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MEMORANDUM

March 24, 2021

To: Tribal Housing Clients

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

Re: *HUD Holds Second Consultation on Tribal Consultation Policy*

On March 23, 2021, the Department of Housing and Urban Development (HUD) held its second consultation on its Tribal Consultation Policy. These consultations come in response to President Biden's January 26, 2021 Presidential Memorandum directing agencies to consult with tribes on improving implementation of Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (Nov. 9, 2000).

HUD Secretary Marcia Fudge, who was confirmed on March 10, 2021, and Deputy Assistant Secretary for Native American Programs Heidi Frechette welcomed tribal leaders and received tribal comments. Secretary Fudge has expressed that she plans to work closely with tribes to improve housing equity and proactively address the climate crisis affecting tribal communities. She also plans to tackle matters related to the impact of the pandemic on tribes, beginning with working to distribute as soon as possible the \$750 million that the American Rescue Plan (ARP) Act provided in HUD resources to Indian Country.

Tribal leaders joining the consultation provided comments on a variety of matters including implementing HUD's consultation policy, streamlining and coordinating consultations across agencies, distributing ARP funds, and addressing tribal housing issues more generally. These comments are summarized below.

HUD's Consultation Policy. Tribal leaders expressed that HUD's current consultation policy, which was updated in 2016, is one of the better federal consultation policies. They noted, however, that the policy should be updated to require obtaining tribes' free, prior, and informed consent prior to taking actions that may affect tribes.

In terms of processes to implementing the HUD policy, Tribal leaders stressed the importance of engaging in various forms of consultation including: regular consultations regarding tribal priorities; issue-specific consultations when decisions need to be made on particular matters; consultation at both regional and national levels; and a mix of in-

person and virtual consultations.

Tribal leaders also expressed the need for meaningful dialogue at consultation so that there is an opportunity to exchange ideas and reach consensus rather than merely having a series of tribal leaders make statements. They also requested that HUD provide feedback regarding agency decision making after tribal consultations, providing explanations if the agency chose not to adopt tribal recommendations.

Finally, tribal leaders emphasized the need for HUD to develop an understanding of tribes, tribal self-determination, and of the HUD consultation policy across various HUD departments.

Streamlining Federal Consultation Processes. Tribal leaders also stressed the need for coordination among federal agencies. They noted that each agency has a different consultation policy and that tribes spend significant time and resources consulting with agencies separately.

Participants made the following suggestions: restoration of the White House Tribal Nations Conference; creating a central tribal consultation website where tribes can find announcements across the federal government; holding joint agency consultations whenever possible; creating a standard core consultation policy for all agencies that would then be supplemented with agency-specific policies.

Tribal leaders also suggested coordinating tribal consultation through the White House Council on Native American Affairs and appointing an Office of Management and Budget official to monitor implementation of consultation policies.

Tribal leaders also noted the need to combine review processes whenever possible rather than having tribes complete, for example, multiple environmental reviews for different agencies.

ARP Distribution. Although the consultation was focused on HUD's consultation policies generally, some tribal leaders did address the upcoming decisions that HUD will make regarding how to spend ARP monies. A couple of tribal leaders stated that tribes that did not receive funds previously should be included in this round of COVID-19 funding for tribal housing programs. One tribal leader suggested allocating 50% of the ARP funding evenly across tribes, 25% based on a formula that would take into account land-base, and 25% based on special needs such as the unique needs of remote Alaska villages. However, this proposal was opposed by another tribal leader on the call.

Additional consultation on ARP funding will occur in the coming weeks, including a March 31 consultation on the \$280 million that ARP provided in additional funds for the Indian Community Development Block Grant Program.¹

HUD Priorities and Policies. Tribal leaders also addressed several ways in which HUD should structure its operations to incorporate tribal input into its programs and address tribal priorities.

Suggestions included using the U.S. Commission on Civil Rights' *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* to develop HUD priorities and measurable benchmarks; advocating for tribal needs in upcoming infrastructure legislation; and providing the maximum flexibility under law for tribes to exercise self-governance in tribal housing programs. Tribal leaders stressed the importance of Secretary Fudge visiting Indian Country to gain a better understanding of the on-the-ground housing challenges and to become familiar with successful tribal housing programs.

Tribal leaders also made several specific recommendations regarding HUD programs, including: supporting tribes in providing off-reservation housing; consulting on how HUD determines area median income; advocating for HUD funding to be mandatory; allowing tribes to house members of any federally recognized tribe; allowing HUD funding to be used for connection to other infrastructure; providing avenues for tribal citizens to add "sweat equity" and participate in rent-to-own models; and working toward tribes being able to effectively use the Section 184 Indian Home Loan Guarantee Program.

Conclusion

Please let us know if you have any questions about the matters discussed in this memorandum. You can reach me at egoodman@hobbsstrauss.com or by telephone at (503) 242-1745.

¹ Additional information about the ICDBG-ARP consultation is available at https://www.hud.gov/sites/dfiles/PIH/documents/DTL_ICDBG-ARP_Consultation_3.19.21.pdf.