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MEMORANDUM

July 20, 2023

TO: TRIBAL HOUSING CLIENTS

FROM:  Ed Clay Goodman & Cari L. Baermann
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RE: ***NAHASDA and UNLOCKED Act Reported Out Favorably to the Senate***

On July 19, 2023, the Senate Committee on Indian Affairs reported out several bills to the Senate, including S.2285, which would reauthorize NAHASDA through 2034, and S.1322, the Unlocking Native Lands and Opportunities for Commerce and Key Economic Developments (UNLOCKED) Act of 2023. Both of these bills were amended prior being reported out. This report is intended to update you on the nature of the amendments and to identify some concerns with the UNLOCKED Act provisions.

NAHASDA Amendment

The NAHASDA amendment (MIR23995) adds a section to S. 2285 pertaining to loan guarantees for Native Hawaiian Housing. This language would amend existing legislation to expand opportunities for Native Hawaiian homeownership. The other provisions we covered in our memo of July 18, 2023, remain as part of the bill that has been forwarded to the full Senate. To recap, those are:

- Authorizing NAHASDA appropriations through 2034 (without any amounts specified);
- Re-establishing a Drug Elimination Program for tribal communities;
- Consolidating the environmental review requirements for housing;
- Allowing tribal housing programs to access the Indian Health Service (IHS) sanitation funding;
- Making tribes eligible for HUD Housing Counseling grants;
- Including HUD-Veterans Affairs Supportive Housing (HUD-VASH) provisions;
- Leveraging by using NAHASDA funding as a match for other federal grants;
- Adding “Student Housing Assistance” to the list of Affordable Housing Activities in 25 USC 4132(3);
- Applying maximum rent rule only to units owned or operated by the Tribe or TDHE (and thus not applicable to voucher programs);
- Raising the “de minimis” procurement amount from \$5000 to \$10,000;

- Allowing Tribes and TDHEs to convert low rent tenants to homebuyers with new contracts without requiring a new determination of eligibility so long as the tenant/homebuyer is in the same unit;
- Binding commitment requirement not applicable to home improvement work if the cost of the improvements does not exceed 10% of the maximum total development cost for the home;
- Granting HUD the authority to suspend grant funding in emergencies, with certain expedited notice and process requirements;
- Authorizing 99 year leases for housing purposes;
- Allowing Tribes and TDHEs to exceed Total Development Costs by 20% without HUD approval (an increase over the current 10%);
- Allowing Tribes and TDHEs to qualify as “community-based development organizations” for the purposes of carrying out new housing construction under a grant made under Section 106(a)(1) of Housing and Community Development Act of 1974;
- Amending the Section 184 loan guarantee program;
- Including Continuum of Care provisions.

UNLOCKED Act Amendment

The UNLOCKED Act amendment (NEW2326) is altogether more comprehensive, and contains both useful provisions as well as provisions that raise some concerns. Originally introduced by Senators Schatz (D-HI) and Murkowski (R-AK) in April of this year, the UNLOCKED Act stated intent is to eliminate barriers to Tribal infrastructure and economic development projects. It has two main components. The first component would authorize every tribe to issue leases of trust land for a period of up to 99 years with the approval of the Department of the Interior (Interior). This is up from the maximum of 50 years (25 plus 25 automatic renewal) currently authorized under the Long-Term Leasing Act of 1955 (25 U.S.C. § 415). Fifty-nine times since 1955, Congress has passed standalone legislation to authorize leases longer than the 25 plus 25 years, so the main focus of this provision is to allow all tribes to engage in long-term leasing without Congressional hurdles.

However, the UNLOCKED Act also requires Interior to consider several factors when deciding to approve a lease, factors which are not currently in the statute or in the BIA’s leasing regulations at 25 CFR part 162. These additional requirements raise some significant concerns. Under this language, Interior must give adequate consideration to the following factors:

- the relationship between the use of the land leased and the use of neighboring land;
- the height, quality, and safety of anything to be constructed on the leased land;
- the availability of public and fire safety services on leased land;
- the availability of judicial forums for criminal and civil causes of action arising on leased land; and
- the effect that activities on leased land would have on the environment.

Such requirements could considerably slow down the approval process or lead to the disapproval of leases that would have otherwise been approved under current law and regulation.

Second, this bill grants Tribes significantly more authority to issue rights-of-way. As it stands, Tribes must seek the approval of Interior to do so. However, if passed, the UNLOCKED Act would allow Tribes to grant rights-of-way without the approval of Interior, as long as they are executed in accordance with a Tribal Regulation approved by Interior. Amendment NEW2326 mainly concerns itself with what the Tribal Regulation review process would look like. This is similar to the HEARTH Act leasing authority enacted several years ago.

The amended UNLOCKED Act imposes a series of protocols guiding the review of Tribal Regulations that were not present in the original version of the bill. It requires a Tribe seeking the authority to issue rights-of-way to submit to Interior a Tribal Regulation that would govern the granting of rights-of-way, and it authorizes Interior to approve the application if certain criteria are met. For example, there must be an environmental review process, which includes requiring the Tribe to have a public comment period and respond to each comment submitted. The amendment also requires Interior to approve or disapprove the application within 180 days and establishes notification procedures if an application was not approved. Finally, it outlines procedures for dealing with violations of the Tribal Regulation and allows interested parties, as a last resort, to petition Interior to review compliance with the Regulation.

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 also be reached at 503-242-1745.

AMENDMENT NO. _____ Calendar No. _____

Purpose: To modify section 19.

IN THE SENATE OF THE UNITED STATES—118th Cong., 1st Sess.

S. 2285

To reauthorize the Native American Housing Assistance and
Self-Determination Act of 1996.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. SCHATZ

Viz:

1 Strike section and insert the following:

2 **SEC. 19. LOAN GUARANTEES FOR NATIVE HAWAIIAN HOUS-**
3 **ING.**

4 Section 184A of the Housing and Community Devel-
5 opment Act of 1992 (12 U.S.C. 1715z–13b) is amended—

6 (1) in subsection (b), by inserting “, and to ex-
7 pand homeownership opportunities to Native Hawai-
8 ian families who are eligible to receive a homestead
9 under the Hawaiian Homes Commission Act, 1920
10 (42 Stat. 108) on fee simple lands in the State of
11 Hawaii” after “markets”;

12 (2) in subsection (c)—

1 (A) by amending paragraph (2) to read as
2 follows:

3 “(2) ELIGIBLE HOUSING.—The loan shall be
4 used to construct, acquire, refinance, or rehabilitate
5 1- to 4-family dwellings that are standard housing.”;

6 (B) in paragraph (4)—

7 (i) in subparagraph (B)—

8 (I) by redesignating clause (iv) as
9 clause (v); and

10 (II) by adding after clause (iii)
11 the following:

12 “(iv) Any entity certified as a commu-
13 nity development financial institution by
14 the Community Development Financial In-
15 stitutions Fund established under section
16 104(a) of the Riegle Community Develop-
17 ment and Regulatory Improvement Act of
18 1994 (12 U.S.C. 4703(a)).”; and

19 (ii) by adding at the end the fol-
20 lowing:

21 “(C) INDEMNIFICATION.—

22 “(i) IN GENERAL.—If the Secretary
23 determines that a loan was not originated
24 in accordance with the requirements estab-
25 lished by the Secretary under this section,

1 the Secretary may require the lender to in-
2 demnify the Secretary for any loss or po-
3 tential loss, regardless of whether the non-
4 compliance caused or may cause the loan
5 default.

6 “(ii) DIRECT GUARANTEE ENDORSE-
7 MENT.—The Secretary may, dependent on
8 the availability of systems development and
9 staffing resources, delegate to eligible lend-
10 ers the authority to directly endorse loans
11 under this section.

12 “(iii) FRAUD OR MISREPRESENTA-
13 TION.—If fraud or misrepresentation was
14 involved in the direct guarantee endorse-
15 ment process by a lender under this sec-
16 tion, the Secretary shall require the ap-
17 proved direct guarantee endorsement lend-
18 er to indemnify the Secretary for any loss
19 or potential loss, regardless of whether the
20 fraud or misrepresentation caused or may
21 cause the loan default.

22 “(iv) IMPLEMENTATION.—The Sec-
23 retary may implement any requirements
24 described in this subparagraph by regula-
25 tion, notice, or Dear Lender Letter.”.

1 (C) in paragraph (5)(A), by inserting be-
2 fore the semicolon at the end the following: “ex-
3 cept, as determined by the Secretary, when
4 there is a loan modification under subsection
5 (i)(1)(B), the term of the loan shall not exceed
6 40 years”;

7 (3) in subsection (d)—

8 (A) in paragraph (1), by adding at the end
9 the following:

10 “(C) EXCEPTION.—When the Secretary
11 exercises its discretion to delegate direct guar-
12 antee endorsement authority pursuant to sub-
13 section (c)(4)(C)(ii), subparagraphs (A) and
14 (B) of this paragraph shall not apply.”;

15 (B) by amending paragraph (2) to read as
16 follows:

17 “(2) STANDARD FOR APPROVAL.—

18 “(A) APPROVAL.—The Secretary may ap-
19 prove a loan for guarantee under this section
20 and issue a certificate under this subsection
21 only if the Secretary determines that there is a
22 reasonable prospect of repayment of the loan.

23 “(B) EXCEPTIONS.—When the Secretary
24 exercises its discretion to delegate direct guar-

1 antee endorsement authority pursuant to sub-
2 section (c)(4)(C)(ii)—

3 “(i) subparagraph (A) shall not apply;

4 and

5 “(ii) the direct guarantee endorsement
6 lender may issue a certificate under this
7 paragraph as evidence of the guarantee in
8 accordance with requirements prescribed
9 by the Secretary.”; and

10 (C) in paragraph (3)(A), by inserting “or,
11 where applicable, the direct guarantee endorse-
12 ment lender,” after “Secretary” and

13 (4) in subsection (j)(5)(B), by inserting after
14 the first sentence the following: “There are author-
15 ized to be appropriated for those costs such sums as
16 may be necessary for each of fiscal years 2024
17 through 2034.”.

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—118th Cong., 1st Sess.

S. 1322

To amend the Act of August 9, 1955, to modify the authorized purposes and term period of tribal leases, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by _____

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Unlocking Native
5 Lands and Opportunities for Commerce and Key Eco-
6 nomic Developments Act of 2023”.

7 **SEC. 2. MODIFICATION OF TRIBAL LEASES AND RIGHTS-OF-**
8 **WAY ACROSS INDIAN LAND.**

9 (a) EXTENSION OF TRIBAL LEASE PERIOD.—The
10 first section of the Act of August 9, 1955 (69 Stat. 539,

1 chapter 615; 25 U.S.C. 415) (commonly known as the
2 “Long-Term Leasing Act”), is amended—

3 (1) by striking “That (a)” and all that follows
4 through the end of subsection (a) and inserting the
5 following:

6 **“SECTION 1. LEASES OF RESTRICTED LAND.**

7 “(a) AUTHORIZED PURPOSES; TERM; APPROVAL BY
8 SECRETARY.—

9 “(1) IN GENERAL.—Any restricted Indian
10 lands, regardless of whether that land is tribally or
11 individually owned, may be leased by the Indian
12 owner of the land, with the approval of the Sec-
13 retary, for—

14 “(A) a public, religious, educational, rec-
15 reational, residential, business, or grazing pur-
16 poses; or

17 “(B) a farming purpose that requires the
18 making of a substantial investment in the im-
19 provement of the land for the production of 1
20 or more specialized crops as determined by the
21 Secretary.

22 “(2) INCLUSIONS.—A lease under paragraph
23 (1) may include the development or use of natural
24 resources in connection with operations under that
25 lease.

1 “(3) TERM.—

2 “(A) IN GENERAL.—Except as provided in
3 subparagraph (B), a lease under paragraph (1)
4 shall be for a term of not more than 99 years,
5 including any renewals.

6 “(B) EXCEPTION FOR GRAZING PUR-
7 POSES.—A lease under paragraph (1) for graz-
8 ing purposes may be for a term of not more
9 than 10 years, including any renewals.

10 “(4) REQUIREMENT.—Each lease and renewal
11 under this subsection shall be made in accordance
12 with such terms and regulations as may be pre-
13 scribed by the Secretary.

14 “(5) CONDITIONS FOR APPROVAL.—Before the
15 approval of any lease or renewal of an existing lease
16 pursuant to this subsection, the Secretary shall de-
17 termine that adequate consideration has been given
18 to—

19 “(A) relationship between the use of the
20 leased lands and the use of neighboring land;

21 “(B) the height, quality, and safety of any
22 structures or other facilities to be constructed
23 on the leased land;

24 “(C) the availability of police and fire pro-
25 tection and other services on the leased land;

1 “(D) the availability of judicial forums for
2 all criminal and civil causes of action arising on
3 the leased land; and

4 “(E) the effects on the environment of the
5 uses to which the leased lands will be subject.”;

6 (2) in subsection (b)—

7 (A) by striking “(b) Any lease” and insert-
8 ing the following:

9 “(b) EXCEPTION FOR SECRETARY APPROVAL.—Any
10 lease”;

11 (B) by striking “of the Interior” each
12 place it appears; and

13 (C) by striking “clause (3)” and inserting
14 “paragraph”;

15 (3) by redesignating subsections (a), (b), (c),
16 and (d) as subsections (b), (c), (d), and (a), respec-
17 tively, and moving the subsections so as to appear
18 in alphabetical order;

19 (4) by striking “subsection (a)” each place it
20 appears and inserting “subsection (b)”; and

21 (5) in subsection (h)(1)—

22 (A) in the matter preceding subparagraph
23 (A), by striking “and the term of the lease does
24 not exceed—” and inserting a period; and

1 (B) by striking subparagraphs (A) and
2 (B).

3 (b) TECHNICAL CORRECTION.—Section 2 of the Act
4 of August 9, 1955 (69 Stat. 539, chapter 615; 25 U.S.C.
5 415a) (commonly known as the “Long-Term Leasing
6 Act”), is amended by inserting “of the Interior” after
7 “Secretary” each place it appears.

8 (c) MODIFICATIONS OF RIGHTS-OF-WAY ACROSS IN-
9 DIAN LAND.—The Act of February 5, 1948 (62 Stat. 17,
10 chapter 45), is amended—

11 (1) in the first section (62 Stat. 17, chapter 45;
12 25 U.S.C. 323), by striking “That the Secretary of
13 the Interior be, and he is hereby, empowered to”
14 and inserting the following:

15 **“SECTION 1. RIGHTS-OF-WAY FOR ALL PURPOSES ACROSS**
16 **INDIAN LAND.**

17 “(a) RIGHTS-OF-WAY.—The Secretary of the Interior
18 may”;

19 (2) in section 2 (62 Stat. 18, chapter 45; 25
20 U.S.C. 324), by striking “organized under the Act
21 of June 18, 1934 (48 Stat. 984), as amended; the
22 Act of May 1, 1936 (49 Stat. 1250); or the Act of
23 June 26, 1936 (49 Stat. 1967),”; and

24 (3) by adding at the end the following:

1 **“SEC. 8. TRIBAL GRANTS OF RIGHTS-OF-WAY.**

2 “(a) RIGHTS-OF-WAY.—

3 “(1) IN GENERAL.—Subject to paragraph (2),
4 an Indian tribe may grant a right-of-way over and
5 across the Tribal land of the Indian tribe for any
6 purpose.

7 “(2) AUTHORITY.—A right-of-way granted
8 under paragraph (1) shall not require the approval
9 of the Secretary of the Interior or a grant by the
10 Secretary of the Interior under the section 1 if the
11 right-of-way granted under paragraph (1) is exe-
12 cuted in accordance with a Tribal regulation ap-
13 proved by the Secretary of the Interior under sub-
14 section (b).

15 “(b) REVIEW OF TRIBAL REGULATIONS.—

16 “(1) TRIBAL REGULATION SUBMISSION AND AP-
17 PROVAL.—

18 “(A) SUBMISSION.—An Indian tribe seek-
19 ing to grant a right-of-way under subsection (a)
20 shall submit for approval a Tribal regulation
21 governing the granting of rights-of-way across
22 the Tribal land of the Indian tribe.

23 “(B) APPROVAL.—Subject to paragraph
24 (2), the Secretary of the Interior shall have the
25 authority to approve or disapprove any Tribal
26 regulation submitted under subparagraph (A).

1 “(2) CONSIDERATIONS FOR APPROVAL.—

2 “(A) IN GENERAL.—The Secretary of the
3 Interior shall approve a Tribal regulation sub-
4 mitted under paragraph (1)(A), if the Tribal
5 regulation—

6 “(i) is consistent with any regulations
7 (or successor regulations) issued by the
8 Secretary of the Interior under section 4;

9 “(ii) provides for an environmental re-
10 view process that includes—

11 “(I) the identification and eval-
12 uation of any significant impacts the
13 proposed action may have on the envi-
14 ronment; and

15 “(II) a process for ensuring—

16 “(aa) that the public is in-
17 formed of, and has a reasonable
18 opportunity to comment on, any
19 significant environmental impacts
20 of the proposed action identified
21 by the Indian tribe under sub-
22 clause (I); and

23 “(bb) the Indian tribe pro-
24 vides a response to each relevant
25 and substantive public comment

1 on the significant environmental
2 impacts identified by the Indian
3 tribe under subclause (I) before
4 the Indian tribe approves the
5 right-of-way.

6 “(B) STATUTORY EXEMPTIONS.—The Sec-
7 retary of the Interior, in making an approval
8 decision under this subsection, shall not be sub-
9 ject to—

10 “(i) the National Environmental Pol-
11 icy Act of 1969 (42 U.S.C. 4321 et seq.);

12 “(ii) section 306108 of title 54,
13 United States Code; or

14 “(iii) the Endangered Species Act of
15 1973 (16 U.S.C. 1531 et seq.).

16 “(3) REVIEW PROCESS.—

17 “(A) IN GENERAL.—Not later than 180
18 days after the date on which the Indian tribe
19 submits a Tribal regulation to the Secretary of
20 the Interior under paragraph (1)(A), the Sec-
21 retary of the Interior shall—

22 “(i) review the Tribal regulation;

23 “(ii) approve or disapprove the Tribal
24 regulation; and

1 “(iii) notify the Indian tribe that sub-
2 mitted the Tribal regulation of the ap-
3 proval or disapproval.

4 “(B) WRITTEN DOCUMENTATION.—If the
5 Secretary of the Interior disapproves a Tribal
6 regulation submitted under paragraph (1)(A),
7 the Secretary of the Interior shall include with
8 the disapproval notification under subparagraph
9 (A)(iii) written documentation describing the
10 basis for the disapproval.

11 “(C) EXTENSION.—The Secretary of the
12 Interior may, after consultation with the Indian
13 tribe that submitted a Tribal regulation under
14 paragraph (1)(A), extend the 180-day period
15 described in subparagraph (A).

16 “(4) FEDERAL ENVIRONMENTAL REVIEW.—
17 Notwithstanding paragraphs (2) and (3), if an In-
18 dian tribe carries out a project or activity funded by
19 a Federal agency, the Indian tribe may rely on the
20 environmental review process of the applicable Fed-
21 eral agency rather than any Tribal environmental re-
22 view process required under this subsection.

23 “(c) DOCUMENTATION.—An Indian tribe granting a
24 right-of-way under subsection (a) shall provide to the Sec-
25 retary of the Interior—

1 “(1) a copy of the right-of-way, including any
2 amendments or renewals; and

3 “(2) if the right-of-way allows for compensation
4 to be made directly to the Indian tribe, documenta-
5 tion of payments that are sufficient, as determined
6 by the Secretary of the Interior, as to enable the
7 Secretary of the Interior to discharge the trust re-
8 sponsibility of the United States under subsection
9 (d).

10 “(d) TRUST RESPONSIBILITY.—

11 “(1) IN GENERAL.—The United States shall
12 not be liable for losses sustained by any party to a
13 right-of-way granted under subsection (a).

14 “(2) AUTHORITY OF THE SECRETARY.—

15 “(A) IN GENERAL.—Pursuant to the au-
16 thority of the Secretary of the Interior to fulfill
17 the trust obligation of the United States to the
18 applicable Indian tribe under Federal law (in-
19 cluding regulations), the Secretary of the Inte-
20 rior may, on reasonable notice from the applica-
21 ble Indian tribe and at the discretion of the
22 Secretary of the Interior, enforce the provisions
23 of, or cancel, any right-of-way granted by the
24 Indian tribe under subsection (a).

1 “(B) AUTHORITY.—The enforcement or
2 cancellation of a right-of-way under subpara-
3 graph (A) shall be conducted using regulatory
4 procedures issued under section 6.

5 “(e) COMPLIANCE.—

6 “(1) IN GENERAL.—An interested party, after
7 exhaustion of any applicable Tribal remedies, may
8 submit a petition to the Secretary of the Interior, at
9 such time and in such form as determined by the
10 Secretary of the Interior, to review the compliance of
11 an applicable Indian tribe with a Tribal regulation
12 approved by the Secretary of the Interior under sub-
13 section (b).

14 “(2) VIOLATIONS.—If the Secretary of the Inte-
15 rior determines that a Tribal regulation was violated
16 after conducting a review under paragraph (1), the
17 Secretary of the Interior may take any action the
18 Secretary of the Interior determines to be necessary
19 to remedy the violation, including rescinding the ap-
20 proval of the Tribal regulation and reassuming re-
21 sponsibility for approving rights-of-way through the
22 trust land of the applicable Indian tribe.

23 “(3) DOCUMENTATION.—If the Secretary of the
24 Interior determines that a Tribal regulation was vio-

1 lated after conducting a review under paragraph (1),
2 the Secretary of the Interior shall—

3 “(A) provide written documentation, with
4 respect to the Tribal regulation that has been
5 violated, to the appropriate interested party and
6 Indian tribe;

7 “(B) provide the applicable Indian tribe
8 with a written notice of the alleged violation;
9 and

10 “(C) prior to the exercise of any remedy,
11 including rescinding the approval for the appli-
12 cable Tribal regulation or reassuming responsi-
13 bility for approving rights-of-way through the
14 trust land of the applicable Indian tribe, pro-
15 vide the applicable Indian tribe with—

16 “(i) a hearing that is on the record;
17 and

18 “(ii) a reasonable opportunity to cure
19 the alleged violation.

20 “(f) SAVINGS CLAUSE.—Nothing in this section af-
21 fects the application of any Tribal regulations issued
22 under Federal environmental law.

23 “(g) EFFECT OF TRIBAL REGULATIONS.—An ap-
24 proved Tribal regulation under subsection (b) shall not
25 preclude an Indian tribe from, in the discretion of the In-

1 dian tribe, consenting to the grant of a right-of-way by
2 the Secretary of the Interior under the section 1.

3 “(h) TERMS OF RIGHT-OF-WAY.—The compensation
4 for, and terms of, a right-of-way granted under subsection
5 (a) will be determined by—

6 “(1) negotiations by the Indian tribe; or

7 “(2) the regulations of the Indian tribe.

8 “(i) JURISDICTION.—The grant of a right-of-way
9 under subsection (a) does not waive the sovereign immu-
10 nity of the Indian tribe or diminish the jurisdiction of that
11 Indian tribe over the Tribal land subject to the right-of-
12 way, unless otherwise provided in—

13 “(1) the grant of the right-of-way; or

14 “(2) the regulations of the Indian tribe.”.