


MEMORANDUM

March 1, 2021

To: TRIBAL HOUSING CLIENTS

From: Ed Clay Goodman 

Re: **HUD Consultation Regarding its Tribal Consultation Policy; Recent Decisions Regarding CDC Eviction Moratorium.**

This memo reports on two recent developments applicable to Indian housing. The first is a listening session by HUD concerning HUD's consultation policy. The second is a series of court decisions regarding the CDC Eviction Moratorium Order.

HUD Consultation Policy

On February 25, 2021, the U.S. Department of Housing and Urban Development ("HUD") hosted a consultation with Tribes regarding the current HUD Tribal Consultation Policy. The call has been recorded and will be uploaded to the HUD Office of Native American Programs ("ONAP") website. This memo provides a summary of the call and the feedback received from Tribal leaders.

On January 26, 2021, President Biden issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. The Memorandum affirmed the Administration's commitment to Tribal sovereignty and to fulfilling its Federal trust responsibility. The Memorandum also reaffirmed the policy announced in Presidential Memorandum of November 5, 2009 ("Tribal Consultation"), which directed Federal agencies to develop and periodically revise their Tribal consultation policies to ensure that Federal agencies consider Tribal feedback when developing policies that have Tribal implications, consistent with Executive Order 13175.

HUD is now developing a plan of action that it will take to implement the policies and directives of Executive Order 13175. HUD's action plan is due to the U.S. Office of Management and Budget by April 26, 2021. To develop its plan, HUD is now seeking feedback from Tribal leaders on how it may strengthen Tribal consultation with Tribes. HUD has directed anyone who has any recommendations or comments on how HUD could improve its Tribal consultation practices and policy to submit their feedback via email to Tribalconsultationpolicy@hud.gov. HUD has asked that Tribal members and leaders provide feedback by April 5, 2021. The current HUD consultation policy, last revised in 2016, can be found at https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogo_v_tcp.

I. Opening Presentation

HUD Chief of Staff Jenn Jones and HUD ONAP Deputy Assistant Secretary Heidi Frechette gave brief opening remarks. HUD invited over 20 Tribal leaders from across the country to join the call. Also participating on the call were senior leaders from the Office of the Secretary, Office of General Counsel, and Office of Public Housing.

Ms. Frechette noted that HUD will continue to host Tribal consultations in the future, including one hosted by the HUD Office of Community Planning and Development in March to design procedures for Tribes to participate in the Continuum of Care program. HUD will continue to host weekly Tribal industry calls, issue Dear Tribal Leader letters, host national best practice webinars, offer training and technical assistance, and provide regular Tribal updates on IHBG-CAREs and ICDBG-CARES via webinars, training sessions, and participation in White House calls. HUD is currently soliciting feedback on ICDBG-CARES funding limits.

Ms. Jones noted that the purpose of this call was to receive feedback from Tribal leaders on how HUD can improve Tribal consultations moving forward. HUD asked that Tribal leaders provide feedback both on the call and via emails to HUD on the following topics:

1. What ideas do Tribal leaders have on how HUD can more effectively consult and strengthen communications and relationships?
2. Are there any best practices from other federal agencies that HUD should review?
3. How can HUD as an agency provide consistent consultation across programs?
4. How can HUD better prepare its staff to understand the consultation responsibilities and the government-to-government relationship?
5. Are there ways that HUD can better use technology to solicit Tribal feedback on policies?

Ms. Frechette then opened the call up to comments.

II. Comments from Participants

Below are comments and questions raised by participants, along with the responses by HUD staff to some of the comments or questions (HUD did not provide a response to each comment; where they did respond we have provided that response below the comment or question).

Tribal Comments:

- HUD's willingness to have regularly scheduled meetings has been very useful and any efforts to have weekly calls moving forward would be appreciated.
- HUD needs to build upon a true understanding of what a government-to-government relationship means and have internal discussions across all departments and with all staff about that relationship. There are many staff members in the various HUD programs that likely do not understand what the government-to-government relationship means and so

do not understand how to work with Tribes. Consultation with Tribes should be uniform throughout all HUD departments.

- HUD should track Tribal comments to determine how many of the comments HUD responds to and incorporates, and if comments are not incorporated, why they are not. An efficient way to track comments would be to designate a point person to be responsible for such tracking.
- Using technology to solicit Tribal feedback is useful. One suggestion would be to create a portal that would allow for Tribal leaders to submit real time comments in a manner that meets their times and schedules.
- When dealing with other industry agencies such as the Environmental Protection Agency (“EPA”), technology such as a portal would be useful, particularly if it included topics and policies on which the Tribes would want to be consulted. Ideally, the portal would notify Tribes any time an agency is moving forward with a new plan of action, or proposing new rules and regulations.
- How does HUD see the next year progressing during the pandemic and how does it view the budget?

HUD response:

- Ms. Jones: The Biden administration is committed to making sure Tribal communities have resources to help their communities, which can be seen in some of the recent economic recovery programs that include Tribal funding set asides. Congress has begun the process of reconciling the fiscal budget process in Washington. There is a much broader, real understanding of the unmet housing needs of the country and the Biden administration will be focusing on identifying additional resources that can be used to meet Tribal housing needs. The administration wants to make sure that Tribes have sufficient information on the proposals within the American Rescue Plan that are specific to Tribal communities. The administration is also focusing on ways to provide emergency assistance to housing, separate from the issues caused by the COVID-19 pandemic. HUD will be issuing more information on emergency assistance by disseminating it to Tribes, either online or through dear Tribal leader letters.
- Ms. Frechette: HUD will be focusing on assisting Tribes and leveraging existing resources for Tribal housing, as well as focusing on specifically addressing Tribal needs, rather than lumping Tribes into non-Tribal programs.

Tribal Comments:

- HUD’s current rule that only allows housing counseling to be provided by HUD-certified housing counselors contradicts the mandate under Section VI of the current HUD Tribal consultation policy. That mandate requires that HUD not promulgate any regulation that

imposes substantial direct compliance costs on Tribal communities unless it provides funds to cover the costs or consults with Tribal officials early in the process of developing the proposed regulation.

- Scoping is a critical part of consultation with Tribes, whether the scoping is done by the agency or directly by Tribes. There should be a mechanism for reaching out to Tribes to obtain their input on HUD policies. An example would be how Tribes are dealing with data and data collection.
- ONAP has recognized Tribal determination, but that recognition has not carried over to other HUD departments. A good example of this is the requirement regarding housing counseling—Tribes should be able to choose whether to implement those housing counseling requirements. Another example is the competitive grant process—it should be more formula-based in order to promote Tribal determination. It would be useful to discuss these ideas in future consultation calls.
- Some of the issues Tribes have faced involve delays or setbacks in receiving federal funding, particularly during the COVID-19 pandemic. However, the funding that Tribes have received has helped them build the structure for sewage and other critical infrastructure systems. Because of the pandemic, Tribal communities are finally getting help. The Tribes' existing housing faces many challenges because of drug use and houses being set aside as unusable. Tribes need additional homes, especially for families that have children or elders who currently do not have safe homes. Many homes have deteriorated to the point where they are too hazardous for anyone to live in them, but the Tribes do not have enough money to renovate those homes.
- A true government-to-government consultation allows Tribes to communicate to HUD what is actually happening on the ground with Tribes and to communicate the problems of tribes not actually receiving the federal funds that they have been allocated.
- HUD is fulfilling the federal trust responsibility by having this consultation. The caller noted that she hopes that federal agencies think about the many Tribal nations and people who are struggling during the pandemic and from conditions that cause them to freeze to death because they do not have their own homes. Tribes also need housing for single individuals, so that people are not required to have a family in order to have a home. It is helpful that HUD senior leaders have a listening ear to hear the needs of Tribes. Tribes need funds to help their people and improve technology so that they can communicate across the country, especially during the pandemic.

HUD response:

- Ms. Jones: It is surprising that it took a pandemic to get federal agencies to talk about the inequalities of housing in Tribal communities, and the devastation of poverty.

Tribal Comments:

- Regarding the consultation process, it is difficult for Tribal leaders to engage all the time. It would therefore be useful for HUD to work with the existing inter-Tribal organizations, who can advocate on the Tribal leaders' behalf.
- For general housing, the needs vary throughout Indian country across the Tribes. Some Tribes have very difficult situations while others are on checkerboard reservations near cities with high costs of living and expensive housing. They have had to come up with innovative ways to meet the Tribal housing needs and address homelessness. Some of the housing regulations are not relevant to certain Tribes, given the different demographics of each Tribe. Regulations must therefore be flexible in order to meet the diverse needs of all Tribes. Tribes and HUD need to continue dialog on creative ways to meet the diverse Tribal housing needs. They need to move away from a one-size-fits-all approach. Any additional flexibility would be appreciated.

HUD Response:

- Ms. Frechette: HUD appreciates feedback on how to improve consultations so that Tribal leaders can engage in ways that meet their demanding schedules. HUD also recognizes the need for flexibility for block grants.

Tribal Comments:

- One thing to keep in mind is when HUD has internal conversations with staff about Tribal consultations, staff may not properly consult with Tribes simply because they do not understand the nature of the government-to-government relationship. Someone within HUD should be responsible for making sure consultations occur across departments and agencies. Dialogs are very important, as is some sort of process that tracks whether Tribal comments have been heard. It is important that there is back and forth communication between HUD and Tribes, with HUD actually responding to comments to ensure that Tribal leaders know that they have been heard.
- Having a Tribal advisory committee, such as the one in the U.S. Department of Health and Human Service ("HHS"), would be very useful. A Tribal advisory committee would engage Tribal leaders and their feedback on an on-going basis.
- HUD should increase opportunities to consult with other federal agencies. One recent example demonstrating the need for inter-agency consultation was the allocation of coronavirus relief funding. The U.S. Department of Treasury ("Treasury") and Department of Interior ("Interior") did not properly consult with Tribes in determining the allocation formula. HUD should reach out to Treasury to make sure that the Treasury's Emergency Rental Assistance ("ERA") funds are allocated by IHBG formulas, and that the IHBG formula be based on current, up-to-date Tribal populations.

- HUD should partner with other agencies that have experience with Tribal consultations, such as Interior. Additionally, Tribal leaders like to consult with high level officials within federal agencies on important topics.
- Some federal agencies have kept track of Tribal comments in order to see which comments are incorporated into the agency policies. It would be useful if HUD tracked which comments it incorporates as well.

HUD response:

- Ms. Frechette: HUD recognizes that using Tribal consultations to implement new ONAP programs improves the programs.
- Ms. Jones: Collaborating with Interior on different programs is a great idea.

Tribal Comments:

- It is important to ensure that services are provided for transitional housing. The Tribe's goal is to provide wellness for its people, who need rehabilitation and a safe way to transition out of being in prison. In order to successfully transition out of prison, they need to have a home. These individuals need a safe transitional space in which they can obtain the services they need to reintegrate back into community. Many of these individuals go to rehabilitation but then do not have anywhere to go afterward because they cannot go back to their families. The Tribe also needs services for education to help these individuals build up their credit scores to apply for loans for outside housing. The Tribe wants people to grow to become self-sufficient. While there is funding for Section 184 loans, the Tribe also needs to be able to provide funding for apartment housing or for purchasing housing outside the reservation. The Tribal members have diverse housing needs, with some needing access to schools or medical facilities that are not available on the reservation. The Tribe therefore needs the ability to lease or rent housing outside the reservation in order to access these additional resources.
- Due to the timing of Tribal elections and terms, the turnover of Tribal personnel makes it difficult for Tribes to continue conversations with HUD and to get up to speed on all of the HUD policies and consultations. Any process that would allow HUD to check in with the new Tribal personnel and leaders every year would be helpful.
- One of the best practices implemented by other federal agencies is to work to understand Tribes as a native people. Tribes want their communities to be successful. Federal agencies should find out more about the specific needs of the Tribal communities by holding consultations more frequently throughout the year.
- It would be helpful if HUD brought Tribes to the table earlier in the process, before the grants are open and the grant process has already begun. This will allow Tribes to share their own ideas of how to help their people.

- Regarding technology, it would be very helpful if HUD grant funding included funding to improve technology. Many Tribes do not have the funds or resources needed to provide internet services for their communities. If HUD grants included funding specifically for installing fiber optic or internet services, and that technology was built into the housing as it was developed, this would save the Tribes from needing to try to find and obtain additional funding to provide internet services separately.
- Using email and text notifications to contact and notify Tribal leaders about programs and consultations is very helpful.

HUD response:

- Ms. Frechette: HUD is trying to use Twitter and other technology to better stay in contact with the Tribes.

Tribal Comments:

- It is critical that HUD engage in consultation consistently, and that it ensure that Indian professionals are at the head of the table, not just sitting at the table.
- It would be very helpful if HUD implemented cultural sensitivity training for all HUD staff who would work with Tribes. Mistreatment of natives is common because of existing stereotypes.
- Due to the vast number of Tribes in the United States, it would be best if HUD had Tribal representatives who would cover different regional areas. The Tribal representative would work with Tribes in that regional area to communicate the collective Tribal needs.
- Providing videos of HUD programs with visual storytelling would be helpful.
- Will the slides be available from today's call?

HUD response:

- Ms. Frechette: Yes, the slides and recording will be available on the HUD website.

Tribal Comments:

- Tribes would like HUD to host Tribal consultations with greater frequency. It would also be useful to have more frequent regional calls, which would keep information timely and relevant to the specific needs of the Tribes in each area.
- As far as best practices go, the EPA region 1 has a good relationship regionally with Tribes and engages in ongoing, frequent communications with Tribes.
- To better prepare staff, HUD should use Tribal representations to provide training on the differing Tribal cultures and constituencies for each region. HUD should also provide

training for its staff on what the government-to-government relationship means and how that relates to Tribal self-determination. HUD should closely examine Section III of the HUD Tribal consultation policy that addresses Tribal sovereignty, and Section VII that addresses waivers. HUD should provide a greater number of waivers, which will allow flexibility and leniency to meet Tribal needs. Many old statutes and regulations were initially developed without any Tribal feedback. The statutes and regulations were predicated on antiquated models of reservations, models which do not work in the modern world.

- Sending out a greater number of reminders of HUD consultation calls through texts, emails, etc. would be useful. It is also helpful if the emails contain links that allow Tribal leaders to download the events to their calendars. Additionally, hosting calls through online platforms helps Tribal leaders attend without needing to travel across the country.
- When considering Tribal regions, agencies have their own delineations for regions that do not mesh with how Tribes view themselves. Agency regions do not currently fit Tribal differences and cultures. For example, HUD's Eastern Woodland region covers the entire eastern part of the country. Many of the Tribes within it have vastly different heritages and cultures from one another. It would be better to have different Tribal cultures recognized in each of the regions, based more accurately on Tribal identities and how Tribes view themselves.
- HUD should focus on hiring natives for HUD staff because the natives already understand native communities and could help provide key insights into the Tribal communities.
- There are numerous housing resources scattered all over. A best practice that HUD could implement would be to create one centralized database with housing resources, such as housing best practices, tools, policies, etc.
- The Northern Plains ONAP Office has been doing a good job of communicating and developing relationships with Tribes in that region. Having the ONAP offices know and learn about the regional Tribes helps higher level HUD officials better understand the Tribes.
- What is the policy position of the Biden Administration on the National Environmental Policy Act ("NEPA") process and environmental review?

HUD response:

- Ms. Jones: HUD does not have an answer to this question now but will look into it further.

Tribal Comments:

- Tribes have many concerns with the Treasury’s ERA program. Treasury indicated that families at or below 80% of the area median income (“AMI”) are eligible. While Tribes have asked Treasury to allow Tribes to use the greater of the national or local AMI, Treasury recently published guidance that provides that the AMI shall be the same as the definition provided at 42 U.S.C. 1437a(b)(2), which is based on the local AMI. Tribes ask that HUD engage with Treasury on this issue and encourage Treasury to allow Tribes to use the greater of either the national or local AMI.

HUD response:

- Ms. Frechette: HUD has flagged this concern and is coordinating with Treasury on the issue.
- Jad Atallah, Director of Performance and Planning at ONAP: HUD is aware of the issue and is having conversations with Treasury about it to allow Tribes to use greater of national or local AMI. However, unlike the Native American Housing Assistance and Self-Determination Act of 1996 (“NAHASDA”), which has a provision that directs Tribes to use the greater of the national or local AMI, this language does not exist in the ERA statute. Treasury therefore feels restricted to using the local AMI. One of the best things that Tribal advocates can do is to present legal arguments to Treasury on why it has the flexibility to issue guidance on this matter and make the determination to use the greater of the national or local AMI. Mr. Atallah suggested that Tribal legal counsel provide these legal arguments to Treasury or to HUD and HUD will then share the arguments with Treasury. However, the ERA is a Treasury program, so it will be a call that Treasury’s legal counsel will make, not HUD’s.

Tribal Comments:

- The Indian Health Service (“IHS”) within the HHS has made a great effort to engage with Tribes through Tribal consultations and has frequent meetings. This would be a good best practice for HUD to use as a model.

HUD response:

- Ms. Frechette: They will take a look at what IHS is doing. However, one main difference is that HUD does not provide direct service as IHS does.

Tribal Comments:

- Greater agency consultation with Tribes is needed. A good demonstration of the need for greater Tribal consultation involved the ERA funds. One of the Alaska Tribes told Treasury to give the funding directly to the Tribe, but Treasury gave the funding to the housing authority based on 2005 NAHASDA Tribal population numbers. This made it difficult for the Tribe to understand how the ERA funding was allocated.

- Tribes have concerns with recent changes to NEPA, which limit Tribes' abilities to deal with contamination in Tribal housing communities.

HUD response:

- Ms. Jones: HUD will get back to participants on NEPA changes and concerns, given HUD's concern with keeping housing communities safe.

Tribal Comments:

- Effective consultation begins with mutual respect and an understanding of individual Tribal needs. HUD needs to understand Tribal people, where each Tribe comes from, and the sacrifices Tribal ancestors and current members have made for their people. HUD should focus on hiring Tribal people for ONAP positions.
- HUD could appoint a Tribal HUD field representative for each state to collectively speak to the needs of the Tribes. That field representative would work with ONAP to help them understand the Tribes.
- Tribes often utilize state and local housing resources, such as LIHTC programs, in addition to utilizing HUD resources. Tribes are hurt if HUD does not work with state and local agencies to make sure HUD policies and programs do not conflict with the use of state and local resources. Establishing field representatives for each state would help HUD ensure that its programs work well with state and local resources and meet the diverse housing needs of Tribes.

Tribal Comments:

- Who will respond back to emails that Tribal leaders send to Tribalconsultation@hud.gov?

HUD response:

- Ms. Frechette: Any comments sent to the HUD consultation email will be seen and HUD will respond to them.

Tribal Comments:

- Regarding HUD's Tribal consultation policy, ideally there will be an effort to streamline the process. Using Tribal advisory councils is a meaningful way for HUD to increase Tribal consultations. Additionally, agencies need to follow through with changing and improving their practices of Tribal consultation, instead of merely changing their consultation policies with each new administration.
- Many Tribes have severe housing shortages. There must be an open door policy to implement a Tribal alliance with HUD. Tribes need HUD to have a boots-on-the-ground

understanding of what is occurring in each Tribal area. There must be greater consultation in order for HUD to be able to prioritize Tribal needs. Tribes need to be able to capitalize on starting and supporting Tribal businesses and improving and repairing infrastructure such as sewer and water systems and roads. It is important that HUD have respectful deadlines and help Tribes remain on track.

HUD response:

- Ms. Frechette: Infrastructure and economic development are important and HUD will continue to work with Tribes to help them accomplish these developments.

Court Decisions Regarding CDC Eviction Moratorium

On February 25, 2021, the federal district court for the Eastern District of Texas issued its decision in the case of *Terkel v. CDC*, which challenges the legality of the CDC Eviction Moratorium (issued on September 4, 2020, and currently extended through March 31, 2021) as beyond CDC's authority under the Commerce Clause of the United State Constitution. This is the fourth court to have heard a challenge to the Moratorium. The prior three decisions have left the Moratorium in place.

In *Brown v. Azar* (Northern District of Georgia), the judge denied an injunction because the landlords who brought the suit failed to show they were substantially likely to succeed on that claim. The judge held that the CDC's authority in this case is clear and unambiguous. In *Chambliss Enterprises LLC v. Redfield* (Western District of Louisiana), the judge stated that the "plain text of the statute is unambiguous," and that the CDC's eviction moratorium "is well supported and falls firmly within the scope of its authority." The judge also pointed to a prior Supreme Court ruling (*Russell v. United States*) that held that regulation of the rental real estate market "unquestionably" falls within the scope of the federal government's authority under the Constitution's Commerce Clause. In *KBW Investment Properties v. Azar* (Southern District of Ohio), the judge denied a request for a temporary restraining order, allowing the moratorium to continue to be in effect.

The new case, *Terkel v. CDC*, is the first case where a court has held that the CDC Eviction Moratorium goes beyond CDC's authority under the Commerce Clause. The court issued a declaratory judgment against the Moratorium. However, the case was not brought as a class action, and by its terms it only applies to the landlords and tenants in that case. In addition, the Department of Justice has already filed an appeal of the decision, and issued the following statement (emphasis added):

The CDC's eviction moratorium, which Congress extended last December, protects many renters who cannot make their monthly payments due to job loss or health care expenses. By preventing people from becoming homeless or having to move into more-crowded housing, the moratorium helps to slow the spread of COVID-19.

The Department of Justice respectfully disagrees with the February 25 decision of the district court in *Terkel v. CDC* that the CDC's eviction moratorium exceeds Congress'

powers under the Commerce Clause and the Necessary and Proper Clause, and the Department has appealed that decision. The decision, however, does not extend beyond the particular plaintiffs in that case, and it does not prohibit the application of the CDC's eviction moratorium to other parties. *For other landlords who rent to covered persons, the CDC's eviction moratorium remains in effect.*

Thus, according to the U.S. Department of Justice, the Moratorium is still in effect other than as it would apply to the landlords and tenants involved in this specific lawsuit.

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If you have any questions regarding this memorandum, please contact Ed Clay Goodman at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.