining a Tribe's ability to expend funds that should be considered in reallocating funds?
2. What factors and data should be considered when determining the reallocation of funds to high-need, high-performing Tribes and TDHEs?
3. Reallocation for states were based on a minimum expenditure ratio. Are there any mitigating factors that are unique to Tribal governments and TDHEs that should be considered when reviewing the minimum expenditure ratio?
4. Are their circumstances where an increase in technical assistance to Tribes and TDHEs would greatly enhance performance? How would Treasury determine this need?
5. In the state program, states facing a reallocation were able to present a case for mitigating circumstances. What are circumstances likely to be presented by Tribes and TDHEs in requesting a review of potential reallocation?
6. In the state program, efforts were made to keep funds within the same state boundaries. Given the diversity in the geographic and demographic composition of American Indians and Alaska Natives, what would you recommend to Treasury that helps ensure reallocations are fair and equitable?

In August, Treasury released tribal ERA Program data, which was based on the June 30, 2021 reports. As of that date, tribes had spent \$79,778,159 (ten percent (10%)) and obligated

\$186,200,920 (twenty-three and four-tenths percent (23.4%)). The amounts spent and obligated have increased since that date.

I commented on the ERA Program reporting guidelines and how burdensome they are for tribes. Treasury has been critical of tribes requiring too much application data from applicants, yet at the same time, Treasury asks for huge quantities of data from tribes. I noted that it might be worth reaching out to Treasury to scale back reporting requirements for tribes, especially small tribes that do not have enough administrative funding to meet the reporting requirements. Mr. Walters commented that the difficulty in meeting reporting requirements is a common theme he has heard from tribes, and that many tribes are having trouble hiring enough new staff to cover the administrative requirements of the ERA Program. Mr. Walters commented that NAIHC will raise this issue with Treasury. Additionally, the NAIHC meeting to be held on November, 10, 2021, will address Treasury Programs (ERA Program and Homeowner Assistance Fund (“HAF Program”)) and will focus on the reporting requirements.

Another participant commented that his tribe has spent twenty-eight percent (28%) of its ERA Program funding and that it is short-staffed and having difficulty hiring staff members. He also noted that the paperwork required for the ERA Program places a heavy burden on the tribe. The participant asked if anyone has recommendations on how to streamline the application and paperwork process. Mr. Walters said that NAIHC has not yet been able to provide any training on reporting requirements, but HUD has provided ERA Program training. Tribes and TDHEs can reach out to their area ONAP offices for assistance. NAIHC will also try to share sample forms and applications from other tribes. Mr. Walters noted that Treasury has posted additional pages on its website covering best practices and attestation form samples. The website can be found [here](#).

b. Treasury’s Homeowner Assistance Fund

As we have reported in prior memos, the ARPA provides approximately \$498 million in funding to tribes for the HAF Program. The HAF Program provides 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 it is focused on homeowners in economic distress at risk of losing their homes.

Funding for the HAF Program is allocated through the Treasury for distribution. Allocations are 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 [here](#). Treasury recently extended the deadline for Tribes or TDHEs to submit that Notice to **November 15, 2021**. Treasury also requires that the Tribe or TDHE, as a condition of receiving the funds, sign a Financial Assistance Agreement, a copy of which is available [here](#).

Treasury will make initial payments to tribes or TDHEs in the amount of ten percent (10%) of the allocated HAF Program funds. In order to receive the remaining 90 percent (90%) of HAF Program funds, the Tribe or TDHE must submit a plan for its use of the HAF funds. Treasury recently published the templates for HAF Program 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, and the portal website link can be found in the portal instruction manual issued by Treasury.

One participant asked whether NAIHC has received any word regarding when Treasury will be approving the HAF plans for tribes. Mr. Walters responded that he has asked Treasury that question and has not yet received a response. However, he has heard that at least one tribe has had their plan approved. Two participants stated that their tribes have not yet heard back on approval of their HAF plans.

V. Other Matters

a. NAIHC Legal Symposium

The next NAIHC event will be the annual Legal Symposium, currently scheduled to be held in person on December 6–8, 2021, at The Mirage, Las Vegas, Nevada. Registration for the event is currently open. If NAIHC decides to hold the Symposium virtually due to changes in the COVID-19 pandemic, any registration fees paid will be refunded. The Legal Symposium will include a members' meeting. The Legislative Committee meeting will start at 1:30 P.M. Pacific Time on Monday, December 6, 2021. The full agenda can be found [here](#).

Mr. Walters remarked that NCAI recently passed two resolutions on tribal housing. The first resolution, #SAC-21-024 – Update Funding Levels for NAHASDA, calls on Congress to increase IHBG funding to \$2 billion and NHHBG funding to \$50 million. The second resolution, #SAC-21-025 – Flexibility for ERA Program, calls on Treasury to clarify its consultation policy and how it proposes it will determine “excess funds” and the reallocation process. It also calls on Congress to amend the ERA Program legislation to give tribes greater flexibility. Mr. Walters noted that NAIHC will likely pass similar resolutions at the Legal Symposium.

b. NAIHC Legislative Committee meetings

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 December 6, 2021 at the in-person Legal Symposium. 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.

c. New Additional Monthly Forums

Mr. Walters noted that these Legislative Committee meetings generally provide updates but do not delve into the details of various housing programs. NAIHC will therefore begin holding

additional monthly member forums to focus on more in-depth conversations, starting in November 2021. The forums will cover a rotating discussion on a single topic. Currently, NAIHC is proposing the three (3) following topics: (1) Treasury programs; (2) HUD Continuum of Care; and (3) HUD Housing Counseling. NAIHC is asking for volunteers to help lead discussions during the forums. The first meeting will be November 10, 2021, from 2:00–3:00 P.M. ET covering the Treasury programs (ERA and HAF Programs). It will be followed by an in-depth training webinar on the HAF Program from 3:00–5:00 P.M. ET. The December meeting will likely focus on the Continuum of Care programs and how to increase tribal participation.

d. Other Updates

NAIHC will continue to provide virtual training and technical assistance. Mr. Walters encouraged NAIHC members to use the virtual trainings and provide feedback. NAIHC sends out a Native housing newsletter every two (2) weeks. Mr. Walters recommends that any tribe who does not currently receive the newsletter can go to the NAIHC website to sign up.

Conclusion

We will continue to update you on the ERA Program and on any forthcoming eviction moratoriums. If you have any questions, please contact Ed Clay Goodman (egoodman@hobbsstrauss.com or 503-242-1745).