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## MEMORANDUM

November 6, 2023

TO: TRIBAL HOUSING CLIENTS

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

RE: ***HUD ONAP Tribal Housing Summit***

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This memorandum provides a synthesis of recent developments in housing matters, as well as information presented during the United States Department of Housing and Urban Development (HUD) Office of Native American Programs (ONAP) Tribal Housing Summit held in Saint Paul, Minnesota on October 31–November 2, 2023.

### I. Opening Remarks

**David Southerland**, HUD ONAP Southwest Administrator; Chief Executive **Melanie Benjamin** of the Mille Lacs Band of Ojibwe; **Tom Garcia**, White House Council on Native American Affairs (WHCNAA); **Diane Shelley**, HUD Regional Administrator; **Richard Monocchio**, PIH Deputy Assistant Secretary ONAP; and **Heidi J. Frechette**, ONAP Deputy Assistant Secretary, gave opening remarks.

Deputy Assistant Secretary Frechette remarked on successes in tribal communities, including the Choctaw Nation ConnectHomeUSA program, the Cheyenne and Arapaho Tribes Emergency Youth Shelter, and the Lummi Nation’s supportive community center. Chief Executive Benjamin discussed some of the housing efforts of the Mille Lacs Band of Ojibwe, including utilizing the Minnesota low income housing tax credit (LIHTC) funding, providing housing for elders, and creating homeownership programs with low interest rates.

In his presentation, Mr. Garcia noted that the WHCNAA is specifically looking for tribal feedback on the following questions:

1. Are there other tribal departments that should be included on the newsletter listserve?
2. Are there joint interagency training sessions that you would like to see?
3. Are there issues with differing policies that make combining funding challenging?
4. Do you feel that you are getting up to date information on new funding sources through the Inflation Reduction Act?
5. Are there challenges in accessing these new funding sources?

## II. Plenary Sessions

ONAP began each of the subsequent days with plenary sessions. The first plenary was a roundtable discussion of philanthropy efforts to prevent and end homelessness. The roundtable was moderated by **Kelly Dennis**, Partnership Strategist of the Office of Strategic Partnerships, Native Americans in Philanthropy. The panelists were **Jane Lawrenz**, Interim Coordinator, Minnesota Tribal Collaborative to Prevent & End Homelessness; **Tonya Plummer**, Native American Housing Programs Director, Enterprise Community Development; and **Onna LeBeau**, Director of the Office of Indian Economic Development (OIED). The panelists began by talking about research efforts to determine the homelessness issues in tribal communities and how generational trauma has contributed to high levels of homelessness in tribal communities. The panelists remarked on some of the barriers that tribes still face in providing housing, including grant funders' lack of knowledge of the unique characteristics and needs of tribal communities; mortgage lenders' hesitancy to lend on tribal trust land because of a limited ability to secure their loans; and limited tribal resources with which to obtain grants. The panelists noted the importance of increasing research and specific data on homelessness in tribal communities as a way to persuade grant funders to award grants to tribes and Tribally Designated Housing Entities (TDHEs).

The second plenary was a roundtable addressing Urban Indian Housing issues. Participants in the roundtable were representatives of urban Indian organizations in Seattle, Portland, and Minneapolis. They addressed the challenges in providing housing for urban Indian populations, namely the lack of a direct funding source for such housing, but also presented success stories in using existing lines of funding and collaborating with local tribal governments.

## III. Breakout Sessions

The remainder of the summit involved breakout sessions involving a variety of topics, several of which involved federal consultation on proposed rulemaking. The National American Indian Housing Council (NAIHC) will provide the materials used for each breakout session on its website. We report on several of these sessions below.

### *a. Federal Partners Panel*

Federal staff members from a number of federal agencies gave a presentation on federal programs and resources available to help tribal communities address a number of different issues.

A staff member from the U.S. Department of Education's Office for Civil Rights (OCR) gave remarks on the OCR's efforts to help tribes. The OCR is a federal civil rights law enforcement office in the Department of Education, with a mission to ensure equal access to education. The OCR enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Despite frequent incidents of discrimination, the OCR staff noted that the OCR does not receive many complaints of discrimination. The OCR therefore encourages tribes and tribal members to file

complaints with the OCR to allow OCR to assist tribal members in addressing discrimination. Information on how to file a discrimination complaint with the OCR is available [here](#).

Staff from the U.S. Social Security Administration Office of Native American Partnerships (SSA ONAP) commented on the SSA ONAP's efforts to increase tribal consultations and to visit tribal communities in person. They noted that SSA ONAP is taking steps to address one of the current problems with tribal consultations—that the federal employees with the ability to make decisions are not the staff members who are attending the consultations, which decreases the tribes' trust that their needs will actually be heard and addressed.

Staff from the U.S. Department of Labor (DOL), Office of Job Corps ("Job Corps") commented on the job training available to tribal youth through the Job Corps. The Job Corp is a no-cost education and vocational training program administered by the DOL that assists young people ages 16–24 by empowering them to obtain jobs. The Job Corps provides employment services, such as career planning, employability skills training, and assistance with starting a job search. More information can be found [here](#).

Staff from the DOL Women's Bureau noted that the Women's Bureau's mission is to advocate for policies and standards that safeguard the rights of working women. The key priorities are closing the gender and racial wage game, eliminating the caregiving penalty for women, and addressing workplace discrimination in the workplace. Two grants, the [Women in Apprenticeships and Non-Traditional Occupants \(WANTO\)](#) and the [Fostering Access, Rights, and Equity \(FARE\)](#), are available to native women to assist them in finding and securing jobs.

The federal staff members also noted that many of the federal agency resources discussed above are available to tribal members in both urban and rural settings, on and off tribal trust lands. Tribal members and TDHEs are therefore encouraged to seek out other resources available to them that can help them leverage current funding sources and programs.

#### *b. Understanding Research Needs in Tribal Communities*

**Joseph Downs**, HUD Office of Policy Development and Research (PD&R), gave an overview of HUD and tribal research priorities for tribal areas and the need for technical assistance, and laid out several areas where PD&R is seeking tribal input. PD&R is responsible for maintaining current information on housing needs, market conditions, and existing programs, as well as conducting research on priority housing and community development issues. The PD&R focuses on how programs can be made better through quick-turnaround studies and long-term evaluations.

PD&R has created a [Learning Agenda](#) ("Learning Agenda") that is a roadmap of what HUD considers to be critical research opportunities and needs. The Learning Agenda is based on tribal consultations, listening sessions, and prior HUD research reports. PD&R is also participating in the HUD Tribal Intergovernmental Advisory Committee (TIAC) as part of its efforts to hear from tribal leaders about the research needs in tribal communities. PD&R is seeking tribal feedback on the following questions:

1. What is the impact of the Indian Housing Block Grant Program's (IHBG) competitive grant program for housing in tribal areas?
2. What are the distinct impacts and challenges of climate change in tribal communities and U.S. territories, and what are implications for housing and community development?
3. What are the most effective disaster recovery, mitigation, and adaptation strategies undertaken by tribal communities, including pandemic response?
4. How are crisis response approaches to prevent and end homelessness different in tribal areas?
5. What is the feasibility of developing local sources of building components and materials in tribal areas to reduce housing construction costs?

PD&R is also seeking tribal feedback on what other questions it should be asking and how else it can prioritize its research goals to adequately meet tribal housing needs. Participants responded that the following are some current priorities:

1. Focusing more closely on urban tribal needs
2. Researching what factors are causing homelessness in tribal areas
3. Focusing on how climate change is affecting tribal areas
4. Recognizing that tribal areas have very different needs based on their geographic location and so research and data should be tailored to the unique locations
5. Compiling data on the staffing shortages, needs, and capacities of TDHEs

PD&R also has three main technical assistance (TA) programs that tribes can access:

1. [Community Compass](#): funds TA and capacity building activities
  2. [Distressed Cities and Persistent Poverty Technical Assistance Program \(DCTA\)](#): resources for tribal fiscal health, economic health, affordable housing; and
  3. [Thriving Communities](#): designed to support the coordination and integration of transportation and housing in infrastructure planning and implementation.
- c. *Tribal Insights: Best Practices for Indian Housing Block Grant Program – American Rescue Plan Act (IHBG-ARPA) (IHBG-ARPA) and Indian Community Development Block Grant Program – American Rescue Plan Act (ICDBG-ARPA) Programs*

This session was presented by **Christine Dennis**, a consultant with FirstPic. This presentation was sponsored by HUD and involved presenting information from interviews with a number of Tribes and TDHEs on their use of IHBG-ARPA and ICDBG-ARPA funds.

The Confederated Tribes of the Umatilla Indian Reservation developed an emergency response program for COVID. It included a wide spectrum of services and resources to help alleviate the impacts of COVID including public safety response, personal protective equipment (PPE), emergency housing, and supplies. Ho Chunk Housing and Community Development Agency (HHCDA) developed a community resources warehouse for emergency essential and public health education. As part of the warehouse they provided seeds, assistance, and a community garden space to improve food stability and cultural education. HHCDA also developed a new software program to enable submitting and processing program applications

online. HHCDA also developed tenant software that allows for remote interactions (to reduce the risk of infection transmission), but that also empowers applicants to check their application, status, waitlist placement, and update information in real time. The key to getting this work done was having already had information from their tenants based on ongoing community survey work.

The Comanche Nation Housing Authority (CNHA) expanded homeownership opportunities through a comprehensive strategy that involved purchasing move-in ready homes and selling them to tribal members on favorable terms. The approach emphasized participant eligibility (setting a minimum income of \$25,000 and other preparation prior to move in). CNHA developed a lease/purchase program designed to enhance affordability through a decrease in \$50,000 of the purchase price and a 0% interest rate. The challenges involved getting participants trained and ready to enter the program, establishing higher-level guidelines, and finding affordable housing units.

The Kaw Housing Authority developed a plan to tackle food insecurity and housing for Tribal members during the pandemic. This plan involved: purchasing air filters and water dispensers for Tribal members; distributing cleaning supplies, masks, and gloves; making food boxes available on a weekly basis; providing, gas and grocery vouchers; and making safety repairs to units.

One of the key takeaways from programs that were able to successfully and expeditiously deploy these funds was having a comprehensive strategic plan already in place. Those plans (and the resident input that formed the basis of those plans) were critical in identifying an approach that could be implemented quickly and that could target needs already identified in the community. Many of those needs were exacerbated by the COVID pandemic, and thus the plans in pretty much every case dovetailed with the emergency to be addressed by these funding sources. These plans served as a foundation, allowing these groups to rapidly establish goals and detailed plans. The existing framework provided a roadmap for allocating resources.

*d. Davis-Bacon and Tribally Determined Wages*

This session was presented by **Loretta Szweduik**, Contractor Industrial Relations Specialist for HUD Office of Davis-Bacon and Labor Standards (HUD-DBLS). The HUD-DBLS monitors and enforces compliance with Davis-Bacon and related acts, as well as labor standards. HUD-DBLS is also responsible for issuing the maintenance wage rate determinations. HUD-DBLS is now moving back into a more active mode for monitoring post-COVID pandemic. They are working with HUD ONAP to provide training and TA in addition to just monitoring and enforcement.

The Native American Housing Assistance and Self Determination Act (NAHASDA) Section 104(b) requires Davis-Bacon wages be applied to “development work” (new construction, reconstruction, major renovation and repair), with a minimum threshold of \$2000. HUD-determined wages are to be applied to “operations” work (work done on an ongoing basis to maintain units and property). The prevailing wage rates apply to employees of the Tribe/TDHE as well as employees of contractors and subcontractors. If a prevailing wage is required, it

applies to all laborers and mechanics carrying out that work. Personnel who are covered are those who are carrying out work that is manual or physical in nature. Note that Davis-Bacon does not apply to ICDBG.

NAHASDA was amended (section 104(b)(3)) to allow an Indian tribe to adopt a law or regulation requiring payment of Tribally-determined prevailing wages, which replaces Davis-Bacon and/or HUD-determined wage rates. If a Tribe adopts its own Tribally-determined wage rates, Davis-Bacon and HUD-determined wage rates will not apply. A Tribe can adopt prevailing wage rates for all trades and categories, or only for some of them. Tribally-determined wage rates can be done through a Tribal resolution and does not require HUD approval. It must be done by the Tribal governing body, and it must be certified annually in Section 9 of your Indian Housing Plan (IHP).

Tribes and TDHEs must submit the Semi-Annual Labor Standards Enforcement Report (HUD-4710). It is not required if the Tribe has adopted its own Tribally Determined Wage rates. The only Davis-Bacon contracts that must be reported on are those that were awarded within the six-month reporting period. The reporting periods are twice a year: April 1 to September 30 and October 1 – March 31.

*e. Department of Energy Programs: Access to Capital and Tribal Home Energy Rebates*

**Adam Hasz** from the Department of Energy (DOE) State and Community Energy Programs, and **Tommy Jones** from the DOE Office of Indian Energy (OIE) gave a presentation on DOE programs. The OIE is charged by Congress to “provide, direct, foster, coordinate, and implement energy planning, education, management, conservation and delivery programs that (1) promote Indian tribal energy development, efficiency and use; (2) reduce or stabilize energy costs; (3) enhance and strengthen Indian tribal energy and economic infrastructure; and (4) bring electrical power and service to Indian lands and homes of Tribal members.” The OIE has three areas it works in: financial assistance, technical assistance, education, and capacity building.

Projects that the OIE has funded tend to be smaller scale, approximately \$2.5 million or below. The presenters gave examples of OIE-funded projects from the Coeur d’Alene Tribe and the Spokane Indian Housing Authority. Both involved installation of solar power infrastructure (batteries, cells, etc.). Tribes/TDHEs are now expected to provide only 10% cost share (the cost share used to be much higher, approximately 50%), which can be in the form of in-kind. The OIE is charged to work with tribes and the OIE has invested more than \$120 million in 210 tribal energy projects since 2010. The budget for the OIE has gone up substantially over the past few years. A TDHE will need a resolution from the Tribe in order to participate in an OIE project.

Over the past year the OIE has made 18 awards for approximately \$34 million for two programs: clean energy deployment on tribal lands and powering unelectrified tribal buildings. The types of projects involved the following technology: renewable (44%), microgrid (39%), electrification (11%), and efficiency (6%). New funding this past year was for a program of project and curriculum planning for Tribal Colleges and Universities (\$15 million). The funds would be used to develop curriculum for energy use and efficiency.



The OIE also provides TA. The types of TA offered are technical analysis (over half the TA requests are from this category), financial analysis, and strategic energy planning. One of the main examples of technical analysis is rooftop solar analysis (feasibility, cost, design).

The OIE is holding an Annual Program Review in Denver from November 13–17, 2023, in Denver, CO. The Program Review is a weeklong series of presentations, and is free of charge. You can find a list of funding opportunities on the OIE’s website, which includes funding opportunities through both DOE and other agencies. The OIE also has a listserv that individuals can subscribe to: [energy.gov/indianenergy/contact-us-and-staff](https://energy.gov/indianenergy/contact-us-and-staff).

Mr. Hasz provided an overview of the Tribal Home Electrification and Appliance Rebates Program. This Program was authorized under the Inflation Reduction Act (IRA), and makes \$225 million available to tribes through September 30, 2031. All federally-recognized tribes and Alaska Native Corporations are eligible for a funding allocation from DOE. The expected minimum is \$150,000 for each tribe with local housing needs. The goal is to develop, implement, and subsidize residential electrification and appliance upgrade projects for Tribal and Alaska Native households. The process is that tribes apply for the funding, and then the tribe administers the program. Tribes can also form a consortium or select a third-party to run a rebate program. DOE will provide TA to help tribes create an acceptable application.

The funds may be used to provide rebates, determine eligibility, work with contractors to streamline rebate processing, verify quality installation and document home upgrades, and help households bundle funds and financing to further reduce upfront costs. The households eligible for this program must be low- to- moderate income, and each household can receive up to \$14,000 (subject to availability). The following upgrades are covered by the Program, with the maximum amounts allowed in parentheses: electric heat pump HVAC system (\$8,000); electric heat pump water heater (\$1,750); electric stove, cooktop, range or oven (\$840); electric heat pump clothes dryer (\$84); electric circuit panel upgrade (\$4,000); insulation, air sealing, and ventilation (\$1,600); electric wiring upgrades (\$2,500). For the appliances, the purchase must be a first-time purchase of new equipment; the rebate is not available to upgrade an existing appliance of the same category. Funding cannot be used for solar, batteries, or electric vehicles. Tribes do not need to fund every one of these upgrades, but can provide only certain upgrades from the list; tribes can determine what their priorities are and fund those priorities. Total electrification rebates cannot exceed \$14,000 per household. Tribes can cover the full cost for households below 80% of area median income (AMI), and half the cost for households between 80% - 150% of AMI.

The IRA included specific restrictions on blending sources of other federal funds in these kinds of upgrades. When tribes are using other sources of federal funds, they must be sure to “braid” those sources, meaning that each source of federal funding goes to distinct and separable measures. One participant asked whether a forgivable loan is treated as a loan or as another grant for purposes of blending funds. Mr. Hasz said that he would contact legal counsel in DOE to obtain an answer to that question.

*f. HUD Overview of the Environmental Review Process*

The presentation was provided by **Danielle Schopp** and **David Nuccio** (both of whom are HUD Program Environmental Clearance Officers). They began with a broad overview the environmental review process, including why such review is required. The requirement begins with the National Environmental Policy Act (NEPA). This law was adopted in 1970, and its requirements are procedural, requiring environmental analyses and review, identifying adverse effects. It does not require any substantive outcomes but does require a thorough and transparent process with the opportunity for public review and comment. Federal agencies are required to prepare a detailed statement on the (1) environmental impacts of proposed action; (2) any adverse effects that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between short term uses and long-term productivity of the environment; and (5) any irreversible impacts.

Under 24 CFR Part 58, Indian tribes have the authority to assume federal review and environmental decision-making powers. When the tribe declines to exercise this authority, HUD steps in to carry out the environmental review under 24 CFR part 50. Under Part 58, the tribe must have a certifying officer sign off on environmental review documents. This is usually the elected tribal leader, but he or she can make a formal written delegation from that officer or a resolution from the tribal legislative body. *See* ONAP Notice 17-03.

The first step of the environmental review process is to prepare a thorough and meaningful description of the project. It must include: location, purpose and need, project beneficiaries and development partners, federal action that are involved (type of project, all activities, number of units, physical description of existing and proposed new buildings), area setting (character, feature, resources, existing conditions), and the total estimated project cost (including all funding sources, not just HUD funding). This is the basis for determining the level of environmental review, conducting analyses, determining compliance, and providing public notice. If the project description is not valid and thorough, mistakes will perpetuate throughout the process. Under 24 CFR § 58.32, activities should be aggregated into a single project if those activities are (a) geographically related or (b) functionally related (logical parts of a composite project). Aggregation forms the basis for project descriptions. You must identify all activities and develop a complete project description. The review is generally valid for up to five years so long as there is (a) not change in project scope and (b) no change in environmental conditions. The public needs to understand the proposed action.

The second step is determining the level of environmental review. There are five levels: (a) exempt; (b) categorical exclusions not subject to 24 CFR § 58.32 (c) categorical exclusions subject to 58.5 (requires notice of intent and Request for Release of Funds (RROF)); (d) environmental assessment (requires a finding of no significant impact (FONSI)); and (e) environmental impact statement (EIS). As you increase the level of review, the level of complexity and the time it takes to complete increase. The first three levels of exemption/exclusion are established by rulemaking; if the project does not meet the requirements, you must begin with an environmental assessment. Exempt actions are those without physical impacts. *See* 24 CFR § 58.34 and 58.35 for examples (including tenant based rental assistance; assisting homebuyers purchasing homes already under construction or already



built; ongoing operations and maintenance; security; utilities; staff; supplies, etc.). Categorical exclusions subject to 24 CFR § 58.5 are the areas where the most review is involved. Some examples include rehabilitation of existing buildings (but there are limitations on scope and size), and acquisition of an existing structure or vacant land, provided that the structure and land will be acquired for the existing use. There is a lot of very specific detail a tribe will need to review for any specific project. For exempt activities, tribes will need to document compliance under 24 CFR § 58.6, including flood insurance if the project is in a special flood hazard area, airport hazards, coastal zones, etc. This documentation does not require signature by a certifying officer, but it does need to go to the relevant tribal agency (it cannot be signed off by the TDHE).

The third step is to analyze and document compliance with various legal requirements: National Historic Preservation Act (contact the State Historic Preservation Office (SHPO) or Tribal Historic Preservation Office (THPO)); floodplains; contamination with hazardous/toxic material, and necessary steps if such contamination is present.

Some final tips and key takeaways: First, use your tribe's Environmental Department (final approval has to come from Tribe not TDHE). Second, if you hire consultants, make sure they have experience with 24 CFR Part 58. Third, a Phase I environmental assessment is not the same as a NEPA Environmental Assessment. The Phase I assessment is to determine if there may be hazardous/toxic substances on-site. Fourth, you should consider using HUD Environmental Review Online System (HEROS), which is a new HUD online system for environment review. HEROS was set up to be user-friendly, along the lines of Turbo-tax. HEROS replaces HUD's current paper-based environmental review process. There are two forms, Form 7015.15 and Form 7015.16. HEROS walks users through the entire environmental review process from beginning to end, including compliance with related laws and authorities. It is available to but not mandatory for Tribes. Tribes will need to register in order to get access. It makes the compliance process easier, streamlines the process, and saves paper.

*g. Federal Partners Roundtable on Interagency Coordination*

ONAP held a Federal Partners Roundtable about federal agencies' interagency coordination efforts. The presenters included Deputy Assistant Secretary **Heidi Frechette** and **Onna LeBeau**, Director of OIED. They remarked on a number of federal programs available to tribes, such as green energy programs, homeowner programs, and Federal Emergency Management Agency (FEMA) programs.

The presenters emphasized that because NAHASDA funding is so limited, tribes can significantly leverage the funding they already receive by accessing grants from other federal agencies. Federal agencies such as the DOE and the DOI recognize that tribes are often hindered in applying for these grants due to limited staff and resources. The DOE and DOI therefore have TA and other resources to help housing staff in effectively applying for these grants.

The participants commented on a number of issues they face in obtaining federal funding. They asked whether there has been any discussion of creating a federal agency unified guideline on income limits so that tribes can more easily determine what the income limits are for each specific federal agency's program. Other participants recommended that federal agencies

consider creating one, single grant platform and process through which TDHEs could submit one grant to be considered for multiple funding sources from multiple agencies.

If tribes have not yet submitted their Homeowner Assistance Fund (HAF) plans, Treasury staff emphasized that they should do so as quickly as possible. Tribes can contact Treasury by emailing or calling Courtney Coffin, Treasury Outreach Manager, at [Courtney.coffin@treasury.gov](mailto:Courtney.coffin@treasury.gov) or (202) 941-8972.

*h. 2 CFR 200 Procurement Regulations and Flexibility*

ONAP staff gave a presentation of the federal procurement regulations (2 CFR Part 200) and the flexibilities available to TDHEs in carrying out those regulations. Due to time constraints, they were not able to complete the presentation. We have requested the full materials they were going to provide and we will report on this presentation separately within the next two weeks.

*i. Active Shooters: Developing an Effective Active Shooter Policy*

**Ed Clay Goodman**, Partner at Hobbs Straus Dean & Walker, gave a presentation on developing an effective active shooter policy as a means of addressing the increase in shootings at places of employment, housing developments, and other tribal areas. Please see our October 11, 2023 memorandum for an overview of this presentation.

*j. ICDBG Rulemaking*

**Jad Atallah**, Director of ONAP Performance and Planning, along with Deputy Assistant Secretary **Heidi Frechette** and other HUD ONAP staff, held the first of a number of tribal consultations on drafting proposed amendments to the ICDBG regulations at 24 CFR part 1003. DAS Frechette began by noting that the ICDBG regulations have not been amended in approximately 20 years, and that updating them is long overdue. ICDBG is a critical program, and HUD ONAP is looking for input on how to improve the program through amending the regulations.

Mr. Atallah began by discussing the way the funds are allocated. It is a competitive program, but the program is competitive on a regional level. Each region receives an allocation based on a formula set out in the regulations, and the competition is between members in each region. Mr. Atallah noted that if all of the ICDBG competitive funding in one of the ONAP areas is not fully allocated, HUD reallocates that funding to a different ONAP area. The ICDBG competitive program currently set up to be a *regional* competitive program—tribes only compete with other tribes in their region; they are not being scored compared to tribes in other regions. That is currently how the regulations are set up, but HUD is looking for feedback on whether that should change going forward. The participants discussed the pros and cons of the competition being regional instead of national. Some participants shared concerns that for those regions with greater numbers of tribes, the competition is more competitive, making regional competitions unfair. However, other participants commented that regional competition is beneficial, because the alternative, of structuring it as a national competition, would be even more competitive. Another participant asked whether it is possible to renegotiate the ICDBG funding caps for the

regions. Mr. Atallah responded that those caps are not regulatory, so tribes can request that HUD change those caps.

Ed Clay Goodman commented that some tribes have found errors in the scoring based not on arithmetic issues but on HUD's errors, yet HUD only allows appeals for arithmetic errors. Mr. Atallah responded that the provision specifying how to address errors is in the Notice of Funding Opportunity (NOFO) and HUD can therefore change it. He recommended that TDHEs submit comments if they would like HUD to change the process of addressing substantive errors.

There are some activities that are currently ineligible under the ICDBG program (*see* 24 CFR 1003.207). HUD is looking for feedback on whether currently ineligible activities should instead become eligible. One participant recommended that the NOFO should be clearer about what activities are and are not eligible activities.

Another participant asked whether ONAP would provide any kind of consideration on the most cost-effective way to use the funds and whether there is a way to waive certain ineligible activity restrictions if a noneligible activity is more cost-effective than an eligible activity (e.g. buying a vehicle instead of renting one). Mr. Atallah remarked that HUD would take that into consideration as a change to make to ICDBG.

An ICDBG applicant must be eligible as an Indian tribe (or as a tribal organization), as required by 24 CFR § 1003.5, by the application submission date. Tribal organization may apply on behalf of Indian tribes but must provide a letter from the Bureau of Indian Affairs (BIA) or Indian Health Service (IHS) demonstrating their eligibility under Title I of Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA). TDHEs sometimes have challenges with obtaining this confirmation from the BIA or IHS, including in finding information about what they need to do to demonstrate eligibility under ISDEAA. They commented that it would be better to have the tribe simply pass a resolution designating the TDHE as the designated entity, and have that be sufficient.

Regarding income criteria for families receiving ICDBG assistance, low- and moderate-income beneficiaries are those whose incomes do not exceed 80% of the median income for the area. In contrast, under NAHASDA low-income families are those whose income does not exceed 80% of the local area median income **or** the national median income, whichever is greater. ONAP is looking for tribal feedback on whether it should change the ICDBG criteria to be the same as the NAHASDA criteria. The participants recommended that it be changed, so that ICDBG and NAHASDA would be the same and therefore easier to follow.

The rating factors included in the NOFOs are dictated by the regulations (24 CFR § 1003.303). Currently, ICDBG NOFOs include the following rating factors:

1. **Capacity:** addresses the applicant's organizational resources necessary to successfully implement the proposed activities in a timely manner.
2. **Need/Extent of the problem:** addresses the extent to which there is a need for the proposed project to address a documented problem among the intended beneficiaries.

3. **Soundness of Approach:** addresses the quality and cost effectiveness of the proposed project, the commitment to sustain the proposed activities, and the degree to which the proposed project provides other benefits to community members.
4. **Leveraging of resources:** addresses the level of tribal resources and resources from other entities that are used in conjunction with ICDBG funds to support the proposed project. HUD will evaluate the level of non-ICDBG resources based on the percentage of non-ICDBG resources provided relative to project costs.
5. **Comprehensiveness and coordination:** address the extent to which the applicant's proposed activities are consistent with the strategic plans or policy goals of the community and further on-going priorities and activities of the community.

The participants commented that the NOFOs are very lengthy and complicated, and require TDHEs to hire both grant writers and attorneys to sift through the NOFO. They therefore recommended that HUD condense and streamline the NOFO. Mr. Atallah responded that ONAP must work from a HUD template that it cannot change because it is dictated by HUD, but ONAP will try to figure out a way to make the NOFO more condensed and concise.

The participants debated whether there should be limits on how many pages a TDHE can submit. One benefit to increasing the page limits is that it would be less limiting for tribes; on the other side, allowing longer pages would increase the turnaround time for ONAP to review the applications.

Participants commented on whether it is fair that a TDHE receive less points because they recently received an ICDBG grant, resulting in tribes that have not received a grant recently having a better opportunity to receive the grant. Some said that it is fair as it allows funding to reach multiple tribes. Others commented that this process is unfair for the tribes that have a multi-stage, multi-year project and that then lose points for receiving a grant during the first state. One suggestion would be that TDHEs should be able to receive grants for four years in a row to do a phased development, and only after that would the TDHE receive reduced points for having recently received an ICDBG award.

Participants noted that the rating factors requiring leveraging of resources should be removed, as that inhibits smaller tribes with fewer resources to leverage. Mr. Atallah responded that that rating factor is required by the regulations, but HUD can see what it can do to minimize the effect of that rating factor.

The participants also asked whether ONAP could provide any training during the NOFO process to assist tribes. Mr. Atallah stated that ONAP is statutorily restricted from providing any help to TDHEs, as it could provide unfair advantage to the TDHEs that receive help.

Mr. Atallah raised some questions regarding the ICDBG Imminent Threat (ICDBG IT) grants (24 CFR 1003 subpart E). In 2022, the U.S. Government Accountability Office issued a report on how agencies can address environmental threats for Alaska Native Villages. The requirements for the ICDBG IT program were cited as a barrier to addressing climate change with federal funds. ONAP is asking for feedback on whether ONAP should remove the regulatory restriction that states that the emergency should be nonrecurring, given that climate

change is causing many of these natural emergency disasters to occur on a frequent basis. Tribal participants all responded that ONAP should remove that restriction. ONAP is also looking for feedback on the following questions:

1. Would tribes be support of increasing the imminent threat grants and what should they be?
2. Should ONAP get rid of the requirement that TDHEs not receive money if they already have funds to cover that emergency.

Participants asked whether there is a way for the imminent threat grants could be deployed quicker to assist TDHEs more quickly after an emergency. Mr. Atallah responded that ONAP will look into how grants could be awarded on a timelier basis.

*k. BABA Tribal Consultation*

1. BABA Overview and Applicability to Tribes

The Build America, Buy America Act (BABA) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58). BABA establishes a domestic content procurement preference (“Buy America Preference,” or “BAP”) for Federal infrastructure programs. On August 23, 2023, OMB published a final rule to implement BABA, located at [2 CFR Part 184](#) and incorporated into 2 CFR Part 200. Please see our September 22, 2023 memorandum for a more detailed analysis of the BABA requirements.

The BABA requires HUD to ensure that none of the funds made available for infrastructure projects may be obligated by HUD unless it has taken steps to ensure that all iron, steel, manufactured products, and construction materials used in a project are produced in the United States. Projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.” The BAP applies to *all sources* of Federal Financial Assistance (FFA) provided to tribes, TDHEs, and other tribal entities (collectively “Tribal Recipients”) involving infrastructure projects.

BABA very likely applies:	BABA does not apply:
<ul style="list-style-type: none"> <li>• IHBG Formula</li> <li>• IHBG Competitive</li> <li>• ICDBG</li> </ul>	<ul style="list-style-type: none"> <li>• IHBG-CARES</li> <li>• ICDBG-CARES</li> <li>• IHBG-ARP</li> <li>• ICDBG-ARP</li> <li>• ICDBG-Imminent Threat</li> </ul>

The more residential housing is publicly owed, the more likely it is to be covered by BABA. Mr. Atallah noted that Section 184 grants will not likely be subject to BABA requirements, because that program involves mostly privately-owned homes. However, the Title VI Loan Guarantee program is probably covered. HUD is currently debating with OMB on whether homes that are privately occupied, used for private use, but are owned by tribes would be subject to BABA.

HUD has issued a general applicability–public interest waiver of the BAP in connection with HUD funding provided to Tribal Recipients, in order to provide HUD with time to complete the tribal consultation process. The BABA therefore will not apply to tribes until May of 2024. Mr. Atallah commented that sometime before May 2024, HUD will either issue a new extension or a plan for a phased implementation for tribes. He noted that HUD will consider issuing a waiver that would state that BABA would not apply to tribes until 2025. HUD is seeking tribal input as HUD moves forward with deciding when and how to implement the BABA requirements for HUD grants for Tribal Recipients. One participant commented that TDHEs need more time for *contractors* to learn what the BABA requirements are, in addition to TDHEs preparing for BABA. HUD is also considering applying iron and steel to tribes first, and then implementing a more delayed application for manufactured products and construction materials.

## 2. Waivers of BABA Requirements

If a project costs too much because of BABA compliance, HUD can issue waivers to tribes and TDHEs that would waive the BABA requirements. HUD must obtain OMB approval of the waivers. Additionally, the waivers must be published in the federal register for fifteen days. There are two types of waivers: (1) general applicable (broad scope) and (2) project specific. OMB has not issued guidance on how long waivers would last but they would be for a limited duration. A waiver may be issued on the following grounds:

- Public interest;
- Non-availability of materials (not available in the quantity or not available at the quality); or
- Results in an increase in the cost of the “project” by more than 25 percent.

HUD can issue a waiver if the product is not available in the United States in adequate quantity, or if the American-made product is not a good enough quality. Currently HUD has issued the following waivers. HUD is seeking tribal feedback on whether these thresholds be higher for Tribal Recipients, and if so at what level should they be set:

1. Exempts grants that are equal to/under \$250,000;
2. Exempts projects equal to/under \$250,000;
3. Exempts 5% of procurements above \$250,000 as long as the 5% does not exceed \$1 million; and
4. Exempts certain activities based on exigent circumstances, such as curing exigent health/safety issues; likely covers ICDBG-Imminent Threat grants with no declared disaster.

One participant suggested that HUD issue a waiver based on a contractor’s unwillingness to comply with BABA, which should be considered an unavailability of materials, therefore justifying a waiver. Another participant suggested that HUD issue a broad public interest waiver because providing affordable housing for impoverished individuals is more important than propping up the American manufacturing industry. Mr. Atallah responded that HUD has heard that argument and also heard the argument to exclude affordable housing in general, in that affordable housing is not the type of infrastructure intended to be covered by BABA. Mr. Atallah asked that tribes submit to HUD any data or other information to support this argument.



Another participant recommended that HUD issue a waiver for circumstances in which BABA implementation when using federal resources would prohibit a TDHE from leveraging non-federal resources (e.g. low-income housing tax credits). The participant noted that because of the increased costs of BABA requirements, it will make TDHE projects less competitive for LIHTC projects. Complying with BABA requirements will therefore inhibit TDHEs from receiving LIHTC awards.

A participant asked whether HUD could issue a geographical waiver for rural areas. They suggested that PD&R conduct research and submit data on the difference in costs between implementing a project in an urban area compared to rural areas. PD&R should also conduct a study on how many tribally owned businesses will fail because they cannot comply with BABA because the costs are too prohibitive. One of the participants recommended that OMB should create a separate sub-department with its own staff dedicated specifically to processing HUD's waiver requests for TDHEs.

### 3. Increased Costs for Tribes and TDHEs

The participants also discussed the increased costs that tribes and TDHEs will face in meeting BABA requirements. One participant asked whether they could request that administrative costs be increased in all tribal grants, as compliance with BABA is going to significantly increase administrative costs, and TDHEs already use up 100% of their allowable administrative costs.

### 4. HUD Consultations and Tribal Feedback

HUD will be conducting more tribal consultations through December 2023. HUD is seeking tribal feedback on when and how to phase in the BAP for FFA provided to Tribal Recipients. Tribes and TDHEs can send, feedback, comments, and questions to [consultation@hud.gov](mailto:consultation@hud.gov) or to [BuildAmericaBuyAmerica@hud.gov](mailto:BuildAmericaBuyAmerica@hud.gov). Additionally, HUD is seeking feedback on the following specific questions.

1. What are the expected impacts of BABA on construction and infrastructure development?
2. Do you know whether the iron, steel, construction materials, and manufactured goods you currently buy are made in the US?
3. Do you have access to viable American suppliers of iron, steel, construction materials, and manufactured goods?
4. Do you anticipate that BABA will increase the cost of construction of infrastructure projects?
5. Should HUD consider a different de minimis threshold requirement when BABA applies to Tribal infrastructure projects?
6. When should HUD begin to require Tribes and TDHEs to comply with BABA requirements?
7. How would BABA impact general infrastructure projects under ICDBG, e.g. road and sewer?

Additional resources on BABA can be found at the following websites: [Office of Management and Budget Guidance and Other Resources](#) and [HUD BABA Webpage](#).

*l. HEARTH Act: Creating and Implementing a Tribal Lease Law*

Mr. Goodman and Cari Baermann gave a presentation on creating and implementing a tribal lease law under the Helping Expedite and Advance Responsible Tribal Homeownership Act, Pub. L. No. 112-151 (2012) (“HEARTH Act”). Please see our October 11, 2023 memorandum for an overview of this presentation.

**IV. Closing Session**

The Housing Summit concluded with a plenary session on November 2, 2023. Deputy Assistant Secretary Frechette and Neil Whitegull, ONAP Eastern Woodlands Regional Administrator, gave closing remarks.

Deputy Assistant Secretary Frechette remarked that HUD is going to be giving awards for innovative housing practices to acknowledge the hard work that tribal housing leaders are doing in their community. HUD will release more information on this in the coming months.

***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](mailto:egoodman@hobbsstrauss.com)) or Cari Baermann ([cbaermann@hobbsstrauss.com](mailto:cbaermann@hobbsstrauss.com)). Both may also be reached at 503-242-1745.