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MEMORANDUM

December 9, 2022

To: TRIBAL HOUSING CLIENTS

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

Re: *NAIHC Legislative Committee and Legal Symposium*

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 5–7, 2022. Below is a summary of the Legislative Committee meeting, the plenary sessions, some of the key presentations, and other developments in housing matters.

I. NAIHC Legislative Committee Meeting

The NAIHC Legislative Committee met in the afternoon of December 5, 2022. NAIHC Executive Director **Tony Walters** presided.

a. Legislative Update

Elections. The midterm elections for the U.S. Congress were held on November 8, 2022 and the new Congress starts in January, 2023. The Democratic Party will control the Senate, while the Republican Party gained control of the House. This likely will lead to a general gridlock. For tribal issues specifically, Mr. Walters commented that the Congressional split may not cause that much of a difference, given that there are tribal housing advocates in both parties. However, achieving any funding increases in the next two years might be tougher.

Continuing Resolution for Government Funding Expires Soon. On September 30, 2022, Congress passed a Continuing Resolution (CR) to fund the Government through December 16, 2022, avoiding a shut-down and providing funding for government programs through that date. Congress will need to either pass an omnibus spending package or pass another Continuing Resolution by December 16, 2022 to avoid a possible shutdown.

b. Budget and Appropriations

The Biden Administration released its Fiscal Year (FY) 2023 budget in March 2022, and the numbers are nearly identical to the FY 2022 Indian Housing Block Grant (IHBG) budget. The budget requests \$1 billion for tribal housing, including \$772 million for IHBG grants, \$150 million

for IHBG Competitive grants, \$70 million for the Indian Community Development Block Grant (ICDBG) Program, \$7 million for training and technical assistance (T/TA), and \$1 million for Title VI loan guarantees. The budget request also contains some additional provisions: a waiver of various housing nondiscrimination laws for tribal continuum of care projects; inclusion of the United States Department of Agriculture (USDA) 502 Pilot; and \$14 million in funding for the BIA Housing Improvement Program (HIP).

On June 30, 2022, the House Appropriations Committee approved the draft FY 2023 Transportation, Housing and Urban Development, and Related Agencies (THUD) Appropriations Subcommittee bill. The bill proposes \$62.7 billion for HUD’s affordable housing, homelessness, and community development programs, which is a \$9 billion (or 17%) increase over FY22-enacted levels. Below is a breakdown of how the House draft THUD bill compares to the Senate draft THUD bill. NAIHC continues to work with Members of Congress to encourage the adoption of the Senate language for THUD funding.

<p>House THUD \$1 billion – Total for Tribal Housing</p> <ul style="list-style-type: none"> • \$772 million – IHBG • \$150 million – IHBG Competitive • \$70 million – ICDBG • \$7 million – Training/TA • \$1 million – Title VI Loan Guarantees 	<p>Senate THUD \$1.052 billion – Total for Tribal Housing</p> <ul style="list-style-type: none"> • \$819 million – IHBG • \$150 million – IHBG Competitive • \$75 million – ICDBG • \$7 million – Training/TA • \$1 million – Title VI Loan Guarantees • Also includes NAHASDA reauthorization
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c. Tribal Housing Legislation

Native American Housing Assistance and Self-Determination Act of 1996. As we have reported in prior memoranda, two versions of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) bill have been introduced: S. 2264 and H.R. 5195. The Senate bill (S. 2264) has eleven bipartisan cosponsors. It has passed out of the Senate Committee on Indian Affairs (SCIA), and the next step would be a vote by the full Senate. Additionally, the S. 2264 bill version of NAHASDA was included in the Senate’s draft FY 2023 THUD appropriations, which was released on July 27, 2022. The provision providing for an assistant secretary for Indian housing at HUD that was in earlier drafts of the Senate NAHASDA bill has been removed from the current version of the bill. At this time, NAIHC anticipates the NAHASDA reauthorization may pass via the Senate THUD appropriations or the legislative tribal “minibus,” which includes thirteen other tribal bills.

Tribal advocates also sought to attach the Senate NAHASDA bill to the National Defense Authorization Act (NDAA), which is a must-pass bill. However, on December 8, 2022, the House passed the NDAA, and this bill did not include the tribal minibus. The NDAA will now move on to the Senate for consideration.

If the Senate NAHASDA bill passes the Senate, it would still then have to pass the House. However, the House has expressed concerns with S. 2264. One of the issues is that the House

leadership wants any NAHASDA bill to include language that targets five tribes (“Five Tribes”) in Oklahoma (Cherokee Nation, Seminole Nation, Muscogee (Creek) Nation, Chickasaw Nation, and Choctaw Nation), withholding NAHASDA funding from the Five Tribes unless they provide housing assistance to Freedmen descendants.

The House NAHASDA bill, H.R. 5195, has one sponsor, Financial Services Committee Chair Maxine Waters (D-CA). This bill was not included in the House THUD appropriations. Chairman Patrick McHenry (R-NC) is now holding up the House bill, but NAIHC is reaching out to him to advocate that the House pass the NAHASDA bill. H.R. 5195 contains concerning provisions that NAIHC does not support. First, it caps the annual IHBG appropriations at \$680 million per year. This amount is lower than what the Biden Administration included in its budget proposal, and this is of general concern because it could set what becomes perceived as a hard cap in subsequent appropriations cycles. Second, as discussed above, H.R. 5195 targets the Five Tribes, withholding NAHASDA funding unless they provide housing assistance to Freedmen descendants. With a new Congress starting in January, the House Financial Services Committee would likely benefit from and want a hearing to learn more about NAHASDA programs. If NAHASDA does not pass this year, such a hearing could help it pass next year by impressing upon the Financial Services Committee the importance of NAHASDA programs for tribal communities.

The American Housing and Economic Mobility Act, S. 1368 and H.R. 2768. The American Housing and Economic Mobility Act is another pending bill that includes a provision reauthorizing NAHASDA for a period of ten years. It would provide up to \$2.5 billion for NAHASDA in the first year and would allow tribes access to Section 8 housing vouchers. This bill is partisan, national in scope, and unlikely to pass.

Native American Rural Homeownership Improvement Act (NARHI Act). The NARHI Act has ten bipartisan cosponsors in the Senate (S. 2092) and six in the House (H.R. 6331). The NARHI Act would provide \$50 million from the USDA Single Family Home Loan Program to Native Community Development Financial Institutions (CDFIs) to provide home loans in tribal communities. It would also expand a demonstration project currently operating only in South Dakota. In addition, it authorizes an operating grant for Native CDFIs who re-extend under this program and appropriates \$1 million annually for technical assistance to Native CDFIs. Even if the NARHI Act does not pass this year, advocates in both the House and Senate have indicated they intend to include it in the farm bill (an omnibus, multiyear package of legislation that governs a variety of agricultural and food programs). Representative Tom Cole (R-OK), Co-Chair of the Native American Caucus, has also been advocating strongly for the bill.

HUD-VASH included in NAHASDA Reauthorization. On November 30, 2022, Senator Jon Tester, Senate Veterans’ Affairs Committee Chairman, reintroduced the Tribal HUD-VASH bill. The Tribal HUD-VASH is bipartisan legislation that will help homeless Native veterans. The bill aims to codify a tribal housing initiative between the U.S. Department of Veteran Affairs (VA) and HUD, which pairs HUD housing vouchers with VA case managers and supportive services, to provide rental and housing assistance to permanently house homeless and at-risk veterans in Indian Country. The bill will also ensure that at least five percent of all HUD-VASH vouchers are set aside for tribes and tribal housing authorities. The Tribal HUD-VASH program has been included in the larger efforts to reauthorize NAHASDA. It has also been included in the legislative

tribal minibus, included in the FY 2023 Senate THUD appropriations, and added as an amendment to the NDAA.

Tribal Trust Land Home Ownership Act, S. 3381. The Tribal Trust Land Home Ownership Act has four bipartisan cosponsors. This bill sets forth requirements for the processing of a proposed residential leasehold mortgage, business leasehold mortgage, land mortgage, or right-of-way document by the Bureau of Indian Affairs (BIA). Notably, the Act would establish timeframes for the realty and land title process. This bill was included in the NDAA Amendments.

Native American Direct Loan Improvement Act, S.4505. On July 12, 2022, Senator Mike Rounds (R-SD) introduced a bill involving the VA Native American Direct Loan (NADL) program in the Senate. The NADL program allows eligible Native American Veterans to buy, build, or improve a home on federal trust land. The NADL may also be used to refinance an existing loan to reduce the interest rate. The new bill would provide funding for Native CDFIs to do more outreach for the program to increase veteran participation. Additionally, the bill would adopt the relending model through Native CDFIs, which would provide Native CDFIs with more flexibility to use the funding in a way that fits Native communities. This bill was reintroduced as a standalone bill last week in a hearing in the Senate VA committee.

d. Treasury Programs Update

1. ERA Program

ERA Program funds expired on September 30, 2022 and are no longer available to provide financial assistance and housing stability services to eligible households. However, funds can now be used only for administrative expenses beyond the September 30, 2022 deadline. Further, tribes that receive reallocated funds have until December 29, 2022 to spend those reallocated funds. This December 29, 2022 deadline is a hard deadline, so tribes cannot write any checks for ERA Program funds after that deadline, including for prospective rent.

NAIHC is continuing efforts to advocate to Congress that they retroactively extend the expenditure deadline for the ERA Program for another year. NAIHC has drafted letters, available at this [link](#), that tribes can use to send to their own members of Congress. Mr. Walters noted that it is still possible for there to be an extension, as Congress often makes retroactive changes to legislation

2. HAF Program

The American Rescue Plan Act of 2021 (“ARP Act”) provides approximately \$498 million in funding to tribes for the Homeowner Assistance Fund (HAF) Program. This Program provides mortgage assistance to homeowners to prevent the foreclosure or post-foreclosure eviction of a homeowner due to the COVID-19 pandemic. Funding for the HAF Program is allocated through the Treasury for distribution. Allocations are based on the IHBG formula for FY 2021.

Tribes or Tribally Designated Housing Entities (TDHEs) that wished to receive HAF funding were required to submit a Notice of Request for HAF funding by December 15, 2021. As of September 1, 2022, over 131 tribes have received HAF plan approval and funds.

e. Other Matters

3. NAIHC Legislative Committee Meetings

The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month on Zoom. The next one will be held January 5, 2022. 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.

II. NAIHC Plenary Session

NAIHC held a Plenary Session on December 6, 2022. **NAIHC Chairman Thomas Lozano, Tribal Treasurer of the Enterprise Rancheria**, gave opening remarks.

a. HUD Updates

Jad Atallah, HUD ONAP Director of Performance and Planning, provided an update on HUD initiatives and programs. Mr. Atallah noted that HUD is working with the House and Senate as they work on the FY 2023 appropriations bills. HUD is focusing its advocacy efforts on increased funding levels for NAHASDA and the NAHASDA reauthorization. Mr. Atallah also remarked that if a tribe needs funding for IHBG projects during the interim CR, they can contact HUD and HUD may be able to provide carryover funds.

The FY 2022 IHBG competitive grant provides up to \$5 million per grant. This year, there will be \$130 million available nationally, so tribes and tribally designated housing entities (TDHEs) are encouraged to apply for this funding, even if they already have an IHBG grant. Awards will range from \$500,000 to \$7,500,000. The deadline to submit applications through [grants.gov](https://www.hud.gov/grants) has been extended to **January 24, 2023**.

The ICDBG regular program application period is closed. HUD is in the process of reviewing the 152 applications received and will announce awards in April, 2023. HUD has now published the Notice of Funding Opportunity (NOFO) for the ICDBG competitive program, which has a grant cap of \$7.5 million. Applications are due **January 24, 2023**. HUD is reviewing the tribal consultation feedback and will be using the feedback to improve future NOFOs.

Mr. Atallah then discussed a couple of significant HUD updates. First, HUD will be publishing a Section 184 Indian Home Loan Guarantee Program (“Section 184”) proposed rule (“Proposed Rule”) sometime in the next two weeks. Section 184 is a home mortgage program that allows Native American borrowers to purchase a home with a low down-payment and flexible underwriting. The Proposed Rule will modernize the Section 184 program and provide detailed processes and requirements that HUD intends to improve and increase homeownership in Indian

Country. HUD will conduct tribal consultation on the Proposed Rule, and the deadline for public comments is **March 6, 2023**.

Second, the Consolidated Appropriations Act of 2017 (Public Law 115–31) made available \$1,727,000 for the costs of guaranteeing Section 184 loans to tribes and TDHEs for the construction of rental housing for skilled workers (e.g., law enforcement, healthcare, educational, technical, etc.). HUD has now created a Section 184 Skilled Worker Demonstration Project (“Demonstration Project”). This Demonstration Project provides tribes with a loan, guaranteed by HUD, to finance the construction of rental housing for skilled workers in tribal communities. On November 29, 2022, HUD released a Dear Lender Letter (DLL) that outlines the requirements for this Demonstration Project. The Demonstration Project DLL can be found [here](#).

Third, as we have discussed in a prior memorandum, on November, 29, 2022, HUD published a notice on the HUD Tribal Intergovernmental Advisory Committee Membership (TIAC) (“TIAC Notice”) in the Federal Register. The Notice announced the list of committee members selected for the TIAC. The purpose of the TIAC is to further facilitate intergovernmental communication between HUD and Tribal leaders. The TIAC will make recommendations to HUD regarding current program regulations and suggest the rulemaking methods to develop those changes. It will also advise on the development of HUD’s housing priorities for American Indian and Alaska Native housing. The TIAC announcement in the Federal Register can be found [here](#), and the press release can be found [here](#). The TIAC webpage can be found [here](#).

HUD has also created a Homelessness Veterans Initiative. This initiative is a collaboration between HUD, the VA, and the U.S. Department of Health and Human Services (HHS). It will increase access to care and services for Native American veterans experiencing or at risk of homelessness in urban areas. Part of the initiative will be to promote the Tribal HUD-VASH program.

Mr. Atallah also commented on the Build America, Buy America Act (BABA) (included in the Infrastructure Investment and Jobs Act of November 2021), which requires infrastructure projects funded with Federal financial assistance to use iron, steel, manufactured products, and construction materials that are produced in the United States. However, HUD recently published four additional waivers in the *Federal Register* related to the Buy America Domestic Content Procurement Preference (BAP), which is part of the BABA. The waivers can be found [here](#) and [here](#). Under the four new waivers, the BAP will not apply:

1. To infrastructure projects whose total cost is an amount equal to or less than the Simplified acquisition threshold, which is currently \$250,000;
2. For all Small Grants of Federal Financial Assistance that are equal to or below \$250,000;
3. For Minor Components of an infrastructure project, such that a cumulative total of no more than a total of 5 percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million; and
4. In exigent circumstances where life, safety and property could be negatively impacted due to the amount of time needed to secure BAP compliant materials.

Additionally, HUD previously issued a general applicability waiver that delays the applicability of the requirements of BABA for tribes and TDHEs that are recipients of HUD programs until at least May 14, 2023 (the Notice can be found [here](#)). HUD is working to review and consider all Tribal feedback provided during Tribal consultation on BABA and will provide additional information on the applicability of BABA on tribes and TDHEs in the near future.

Heather Dawn Thompson, USDA Director of Office Tribal Relations, provided an update on USDA programs. She noted that the USDA has a number of programs in rural America. Because many tribes are in rural areas, she encouraged tribes to look into USDA programs for funding. USDA programs include broadband, water, and infrastructure. Ms. Dawn Thompson commented that the USDA is hiring and she encouraged tribal members to apply.

Martin Sanchez, Vice President of Mortgage Sustainability, Wells Fargo Home Lending, remarked on Wells Fargo's efforts to help maintain sustainable homeownership. Mr. Sanchez announced that Wells Fargo has provided a new \$853,000 grant to a tribal housing assistance resource hub to help homeowners avoid foreclosure and help them remain in their homes.

b. Panel discussion: current legal issues in Indian Country.

Ed Clay Goodman, Partner at Hobbs Straus Dean & Walker; Sylvia Wirba, Partner of Wagenlander & Heisterkamp, LLC; Caroline LaPorte, Director of STTARS Indigenous Safe Housing Center, National Indigenous Women's Resource Center, joined a panel to discuss current legal impacts in Indian Country.

The panel first discussed the 2022 Supreme Court decision in *Oklahoma v. Castro-Huerta*. In this case, the Supreme Court held that both federal and the State of Oklahoma held joint jurisdiction to prosecute non-Native Americans for crimes in Indian Country. Ed remarked that this ruling overturns over two hundred years of legal precedent in federal Indian law. He noted that Justice Gorsuch's dissent is aligned with traditional federal Indian law, and is a powerful statement to how wrongly-decided the majority decision is. The panelists commented on their concerns with the reasoning used by the Court to reach its decision, including the assertion that Indian Country is part of the state and that states have jurisdiction in Indian Country unless Congress prohibits it. They also remarked on how the case makes clear that many of the current Justices have little or no understanding of Indian Country. One panelist commented on the troubling nature of the case, given that even though this case will have a significant negative impact in Indian Country, no tribe was a party to the case. She noted that with the current Supreme Court Justices, bringing any Indian law case to the Supreme Court in the next couple of years could be problematic.

The panelists also discussed how the *Castro-Huerta* case will impact the safety of women and children in Indian Country with regard to non-native perpetrators. They commented on the Violence Against Women Act (VAWA) and how VAWA indicates that Congress recognizes its federal trust responsibility to tribes. Further, VAWA is a bipartisan act and provides greater protection for Native women and children. Ed emphasized that VAWA does not apply to housing funded through IHBG unless the tribe itself has adopted VAWA. However, TDHEs can choose

to apply the VAWA provisions in order to provide greater protection against domestic violence for tribal housing tenants.

The panelists remarked on economic issues related to the cannabis industry in Indian Country. The panelists commented on the jurisdictional issues involved in cannabis, caused by the fact that many tribes and states have legalized cannabis while federal law still criminalizes it. These diverging laws create complicated issues for tribes that receive federal funding and therefore must comply with federal controlled substances law (which still outlaws cannabis) for housing that is federally funded.

Ed discussed the *Association of Village Council Presidents Regional Housing Authority v. Mael* case, which involved a mutual help and occupancy agreement (MHOA) home in which the boiler exploded and injured a resident of that home. The MHOA had expired and was conveyance-eligible, but the housing authority had not yet conveyed the home and had stopped conducting inspections. The resident of the home sued the housing authority for injuries resulting from the boiler explosion. The court held that since the housing authority had not formally conveyed the home, the housing authority still had duties under that MHOA to inspect the home. The court further held that the contractual obligations imposed by the MHOA created potential tort liability for negligence. While the case was decided in Alaska, other state or federal courts could apply the reasoning of that Alaska case to other tribes. This case therefore implicates tribes that have MHOA homes that are ready to be conveyed but that they have not yet conveyed. Under the reasoning of *Mael*, a tribe could be liable for issues or injuries that occur in that home. Further, if tribes have any MHOAs, the tribes are responsible for inspecting the units up until the point that they convey the units.

Finally, the panelists discussed the *Brackeen v Haaland* case, which involves challenges to the Indian Child Welfare Act (ICWA). The Supreme Court heard oral arguments on the *Brackeen* case on November 9, 2022. *Brackeen* attacks ICWA on two primary approaches: (1) that ICWA commandeers state governments, and (2) that ICWA draws classifications on the basis of race, thereby attacking the political identity of Indian tribes and persons. This position directly contradicts the holding in *Morton v Mancari* that “Indian” is a political classification based on tribal affiliation, instead of a racial classification. The panelists remarked that the *Castro-Heurta* case raises some concerns about how the Supreme Court could decide the *Brackeen* case. At the extreme, it could destroy a significant portion of Title 25 of the United States Code, which contains a majority of the laws on Indian Country and Native American programs, including NAHASDA. During oral arguments, some of the Justices also expressed concerns with the ICWA provisions providing for priority placement preferences of Native American children based on tribal family members and other tribal members, indicating they might see this placement preference as going beyond the political classification.

III. Breakout Sessions

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

a. *HUD Environmental Updates: Coordination, Radon, and Floodplains.*

Danielle Schopp, HUD Program Environmental Clearance Officer, gave a presentation on HUD's environmental updates concerning environmental review coordination, radon issues, and floodplain issues.

The Tribal Housing and Related Infrastructure Interagency Task Force (THRIITF). THRIITF is comprised of multiple tribal representatives and eight federal agencies (including HUD, U.S. Department of Interior (DOI), and BIA). THRIITF has been created to develop a coordinated environmental review process and to analyze federal agency National Environmental Policy Act (NEPA) categorical exclusions. Categorical exclusions are a class of actions that a federal agency has determined do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is normally required. As a result of its analysis, THRIITF developed recommendations for agencies to consider to align categorical exclusions with tribal housing needs. Additional information on THRIITF can be found [here](#). HUD also created a tribal environmental reviews training webinar series, which can be found [here](#).

Moving forward, THRIITF will be creating project planning guidance and will be coordinating federal interagency planning to increase the consistency of environmental review deadlines across federal agencies. THRIITF has also discussed a pre-screening process to help tribes determine whether the land is suitable for housing, and whether BIA NEPA review is needed for leasing actions. THRIITF will be developing NEPA efficiency tools based on updated Council on Environmental Quality (CEQ) and agency NEPA regulations.

Additionally, THRIITF will be completing tribal consultations and will be deploying a Tribal/Interagency Environmental Streamlining (TIES) Toolkit. The TIES Toolkit will contain information and efficiency tools. Tribes can use it to find environmental requirements for tribal housing and related infrastructure (electric, water, broadband, roads) from eight different federal agencies. The TIES Toolkit can also be used to learn about guidance and best practices for meeting the requirements of NEPA, historical preservation, and the protection of endangered species.

HUD has also issued a departmental radon policy proposal. HUD held tribal consultation webinars in October, 2022. Written comments were due December 3, 2022. HUD will not be going through an official rulemaking process, but HUD is currently reviewing the tribal comments it received. HUD will also be seeking additional tribal comments on the radon policy when HUD publishes it in the *Federal Register*. One key piece of feedback was that the proposed radon policy would be an unfunded mandate, which would impose significant burdens on tribes because of the radon requirements. Tribes are also concerned with the limited funding available for radon testing. Under HUD's proposed radon policy, radon would be considered as part of the contamination analysis required under a HUD environmental review. HUD is also considering allowing do-it-yourself radon testing for single-family housing and promoting continuous radon monitoring devices for remote areas where timeframes for shipping radon tests to labs may cause invalid results or where there are no radon professionals available. Additional information can be found in a [HUD Dear Tribal Leader Letter](#) addressing HUD's proposed radon policy.

Additionally, HUD will be releasing a proposal to update its floodplain management and wetlands protection regulations (24 CFR 55). The regulations currently outline the requirements and procedures for complying with Executive Order 11988—Floodplain Management, which requires federal activities to avoid impacts to floodplains and to avoid direct and indirect support of floodplain development to the extent practicable. HUD conducted tribal consultation on the updates to the regulations in 2021. In the proposed updated regulations, HUD proposes a three-tiered approach to define the Federal Flood Risk Management Standards (FFRMS). HUD proposes that it will use a climate informed science climate approach (CISA) when available. A 500-year flood plan will be used for those areas for which CISA data is not available. Additional information on the current regulations can be found [here](#). We will provide further information on the proposed regulations when it becomes available. The HUD representatives stated that comments on the proposal are due **December 13, 2022**.

b. Reducing Energy Costs with the Inflation Reduction Act.

John Clancy and Mark Bender, attorneys with Godfrey Kahn, discussed ways to reduce energy costs through funding available under the Inflation Reduction Act (IRA) and through other federal sources.

The presenters noted that the USDA rural energy for America program (REAP) provides competitive unrestricted grants up to \$500,000. Competitive loan guarantees are also available throughout the year. The IRA added an additional \$2 billion in funding available for the REAP, including \$300 million reserved for underutilized technologies. Tribal corporations or other tribal business entities chartered under Section 17 are eligible to receive REAP funding.

Additionally, the IRA created the following programs:

- High-Efficiency Electric Home Rebate Program (\$225 million is reserved for tribes)
- Tribal Electrification Program
- Tribal Climate Resilience through the BIA (\$220 million, available until September 30, 2031)
- Home energy property credit
- Climate pollution reduction grants (\$5 billion in competitive funding through EPA)
- Environmental and Climate Justice Block Grants (\$2.8 billion)
- Greenhouse Gas Reduction Fund (\$27 billion)
- Zero Emission Projects (\$7 billion)
- Greenhouse Gas and Air Pollution Reduction Projects (\$12 billion)

Additional information on these IRA programs and tax credits can be found [here](#) and [here](#).

There are also a number of federal grants outside of the IRA through which tribes can receive funding for reducing energy costs, including through the ICDBG and grants through the U.S. Department of Energy (DOE) Office of Indian Energy Infrastructure. Applications for the DOE Clean Energy Technology Deployment on Tribal Lands are due February 9, 2022, and applications for the Powering Unelectrified Tribal Building(s) are due February 23, 2022. Additional information on those and other DOE grants can be found [here](#). Approximately \$20

million in federal funds will be available for all DOE grants. Individual grant award amounts vary by topic, but range from about \$100,000 to \$400,000.

c. Construction Disputes: Strategies for Prevention

Sylvia Wirba, an attorney with Wagenlander & Heisterkamp LLC, gave a presentation on construction disputes. She provided an overview of the various steps involved in construction, which include: planning and design; securing financing; procurement; contracts; construction; construction management; and dispute resolution. Ms. Wirba remarked on the importance of drafting accurate and detailed contracts, as this can help a TDHE save money, avoid corruption, and avoid disputes during or after the construction phase.

Ms. Wirba also commented on other strategies that tribes and TDHEs can use to prevent disputes: using a design appropriate to the geographic area; conducting detailed planning; using up-to-date contract documents; and utilizing experienced development staff, consultants, and contractors. Ms. Wirba noted the importance of identifying funding sources and figuring out whether the tribe or TDHE will receive all of the funding before the project begins, or whether they will receive the funding in phases.

Regarding procurement and contracts, construction projects go more smoothly if the contracts contain detailed scopes of work and pricing parameters and limitations, so that TDHEs and contractors do not need to figure out and possibly disagree on the details after construction has already begun. The contract should also have clear, unambiguous terms and detailed provisions addressing dispute resolution, sovereign immunity, liquidated damages, and termination for cause. TDHEs can use contract forms developed by American Institute of Architects (A.I.A.) or HUD. However, if used, TDHEs should make sure to revise the forms to fit the TDHE's needs and protect the TDHE.

d. Evictions: the Nuts and Bolts of Legal Requirements

Ed Clay Goodman, Partner, and Cari Baermann, Associate Attorney at Hobbs Straus Dean & Walker, LLP, gave a presentation on the general legal requirements for eviction cases in tribal courts.

During the presentation, Ed and Cari provided an overview of the due process requirements that tribes meet in order to bring a successful eviction case in tribal courts. Each tribal code and tribal or TDHE housing policy varies on the details of the requirements, but NAHASDA and most tribal codes and housing policies require TDHEs to first give the tenant certain procedural rights and opportunities before receiving a court eviction order. Failure to follow the requirements to the letter will result in the eviction case being dismissed by the court. Requirements include the following:

- Advance written notice of reason for termination of lease (according to specific timelines set by law)
- Service of notice by specified means to ensure it is received
- Opportunity to correct the violations
- Opportunity for a hearing to challenge the termination and eviction

- Opportunity to review all records and documents related to the eviction
- Right to have counsel or other representative (at their own expense)

Even after providing proper notice to a tenant, enforcing evictions requires filing an action in court. A fundamental principle of landlord-tenant law (tribal, state, and federal) is that the landlord may not use “self-help” to evict a family that is in non-compliance. Landlords, including TDHEs, must rely on the assistance of law enforcement personnel and may not forcibly evict a tenant themselves.

Ed and Cari then walked through the basic steps for eviction, including the grounds for the initial violations of a rental agreement or tribal code, requirements for notices to the tenants of the violations, and an overview of an eviction court case. However, each tribe’s laws and policies are different, and tribes must look to their own specific laws and policies for timing, notice, and service requirements.

e. Section 184 Regulations Listening Session

As noted by Jad Atallah in his comments at the plenary session, HUD is in the process of proposing amendments to the Section 184 loan guarantee program regulations. As part of that process, HUD is conducting outreach and holding listening sessions with Indian tribes and organizations. A breakout session at the Legal Symposium served as one such listening session. We will report on that session separately as part of a memo discussing the proposed amendments, once they are released.

f. Lewis v. Clarke and Other Troubling Decisions

Ed Clay Goodman, Partner, Hobbs Straus Dean & Walker, LLP, Dave Heisterkamp, Managing Partner, Wagenlander & Heisterkamp, and Kelly Rudd, Managing Partner, Baldwin, Crocker & Rudd gave a presentation on the 2022 cases involving sovereign immunity and individual capacity lawsuits brought against tribal officials and tribal employees following in the wake of the 2017 *Lewis v. Clarke* Supreme Court decision. The courts have continued to refine the application of *Lewis v. Clarke*, and certain trends are becoming more obvious. One is that the more egregious the facts are in a particular case, the greater the likelihood a court is going to look for a means around sovereign immunity protections, and the individual capacity lawsuit approach is an option in those circumstances. However, the courts are also beginning to clearly distinguish those cases where the tribal official’s actions are actions that the official could only engage in as an official – such as voting on Tribal Council legislative decisions – and finding that the individual capacity waiver does not apply.

g. Transitioning Low-Income Housing Tax Credit (LIHTC) Rental Homes to Homeownership

Ed Clay Goodman, Partner, Hobbs Straus Dean & Walker, LLP, Ben Shockey, Associate Director of Acquisitions, Raymond James, and Adam Rose and Mike Price of Travois gave a presentation on issues related to transitioning out of the initial LIHTC compliance period at year 15, and into homeownership. They discussed issues related to determining the appropriate sales price, assuring affordability for homebuyers, developing and

implementing homeownership policies, both at the outset and at year 15, addressing and funding capital improvements, and the legal issues involved with the exit of the investor Limited Partner and whether to dissolve the Partnership entity or keep it going.

IV. Closing Plenary Session

The Legal Symposium concluded with a plenary session on Wednesday afternoon. There were two “model projects” presentations. The first was by representatives of the Housing Authority of the Choctaw Nation. Executive Director Bobby Yandel and his staff discussed a new housing project leveraging several funding sources using IHBG funds. Representatives of the Laguna Pueblo Housing Development and Management Enterprise made a presentation on the “New Compressed Earthen Block Home Construction Project,” featuring unique construction materials developed by the tribal program.

The plenary session concluded with a presentation from the Department of Native Hawaiian Homelands and a Hula Halau performance by members of the Kailihao Hula Studio. The presentation and performance were intended as a preview of the NAIHC Annual Convention to be held in Hawaii on May 8 – 11, 2023.

Conclusion

If you have any questions about this memorandum or any of the topics discussed in this memorandum, please contact Ed Clay Goodman (egoodman@hobbsstrauss.com) or Cari Baermann (cbaermann@hobbsstrauss.com); both may be reached by phone at 503-242-1745.