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MEMORANDUM

March 18, 2025

TO: TRIBAL HOUSING CLIENTS

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

RE: ***Continuing Resolution for FY2025; HUD Issues Legal Analysis Regarding Non-Applicability of Executive Orders on DEI to Native American Programs***

This memorandum reports on two recent developments: the passage of a Continuing Resolution (CR) for fiscal year (FY) 2025 Appropriations and the release of a legal analysis from Department of Housing and Urban Development's (HUD) acting General Counsel finding that the Trump Administration Executive Orders (EOs or Order) on Diversity, Equity and Inclusion (DEI) to not apply to the HUD's native American Programs. from HUD exe.

I. Continuing Resolution Passes for Remainder of FY2025

Congress was not able to pass a full year appropriations bill by the beginning of FY2025 prior to October 1, 2024, therefore, Congress adopted a Continuing Resolution, which funded the federal government essentially at FY2024 levels. That first CR expired just before Christmas, but was subsequently extended through March 14, 2025. Last week, the Republican-controlled House, on a party line vote, passed a CR through the end of the FY2025 fiscal year (September 30, 2025). The bill contained some items that House Democrats objected to (all but one voted against it). As a result, the likelihood of it passing the Senate was in question, since while the Republicans are also in the majority in that chamber (53-47), 60 votes were needed to overcome a filibuster. Therefore, some Democratic votes would be needed to pass the CR and avoid a government shut-down. After going back and forth during the course of the week, Senate Minority Leader Chuck Schumer (D-NY) finally indicated that he would support the CR, and enough Democratic Senators joined him to reach the 60 vote threshold. The bill passed on March 14, 2025 and was signed by President Trump shortly thereafter.

The bill leaves Indian housing funding provisions at the FY2024 levels for FY2025. For your reference, below is a chart showing the FY 2024 appropriations:

Native American Programs	FY 2024
Tribal HUD-VASH	\$7.5 million
Indian Housing Block Grant (IHBG)	\$1.11 billion
IHBG Competitive Grants	\$150 million
Title VI Loans	\$1 million

Indian Community Development Block Grant (ICDBG)	\$75 million
Training and Technical Assistance	\$7 million
National Organization Funding (per Sec.703 of NAHASDA)	\$2 million
Section 184 Loans	\$1.5 million
Imminent threats to health and safety	\$5 million
Native Hawaiian Program	
Native Hawaiian Housing Block Grant (NHHBG)	\$22.3 million
Native Hawaiian Housing Loan Guarantee Program (Section 184A)	\$28 million
Native Hawaiian Training and Technical Assistance	\$1 million

II. HUD Legal Analysis of Anti-DEI Orders

During the first two weeks after taking office, the new Trump Administration issued a series of Executive Orders targeting and rescinding various DEI initiatives across the federal government. These included the following: EO 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 29, 2025); EO 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 30, 2025); and EO 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity Executive Order, 90 Fed. Reg. 8633 (Jan. 31, 2025). Tribes around the country immediately expressed alarm that these Executive Orders could potentially be used to target Indian Country programs. Many tribes, intertribal organizations such as the National Congress of American Indians (NCAI) and the Affiliated Tribes of Northwest Indians (ATNI), along with Senator Lisa Murkowski (R-AK) and other allies in Congress, called on the Administration to make clear that these anti-DEI orders would not apply to Indian tribes, since these programs were based on treaty obligations and the trust responsibility, and were distinct from DEI.

Federal agencies serving tribes appear to have heard the message. The Department of Interior (Interior) was first, issuing an order on January 30, 2025, that described its steps to comply with the anti-DEI Executive Orders, but expressly exempting Indian programs from the scope of such compliance. A week later, the Department of Health and Human Services (HHS), where Indian Health Service is housed, issued a legal analysis from its acting General Counsel, reaching the conclusion that Indian programs were outside the scope of the anti-DEI Executive Orders. Based on informal discussions we had with HUD staff and counsel, we understood that HUD was following the lead of Interior and HHS but had not yet issued any formal orders or legal analysis.

On March 13, 2025, in a legal analysis from the acting HUD General Counsel, Brian D. Miller (attached), HUD formally took the same position as Interior and HHS, determining that:

The three recent EOs addressed below do not apply to the Department's legal obligation to provide housing for Indian Tribes and their citizens or the government-to-government relationship that underlies those obligations, which are distinct from the DEI programs targeted in the EOs... Accordingly, the Department's legal obligations to Indian Tribes

and federal programs for AI/AN were not eliminated, rescinded, hindered, impaired, or otherwise affected by the EOs or the Department's orders implementing the EOs.

The analysis noted that HUD's "government-to-government relationship with, and legal obligations to, Indian Tribes are logically and legally distinct from policy-based DEI programs", such as those rescinded by the anti-DEI Executive Orders. The analysis cited the United States Constitution and longstanding case law establishing the unique, government-to-government relationship between Indian tribes and the United States. It also pointed out that during his first term, President Trump took several initiatives to recognize tribes' political status and to enhance tribal self-government.

However, the analysis comes with an interesting caveat that may require some further clarification: "The EOs do, however, apply to policy-based DEI programs operated by Indian Housing Authorities." The analysis included a final paragraph giving one example of what this caveat might mean:

Although the EOs may not halt the government-to-government relations between the Department and Indian Tribes, Indian housing authorities and agencies must comply with the EOs in its operation of hospitals, clinics, and other facilities. They must, for example, discontinue diversity and inclusion efforts implemented under EO No. 13583, Establishing a Coordinated Government-Wide Initiative to Promote Diversity and Inclusion of the Federal Workforce, 76 Fed. Reg. 52847 (Aug. 23, 2011). EO 14173, § 3(a)(ii).

We do not believe that this caveat would apply to prohibit Indian or Tribal preference in providing services or in procurement, contracting, and employment. First, the analysis repeatedly emphasizes the obligation of the federal government not just to tribes, but to their citizens as well. Second, the analysis expressly states that "citizens (a/k/a members) enjoy a distinct political status as citizens of both the United States and an Indian Tribe. *Morton v. Mancari*, 417 U.S. 535 (1974)." The *Morton v. Mancari* decision expressly upheld the use of Indian preference in hiring by the Bureau of Indian Affairs (BIA). Finally, the use of Indian and Tribal-specific preference in provision of services as well as in employment and procurement is based in the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) statute itself, and such statutory language cannot be overturned by Executive Order. It is this statutory basis that is underscored by the language that prohibits "policy-based" DEI programs. Tribal housing programs and tribally designated housing entities will need, however, to consider if they have other, more general DEI programs based on policy, rather than statute, in place.

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.