


MEMORANDUM

November 19, 2021

TO: TRIBAL HOUSING CLIENTS

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

RE: ***COVID-19 Housing Updates: Tribal Consultation on ERA Program “Recapture” and HUD Notice of Intent to Form a Tribal Intergovernmental Advisory Committee***

This memorandum reports on two events that took place this past week. The first was a Tribal consultation meeting on November 18, 2021, convened by the United States Department of Treasury (“Treasury”). The focus of the consultation was the proposed methodology for recapturing and reallocating Emergency Rental Assistance Program (“ERA Program”) funds for tribal governments and TDHEs. The second was the Notice of Intent issued by the Department of Housing and Urban Development (HUD) to form a Tribal Intergovernmental Advisory Committee (TIAC).

I. Tribal Consultation with Treasury on Emergency Rental Assistance Program

a. Opening Presentation

Noel Poyo, Treasury Deputy Assistant Secretary (DAS) for Community and Economic Development, and Nancy Montoya, Treasury Point of Contact for Tribal Consultation, gave brief opening remarks. Also participating on the call for Treasury was Vanessa Megaw, Policy Analyst; Ana Esparza, Policy Advisor; Fatima Abbas, Senior Advisor for their tribal Team; and Josh Jackson, Policy Advisor.

The Consolidated Appropriations Act, 2021 (the “Act”) (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020) included an updated COVID-19 relief package. That package 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 Indian Housing Block Grant (IHBG) formula operated by the U.S. Department of Housing and Urban Development (HUD), the ERA Program itself is overseen by Treasury.

DAS Poyo commented that when drafting the ERA Program legislation, Congress made allocations of ERA Program funding based on anticipated need. However, Congress recognized

that an appropriate allocation would be difficult to understand in advance, particularly given the unprecedented effect of the COVID-19 pandemic. For that reason, Congress included a reallocation process to direct funds to where they would be most needed. 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 grantees who have already expended sixty-five percent (65%) or more of their ERA Program funding by the date of such reallocation. The statute does not define “excess” funds, leaving such definition to Treasury.

In guidance that Treasury issued on October 4, 2021, Treasury stated that it will not recapture funds from Indian Tribes or tribally Designated Housing Entities (TDHEs) prior to April 2022 (in order to provide for an opportunity to consult with Tribes). DAS Poyo emphasized that Treasury has not yet determined whether it will recapture any funds from Tribes. However, if a recapture of tribal funds does occur, it will not happen until at least the final reallocation based on data obtained from the March 30, 2022 reporting period. DAS Poyo remarked that the purpose of engaging in a tribal consultation is for Treasury to provide Tribes and TDHEs with the clarity on how the reallocation process would work and to receive input from Tribes and TDHEs on how a recapture and reallocation process would affect Tribes and TDHEs. Treasury can promulgate further guidance on this final reallocation.

In deciding how to handle a potential recapture and reallocation of tribal funding, the key question Treasury will be considering is what to do if a Tribe or TDHE has not used 65% of its funding by March 2022. ERA Program funding must be fully expended by September, 30, 2022; any unexpended funds return to Treasury. This does not leave much time between the March 2022 final reallocation date and the final expenditure date for Tribes and TDHEs to spend funding, particularly if they have not already obligated 65%). Treasury’s goal will be to direct the funds to where they can best meet the significant amount of need in the time allowed.

DAS Poyo further noted that all grantees, including Tribes, may voluntarily reallocate funds to Treasury at any point if the grantee believes they will not be able to spend the funding. If a grantee voluntarily reallocates the funds back to Treasury, that grantee can recommend that the reallocated funds go to another grantee in same area. Further, some states might reallocate funds to grantees in their states, including Tribes.

DAS Poyo stated that Tribes and TDHEs that have obligated 65% of their ERA Program funds can apply right now to receive reallocated funds. Any grantee that wants to request reallocated funds must submit the form by November 30, 2021 in order to be in the first round of reallocations. The “Reallocation Funds Form” used to request funds is available on the Treasury website, located [here](#). To request reallocated funds, the grantee (1) must certify that it obligated 65% of its ERA Program funds (as required by the Act); and (2) must demonstrate need. Need will be determined based on the grantee’s four (4) month projection of their need for reallocated funds and what they reasonably anticipate being able to spend in that four (4) month period. Treasury will test the reasonableness of that projection based on past performance by that grantee.

DAS Poyo also provided brief comments on the Treasury Homeowner Assistance Fund Program (“HAF Program”). He noted that Treasury has received many tribal HAF plans already and is actively reviewing and approving them on a rolling basis. Tribes or TDHEs that want to receive HAF funding must submit a Notice of Funds Request for HAF Program funding. A copy of that form is available [here](#). Treasury recently extended the deadline for Tribes or TDHEs to submit that Notice of Funds Request to **December 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](#). DAS Poyo encouraged any Tribe or TDHE that has not yet submitted a Notice of Funds Request to reach out to Treasury, emphasizing that Treasury wants to facilitate tribal access to HAF Program funds.

Ms. Montoya noted that Treasury welcomes written comments from tribal leaders on the ERA Program reallocation process. The deadline for written comments is November 30, 2021. Written comments can be sent to EmergencyRentalAssistance@Treasury.gov. 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?

DAS Poyo then opened the call up to questions and comments.

b. Comments from Participants

Below are comments and questions raised by participants, along with the responses by Treasury staff to some of the comments or questions (Treasury did not provide a response to each comment; where they did respond we have provided that response below the comment or question).

- Chairwoman Andrews-Maltais, Wampanoag Tribe of Gay Head Aquinnah. The Chairwoman recommended that Treasury consider setting a portion of funding aside for those Tribes that were not funded in first round of allocations. For Tribes that have already received ERA Program funds, it would be useful for Treasury to provide supplemental support for this. Tribes are facing many problems caused by the lack of

available employees, particularly Tribes in remote areas who do not have enough housing. It is difficult to hire enough people to implement the ERA Program. Further, Treasury should not recapture any funds from Tribes. Staffing issues, delays in receiving guidance from Treasury, and reporting requirements have all caused unavoidable delays that make a tribal recapture unfair. Regarding ERA Program eligibility, the thresholds for eligibility should be determined by Tribes, as they know their tribal members best. It is also best to give Tribes and TDHEs flexibility to determine the best interest of their citizens and how to best support them. Chairwoman Andrews-Maltais noted that the ERA Program is vitally necessary for Tribes, in spite of potentially not meeting expenditure deadlines.

- First Vice Chairman Clarence Silvertsen, Little Shell Chippewa Tribe. The Tribe is in a unique position. At the start of the COVID-19 pandemic, the Tribe had limited staff and very little government infrastructure or funding to address the pandemic. The housing department had one staff member at the beginning. The housing department has since grown and has been able to successfully implement the ERA Program. The Tribe has conducted surveys to understand the needs of Tribal members. The purpose is to meet the rental needs of tribal members. The First Vice Chairman recommended that Treasury consider that Tribes are best-situated to serve their Tribal members. The Tribe communicates with Tribal members directly. The Tribe is uniquely situated to address the needs of its own tribal members. Treasury should therefore avoid recapturing any Tribe funds. Treasury should also consider mitigating factors in determining how much excess funds to recapture. The Little Shell Chippewa Tribe had very little infrastructure and a shortage of staff, which caused delays in implementation of the ERA Program. The ERA Program has made a huge impact on tribal members and has provided critical funds to prevent homelessness and prevent utilities from being shut off for Tribal members. Treasury should not take these vital funds away from Tribes.
 - DAS Poyo commented that he appreciates the feedback. He also noted that Treasury is very interested in hearing stories of the impact the ERA Program and would welcome any letters Tribes submit on that impact. Treasury can then take these written stories to Congress to advocate for further legislation to help Indian Country.
- Sorhna Li, Scotts Valley Band of Pomo Indians. The Scotts Valley Band is a small landless Tribe located in California. Scotts Valley appreciates all that Treasury has done and appreciates the fact that Tribes are not subject to recapture right now. Tribes tried to obtain confirmation on certain key ERA Program issues early on, but did not receive that information from Treasury until later into the year. This delay caused many Tribes to wait to implement the ERA Program out of a desire to make sure they were implementing it correctly. However, those delays will make it hard to meet the September 30, 2022 expenditure deadline. In the recapture process, it would be good if Tribes could request reallocated funds even if they have not obligated 65%, due to the delays in implementation. Tribes still have significant unmet need and are working as quickly as possible to obligate the funds. On a similar note, Tribes should not be penalized for not complying with certain aspects of the ERA Program, when much of this noncompliance

was caused by a delay in the guidance provided by Treasury. Regarding Treasury's methodology for determining "excess funds" for the recapture process, the methodology should not be based on a minimum expenditure ratio because Tribes delayed expending funds in order to make sure they were doing so correctly. It might be better to calculate "excess funds" based on a Tribe's expenditures since they first began to implement the program. It would also be useful if Tribes could receive Treasury guidance that is specific to Tribes. Including guidance for Tribes at the end of multi-page documents that also provide guidance to states makes it time-consuming. Tribes must devote time to reading through the pages of state-specific requirements, only to find out later that those requirements do not apply to Tribes. Regarding the reallocation process, Treasury should consider mitigating circumstances, such as: the date of implementation of each Tribe's ERA Program; the geographic area of the Tribe's population—if Tribal members live across a broad area, it is more difficult to communicate with them; the process by which Tribes prioritized assistance—some Tribes delayed obligating funds in order to make sure that tribal members most in need were served first; challenges caused by slow internet, difficulty in hiring staff, and staff members having a lack of capacity to manage numerous housing programs simultaneously. Treasury should first look to reallocate funding in the tribal service areas and then should consider reallocating funding to tribal consortiums or TDHEs that are opening funds up to tribal members of other nations. This is a good way to serve tribal members everywhere. When requesting reallocated funds, how do Tribes determine what percentage of funding to request?

- DAS Poyo responding by stating that requests for reallocated funds are based on projections for what the Tribe anticipates being able to implement in the next four months. Treasury is not asking for an accounting of funding percentages or what percentage of funds Tribes anticipate spending. Treasury is instead concerned with need and a Tribe's capacity to meet that need in four months. Reallocations will occur every two months. It would not be appropriate to ask for funding a Tribe cannot spend in four months.
- Joey Nathan, Northern Ponca Housing. The Tribe spent 90% by September 30, 2021. Now staff are referring clients out to the state ERA Program, but they are having problems with the state. A lot of tenants are elderly and are having a hard time sending paperwork in to state. It might be difficult to project what the Tribe can spend in four months if the Tribe has already directed tribal members to the state.
 - DAS Poyo noted that projections should be based on the best estimate of grantee of the amount the grantee thinks it could deliver during those four months. That is a reasonable strategy to facilitate applications to state. ERA Program spending has ramped up, so Tribes and TDHEs should not expect that their full request for reallocated funds will be fulfilled.
- Charlene Abrahamson, Director of Family Services for Squaxin Island Tribe. ERA Program funds have impacted lives in many ways. The Family Services program has many programs they are trying to implement simultaneously, while dealing with the

challenges caused by COVID-19. The information from Treasury was often not available to Tribes, which caused delays in implementation of ERA Programs. The Tribes are best situated to serve the tribal members, as they know their tribal members' needs best. Tribes know when people are actually facing hardship. The Squaxin Island Tribe did not implement the ERA Program until June 2021, so they are facing a caused delay in the obligation of funds. Tribes have numerous programs devoted to serving their tribal members, so that is their strength. One of the obstacles in spending funding is having enough staff members to implement the ERA Program. Many staff members are paid through grants and must devote time to the programs those grants cover. It is therefore difficult to have the staff member time devoted to implementing the ERA Program. If there were a way to pay staff to work on the ERA Program solely, that would help increase the efficiency of spending funds. Reporting requirements of the ERA Program are also tough to meet.

- Joel Azure, Executive Director of the Tule River Indian Tribe Housing Authority. It is difficult to find qualified employees to implement these programs. Tribes suffer from a shortage in staff, so it takes them time to ramp up a new program. Having a short deadline to implement a program is unrealistic and unfair. With multiple new housing programs to implement, staff are having a difficult time implementing them all and meeting all of the various program requirements. The Tribe is the only entity available to serve their people. Having to meet the deadlines for obligating and expending funds disproportionately affects the Tribes, given their lack of employees, lack of resources, and remoteness. If funding is reallocated from Tribes, that reallocated funding should go back to Tribes. If funding is recaptured from Tribes and reallocated to nonnatives, it would go against the intent of Congress to serve Indians. The Tribes that need the funding the most are often those that are having the most difficult time implementing the program because of the staffing shortages. If Tribes are not able to spend the funds, it is not because there is no need but because of efficiency of implementation. Efficiency is difficult for Tribes that are so short-staffed and overburdened.
 - DAS Poyo stated that Treasury understands that if there is to be reallocation of any Tribal funding, it should be reallocated to other tribes.
- Gracelyn Johnson, CARES Act and ARPA Director of the Yupiit of Andreafski Tribe. The Tribe has 278 members. The Tribe is one of those that has not yet received the first round of funding under the ERA Program. The Tribe would like to know what is needed from the Tribe in order to receive this funding. Out of 278 tribal members, 270 have needed assistance through other COVID-19 relief funding. The Tribe would like to know what the next step is to move forward with the application.
 - DAS Poyo stated generally that if participants have questions specific to their tribe, reach out to Treasury directly at tribal.consult@Treasury.gov.
- Patrick Goggles, Executive Director of Northern Arapahoe Tribal Housing. Tribal consultations are very meaningful. Northern Arapahoe Tribal Housing has expended

65% of their ERA Program funding. What the Tribe really needs is more leeway in providing the services. The dynamic of the pandemic and housing crisis is changing, and they are seeing a spike of COVID-19 cases. Many of the households are overcrowded, with only one bathroom. This poses problems during the COVID-19 pandemic. The Tribe would like Treasury to consider allowing the Tribe to provide an additional three (3) to six (6) months of prospective rent for those families that were affected during the first twelve (12) months of the pandemic and are now again being affected during this next wave of the pandemic. Providing fifteen months of assistance was good at the beginning. However, the pandemic keeps dragging on and people are still in need. The Tribe has served 500 households, averaging three (3) to five (5) people per household. Obtaining documentation from tribal members is tricky because of needing to maintain social distancing. Tribes could also use boots-on-the ground help in reaching and assisting tribal members. About 75% of the Tribe population is vaccinated. They are working with the State of Wyoming to obtain a reallocation of funding from state for the Northern Arapaho Tribe and Eastern Shoshone Tribe.

- DAS Poyo noted that, regarding the fifteen months of assistance, Treasury wishes they could allow Tribes to provide further assistance. However, that time period of assistance is mandated by the Act implementing the ERA Program. Only Congress can change that. Treasury would welcome written feedback on this point so that Treasury can share that with Congress members.
- Tony Walters, Executive Director of Native American Indian Housing Council (NAIHC). Staff bandwidth is making it difficult for many tribes and tribal housing programs to implement the ERA Program, in addition to implementing normal housing programs. Further, Tribes waited for Treasury guidance before implementing the ERA Program and experienced delays in obligating and spending funds as a result. Some Tribes were initially focusing on serving reservation households, but are now serving tribal members elsewhere. However, tribal outreach to those outside of the reservations (which is permitted under the Act and specifically authorized under Treasury guidance) is causing further delays in expenditures. For the reallocation process, Treasury should look at state data to see if they have served Tribe communities. If states have not served Tribe populations, then Tribes are still the best entities to serve their tribal members. Do not leave out Native families when reallocating funding. Tribes have faced multiple obstacles of high overhead costs and burdensome administrative and reporting requirements, which makes it more difficult for Tribes that are already short-staffed. Most Tribe programs are already intended to serve low income families, so they are the best suited to doing so.
- Ed Clay Goodman, Hobbs, Straus, Dean & Walker, LLP. I spoke on behalf of three of our TDHE clients that specifically authorized me to do so: Colville Indian Housing Authority, Port Gamble S'Klallam Housing Authority, and the White Mountain Apache Housing Authority. I raised the following points. All clients are appreciative of Emergency Rental Assistance funding to address an unprecedented housing crisis during the COVID-19 pandemic. All of our clients are engaged in serving their populations, and

doing their best to reduce overcrowding. Tribes should not be subject to reallocation, period. If some kind of reallocation trigger is applied to Tribes, the factors that trigger the reallocation should be very narrow and limited. Congress did not give Tribes sufficient flexibility to utilize these funds to address the rental and eviction crisis created by COVID-19. It would have been more effective for Tribes themselves to have been able to prioritize how to best address the crisis. For some of our clients, it would have involved new construction and rehab. For others, it would have involved different income guidelines, due to extremely high costs that render the existing income guidelines largely irrelevant to determining need. Nonetheless, all Tribes are standing up and operating programs within the parameters of the funding – and because it is not the most accurate fit for many tribal communities, it is taking longer to move the funding out the door for many tribes. The root of the problem for many rural Tribes is the lack of homes, so the Treasury should acknowledge that this is not a "one size that fits all approach" and should allow Tribes sufficient time to stand up the program instead of recapturing and reallocating these funds. While some Tribes and States significantly benefit from this funding because they have a large housing infrastructure or sufficient housing for renters, other Tribes are left behind because they do not have the necessary housing stock. Many Tribes' target service areas are rural reservation, and the membership lacks access to reliable internet and transportation. This creates a hardship for even getting an application sent and received in a timely manner. It further complicates processing if an application is missing information (support documents). Tribes have been disproportionately impacted by the COVID-19 Pandemic, especially in rural areas. Tribes are operating with less than adequate staffing due to COVID-19 related issues that have impacted the availability of workers. Tribes are operating with a very limited, and frankly unrealistic, administrative cost cap. This requires existing employees, who are already overburdened, to continue taking on more and more work to deliver these much-needed resources to tribal Members and communities. In the midst of all of these challenges, Tribes are having to navigate programs that have vastly different requirements than the tribal based programs we are used to, which further slows down initial program delivery while setting new programs up. The additional reporting requirements further complicate and delay assistance delivery. Had these funds been distributed through the Indian Housing Block Grant formula with the same format, and reporting, the ERA Program could have fallen into place much faster. Many of our clients are starting to see upticks in COVID-19 numbers again, and we are likely to see a winter surge. To pull these funds away from Tribes in the midst of a surge would compound the unfairness. There are no other entities in these rural, reservation areas who are in a position to provide this kind of assistance to tribal members. Recapturing these funds means that these tribal members will effectively be denied access to such funding. As a result, ANY recapture of this funding is fundamentally unfair to Tribes who are making a sincere effort to stand up this program and meet the needs of tribal members. If Treasury insists on some kind of recapture figure, it should be very forgiving and permissive with respect to Tribes. For Tribes, the minimum expenditure ratio, if applied at all, should be very low.

- DAS Poyo stated that Treasury hears the point about the burden of the administrative costs. To be clear, the administrative cap is statutory cap, but the ERA Program provides clear examples of what administrative cap means and the impact it has had. Treasury will communicate that to Congress. Treasury will not be recapturing Tribal ERA Program funds during a winter surge. The earliest time Treasury would recapture Tribe funds would be April 2022. Any funding not redistributed during the final reallocation in April 2022 would be left with the grantee. Because the ERA Program has a September 30, 2022 deadline, that would not leave the grantee with a long period of time to spend that funding. Treasury must therefore determine how to use these funds if a tribe is not able to spend them by September 30, 2022.
- Ramone Bear Runner, Executive Director, Oglala Sioux and Susan Schrader, Executive Director of the Oglala Sioux Lakota Housing. The Tribe has 45,000 tribal members. Many people in South Dakota are not vaccinated, so the Tribe has checkpoints on the edge of reservation to protect tribal members from the spread of COVID-19. The Tribe has spent 82% of its ERA Program funding. They are concerned with the reallocation because the Tribe serves tribal members from other Tribes. The Oglala Sioux needs additional funding to serve many of these individuals who are members of other Tribes. The Tribe has served over 10,000 households during this time. The Tribe will do what is necessary to serve all tribal members. The Tribe will help natives who are members of any Tribe, so other Tribes that are not able to serve their tribal member can direct those tribal members to the Oglala Sioux. The Tribe does not know what their ERA Program number is, which makes it difficult to use the Treasury portal.
 - Treasury will follow up on the ERA Program number.
- Delegate from the Crow Creek Housing Authority. The main issue is the burden posed by the administration of the ERA Program and the amount of staff time required to implement it. It is not the issue of finding the need. Treasury should consider more ways to help the families become self-sufficient. COVID-19 hit the families that already did not have stability.
- How many months of assistance can Tribes provide to a household?
 - Tribes and TDHEs can provide twelve months of assistance, plus an additional three months of assistance if they have available funds. For any reallocated funds a Tribe receives, the Tribe can use ten percent (10%) of that new, reallocated funding for administrative costs.
- For the four month estimate of expenses to show need for the request for reallocated funds, which four-month period should that be—the last four months of the fiscal year (June, July, August, and September of 2022)?
 - The months for which to provide a project of need and capacity to spend funds would be November and December of 2021 and January and February of 2022.

- Will the tribal recapture not occur until September 2022?
 - DAS Poyo clarified that Treasury will recapture funds from Tribes between now and April 2022. However, Treasury has not decided one way or the other whether Tribes will be subject to a recapture at that point in April 2022. In the final reallocation, any unobligated funds would be subject to reallocation in April. Treasury has not decided anything narrower than that. The requirement to obligate 65% of funds is tied to the September 30, 2021 deadline, by statute. That means that even if a grantee obligated 65% by the September 30, 2021 deadline, that grantee may still be subject to a funds recapture in April 2022. However, Treasury has not decided how that process will apply to Tribes and will provide guidance on that.

II. HUD Tribal Advisory Committee

On November 15, 2021, the HUD Office of Assistant Secretary for Public and Indian Housing published a notice of HUD's intent to form a Tribal Intergovernmental Advisory Committee (TIAC). Notice of Intent to Establish a Tribal Intergovernmental Advisory Committee; Request for Comments on Committee Structure, 86 Fed. Reg. 63,051 (Nov. 15, 2021). The full Notice can be found [here](#). HUD is now soliciting comments and recommendations regarding the establishment and structure of the TIAC. The deadline to submit comments on the proposed TIAC is **January 14, 2022**.

The Notice states that the TIAC will be comprised of a diverse group of elected tribal leaders from small, medium, and larger federally recognized Tribes across the country. "The TIAC is intended to further communications between HUD and federally recognized Tribes on HUD programs, make recommendations to HUD regarding current program regulations, provide advice in the development of HUD's American Indian and Alaska Native (AIAN) housing priorities, and encourage peer learning and capacity building among Tribes and non-tribal entities." The proposed TIAC is a result of HUD's Tribal Government-to-Government Consultation Policy, which recognizes the right of Indian Tribes to self-governance and supports tribal sovereignty and self-determination. Comments can be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov.

Conclusion

If you have any questions regarding this memorandum, please contact Ed Clay Goodman at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.