

215 SW Washington Street, Suite 200  
Portland, OR 97204


T 503.242.1745  
F 503.242.1072

HOBBSSTRAUS.COM

## MEMORANDUM

December 13, 2021

TO: TRIBAL HOUSING CLIENTS

FROM:  Ed Clay Goodman and Cari L. Baermann  
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: Housing and COVID-19 Update

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This memorandum provides a synthesis of information presented during the Native American Indian Housing Council (NAIHC) Legislative Committee meeting and Legal Symposium held in Las Vegas from December 6 – 8, 2021. Below is a summary of the Legislative Committee meeting, the plenary sessions, some of the key presentations, and other developments in housing matters related to the coronavirus (“COVID-19”) pandemic.

### I. NAIHC Legislative Committee Meeting

The NAIHC Legislative Committee met in the afternoon of December 6. NAIHC Executive Director Tony Walters presided, and gave a detailed report.

#### A. Congressional Updates

##### 1. 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 (CR) to keep the federal government funded through December 3, 2021, at largely FY 2021 funding levels and conditions. On December 2, 2021, Congress passed another temporary spending bill (HR 6119) that will keep the federal agencies funded through February 18, 2022.

In anticipation of a potential default in federal funding in October, Congress passed a short-term increase in the debt limit to temporarily continue to cover federal obligations through what was estimated to be December 3, 2021. The Treasury Department has warned Congress it will exhaust its borrowing powers on December 15, 2021 and will be forced to skip some of its financial obligations. On December 7, 2021, the House passed legislation that would ease the passage of a bill increasing the debt limit. The bill, which was based on an agreement struck earlier in the day by Senate Majority Leader Charles Schumer (D-N.Y.) and Senate Minority Leader Mitch McConnell (R-KY.). The deal will allow Democrats to circumvent a GOP filibuster of a debt limit extension in the Senate. This approach was approved in the Senate, paving the way for the Democrats to avoid a Republican filibuster and pass a separate measure on their own that would actually raise the debt limit by a

specific number. It's expected that Democrats will enact a debt limit hike high enough to cover federal spending obligations until after the 2022 midterm elections.

On November 15, 2021, President Biden signed the roughly \$1 trillion bipartisan infrastructure bill and five-year surface transportation reauthorization, the "Infrastructure Investment and Jobs Act" ("IIJA", Pub. L. No. 117-58). The IIJA provides over \$11 billion for Native communities, including:

- \$3.5 billion for the Indian Health Service Sanitation Facilities Construction Program;
- \$3 billion for the US Department of Transportation Tribal Transportation Program;
- \$2.5 billion to address approved Indian water rights settlements; and
- \$2 billion for the National Telecommunications and Information Administration Tribal Broadband Connectivity Program.

The IIJA also establishes an Office of Tribal Government Affairs in the U.S. Department of Transportation and an Assistant Secretary for Tribal Government Affairs, among other beneficial provisions and funding for tribes.

On November 19, 2021, the House passed a slimmed down (\$1.7 trillion, instead of \$3.5 trillion) budget reconciliation package, the Build Back Better (BBB) Act, a package of provisions to address childcare, health, education, and climate change. Further changes are expected in the Senate to the following provisions: paid leave, immigration, certain state and local tax deductions, methane emissions, and a vaping tax. Any changes made by the Senate would send the package back to the House for another vote. The package, as currently drafted, contains significant resources for Indian Country, but less than the original \$3.5 trillion version. Examples include:

- \$1 billion for Indian Housing programs:
  - \$277 million IHBG;
  - \$277 million IHBG competitive;
  - \$200 million ICDBG;
  - \$200 million NHHBG;
  - \$25 million HUD admin; and
  - \$20 million T/TA grants.
- \$200 million to carry out the tribal energy loan guarantee program;
- \$441 million for tribal climate resilience and adaptation programs;
- \$19.6 million for Bureau of Indian Affairs fish hatchery operations and maintenance programs;
- \$294 million for the provision of electricity to un-electrified tribal homes through renewable energy systems;
- \$945 million for the maintenance and improvement of Indian Health Service and tribal healthcare facilities;
- \$490 million for Indian Affairs public safety and justice programs; and
- \$715.4 million for the Bureau of Indian Affairs Road System and Tribal transportation facilities for road maintenance, planning, design, construction, and to address the deferred road maintenance backlog.

## *B. Update on Other Tribal Housing Bills*

### 1. 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 co-sponsors. The co-sponsors are trying to move the NAHASDA reauthorization bill out of the Committee on Indian Affairs 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. The bill sponsors are also attempting to attach the NAHASDA bill to some other “must-pass” legislation, with the main focus being the National Defense Appropriations Act (NDAA). On Tuesday, December 9, the House passed its version of the NDAA without the NAHASDA reauthorization bill. Reauthorization of NAHASDA by the end of 2021 does not look likely, but NAIHC will continue to work towards reauthorization during the remainder of the session.

Both the House and Senate are working on versions of a NAHASDA reauthorization bill. We have reported on the provisions of those two bills in prior reports.

### 2. Tribal HUD-VASH

There has been little progress on the Tribal HUD-VASH legislation since our last update, although the Tribal HUD-VASH language is included in both the Senate and House NAHASDA reauthorization bills, as well as in standalone bills. Mr. Walters remarked that the funding structure for a Tribal HUD-VASH is up in the air, and it has not been decided as to where Congress would draw the money from to fund Tribal HUD-VASH funding. Tribal advocates want to ensure that the money does not come out of some other already-existing funding for tribal housing. 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 Tribal HUD-VASH program.

### 3. 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 single-family loan pilot program in South Dakota and would expand that program to be accessible to tribes across the country. The South Dakota tribes have been working on this pilot and have found the program to be successful. The South Dakota tribes received \$2 million under this initial pilot program. Mr. Walters commented that, if passed, the funding would increase the amount of loan funding for tribal communities. It would further bolster local tribal Community Development Financial Institutions (CDFIs). Mr. Walters also remarked that there is a companion USDA bill that will likely be introduced in the House soon, which indicates support in both Congressional chambers

for the program. He noted that it is often easier to create tribal set-asides in existing programs than to create tribal programs from scratch, so there is a potential that this Act passed.

Another bill that could benefit tribal housing is the “Tribal Trust Land Homeownership Act”. Congress is still drafting the bill, so the exact details have not been released. However, the bill would address issues with BIA’s processing title status reports for Section 184, 184A, and other lending programs. The bill would create deadlines for the BIA, which should speed up the process and decrease delays in approval of the title status reports.

### *C. HUD Programs*

HUD is on track to award and allocate the ICDBG FY 21 and IHBG Competitive FY 21 grants shortly. The ICDBG FY 21 grant (\$76 million) application deadline was October 25, 2021. The IHBG Competitive FY 21 grant (\$95 million) deadline is **January 4, 2022** (HUD extended the original deadline of December 1, 2021). HUD is also processing T/TA requests. Tribes and Tribally Designated Housing Entities (TDHEs) can also contact NAIHC for additional training, as NAIHC is continuing to try to help connect tribes with TTA.

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 purpose of the TIAC is to enhance the government-to-government relationships, communications, and mutual cooperation between HUD and tribes. The Notice states that the TIAC will be comprised of a diverse group of fifteen elected tribal leaders from small, medium, and larger federally recognized Tribes across the country—two for each of the six ONAP regions and three at-large members. HUD is proposing that “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](http://www.regulations.gov).

### *D. Treasury Programs*

#### 1. Emergency Rental Assistance Program

The Consolidated Appropriations Act, 2021 (the “Act”) (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020) included \$25 billion for the Emergency Rental Assistance (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. One of

the provisions of the ERA Program legislation is that Treasury is authorized to recapture “excess” funds and reallocate those funds to recipients who have already expended 65% or more of their ERA Program funding by September 30, 2021. 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 TDHEs prior to April 2022 (in order to provide for an opportunity to consult with Tribes). Treasury has not yet indicated 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.

One participant asked when the recapture process will begin for states. Mr. Walters responded that the process has already begun. Tribes and TDHEs that have obligated 65% of their ERA Program funds can apply right now to receive those recaptured state funds. Any grantee that wants to request reallocated funds must have submitted Treasury’s Reallocation Funds form by November 30, 2021 in order to be in the first round of reallocations. This form 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-month projection of their need for reallocated funds and what they reasonably anticipate being able to spend in that four-month period. Treasury will test the reasonableness of that projection based on past performance by that grantee.

Another participant asked whether other tribes have had issues with providing ongoing ERA Program assistance to tribal members as the COVID-19 pandemic continues to affect jobs and public health. The participant noted that his tribe has provided ERA Program assistance to many tribal members who were laid off due to the COVID-19 pandemic. However, if the pandemic continues and those tribal members are laid off again, he is concerned that the tribal members would not be able to receive further assistance under the ERA Program. The participant asked whether it is possible for the tribe to provide more than fifteen months of ERA Program assistance to individuals if needed. Mr. Walters responded that the fifteen-month cap on assistance is a statutory requirement, so Treasury does not have the flexibility to allow tribes to provide assistance beyond that timeframe unless the legislation is amended.

In August, Treasury released tribal ERA Program data, which was based on the June 30, 2021, reports. As of that date, tribes had spent \$76,109,500 (nine and one-half percent (9.5%)) and obligated \$181,678,109 (twenty-two and seven-tenths percent (22.7%)). The amounts spent and obligated have increased since that date.

## 2. Treasury’s Homeowner Assistance Fund

As we have reported in prior memos, the American Rescue Plan Act (ARPA) provides approximately \$498 million in funding to tribes for the Homeowner Assistance Fund (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 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 **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](#).

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. The portal website link can be found in the portal instruction manual issued by Treasury. Mr. Walters commented that NAIHC held a HAF training, which was recorded and is available on the NAIHC website.

A participant asked whether Treasury has approved any tribe's HAF plan yet. Mr. Walters responded that most tribes have not yet received Treasury approval of their plan, but Treasury is slowly processing the plans. Only one member present at the Legislative Committee meeting reported that his tribe had received the full HAF allocation in late November. His tribe submitted the HAF Plan in early August. Mr. Walters indicated that he heard that one or two other tribes may have also received funds recently, and that they had submitted their HAF Plans in August as well. So it appears that Treasury has a several month lag between receipt of the HAF Plan and allocation of funds.

#### *E. Other Matters*

##### 1. NAIHC Legislative Committee meetings

The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month on a videoconference platform. 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. 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).

##### 2. New Additional Monthly Forums

NAIHC has started holding additional monthly forums to focus on more in-depth conversations. The next monthly forum will be held on December 15, 2021, and will cover the HUD Continuum of Care. The following meeting will be January 12, 2022 and will cover HUD Housing Counseling. The forums will cover a rotating discussion on a single topic. Currently, NAIHC is proposing the three following topics: (1) Treasury programs; (2) HUD Continuum of Care; and (3) HUD Housing Counseling. NAIHC welcomes any other topics individuals would like covered during these monthly forums. NAIHC is also asking for volunteers to help lead discussions during the forums.



### 3. Other Updates

NAIHC will continue to provide virtual training and technical assistance. NAIHC sends out a Native housing newsletter every two weeks. Any tribe who does not currently receive the newsletter can go to the NAIHC website to sign up.

## **II. NAIHC Pre-Meeting Ahead of NAIHC Members' meeting.**

Following the Legislative Committee, NAIHC held a brief pre-meeting during which NAIHC Executive Director Tony Walters lead a discussion of the NAIHC Members' meeting planned for the next day. The Members' meeting was a special, one-time meeting because NAIHC did not have the opportunity to have an annual Members meeting in 2020 or 2021 due to COVID-19 (the bylaws require that such meetings take place in person). The next regular Members' meeting will take place in May 2022 at the Annual Meeting in Seattle. Mr. Walters remarked that there were three items of business for the Members' meeting.

### *A. Election of a NAIHC Board Chair*

The last election was held in 2018 through which Gary Cooper was elected. The next chair election would have been in 2020. However, due to COVID-19 health precautions, NAIHC decided to hold off on holding a meeting. As a result, Gary Cooper held over as Chair under the NAIHC bylaws. At the end of 2020, Gary Cooper later left the Cherokee Nation Housing Authority (to work for HUD ONAP), and therefore ending his time at NAIHC. Adrian Stevens stepped in as Interim Chair. NAIHC therefore needs to elect a new Chair.

Each Board Chair serves a two-year term from the date of the election. This Chair would serve until December 2023, but would then hold over until the next annual meeting in Spring 2024, at which time NAIHC would go back to its regularly-scheduled two-year election cycle in every even-numbered year. The nominations for Chair opened during the pre-meeting and could be raised on the floor at the 2021 Members' meeting. As of the pre-meeting, Adrian Stevens, the current Interim Chair, was the only candidate running for Chair. If there ended up being more than one nominee for Chair, a vote would be called and ballots collected. The winner will be determined by plurality vote and would be announced at the end of the day.

### *B. Adoption of Bylaws amendments.*

The second agenda item involved three proposed changes to the bylaws (originally, there was a list of sixteen proposed changes, but the NAIHC Board decided that the other changes should be considered at a later date, after allowing for more time for discussion). The three proposed changes involved:

- Adding Virginia to a list of states where NAIHC members are located, as a result of seven tribes being recognized in Virginia in the past year.
- Changing the bylaws to allow for Members' meeting to be held at any time during the calendar year.
- Adding the ability to hold Members' meetings virtually, if circumstances exist such that an in-person meeting would be unsafe for Members to attend or if there are travel restrictions in place.

*C. Resolutions.*

The last item for the meeting involved two resolutions. The first of the resolutions addresses the bylaws changes noted above. The second resolution is a resolution recognizing the Centennial Celebration of the Hawaiian Homes Commission Act of 1920. The resolution was submitted by the Department of Hawaiian Homelands, which was formed by this Act of Congress.

### **III. NAIHC Plenary Session**

NAIHC held a Plenary Session on December 7, 2021. NAIHC Vice Chair Sami Jo Difuntorum, Executive Director of the Siletz Tribal Housing Department, gave opening remarks. She remarked on the number of resources now available to Indian housing, while also noting the significant obstacles that still face Indian housing. Vice Chair Difuntorum emphasized that this is a good time to move the needle on funding amounts because of the attention that the housing shortage is receiving on the national level. She also noted that NAHASDA funding has remained stagnant, and because of inflation, has effectively decreased.

Vice Chair Difuntorum commented that it is important that NAIHC members discuss funding issues and develop a collective strategy on how to increase the amount of funding for all Indian housing programs. She encouraged tribal members and advocates to reach out to their members of Congress to advocate for more funding for tribes.

Adrienne Todman, Deputy Secretary of HUD, joined the meeting virtually to comment on the Biden Administration's tribal priorities. She emphasized that HUD and the Biden Administration have committed to deepening relationships with tribal governments. She noted that the Biden Administration proposed \$1 billion in the budget proposal for Indian housing. Ms. Todman remarked that in spite of the gains seen in funding for tribal housing, the Administration recognizes that more is needed for affordable housing and therefore is striving to pass the Build Back Better Act, which has (as described above) additional funding for Indian housing. The Act would also provide down-payment assistance funding and would ensure that disadvantaged communities receive 40% of climate change investments.

Heidi Frechette, ONAP Deputy Assistant Secretary, also joined the Plenary Session virtually. She remarked that HUD is investing in information technology (IT) support systems. HUD launched a Native American loan claims module last week to support Section 184 and 184A programs. Lenders can now submit claims through the online HUD system. The module also streamlines the loan process to make loans for Native Americans easier. Ms. Frechette commented that HUD intends to provide frequent opportunities for tribal consultation. The HUD website lists actions HUD plans to take to engage in tribal Consultation.

Ms. Frechette provided an update on some of the NAHASDA programs. In November, 2021, HUD extended deadline for the FY21 IHBG Competitive Grant Program application to January 4, 2022. On November 2, 2021, HUD ONAP published a second NOFA for the Tribal HUD-VASH Expansion Program. This NOFO, found [here](#), announces the availability of approximately \$2.2



million for competitive grants available to eligible Indian tribes and TDHEs. Ms. Frechette encouraged any tribe that has not submitted their Indian housing Plans (IHP) for the IHBG block grant to reach out to their area ONAP for assistance.

In celebration of the 25<sup>th</sup> anniversary of NAHASDA, Bob Gauthier, Director of the United Native American Housing Authority; Jacqueline Pata, President and CEO of Tlingit-Haida Regional Housing Authority; and Phil Bush, Director of the Modoc Lassen Indian Housing Authority joined a panel to share stories of Indian housing successes. The panel also discussed the challenges in Indian housing that remain to be addressed. Since 1996, tribes have collectively received over \$15 billion in Indian Housing Block Grant and NHHBG funding. The panel discussed what this kind of investment has meant for their tribes and for Indian Country collectively. The panel noted that NAHASDA has allowed tribes to achieve greater levels of self-determination, providing tribes with the opportunities to decide for themselves how best to meet the housing needs of their communities. However, they also emphasized that the NAHASDA funding is not enough to cover all of the needs in Indian housing. They also mentioned that many of the limitations on uses of NAHASDA funding prevent tribes from exercising their self-determination by using money to address issues specific to each tribe.

Despite the investment in tribal housing over the last 25 years, there continues to be high levels of unmet housing needs in Indian Country. The panel discussed some of the top issues that NAHASDA is not addressing. The panelists highlighted the fact that training and technical assistance is now under the control of HUD, which creates barriers to tribes accessing the information they need. The panelist emphasized that training and technical assistance should instead be offered through NAIHC and NCAI. The panelists also remarked that HUD should engage in tribal consultations more frequently, rather than only when required by regulations.

Finally, the panelists addressed what changes they would like to see for tribal housing in the next 25 years. They emphasized that any changes to tribal housing should be determined by tribes, not mandated by HUD. As an example, they noted that HUD's new housing counseling requirements are inconsistent with self-determination. Tribes have the ability to train their tribal members on how to be fiscally responsible and HUD should honor that. They would like to see much higher levels of funding allocated through the annual appropriations, and would like to be able to see more demonstrations of HUD honoring tribal self-determination.

The panelists also remarked that with each big change in HUD staff, tribes need to remind the new staff of the necessity of tribal self-determination and remind the staff that tribes need flexibility to implement tribal programs in ways that fit the specific needs of their communities. NAHASDA and HUD have generally recognized tribal self-governments. HUD needs tribes to remind them of what tribes need and how best to meet those needs. Additionally, other federal agencies need to better understand tribal self-determination and learn what it means to honor the government-to-government relationship with tribes. The panelists highlighted the importance of removing funding barriers and increase funding overall, so that tribes do not need to compete with each other for the same funding stream. For example, the panelists emphasized that there needs to be

a tribal carve-out for USDA programs, and the Section 184 and 184A loan programs should be improved to better provide loans to tribal communities.

#### IV. Breakout Sessions

We attended several of the relevant breakout sessions and report on them below. NAIHC will make the materials used for each breakout session available on its website.

##### A. *Ghosts of Eviction Moratoria: Past, Present, and Future*

This presentation, made by Ed Clay Goodman and Cari Baermann of Hobbs Straus Dean & Walker, LLP, focused on the legal background of, legal challenges to, and potential future of the various eviction and foreclosure moratoria that were adopted by HUD and the Centers for Disease Control (CDC) in response to the COVID-19 pandemic.

A number of jurisdictions across the United States, including cities, counties, and states, used eviction moratoria in response to the COVID-19 pandemic. Many tribes also enacted eviction moratoria. Some tribes did so formally, via a Tribal Council resolution, ordinance, or statute. A number of other tribes imposed eviction moratoria less formally, through their court systems, who simply refused to hear or grant evictions during the epidemic.

The exercise of such authority to impose eviction moratoria is based on each jurisdiction's general police power and/or emergency powers. There have been a number of legal challenges brought against the eviction moratoria issued by the various jurisdictions. These challenges generally did not succeed against the local jurisdictions. There were no legal challenges brought in response to the informal approaches that tribal courts too, because the court with jurisdiction over a challenge was the entity imposing the moratorium.

There were also several eviction and foreclosure moratoria implemented at the federal level. These included the CARES Act eviction moratorium, CDC eviction moratorium, and HUD moratorium on Section 184 loan foreclosures. The CARES Act included an eviction moratorium for several months for tenants of certain federally-funded housing programs (NAHASDA was not included). The CDC issued a nationwide eviction moratorium in September 2020. It was extended several times, once by Congress, and again by the CDC. It was challenged in court and, after two separate hearings at the U.S. Supreme Court, was ultimately struck down as exceeding CDC's authority.

Even though overturned, the CDC Moratorium remained in effect for nearly a year. Tribal, state, and local moratoria remained in place even longer, and some are still in effect. With regard to whether the moratoria were an effective public health measure, it will take significant time and epidemiological research to determine whether it had a public health impact. It is unlikely that we will see any future broad eviction moratoria imposed on the federal level, unless the moratoria are enacted by Congress, which is also unlikely to occur. However, tribal, state, and local eviction moratoria approaches may be used again in the future, depending on the severity of the COVID-19 outbreak in the area. It is also likely that TDHEs and tribal courts will continue to take informal approaches to preventing evictions.

*B. ERA Program Updates (two separate sessions)*

Tribes continue to implement the Treasury's ERA Program. One of the challenges that tribes face is meeting the reporting requirements. Below are the upcoming reporting requirements for tribes for the ERA Program.

Cycle	Quarter	Reporting period	Submission deadline
Cycle 4	Q4 2021	Oct. 1, 2021–Dec. 31, 2021	January 17, 2022
Cycle 5	Q1 2022	Jan. 1, 2022–Mar. 31, 2022	April 15, 2022
Cycle 6	Q2 2022	Apr. 1, 2022–Jun. 30, 2022	July 15, 2022
Cycle 7	Q3 2022	Jul. 1, 2022–Sept. 30, 2022	October 17, 2022
Cycle 8	Final Report		January 31, 2023

As discussed above, beginning on September 30, 2021, Treasury will begin recapturing “excess” funds and reallocating those funds to recipients who have already expended 65% or more of their ERA Program funding by that date. Treasury has indicated that any reallocation will not be issued on a first-come, first-serve basis. Instead, Treasury will utilize the following priority system for any reallocations of ERAP funds:

- Grantees in the same state where the excess funds were initially allocated.
- Grantees that are close to expending (not just obligating) all of their initial funds.
- A single nationwide pool that will be distributed proportionally to grantees based on their relative need.

If requests for reallocated funds are greater than the funds available, Treasury will utilize a formula based on the grantees' initial allocation and may also provide funds based on need. To request any reallocated funds, tribes should submit the forms for requesting for reallocated funds found on Treasury's website, located [here](#). The process of recapturing state ERA Program funds started in mid-November. However, it may take a few months for any funds that were recaptured to be reallocated to other entities.

One of the participants indicated that their Tribe has had significant issues submitting reports through the Treasury portal. Because of this, Treasury will not know that the tribe has spent all of its money. When they emailed Treasury about this, Treasury simply emailed the Tribe back directing them to read the Treasury Guidance.

The statute authoring the ERA Program provides that ERA Program funds may only be used to pay rent arrears and utility costs arrears for rent and utility and home energy costs incurred on or after March 13, 2020. One participant asked whether Treasury can change this to allow assistance for arrears that began before March 13, 2020. This is a statutory requirement and will not likely change.

Another participant asked how to handle costs for damages to a hotel caused by someone staying at a hotel due to COVID-19, and whether the ERA program funds can be used to cover the damages. The presenter recommended being careful how the ERA program funds are being used,

and to carefully read the statute establishing the ERA Program to determine which costs are eligible to be covered under the ERA program.

A participant raised the interesting obstacle that neither the statute nor Treasury specified the amount of assistance that could be provided to a single individual in any given month. The participant noted that their tribe decided to provide monthly assistance under the ERA program based on the average monthly rent for a three-bedroom home in the tribe's area.

Regarding redetermination of eligibility, multiple participants commented that their tribes require individuals to go through the eligibility determination process again at the end of each of the three-month periods during which the tribe provides funds.

Housing stability services include housing counseling and fair housing counseling. This also includes case management related to housing stability, including helping negotiate repayment agreements, settlement agreements, and last chance agreements. Funds can also be used for housing-related services for survivors of domestic abuse or human trafficking, tenants' attorney's fees related to eviction proceedings, and specialized services for individuals with disabilities or seniors that support their ability to access or maintain housing. Grantees using ERA funds for housing stability services must maintain records regarding such services and the amount of funds provided to them. Also, it is difficult to assign specific monetary values to providing such housing stability services, given that tribes provide such services as part of their normal daily operations.

Tenants must provide a certification that they have not received any other assistance for the costs for which they are asking for assistance. One participant commented that when accepting a written attestation of a lease for a tenant who was renting from her mother, both the tenant and her mother submitted a written attestation, which allowed the tribe to make sure that the household was not receiving duplicative funds. Another participant commented that they asked for bank statements showing monthly rental payments, in addition to the written attestations, to prove that a lease existed.

The presenters also gave suggestions on methods tribes can use to more quickly spend their ERA Program funds:

- Check to make sure that the tribe's eligibility requirements are not greater than what is required by Treasury. Matching the Treasury requirements might increase the number of households eligible for assistance;
- Make sure the tribe's documentation requirements are not greater than Treasury requires;
- Use self-attestations;
- Allow applicants to make corrections to applications;
- Look at additional ways to make it easier for applicants to apply. Use online application portal and in person applications;
- Figure out how to process applications quicker; and
- Advertise more through multiple different types of media, such as sending out mass mailings or billboards.

Treasury has not given guidance on how to handle or report fraud. Fraud examples include a landlord engaging in identify theft, a landlord and tenant being family members, and significant

spikes in what the tenant lists as their monthly rent. It is best to report fraud activity to Treasury for now. It is anticipated that Treasury will provide more detailed information to tribes regarding fraud in the future. It is also best to maintain all documentation in the meantime. Applicants are required to certify that the information they submit is accurate and truthful. Tribes have the authority to deny an application if there is good reason to believe fraud is occurring.

### C. HAF Program Updates

As discussed above, 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 can be used to pay to mitigate financial hardships associated with the COVID-19 pandemic for the purpose of preventing homeowner mortgage delinquencies, defaults, foreclosures, loss of utilities or home energy services, and displacements of homeowners experiencing financial hardship going back to January 21, 2020.

Treasury has posted HAF Plan templates on its website, which can be found [here](#). The template outlines eligible uses and some of the planning pieces. Tribes and TDHEs that receive less than \$5 million in HAF funding will have a shorter HAF Plan than those tribes and TDHEs that receive more than \$5 million in HAF funding. The difference mostly involves data requirements.

Treasury is starting to approve the HAF plans submitted by tribes/TDHEs in September, 2021. One participant asked whether there is a deadline by which tribes need to submit their HAF plans. Treasury has not yet released anything that indicates that there is any HAF plan deadline. Another participant asked whether they can use HAF Program funds to hiring people. Fifteen percent of the HAF funds that can be used for administrative expenses includes hiring staff members to implement the programs.

### D. *Lewis v. Clarke*—Impact on Tribal and TDHE Sovereign Immunity

In *Lewis v. Clarke*, the Supreme Court held that, in a suit brought against a tribal employee in his individual capacity for a tort committed in the scope of employment, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. The Court also held that an indemnification provision codified under tribal law cannot, as a matter of law, extend the tribe's sovereign immunity to individual employees who would otherwise not fall under its protective cloak.

In 2021, there were four state court cases, nineteen federal district court cases, and two federal appellate court cases that discussed (not just cited) *Lewis v. Clarke*. About fifteen of the cases involved officers or employees of Indian tribes. Some of these cases are grappling with the scope and meaning of *Lewis v. Clarke*. Various plaintiffs have found creative ways to use *Lewis v. Clarke* as a means of suing individual tribal employees and officials as a means of avoiding the defense of sovereign immunity. The courts are often siding with those plaintiffs, particularly where the facts of the case are egregious and the court wants to find a remedy.

The power point for this presentation is attached.

*E. Using ARPA Funds to Develop Middle Income Housing*

NAHASDA and low-income housing tax credits (LIHTC) are the main sources for housing development for tribes. Both of these sources of funding require grantees to serve low-income clients. As a result, there are not many funding opportunities available for developing middle-income housing. Some tangible ideas to take back to tribal communities are to use ARPA Fiscal Relief Funds (ARPA-FRF) to develop housing for middle-income tribal members.

The Tribe is developing an LIHTC project using ARPA-FRF money as the tribal contribution. However, because it is an LIHTC project, all of the units must be low-income. However, ARPA-FRF is not income-restricted, so the funds can be used to develop housing that is not income-restricted. If there are no LIHTC or IHBG funds used in the project, tribes can serve middle-income clients. The ARPA Final Interim Rule allows using funds for the “development of affordable housing”. After researching use of this term, as well as the preamble and discussion of the Final Interim Rule, the presenters argue that “affordable housing” is not limited to the NAHASDA definition (which is below 80% of AMI). The goal of the program is to provide benefits as widely as possible. Consequently, the program shouldn’t require governments receiving these funds to spend significant time and money conducting income checks on program participants.

The argument is that the ARPA language regarding state and local governments indicates that if any government that is such an entity and is providing affordable housing services within a “qualified census tract” (QCT)—which is a term also used in the Final Rule—that entity is presumptively acceptable (i.e., the entity is presumed to be providing affordable housing). The language regarding tribes is different. State and local governments can use QCT. The language for Tribes says that if the services are provided by a “Tribal Government” (i.e. if a “Tribal Government” is running a program) that Tribal Government is presumptively acceptable as well. Mr. Pierson and Mr. Clancy commented that they think this analysis is sound, but tribes should develop a policy to ensure that they have reasonable sideboards for income and types of programs. This could include limiting assistance to households at 125% of AMI, and for homes that are modest in cost. It is also advisable to run it by Treasury to make sure they do not see any concerns with such use. It is not 100% certain that Treasury will confirm this approach.

Additionally, it is recommended that tribal policies should:

- Recite COVID impacts and identify ARPA’s other goals as purposes (i.e. negative impacts from overcrowding, public health emergency, etc.).
- Adopt criteria for “essential families” under the NAHASDA statutory provision to squarely qualify the program as “affordable housing”.
- Set reasonable income limits on families served, based on individual tribal demographics.
- Satisfy all applicable regulations, such as the Interim Final Rule, Compliance and Reporting Guidance, and the 2 CFR Part 200 requirements.
- Seek confirmation from Treasury that this program is a permissible use of ARPA funds.

*F. Continuum of Care Funding for Tribes*

Under the CoC Program, a Continuum of Care (CoC) is a state, regional, or local planning body organized to carry out the responsibilities of the CoC Program. Tribes had not been eligible to apply for CoC funding until the Consolidated Appropriations Act, 2021 (Public Law 116-260,



approved December 27, 2020) included language allowing participation of Indian Tribes and TDHEs in the CoC Program. Tribes are now eligible to participate by (1) forming their own CoC or (2) joining an existing CoC as a recipient. HUD is working to implement tribal participation in the coco program in phases from now through future CoC competitions. Each year, HUD releases a Notice of Funding Opportunity (NOFO) for the CoC competition. This year's competition has already ended. The total (estimated) amount of funding to be awarded is \$2,656,000,000. Next year's competition will begin in July or August of 2022. The application process is complicated, so the presenters recommended that tribes begin the application process in January 2022. At this time, there is no additional or set-aside funding for tribes. CoCs and tribes need to connect to understand each other's processes and project priorities. The presenters recommended that tribes try to be on the CoC Board in order to be part of the decision-making process.

There are a number of benefits to joining a CoC. Doing so allows the Recipient to apply for funding opportunities passed through the CoC by HUD and other funding bodies, with the potential for state funding, housing vouchers, etc. Joining a CoC would allow the tribe to serve on CoC committees as voting members, with the authority to make formal recommendations to the CoC Board of Directors and to set policies around project ranking and evaluation.

#### *G. Navigating Pandemic-Era Issues to Construct Low-Income Housing*

The presenters noted that COVID-19 has made significant impacts on tribes and TDHEs. Impacts include increased material costs, increases in demands for labor but a shortage of labor available, and significant housing shortages. There are a number of funding sources available for addressing low-income housing. These include funds through IHBG, IHBG-CARES, ICDBG-CARES, IHBG-ARPA, ERA Program, and HAF Program. Additional funds would be available if the BBB Act is passed. This Act includes an LIHTC expansion, Neighborhood Homes Tax Credit (one-year tax credit), and \$1 billion in funding for Indian housing.

The presenters provided the following tips for tribes to follow when contracting for low-income housing:

- Assess TDHE staff capacity and expertise to oversee the project;
- Ensure the contract has sufficient labor to meet the project needs – include assurances in the contract with significant damages provisions, and provisions allowing the TDHE to cancel the contract;
- Consider front-end loading the contract for material purchases;
- Consider increasing bonding thresholds to mitigate work halt, labor shortages, etc.; and
- Include provisions addressing time-is-of-the-essence, force majeure, suspension of work, and an owner option to terminate for convenience.

#### **V. NAIHC Members Business Meeting**

During the NAIHC Members Meeting, held on December 7, 2021, NAIHC Secretary Erna Reeves provided the Credentials Report. NAIHC has 237 total Members. Of these Members, 112 were present or represented by proxies during the Members' meeting. However, 119 Members were needed for a quorum. Because the quorum was not met, the Members' meeting was not a business meeting. The attendees then moved and adopted the Credentials report.

One of the attendees asked whether the Board can adopt a non-controversial resolution, such as the Centennial Celebration resolution. Vice-Chair Difuntorum responded that because it is a non-controversial resolution, the Board can act on it.

Another attendee asked whether there will be a review and comment process on the proposed bylaws resolutions. Vice-Chair Difuntorum responded that the Board plans on going through a review and comment process for the bylaws amendments in the lead up to the meeting in Seattle in 2022.

NAIHC Executive Director Tony Walters then provided an overall report. He reported that NAIHC is back up and running in person after working remotely for a long time. NAIHC continued to provide T/TA and courses virtually throughout the COVID-19 pandemic. The courses and T/TA that NAIHC provided both increased during 2020 and 2021 from 2019.

Mr. Walters then provided an update on NAIHC's 2021/2022 initiatives:

- Providing online leadership institute courses;
- Celebrating the 25<sup>th</sup> NAHASDA anniversary;
- Providing core HUD trainings library on-demand (NAIHC received HUD approval);
- Creating a HAF training and website – it includes guidelines and best practices for tribes/TDHEs, as well as having an outward facing focus on families and individuals (funded by Wells Fargo); and
- Community needs assessment technical assistance.

The formal presentation of audits will take place at the Seattle meeting in 2022, and will include audits for 2019, 2020, and 2021. NAIHC net assets over the last five years have been significantly improving and growing from the low point in 2016 to a high point in 2019 (from \$1.5 million to almost \$3.2 million in 2019). The assets dropped slightly in 2020 and NAIHC expects to see another small drop for 2021 due to impacts of the COVID-19 pandemic.

## **VI. Closing Session**

Ed Clay Goodman gave a presentation covering litigation and regulation updates concerning issues in tribal housing and Indian Law. The memo discussing these updates is attached. Wells Fargo gave a brief update on their lending programs for Indian Country. Additionally, NAIHC Executive Director Tony Walters gave an overview of NAIHC's efforts to move training and technical assistance to an online platform, specifically the Pathways Home program. NAIHC has several of their programs online already, and is working diligently to post all courses online.

### ***Conclusion***

If you have any questions, please do not hesitate to contact Ed Clay Goodman at [EGoodman@hobbsstrauss.com](mailto:EGoodman@hobbsstrauss.com) or Cari Baermann at [CBaermann@hobbsstrauss.com](mailto:CBaermann@hobbsstrauss.com) or by phone at (503) 242-1745.