



# Indian Housing Development Handbook

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# FOREWARD

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The National American Indian Housing Council (NAIHC) is pleased to publish this Indian Housing Development Handbook. We believe that the Handbook will be a useful resource not only to our members but also to partners who with tribes work to meet Indian Country's acute need for decent and affordable housing, including state and federal government officials, lenders, contractors, investors, attorneys, and other housing professionals.

The National American Indian Housing Council (NAIHC) was founded in 1974 as a 501(c)(3) corporation. NAIHC is the only national organization representing the housing interests of native people who reside in Indian communities, Alaska Native Villages, and on native Hawaiian Home Lands. The NAIHC is composed of 255 members representing 478 tribes and housing organizations. NAIHC also has associate and individual members and organizations that support our mission. NAIHC is guided by a 10-member Board of Directors representing Native housing entities in nine geographical regions throughout the United States.

NAIHC promotes and supports Native housing entities in their efforts to provide culturally relevant and quality affordable housing on behalf of Native people. NAIHC services to its members and the general public include:

- Advocacy for housing opportunities and increased funding for Native American housing and community development programs;
- Training in many areas of Native housing management;
- On-site technical assistance for Native housing professionals; and
- Research and information services related to Native housing issues and programs.

NAIHC is supported by member dues and fees, and government, foundation, association, and private grants.

The Handbook is intended as a supplement to our technical assistance and training activities. We welcome comments and suggestions for improvement of the Handbook, as well as suggestions as to how NAIHC can better serve our members. Visit [www.naihc.net](http://www.naihc.net) for more information.

- Tony Walters  
Executive Director, NAIHC

# PREFACE

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Preparation of a handbook attempting to address a topic as broad as Indian housing development requires a compromise between conciseness, simplicity and user-friendliness on the one hand and thoroughness on the other. The Handbook includes numerous references to statutes, regulations, and court cases that relate to Indian housing. Readers should follow NAIHC updates posted on its website, [www.naihc.net](http://www.naihc.net), and consult with their attorneys to confirm the status of laws and regulations relating to Indian housing.

The author wishes to thank NAIHC and the U.S. Department of Housing and Urban Development for their support of this Handbook, as well as the following agencies and Indian housing professionals who were kind enough to review and comment on drafts: Tedd Buelow (USDA), John Carrell (United States Army Corps of Engineers), Kevin Fitzgibbons (Fitzgibbons and Associates), Brian Gillen (HUD), Darrell Harman (US EPA), Andria Hively (USDA), Zoe Lebeau (LeBeau Development LLC), Captain Kelly Machado (U.S. Army), Carlo Montemayor (Department of Defense), Craig Morin (IHS), Linda Lee Retka (NAIHC), Judd Roth (Judd K. Roth Real Estate Development) and Lynn Trujillo (USDA). Finally, I am most grateful to the many tribes and tribal housing authorities that have retained my services over the years and provided me with the opportunity to learn enough about Indian housing to write a Handbook.

- Brian L. Pierson

Indian Nations Law Team Leader

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# PREFACE

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| AHP     | Affordable Housing Program administered by the regional Federal Home Loan Banks   |
| AMI     | Area median income  |
| BIA     | Bureau of Indian Affairs, the agency within the Department of the Interior with the principle responsibility for performing the federal government's trust obligation to tribes   |
| CDFI    | Community Development Financial Institution: lending agencies certified by the US Department of the Treasury  |
| DOE     | U.S. Department of Energy   |
| DOI     | U.S. Department of Interior   |
| FHLB    | Federal Home Loan Bank  |
| IHBG    | Indian Housing Block Grant: Block grants to tribes, or tribal TDHEs, for housing under the NAHASDA  |
| IHS     | Indian Health Service: An agency within the U.S. Department of Health and Human Services  |
| HUD     | U.S. Department of Housing and Urban Development: Administers NAHASDA and the Section 184 guaranteed loan program   |
| IBIA    | Interior Board of Indian Appeals  |
| IHP     | Indian Housing Plan: Annual housing plan required as part of the application for NAHASDA block grants   |
| IRA     | Indian Reorganization Act: 1934 law under which most tribes are organized   |
| LIHTC   | Low-Income Housing Tax Credits  |
| LTRO    | Land Title and Records Office: Regional offices of the BIA where documents relating to Indian trust lands are recorded  |
| NAHASDA | Native American Housing Assistance and Self-Determination Act: 1996 law establishing the current Indian housing block grant program; the principle federal Indian housing program |



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|-------------|---|
| NOFA        | Notice of Funding Availability: Notices the federal agencies publish in the <i>Federal Register</i> to announce the availability of program funds and to provide application information          |
| ONAP        | Office of Native American Programs: Office within HUD that administer NAHASDA and other Indian-related programs through a national office and regional offices                                    |
| OLG         | Office of Loan Guarantees: Office within HUD ONAP that administers the Section 184 guaranteed loan program, the NAHASDA Title VI guaranteed loan program, and the IHBG Leveraging Finance Program |
| RD          | Rural Development: A mission area within the U.S. Department of Agriculture that includes the Rural Housing Service   |
| RHS         | Rural Housing Service: The agency within RD that administers the Section 502, 504, 515, 523 and 538 programs and the Community Facilities Program   |
| RUS         | Rural Utilities Service: an agency within RD that administers programs for the financing of water and wastewater systems  |
| Section 184 | Section 184 of the Housing and Community Development Act of 1992, permitting HUD to guarantee loans made to tribal members  |
| TDHE        | Tribally-Designated Housing Entity: Entity designated by a tribe to administer its IHBG; may be a tribal housing authority, division of tribal government, or corporate entity                    |
| TSR         | Title Status Report: Report of title status of tribal trust lands or individual trust lands generated by the Land Title Records Office of the BIA   |

# INTRODUCTION TO THE 2020 EDITION

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The Handbook was first published in early 2009, shortly after Congress enacted the American Recovery and Reinvestment Act of 2009 (Recovery Act). Updated editions were published in 2010 and 2013. Significant developments since publication of the 2013 edition include

- The Consolidated Appropriations Act, 2016,<sup>1</sup> which permanently authorized the Low Income Housing Tax Credit program, extended the New Markets Tax Credit program and, subject to a phase-down provision, extended the Renewable Energy Investment Tax Credit program;
- BIA's issuance of new regulations governing rights-of-way through tribal lands;<sup>2</sup>
- Congress' enactment of the Tribal General Welfare Exclusion Act;<sup>3</sup>
- BIA's adoption of new rules governing the Housing Improvement Program;<sup>4</sup>
- HUD's adoption of Uniform Federal Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards and Uniform Federal Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribes;<sup>5</sup>
- HUD's adoption of new regulations addressing the Indian Housing Block Grant formula under the Native American Housing Assistance and Self-Determination Act.<sup>6</sup>

Congressional authorization for spending under the Native American Housing Assistance and Self-Determination Act (NAHASDA) expired in 2013. Notwithstanding the lack of authorization, Congress has continued to fund NAHASDA through continuing budget resolution appropriations.

The 2020 edition updates the statutory, regulatory and case law references and adds new sections in Part III summarizing sources of financing for veterans supportive housing (Section B. 7), telecommunications (Section E. 9), electrical facilities (Section E. 10), infrastructure through the U.S. Military (Section I), water and waste water through the Environmental Protection Agency (Section J) and Renewable Energy (Section M). The increasing cost of electricity and the steady decrease in the cost of renewable energy facilities, especially solar energy, make renewable energy financing an essential component of an effective tribal leveraging strategy.

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<sup>1</sup> December 18, 2015, Pub. L. 114-113.

<sup>2</sup> 80 Fed. Reg. 72492, November 19, 2015

<sup>3</sup> Pub. L. 113-168, Sept. 26, 2014, 128 STAT. 1883

<sup>4</sup> 80 Fed. Reg. 69590 November 10, 2015

<sup>5</sup> 79 Fed. Reg. 76078 December 19, 2014

<sup>6</sup> 81 Fed. Reg. 83674 November 22, 2016

# INTRODUCTION

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Many tribes suffer from an acute shortage of quality, affordable housing, aggravated both by natural population increase and tribal members who return home to take advantage of employment opportunities created by gaming and other economic development. The purpose of this Handbook is to provide tribal governments, tribal housing agencies, government agencies and outside partners, including commercial lenders, developers, consultants, attorneys, and other stakeholders with a single source of legal information essential for housing development in Indian Country.

Part One discusses the administrative infrastructure necessary for effective housing development. Indian Housing Block Grants (IHBGs) allocated under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) constitute the principal source of federal support for Indian housing. IHBGs, however, meet only a fraction of the housing needs on most reservations. A sustained and sophisticated team approach is required to pursue large-scale housing development through low-income housing tax credits, Federal Home Loan Bank AHP subsidies, HOME funds, USDA Rural Development funds, and other sources of housing finance.

Part Two discusses strategies to promote homeownership. Indian housing programs have traditionally focused on rental housing or heavily subsidized rent-to-own programs. Rising incomes in Indian communities have increased the demand for homeownership, which promotes asset-building by members and improves neighborhoods. Homeownership services are outside the experience of most tribal housing agencies, however, and homeownership on tribal trust lands is complicated by the need for tribal and federal approvals. Tribes must, therefore, establish new administrative structures and innovative programs to meet the growing demand for homeownership.

Part Three summarizes the principal federal, state, and private financial resources available for Indian housing development. Eligibility criteria, application processes, statutory and regulatory references, and other program features are described. While important, NAHASDA is only the starting point for an effective housing finance strategy. Helping tribes take advantage of all available financing resources is a major goal of this Handbook.

Part Four addresses the legal infrastructure that supports Indian housing, including the tribal and federal laws that govern Indian lands. The existing legal framework of federal oversight of tribal affairs pre-dates the modern era of tribal self-determination and makes little sense in connection with efforts by tribal governments to provide housing to their own members. The HEARTH Act and revised leasing regulations in 2012 and revised right-of-way regulations in 2016 shift authority to tribes. Federal control is likely to diminish further in the future and will need to be replaced with tribal laws that facilitate development and strengthen tribal sovereignty.

## **PART ONE: ORGANIZING FOR EFFECTIVE HOUSING DEVELOPMENT**

### **A. Background**

Until the 1960s, federal housing assistance to tribes was sporadic and unsystematic. Appropriations were occasionally made under the authority of the 1921 Snyder Act, which authorized expenditures for the “benefit, care and assistance of the Indians throughout the United States.”<sup>7</sup> During the Great Depression, Congress enacted several acts for the relief of tribes but established no permanent housing program.<sup>8</sup> The New Deal’s signature housing legislation, the Housing Act of 1937, provided federal funds to remedy unsafe housing conditions and to address the shortage of decent homes for low-income families through public housing authorities established by states and municipalities.<sup>9</sup> It was not until the 1960s, however, that the U.S. Department of Housing and Urban Development (HUD) first began providing financial assistance to tribes under the 1937 Housing Act.<sup>10</sup> At approximately the same time, the Bureau of Indian Affairs established the Housing Improvement Program (HIP), an emergency housing assistance grant program for Indians who occupied substandard reservation homes acquired outside of the 1937 Housing Act programs.

In order to take advantage of 1937 Housing Act funding, many tribes established Indian housing authorities (IHAs) closely resembling city and county housing authorities. Most tribal housing authorities continue to operate under a model tribal housing ordinance furnished by HUD.<sup>11</sup> From the mid-1960s to the late 1990s, housing development on Indian land was carried out primarily by these IHAs.

The 1937 Housing Act, intended principally to meet the needs of urban areas, was not well suited to Indian Country. HUD did not publish regulations specific to IHAs until 1976.<sup>12</sup> The “Mutual Help” program, in the form still familiar to many in Indian Country, was established at that time. In an effort to customize the 1937 Housing Act for tribes, Congress enacted the Indian Housing Act in 1988<sup>13</sup> but this law still did not meet the needs of Indian Country.

Congress fundamentally restructured federal Indian housing policy in 1996 by replacing funding under the 1937 Housing Act with Indian Housing Block Grants (IHBGs) under the Native American Housing Assistance and Self-Determination Act of 1996<sup>14</sup> (NAHASDA). Tribes were given the choice of administering the block grant themselves as a division of tribal government, forming a new agency, or designating their existing IHAs as their “tribally-designated housing entities” (TDHEs) to administer their block grants. Most tribes have chosen their IHAs as their

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<sup>7</sup> Act of Nov. 2, 1921, ch. 115, 42 Stat. 208, currently codified, as amended, at 25 U.S.C. § 13

<sup>8</sup> See, e.g., Section 5 of the Emergency Relief Appropriation Act of 1939, Act of June 30, 1939, ch. 252, Sec. 5, 53 Stat. 930; Section 4 of the Emergency Relief Appropriation Act, fiscal year 1941, Act June 26, 1940, ch. 432, Sec. 4, 54 Stat. 617.  
432, Sec. 4, 54 Stat. 617.

<sup>9</sup> 50 Stat. 888, 42 U.S.C. § 1437 et seq.

<sup>10</sup> See House Report No. 100-604, 1988 U.S.C.C.A.N. 791.

<sup>11</sup> The model ordinance was published in the *Federal Register* March 9, 1976, 41 Fed. Reg. 10157-60.

<sup>12</sup> *Federal Register* March 9, 1976, 41 Fed. Reg. 10157-60.

<sup>13</sup> Pub. L. No. 100-358, 102 Stat. 676.

<sup>14</sup> Pub. L. No. 104-330, 110 Stat. 4030, 25 U.S.C. §§ 4101 et seq.

TDHEs. While NAHASDA block grants provide tribes with greater flexibility in the use of federal funds, total housing development dollars have not increased significantly. Acknowledging that NAHASDA funding would be inadequate to meet tribes' needs, Congress intended that tribes leverage NAHASDA funds with housing development funding from other government and private sources, many of which are described below in Part Three. There are excellent opportunities for large-scale housing development in the NAHASDA era. Taking advantage of these opportunities, however, requires imagination, creativity, and hard work.

This Part One proposes a focused approach to housing development through the formation of a housing development team. A tribe may elect to assign primary responsibility for development to the tribal government or to a tribal agency. Some tribes have chartered nonprofit 501(c)(3) corporations, which may be eligible for federal, state and private funding sources unavailable to housing authorities, to develop housing. In most cases, however, the tribe's TDHE, as the tribal agency with the most relevant experience, will oversee development. For convenience, this Handbook will normally use the term TDHE to refer to the housing development entity, recognizing that in some cases another tribal agency will be involved.

Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions." Native American Housing Assistance and Self-Determination Act of 1996, § 2.

## **B. Forming a Development Team**

Formation of a development team is important because many housing finance programs are complex. In order to exploit them effectively, specialized knowledge and experience is required. The focus of the development team is not the day-to-day operation of tribal housing, tenant issues or maintenance but, rather, the preparation and implementation of the tribe's plan for rehabilitation of existing housing and construction of new housing and related infrastructure, including community centers and water, wastewater and energy facilities. Ideally, the development team should include a development coordinator, finance officer, attorney, and grant writer (or consultant). TDHE personnel assigned to the development team will gain valuable experience with each project and, over time, become experts in development. A description of the development team is often required as part of the application for housing financing. An experienced, qualified team increases the TDHE's chances of obtaining funds. Provided the relevant expertise is included, there are many potential successful development team structures. The following is one example.

- The leader of the development team may be the TDHE's executive director or an experienced individual who reports directly to the executive director. The development leader's role is to coordinate the efforts of other members of the development team, assure compliance with procurement and other grant requirements and serve as the TDHE's contact for outside contractors and government agencies. The course of large-scale housing development does not always run smoothly. Management must understand projects well enough to make informed decisions and solve problems as they arise. The team leader must, therefore, work closely with the executive director to assure that each proposed development project is fully understood by, and has the full support of the TDHE board and the tribe's elected leaders.

- The role of the development team finance officer is to (1) assist in preparing project budgets and projections; (2) assess the financial viability of proposed projects; (3) track the uses of project funds; and (4) prepare reports and certifications required by various funding agencies. In some cases, the finance officer will also prepare reports for filing with the IRS and other government agencies. Ideally, the finance officer should be an accountant, but any individual with experience in project accounting and a sound understanding of accounting principles can do the job. If the TDHE does not have a finance officer, an outside accountant should be retained.
- The role of the development team attorney is to (1) advise with respect to the legal requirements of the programs that may provide funding for a particular project; (2) review, negotiate and, where necessary, draft agreements with contractors, lenders, and government agencies; (3) explain tribal jurisdictional issues to outside parties; (4) deal with the BIA and other governmental agencies with respect to federal approvals and issues relating to title, leasing, mortgaging, and related issues; (5) work with the tribe to enact any codes or ordinances necessary to maximize eligibility for funding from outside sources; and (6) address compliance and other legal issues as they arise.
- With respect to certain housing finance programs, such as low-income tax credits, ICDBG, Rural Development Section 515 loans, and Federal Home Loan Bank Affordable Housing Program subsidies, there is keen competition for funds and applications are very complex. TDHEs without highly-experienced grant writers on staff may require the assistance of consultants. Experienced consultants, by virtue of their familiarity with scoring methodologies, can greatly increase the TDHE's chances of obtaining competitive grants and low-income housing tax credits.

Transaction costs, including professional fees, can often be included in program budgets and either paid by grant funds or covered by loans and amortized. Some programs also allow the developer (i.e., the TDHE) to be compensated for its efforts from loan or grant funds. Many consultants work on a contingent fee or partial contingent fee basis. Under this arrangement, compensation is paid out of the grant or loan proceeds upon successful closing of the financing.

### **C. Preparing a Development Plan**

The development team's first task is to evaluate and prioritize the housing needs of the community. In order to determine what kind of housing should be developed (i.e., rental, homeownership, single-family, multifamily, elderly, etc.), the development team must have accurate information regarding the demographics (age, family status, income) of the tribal population and members' housing preferences. Focus groups, elder sessions, and community forums may be useful. An informal survey or professional market study may be necessary, depending on the requirements of the program through which financing is sought. Based on the priorities established through the needs assessment, the development team is in a position to identify and rank potential development projects.

### **D. Executing the Development Plan**

Few tribes have the resources to address all of their housing needs at once. It is necessary to prioritize and stretch limited tribal dollars by leveraging them with other private and public sources of funding. Once the planning process is complete, implementation would typically include the

following steps:

1. *Evaluate non-financial and financial resources available for development.* Non-financial resources include available land, water, sewer, and other utilities. Financial resources include the portion of the tribe's IHBG available for development, the financing sources described in Part Three and local grants and loans. The development team evaluates the eligibility criteria, amounts available, and funding cycles of the various grant and loan programs to determine which are best suited to the projects under consideration. Most projects will require multiple funding sources.
2. *Select the project.* Taking into consideration community priorities, the eligibility criteria of the various potential funding sources and other factors, the development team selects an appropriate development project. All members of the team must have a thorough understanding of the regulatory requirements and deadlines associated with the programs to be used. Formal board action should be taken to confirm the project selection and the full support of the tribal government should be assured before proceeding.
3. *Secure the financing.* Preparing the necessary loan and grant applications is often a lengthy and difficult process. Advance planning is essential. For many key programs, there are strict application deadlines and opportunities are limited to one or two per year. For the more complex applications, such as HUD ICDBG, DOE Tribal Energy Grants, Rural Development Section 515 loans, Federal Home Loan Bank subsidies and low-income housing tax credits, the assistance of a professional consultant may be necessary.
4. *Execute.* Responsiveness is the key. The development team must be prepared to meet strict deadlines and respond to requests for information from government agencies, lenders, and contractors. Documentation of most housing finance programs is voluminous. Numerous agreements, contracts, documents, and certifications must be reviewed and executed. It is essential that the TDHE board confer the necessary signature authority on a person who is readily available. Many documents in the development process may need to be generated internally or drafted by counsel. In Indian Country, issues relating to sovereignty and land status inevitably arise. Every effort should be made to educate and increase the comfort level of lenders and government agencies with a view toward forming partnerships that will make the next transaction easier.
5. *Comply with program requirements.* Most grants and low-interest loans come with strings attached. The TDHE must comply with federal procurement requirements. Typically, the TDHE must assure that housing will be targeted at low-income renters or homeowners. Forms and reports must be prepared and filed. Failure to comply with program requirements can have very negative results, including loss of funds and limits on future access to programs. The development team must assure that the TDHE can meet program requirements. To protect the TDHE from any liability, it may be advisable to hire an outside firm to assist with compliance until the TDHE acquires the necessary experience in the various programs.
6. *Begin the next project.* In almost every tribal community, there is an enormous unmet need for housing. In order to make progress in meeting ever-increasing demands, the process of housing development must be continuous. With each new project, the team will gain more experience and the process will become easier.

## **PART TWO: STRATEGIES TO PROMOTE HOMEOWNERSHIP IN INDIAN COUNTRY**

### **A. Introduction**

As tribal members return home to take advantage of new employment opportunities offered by tribal enterprises, the chronic shortage of quality, affordable housing in Indian Country becomes more acute. While rental housing, long the focus of tribal housing authorities, will continue to be needed on most reservations, tribal members increasingly seek to become homeowners. Home ownership serves broader economic development goals. A home is typically its owner's most valuable asset. By maintaining its value, tribal members create personal wealth that can be passed on to the next generation, as is common outside Indian Country.

Historically, lenders have been reluctant to provide mortgage loans on trust land. Tribal trust land cannot be mortgaged without the approval of the United States Department of the Interior<sup>15</sup> and cannot be sold except with Congress' consent.<sup>16</sup> Foreclosure and sale of mortgaged land, the mortgage lender's normal default remedy, is unavailable in Indian Country. Other obstacles to mortgage lending in Indian Country include lenders' ignorance of, and lack of interest in, Indian Country, tribal members' lack of familiarity with financing, and poor credit.

This Part summarizes several strategies for promoting homeownership by tribal members, including (1) forming a tribal homeownership agency; (2) direct lending by tribes to tribal members, using funds provided by commercial lenders and other outside sources; and (3) creating a tribal program to provide grants and/or below-market rate interest loans to tribal members. The first strategy is available to most tribes. The extent to which a tribe can implement the second and third strategies will depend in large part on its financial resources. All strategies can be implemented to serve low and moderate-income tribal members.<sup>17</sup>

### **B. Forming a Homeownership Agency to Advise Members on Homeownership and Facilitate Mortgage Lending by Outside Lenders**

A reservation-based, culturally sensitive, tribal member-run homeownership agency can dramatically raise the overall level of knowledge of community members concerning homeownership and motivate members to take the steps necessary to qualify for mortgage loans. Even tribes that are unable to provide direct grants or loans to tribal members can help overcome traditional obstacles to homeownership by establishing a tribal homeownership agency as a one-stop, informational, counseling and technical services resource. Such an agency can -

- Help tribal members learn about homeownership and the steps they must take in order to become eligible for a mortgage loan.

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<sup>15</sup> 25 U.S.C. § 81

<sup>16</sup> 25 U.S.C. § 177

<sup>17</sup> The "Tribal Leaders Handbook on Homeownership," Ed. Patrice H. Kunesh, copyright 2018 Center for Indian Country Development of the Federal Reserve Bank of Minneapolis and Enterprise Community Partners, summarizes additional strategies to promote homeownership. The Tribal Leaders Handbook, which also includes helpful case studies, is available at <https://www.minneapolisfed.org/~media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en>



- Help tribal members rehabilitate their credit so they can borrow money for a home loan. Credit rehabilitation normally requires debt consolidation, payroll deduction, and establishment of credit relationships. The process may take several years before a tribal member meets commercial mortgage lending underwriting standards.
- Encourage local lenders, especially banks that hold the tribe's deposits or otherwise enjoy a business relationship with the tribe, to learn more about the tribe and the potential home mortgage market on the reservation.
- Facilitate the enactment of a tribal mortgage lending ordinance and other appropriate tribal laws necessary to encourage lending.
- Facilitate tribal governmental approvals, and BIA approvals, of environmental reviews, leases, permits, etc.
- Help tribal members take advantage of state, federal, tribal, and private homeownership programs that may provide additional funds, e.g., the HUD Section 184 program, Rural Development's (USDA) Section 502 subsidized loan program, the FHLB down payment assistance program, and state down payment assistance programs.
- Help tribal members fill out loan applications and meet lender requirements. Loan applications can be complex and daunting even to sophisticated borrowers.
- Help tribal members become responsible homeowners by providing home maintenance training.
- Originate or package loans for lenders.

A tribal homeownership agency can take any one of a number of forms, including (1) an office within the tribe's TDHE; (2) a division of tribal government; or (3) a separate corporation or limited liability company formed under tribal, state, or federal law. Formation of a tribal corporation under state law is normally not prudent because of the risk that the agency would thereby subject itself to state regulatory authority.

### **C. Organizing a Tribal Lending Agency – CDFIs**

When a tribe undertakes to provide mortgage loans to tribal members, it must decide whether the lender should be the tribe itself, the TDHE, or a related corporation. If only tribal funds are used, the lender could conveniently be a tribal lending office, provided such an office can operate the program in a businesslike manner. The advantages of forming a separate entity, however, include (1) relieving the tribal council, which normally has no special housing or lending expertise, of the burden of administering a complex program; (2) insulating the program from tribal politics; (3) insulating the tribe from any liability for the corporation's debts; (4) developing institutional expertise; and (5) providing a business form that, because of its separation from the tribe, is more attractive to outside sources of capital.

A corporation or limited liability company formed under tribal or state law would be a suitable structure for a tribal lending agency. Chartering under state law increases the likelihood that the state may seek to assert its regulatory authority but this disadvantage may be offset by the greater

confidence that lending sources may have in a state corporation, particularly where the tribe does not have established corporate laws. Board members and loan committee members should be chosen based on their experience in community lending, development, accounting, law, and other relevant expertise. Representation on the board by the tribal government and/or TDHE is useful to assure good communications and support but the corporation should be operationally independent of both.

A tribal homeownership agency that focuses on making loans can seek United States Department of the Treasury certification as a Community Development Financial Institution (CDFI). Pursuant to the Community Development Banking and Financial Institutions Act of 1994,<sup>18</sup> the U.S. Treasury Department administers a “Community Development Financial Institutions Fund” whose purpose is to promote economic revitalization and community development through investment and assistance to fund-certified CDFIs. The Fund offers grants, loans, equity investments, and other forms of assistance on a matching funds basis to non-governmental lending entities serving a targeted low-income population.

The Native American CDFI Assistance (NACA) Program is specifically designed to assist CDFIs that focus at least 50 percent of their business activities on American Indians.<sup>19</sup> In order to obtain funding from the Fund a CDFI must demonstrate its independence from tribal government and inclusion of its target population on its board of directors. This structure is intended to assure separation from tribal politics and sound lending practices. It may also attract financial support from banks and other lenders. HUD’s Office of Native American Programs (ONAP) will certify a tribal CDFI as an originator of Section 184 Guaranteed Loans. Rural Development (RD), a USDA agency, will pay tribal entities a fee for “packaging” loans made under RD’s Section 502 loan program.

#### **D. Establishing a Tribal Loan Program**

Few tribes have experience underwriting, documenting, and complying with federal mortgage interest reporting requirements. Tribes that do operate lending programs are often pressured to make loans to tribal members who are not creditworthy. Tribal loan program default rates are notoriously high. Where a good relationship with a commercial lender already exists, or where one can be established, the tribe can preserve its own assets and facilitate homeownership by providing the ancillary services described in Section A, above. There were 73 Native CDFIs at the end of 2017,<sup>20</sup> some of them focused on mortgage lending. There are approximately eighteen Native-owned banks in the United States, some of whom do significantly mortgage lending.<sup>21</sup> HUD publishes a list of lenders approved to participate in its Section 184 guaranteed loan program.<sup>22</sup> Tribal lending agencies should investigate partnerships with these lenders before undertaking lending.

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<sup>18</sup> 12 U.S.C. § 4701 *et seq*

<sup>19</sup> For more information, see <https://www.cdfifund.gov/programs-training/Programs/native-initiatives/Pages/default.aspx>

<sup>20</sup> [https://www.cdfifund.gov/Documents/CDFI7205\\_FS\\_NI\\_updatedDec2017.pdf](https://www.cdfifund.gov/Documents/CDFI7205_FS_NI_updatedDec2017.pdf)

<sup>21</sup> See, Access to Capital and Credit in Native Communities, p. vi. [http://nni.arizona.edu/application/files/6514/8642/4513/Accessing\\_Capital\\_and\\_Credit\\_in\\_Native\\_Communities\\_A\\_Data\\_Review.pdf](http://nni.arizona.edu/application/files/6514/8642/4513/Accessing_Capital_and_Credit_in_Native_Communities_A_Data_Review.pdf); See also, <https://indiancountrymedianetwork.com/news/native-news/divesting-dapl-favor-american-indian-owned-banks/>

<sup>22</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/lender\\_list](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/lender_list)

Although banks are in the business of making mortgage loans at market rates of interest, many do not serve Indian Country adequately because they are ignorant of tribal communities, unwilling to participate in federal guarantee programs, and/or perceive the tribal mortgage lending market as not worthwhile. Where there are no alternatives, a tribe that makes loans to its members, even at market rates, fills an important unmet need.

The key to a successful tribal lending program is business-like administration. This does not mean that the agency should not exercise cultural sensitivity or that it should never make “character loans.” It means the program should establish criteria, standards, policies, and procedures that minimize defaults and apply equally to all members. If the tribe permits defaults without consequences, other tribal members will be encouraged to default, creating a snowball effect that undermines the program and leaves the tribe with less revenue to meet the needs of other members. A well-run loan program requires:

- A fully developed legal infrastructure to support the program (See Part Four, Section III), including lease laws that define the rights of members to assign their homes and/or homes to non-members, efficient foreclosure remedies in tribal court and procedures for perfecting and enforcing security interests in cars, boats, and other collateral;
- Written program policies and procedures, neutrally implemented by a trained staff, including standards relating to loan-to-value and debt coverage;
- Neutral eligibility criteria addressing the borrower’s credit history, ratio of debt to the value of the home, borrower’s monthly debt payments relative to income, etc.;
- Careful underwriting to minimize the risk of default;
- A lease from the tribe if the borrower’s home is on trust land;
- A loan agreement that (1) requires the borrower to pledge any per capita payments as security for repayment of the loan; and (2) specifies the rights, if any, of nonmember spouses and children of the borrowing member to assume the loan in the event of the borrower’s death;
- A title report or, if the home is on trust land, a title status report from the Bureau of Indian Affairs;
- A survey that meets American Land Title Association (ALTA) standards;
- An Appraisal to assure that there is an appropriate loan-to-value ratio;
- In the case of a construction loan, a means of assuring that progress payments are appropriate, either through an escrow arrangement or a tribal inspection requirement;
- A mortgage on the home or, if the home is on trust land, a leasehold mortgage, which must be recorded with the applicable local authority or, if the home is on trust land, with the tribe’s own recording office and the BIA; and
- A final, post-closing title report or TSR showing the priority of the tribe’s mortgage.

## **E. Sources of Funds for Tribal Lending Programs**

A tribe that wishes to make mortgage loans does not necessarily need to meet the tribal member's entire borrowing needs. To the extent tribal funds can be leveraged with *outside* sources, tribal funds are preserved to meet other community needs. Alternative sources of capital include HUD Section 184, HUD Title VI, HUD ICDBG, USDA RD, the CDFI program, the Federal Home Loan Bank, private foundations, and commercial banks. By making loans to tribal lending agencies in low-income areas, banks may satisfy their obligations under the Community Reinvestment Act.<sup>23</sup>

## **F. Tribal Subsidy Programs**

### **1. Tax Considerations**

In 2014, Congress enacted the Tribal General Welfare Exclusion Act of 2014 (GWE Act).<sup>24</sup> The GWE Act provides that "Indian general welfare benefits," defined to include "services provided to or on behalf of a member of an Indian tribe (or any spouse or dependent of such a member) pursuant to an Indian tribal government program, are not includible in gross income, provided that the program is administered under specified guidelines, does not discriminate in favor of members of the governing body of the tribe, and the benefits are (1) available to any tribal member who meets such guidelines, (2) for the promotion of general welfare, (3) not lavish or extravagant, and (4) not compensation for services. Tribal homeownership programs should be designed to assure compliance with the GWE Act.

### **2. Down Payment Assistance Grants**

Down payment assistance is normally a grant to a member to finance a portion of the purchase price of a home. The remainder of the purchase price is often financed through a commercial mortgage lender, usually with a HUD Section 184 guaranteed loan. The result of the grant is lower monthly payments for the member. In a needs-based program, a tribe might determine, for example, that the subsidy will be used to limit monthly payments to a certain percentage (e.g. 30%, 25%, or 20%) of the member's income.

Because the purpose of the program is to provide housing for members, use of the home as a primary residence should be a requirement. Federal and state down payment assistance programs require "recapture" of grants in the event the home buyer sells the home within a specified period of years, normally 15. This is to prevent the homeowner from "cashing out" equity provided by the government for homeownership purposes. Tribes administering down payment assistance grant programs should consider imposing a similar requirement, assuming the program's underlying purpose is to meet housing needs rather than to provide cash benefits.<sup>25</sup>

### **3. Forgivable Loans**

A loan forgiveness program typically provides for a certain percentage of a tribal loan to be forgiven

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<sup>23</sup> Pub. L. No. 95-128, Title VIII, 91 Stat. 1147, 12 U.S.C. §2901 et seq.

<sup>24</sup> Public Law 113-168, codified at 26 USC 139E

<sup>25</sup> The program described in PLR 200632005 included a recapture feature

each year that the member resides in the home, until the loan is fully paid off at the end of the loan term. Gradual loan forgiveness is equivalent to the recapture provision of the grant program described above. In a down payment assistance program, the tribe enforces the requirement that the member reside in the home by requiring reimbursement of the grant if the member sells the home early. A forgivable loan program enforces the residency requirement through forgiveness over time and by canceling the forgiveness upon sale or abandonment.

The possible variations on a tribal forgivable loan program are numerous. A tribal forgivable loan program should include most of the same basic provisions discussed at Section D relative to non-forgivable loans. The entire loan may be forgivable or just a portion of it. The non-forgivable portion of the loan may be at market interest rates or below-market interest rates. Normally, the tribal member would be responsible for negotiating the purchase, whether an existing home or new home. Loans are secured with a mortgage and other available security (a per capita pledge, for example).

As discussed at F.2, a forgivable loan results in annual transfer of equity from the tribe to the member. It is necessary, therefore, for the tribe to have clear rules with respect to the borrower's rights when a home is sold during the term of the loan. Certainly, most tribes would not permit a non-member of the tribe to assume a loan that provides a significant annual subsidy to a borrower. The unforgiven loan balance, therefore, should be due upon sale or, alternatively, the loan should revert to a commercial market rate of interest with no forgiveness feature.

## **G. Build-to-Sell and Rent-to-Own Programs**

### **1. Potential Benefits**

The direct subsidy program described above assumes the tribal member will function independently of the tribe in choosing the type and location of home desired and negotiating the purchase. A completely different approach is for the tribe, TDHE, or other tribal entity to act as developer. By acting as developer, a tribe can normally offer homes to members at lower prices because of economies of scale in the construction of infrastructure and housing and the purchase of services (architectural, construction, legal, etc.) and materials. In addition, a tribe can facilitate environmental clearances, land leases, BIA approvals, etc. that would be major obstacles to individual members. By building 20 or more homes at once, the tribe can pass cost savings on to tribal member purchasers.

When a tribe or TDHE acts as developer, it can either sell the homes it builds immediately upon completion or enter into a rent-to-own home purchase agreement. A rent-to-own program is designed to meet the needs of tribal members who are not eligible for loans immediately but are expected to be eligible borrowers in the not-too-distant future. Such a program would replace the "Mutual Help" homeownership program operated under the 1937 Housing Act, now superseded in Indian Country by the NAHASDA block grant program.

A major advantage of the build-to-sell model is that, upon sale, the tribe has recouped its development costs from the proceeds of the sale to the member and has no further commitment to spend money for the maintenance of the home. This leaves the tribe free to develop new housing for more tribal member families.

## 2. Program Operation

Under a build-to-sell program, the tribe builds homes and then sells them to tribal members. While the tribe has greater control over the construction process as developer, it can identify and pre-qualify member homebuyers in advance. Homebuyers can participate in the development process and, within certain parameters, choose important features of the home. Components of a Build-to-Sell program might include:

- Screening by income levels and credit history to determine eligibility for a mortgage loan and referral of members who are ineligible to credit rehabilitation;
- An agreement between the tribe and the buyer under which (1) the tribe finances construction of the home, which the member is then obligated to purchase, contingent on the member's ability to obtain financing; (2) the member makes selections relating to size, design, and furnishings of the home; and (3) other purchaser obligations, such as earnest money, insurance, assessments, are described;
- Homebuyer education to assure that the tribal member has the skills necessary to maintain his or her home;
- Assistance to the member in obtaining a long-term lease from the tribe;
- Pre-qualification of the member for a loan under the Section 184 program, RD's section 502 program, conventional loan program, etc.;
- Assistance in connection with applications for other available assistance, such as state or Federal Home Loan Bank down payment assistance programs; and
- Pre-qualification for any available tribal assistance programs.

The build-to-sell program would conform in many respects to the lending program described above, except there would be no construction loans to borrowers and the tribe would retain greater control over the entire process. The tribe could include in the purchase price a developer fee or, by not charging a developer fee, pass along the savings to the member. The market conditions on each reservation will determine the best approach. In some cases, both approaches might be needed.

A rent-to-own program could be substantially identical to the build-to-sell program except that tribal members would not be required to purchase the home immediately. A homebuyer might rent for 18-24 months while undergoing credit rehabilitation and counseling. Once the homebuyer qualifies for a loan, he or she would purchase the home from the tribe. In order to assure that its funds are not tied up, the tribe might require homebuyers to enter into an agreement under which purchase of a home becomes compulsory once the tribal member qualifies for a loan.

The tax consideration discussed in Section F.1 should be carefully considered and the program should be administered in a manner that conforms to the GWE Act. As discussed above, a tribe can provide significant assistance to members' by selling a home at a reduced price. In many respects, this is the equivalent of a down payment grant.

### 3. Sources of Financing

Some tribes can fund home construction from existing resources. Most tribes, however, will need financing for any large-scale development. Potential sources of construction funding include (i) NAHASDA block grants, (ii) NAHASDA Title VI guaranteed loans (provided purchasers earn less than 80% of area median income), (iii) ICDBG (iv) HUD Section 184 guaranteed loans, (v) tax exempt bonds or (vi) commercial loans. Sources of financing to assist the tribal member in purchasing the home from the tribe include (i) tribal down payment assistance programs, as described above, (ii) USDA Section 502 direct loan program, (iii) HUD's Section 184 guaranteed loan program, (iv) Federal Home Loan Bank down payment assistance program, or (v) state down payment assistance programs. These funding sources are described in greater detail in Part Three.

#### **H. Tribal Guarantees**

Some tribes seek to assist tribal members by guaranteeing loans made to members by local banks. One may reasonably question the need for a tribal guarantee program since the federal government has enacted Section 184 of the Housing and Community Development Act of 1992 to provide a federal guarantee of loans made to tribal members in Indian Country. The USDA Section 502 program is also available to tribal members. While the Section 184 program requires a certain investment of the lender's time to learn the program's rules and procedures and imposes modest servicing requirements in the event of a default, this is not an unreasonable burden, particularly for a lender that holds the tribe's deposits or otherwise benefits from a business relationship with the tribe.

The bank will typically seek as strong a guarantee as possible including, for example (1) a pledge of gaming revenues; (2) a pledge of bank deposits, certificates of deposits or other liquid assets with a right of setoff; and (3) a waiver of the tribe's sovereign immunity. The benefits of this arrangement from the bank's perspective are obvious: The traditional reasons for reluctance to lend—inability to foreclose on trust land, reluctance to accept a leasehold mortgage, jurisdictional uncertainty, even credit issues—all disappear. In the event of a default, the bank simply exercises its right of setoff and is made whole. The task of pursuing the delinquent tribal member is left to the tribe.

A tribe that chooses to offer a tribal guarantee program must be careful to protect itself against both overreaching by the lender and defaulting by tribal members. A \$1 million certificate of deposit, for example, should not be necessary to secure \$1 million in loans. If the bank is not to take advantage of the tribe's guarantee, it should be required to apply its normal underwriting criteria, which should result in a default rate well under 10%. The collateral requirement should be determined accordingly so that the tribe does not unnecessarily tie up its assets.

A tribal loan guarantee program will become a costly drain on tribal resources unless the tribe is prepared to enforce its rights on default aggressively. This means having in place effective court remedies for eviction and foreclosure that enable the tribe to replace the defaulting homeowner as quickly as possible and sell the home to another member who can make the required monthly payment. If the tribe makes per capita payment to members, tribal law should permit the tribe to deduct amounts owed by defaulting borrowers.

## PART THREE: SUMMARY OF FINANCING SOURCES

### A. Introduction

What follows is a summary of the finance tools important for the development of Indian housing. The development team should research other loan and grant programs that may be available at any given time. Some of the programs described below are intended to benefit homebuyers. Homes developed through home buyer programs generally will not be maintained by the TDHE and cannot be included in Formula Current Assisted Stock for purposes of its Indian Housing Block Grant (IHBG). The TDHE can nevertheless play an essential role, as facilitator and/or developer, in assuring that tribal members have access to these programs. All of the programs are subject to change. TDHEs should consult legal counsel and the relevant agencies for program details.



*Red Cliff Rehab II - Photo courtesy Red Cliff Housing Authority*

While most of the programs described below are grouped by the federal agency that administers them, for convenience we have combined all renewable energy-related programs in Section L. This topic merits a separate section because the development and financing of cleaner, cheaper sources of energy is an essential feature of any effective, long term, affordable housing development strategy.

### B. HUD Tribal Housing Assistance

#### About HUD ONAP

The United States Department of Housing and Urban Development (HUD) is one of the largest departments of the federal government. The Secretary of HUD, a cabinet officer, leads the agency. Under the Secretary are a deputy secretary and eight assistant secretaries, including the Assistant Secretary for Public and Indian Housing (PIH). The Office of PIH, under the direction of the Assistant Secretary, administers programs authorized under the 1937 Housing Act and its many amendments.

Also under the PIH is the Office of Native American Programs (ONAP),<sup>26</sup> directed by the ONAP Administrator.<sup>27</sup> ONAP administers the Indian Housing Block Grant (IHBG) Program under

<sup>26</sup> Section 901 of the Housing and Community Development Act of 1977, Pub. L. No. 95-128, created a "Special Assistant for Indian and Alaska Native Programs." The Indian Housing Act of 1988, Pub. L. No. 100-358, established a separate HUD housing assistance program for tribes and Alaska Natives under the Housing Act of 1937, 42 U.S.C. 1437. NAHASDA replaced the 1937 Act program.

<sup>27</sup> In 2013-2016, tribal advocates attempted, without success, to elevate this position to the assistant secretary level through NAHASDA reauthorization legislation.



the Native American Housing Assistance and Self-Determination Act (NAHASDA), the Indian Community Development Block Grant Program (ICDBG), the Section 184 home loan guarantee program, and the Tribal Housing Activities Loan Guarantee Program authorized under Title VI of NAHASDA. In addition to the national ONAP office, seven regional ONAP offices, each with its own regional administrator, administer the IHBG and ICDBG programs and provide housing-related assistance to tribes within their jurisdictions.

Finally, the ONAP Office of Loan Guarantees (OLG), under an office director, is responsible for the Section 184 guarantee program, its Hawaiian Section 184a counterpart and the Title VI guarantee program. The programs described below include both programs administered by HUD ONAP and HUD programs, as well as additional non-ONAP HUD programs valuable to tribes.

#### 1. Native American Housing Assistance and Self-Determination Act

*Generally.* The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)<sup>28</sup> established the Indian Housing Block Grant (IHBG) as the primary program by which the federal government fulfills its federal trust obligation to tribes with respect to housing. For most tribes, the IHBG is the most dependable source of funds for housing development and typically provides the starting point for all development. In 2000, Congress enacted the Hawaiian Homelands Homeownership Act, a parallel housing block grant program for Native Hawaiians.<sup>29</sup> In 2008, Congress reauthorized NAHASDA through 2013.<sup>30</sup> IHBG program regulations were revised in 2012.<sup>31</sup> As of late 2019, Congress had not reauthorized NAHASDA, though Congress continues to fund the IHBG program annually.

*Indian Housing Plan.* As a condition to receiving an annual IHBG, a tribe or a tribally-designated housing entity (TDHE) submits an Indian Housing Plan each year to HUD, containing (a) a description of planned activities including the types and numbers of houses to receive assistance, number of new units to be built and/or demolished, and plans for preservation of units funded under the 1937 Housing Act; (b) statement of needs of low-income families in the tribe's jurisdiction; (c) an operating budget showing sources of funds "reasonably available" and intended uses of funds for permitted "affordable housing activities;" and (d) certifications relating to compliance with the Indian Civil Rights Act, property insurance, and existence of policies relating to eligibility, admission, occupancy, rents, management, maintenance, and labor practices.<sup>32</sup> Within 90 days after the end of the program years, the TDHE submits an annual performance report,<sup>33</sup> using the same form employed for the Indian Housing Plan.

*Eligible Affordable Housing Activities.* NAHASDA block grant funds may be used for (a) modernization of, or operating assistance to, housing previously developed under a contract between HUD and a tribal housing authority; (b) affordable housing development, including real

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<sup>28</sup> Pub. L. No. 104-330, 110 Stat. 4030, 25 U.S.C. §§ 4101 et seq.; See HUD Regulations at 24 C.F.R. Part 1000.

<sup>29</sup> Pub. L. No. 106-569, Title V, Subtitle B; 25 U.S.C. §§ 4221 et seq.

<sup>30</sup> Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411.

<sup>31</sup> 77 Fed. Reg. 71513, December 3, 2012

<sup>32</sup> Section 102(b), 25 U.S.C. § 4112(b).

<sup>33</sup> 24 CFR § 1000.514

property acquisition, site improvement, new construction, rehabilitation, utilities, infrastructure, conversion, demolition, financing, administration and planning, energy efficiency improvement, mold remediation, and related activities; (c) housing related services, including rental or homeownership assistance and other services to owners, tenants, contractors involved in permissible NAHASDA-funded activities; (d) management of affordable housing, including maintenance of units and loan processing; (e) crime prevention, and law enforcement; (f) “model activities” approved by HUD and (g) funding of reserves.<sup>34</sup>

*Who can benefit?* With certain limited exceptions, funds may be used to benefit only Indian families whose income does not exceed 80% of median income (defined to mean the greater of the median income for the Indian area, as determined by the Secretary of HUD, or the median income of the United States). Rents may not exceed 30% of the family’s adjusted monthly income.<sup>35</sup> The right of tribes to give preference to their own members in providing housing assistance is expressly recognized in NAHASDA.<sup>36</sup>

*Allocation Formula:* NAHASDA’s allocation formula takes into account (1) amounts required to modernize and operate “formula current assisted stock” (i.e., housing units a tribe has developed under 1937 Housing Act, the pre-NAHASDA federal housing program for tribes); and (2) amounts required to address current needs, determined based on seven factors.<sup>37</sup> In recent years, NAHASDA has been funded at approximately \$650 million annually. For each of FY 2018 and 2019, Congress provided an additional \$100 million for “competitive grants to eligible [NAHASDA] recipients” based on “need and administrative capacity” and providing priority for “projects that will spur construction and rehabilitation.”<sup>38</sup> Whether the competitive IHBG will be repeated is unknown at the time of publication.

## 2. Title VI Guarantee Program



*Ho-Chunk HHEDA Title VI Project - Photo courtesy of Ho-Chunk Housing and Community Development Agency*

*What does the program offer?* In addition to the IHBG program described in the previous section, NAHASDA Title VI authorizes HUD to guarantee notes and other obligations issued by Indian tribes or TDHEs, with tribal approval, for the purpose of financing affordable housing activities permitted under NAHASDA.<sup>39</sup> The guarantee covers 95% of the outstanding principal balance and accrued interest due on the loan. The maximum Title VI commitment is the amount of a tribe’s current NAHASDA block grant, less the amount required to maintain current assisted stock, multiplied by five.

<sup>34</sup> Section 202, 25 U.S.C. § 4132.

<sup>35</sup> Section 203(a), 25 U.S.C. § 4133(a).

<sup>36</sup> Section 201(b)(5); 25 U.S.C. § 4131(b)(5)

<sup>37</sup> 24 C.F.R. § 1000.324.

<sup>38</sup> P.L. 115-141, p. 1609; P.L. 116-6, p. 431

<sup>39</sup> See also, 24 C.F.R. Part 1000, Subpart E, 63 FR 12333-74, as amended at 77 FR 71528.

*What is required?* The tribe or TDHE must pledge its NAHASDA block grant to assure repayment of the loan. Further, the tribe or TDHE must demonstrate experience in complex financial transactions, obtain tribal approval authorizing the obligation, and demonstrate an ability to repay the obligation without impairing its use of NAHASDA block grant funds. Environmental reviews must be completed before any NAHASDA funds are committed, obligated or spent.

*How do I apply?* Application for the guarantee is made by the borrower (tribe or TDHE), who furnishes HUD with the information concerning the proposed project, including the borrower's experience in developing affordable housing, the number of families to be served, and financial information. Once HUD sends a notification authorizing the project to proceed, an environmental review is required. Copies of building codes, BIA-approved leases and eviction and foreclosure ordinances must be furnished to HUD. For further information, contact HUD's Office of Native American Programs (ONAP) (202) 402-4134 or visit the program website.<sup>40</sup>

### 3. HUD Section 184 Loan Guarantee

#### *For Individual Tribal Members*

*What does the program offer?* Section 184 of the Housing and Community Development Act of 1992<sup>41</sup> offers lenders a 100% guarantee of loans made to qualifying Indians. The Omnibus Indian Advancement Act of 2000 added a parallel Section 184A program for Native Hawaiians.<sup>42</sup> Congress enacted Section 184 primarily to overcome the reluctance of lenders to lend on tribal trust land, which cannot be encumbered or alienated. A loan guaranteed under Section 184 may be used to purchase or rehabilitate an existing house, purchase manufactured housing, purchase and rehabilitate an existing house, or construct new housing.

*Whom does the program serve?* The program is available only for single-family housing of one to four units located on tribal trust land, allotted trust land or fee simple land in an Indian area. HUD has defined Indian areas to include urban areas with substantial Indian populations. The majority of Section 184 loans have been made to Indians residing off-reservation. The borrower may be an individual tribal member, tribe or TDHE. Unlike the RD Section 502 Program, Section 184 guarantees are not reserved for moderate- and low-income homebuyers.

*What does the program require of the borrower?* HUD charges a 1.5% guarantee fee.<sup>43</sup> The home buyer must make a down payment of 1.25% on loans under \$50,000 or 2.25% if the loan exceeds

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<sup>40</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/titlevi](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/titlevi)

<sup>41</sup> Pub. L. No. 102-550, 12 U.S.C. § 1715z-13a, as amended by NAHASDA; 24 C.F.R. Part 1005 (61 FR 9054, 3/6/96); 63 FR 12349, 48987-94. Section 184 was reauthorized, through 2012, by enactment of the Native American Home Ownership Opportunity Act of 2007, Pub. L. No. 110-037. See federal regulations at 24 C.F.R. Part 1005.

<sup>42</sup> Pub. L. No. 106-568, Title II, 25 U.S.C., 25 U.S.C. § 4221 et seq. 24 C.F.R. Part 1007

<sup>43</sup> See, 79 Fed. Reg. 60492; 2013 Consolidated Appropriations Act (Pub. L. 113-6, approved March 26, 2013) amended section 184(d) of the Housing and Community Development Act of 1992 by authorizing the Secretary to increase the fee for the guarantee of loans up to 3 percent of the principal obligation of the loan and to establish the amount of the fee by publishing a notice in the Federal Register. By a notice published March 5, 2014, HUD increased the fee to 1.5%. 79 Fed. Reg. 12520; 79 Fed. Reg. 2382 March 5, 2014 (conforming 24 C.F.R. § 1005.109.)

that amount. This investment can be from private funds or a gift from the tribe or TDHE. If the borrower's income is less than 80% of AMI, NAHASDA funds can be used to cover the down payment. In addition, HUD assesses an annual insurance premium, equal to .25% of the loan balance, on loans whose loan to value ratio exceeds 78%.<sup>44</sup> The lender must evaluate the borrower's ability to repay the loan, considering income history and stability, credit history and other factors. Generally, the borrower's total debt-to-income ratio may not exceed 41%, although HUD may make exceptions in appropriate circumstances. The Section 184 program does not require mortgage insurance.

*How do I apply?* The individual tribal member or TDHE first negotiates the loan with a HUD-approved lender. The lender requests a case number from the HUD guarantee office. The lender verifies the status of the land (trust, fee, etc.) through the Land Status Jurisdiction form. The lender submits the underwriting package to HUD, which either denies or approves the guarantee. Lenders meeting certain criteria may be authorized by HUD to pre-approve a guarantee under HUD's "Direct Guarantee" program, patterned after the HUD/FHA Direct Endorsement procedures.

*What are the requirements for mortgages and leases?* Where the home to be financed is located on fee land, the lender takes a standard mortgage. Where the home is on tribal trust land, the lender takes a mortgage on the borrower's leasehold. Unless the Tribe has enacted a leasing law approved under the HEARTH Act, BIA must approve the lease and leasehold mortgage and provide title status reports. (See Part Four, Section II). Lenders seeking to obtain a guarantee with respect to land on tribal trust land or individual trust land should begin to work with BIA as soon as possible.

*What must the tribe do to participate?* In order to make the Section 184 program available for their members, tribal governments must enact eviction and foreclosure procedures that permit the lender to foreclose in the event of default. Tribal ordinances may provide for tribal court jurisdiction and give the tribe an opportunity to find a tribal member to assume the lease or to exercise the right to pay off the loan and assume the lease itself, before the leasehold can be occupied by a non-Indian person. See Part Four, Section III, below, for a discussion of the legal infrastructure for mortgage lending in Indian Country.

#### *For Tribes and TDHEs*

*What does the program offer?* Section 184 also provides lenders a 100% guarantee on loans made to Tribes and TDHEs to purchase or rehabilitate housing or construct new housing units up to a maximum of twenty (20) units per project.

*Whom does the program serve?* The program is available only for single-family housing of one to four units located on tribal trust land, allotted trust land or fee simple land in an Indian area. There are no income limitations for units purchased, rehabbed or constructed under Section 184 guarantees. The Program has been used by tribes and TDHEs to develop subdivisions of houses that are then leased, sold on a lease-to-own basis, or sold outright to tribal members.

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<sup>44</sup> 81 Fed. Reg. 75836, November 1, 2016.

*What does the program require of the tribe of the TDHE?* HUD charges a 1.5% guarantee fee.<sup>45</sup> The tribe or the TDHE provides a down payment of 1.25% on loans under \$50,000 or 2.25% on loans exceeding that amount. This investment can be from tribal or private sources. If the tribe or TDHE intends to sell or rent to members with incomes less than 80% of AMI, NAHASDA funds can be used to cover the down payment. In addition, HUD assesses an annual insurance premium, equal to .25% of the loan balance, on loans whose loan to value ratio exceeds 78%.<sup>46</sup> The lender will evaluate the tribes or TDHEs ability to repay the loan.

*How does the tribe or TDHE apply?* The tribe or the TDHE contacts the HUD-approved lender to discuss the proposed project, including number of units to be acquired, rehabbed or constructed. The lender will request case number from the HUD guarantee office. The lender verifies the status of the land (trust, fee, etc.) through the Land Status Jurisdiction form for each unit. The lender works with the tribe or TDHE to assemble and submit the underwriting package to HUD, which either denies or approves the guarantees. Lenders meeting certain criteria may be authorized by HUD to pre-approve a guarantee under HUD's "Direct Guarantee" program, patterned after the HUD/FHA Direct Endorsement procedures.<sup>47</sup>

*What are the requirements for mortgages and leases?* Where the home to be financed is located on fee land, the lender takes a standard mortgage. Where the home is on tribal trust land, the lender takes a mortgage on the borrower's leasehold. Unless the Tribe has enacted a leasing law approved under the HEARTH Act, BIA must approve the lease and leasehold mortgage and provide title status reports. (See Part Four, Section II). Lenders seeking to obtain a guarantee with respect to land on tribal trust land or individual trust land should begin to work with BIA as soon as possible.

*What must the tribe do to participate?* Tribal governments must enact eviction and foreclosure procedures that permit the lender to foreclose in the event of default. Tribal ordinances may provide for tribal court jurisdiction and give the tribe an opportunity to find a tribal member to assume the lease or to exercise the right to pay off the loan and assume the lease itself, before the leasehold can be occupied by a non-Indian person. See Part Four, Section III, below, for a discussion of the legal infrastructure for mortgage lending in Indian Country.

Tribes wishing to make the Section 184 program available for their members should contact the Office of Loan Guarantee, Office of Native American Programs, at 1-800-561-5913 or [Section184@hud.gov](mailto:Section184@hud.gov) through the HUD ONAP website.<sup>48</sup>

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<sup>45</sup> See, 79 Fed. Reg. 60492; 2013 Consolidated Appropriations Act (Pub. L. 113–6, approved March 26, 2013) amended section 184(d) of the Housing and Community Development Act of 1992 by authorizing the Secretary to increase the fee for the guarantee of loans up to 3 percent of the principal obligation of the loan and to establish the amount of the fee by publishing a notice in the Federal Register. By a notice published March 5, 2014, HUD increased the fee to 1.5%. 79 Fed. Reg. 12520; 79 Fed. Reg. 2382 March 5, 2014 (conforming 24 C.F.R. § 1005.109.)

<sup>46</sup> 81 Fed. Reg. 75836, November 1, 2016.

<sup>47</sup> A copy of the "184 Indian Housing Loan Guarantee Program Firm Commitment Submission Checklist – TDHE and Tribe Borrowers" is available at: [https://www.hud.gov/sites/dfiles/PIH/documents/checklisttdhe\\_triballoans.pdf](https://www.hud.gov/sites/dfiles/PIH/documents/checklisttdhe_triballoans.pdf)

<sup>48</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184)

#### 4. Indian Community Development Block Grants (ICDBG)

*What does the program offer?* The Indian Community Block Grant (ICDBG) Program<sup>49</sup> is an Indian Country set-aside from the larger Community Development Block Grant Program.<sup>50</sup> The primary objective of the ICDBG program is to develop viable Indian communities by providing decent housing and expanded economic opportunities principally for persons of low and moderate income. Single-purpose grants may be used for a broad range of housing, infrastructure and economic development purposes, including housing rehabilitation, installation of solar panel and energy efficiency improvements, land acquisition to support new housing construction, roads, water, sewer and community buildings, as well as commercial, industrial, and agricultural projects that may be owned and operated by the recipient or by a third party. Maximum grants vary by ONAP region and have historically ranged from \$500,000 - \$1,000,000 except within Southwest ONAP, where tribes with large populations are eligible for larger grants.

ICDBG funds may be used for new construction of residential housing only as a last resort for relocation of displaced persons or for projects carried out by community based development organizations. ICDBG funds can, however, be used for homeownership assistance to low and moderate-income households, including down payment assistance, interest rate subsidization and guarantees.

A portion of ICDBG funds are reserved for “Imminent threats.”<sup>51</sup> Imminent Threat (IT) grants are intended to alleviate or remove threats to health and safety in an. According to program guidance, the threat “must be unique and unusual and not something that the tribe has known about for a long time. It must also impact the entire tribal service area, not just a few homes.”<sup>52</sup> The grant ceiling for the IT program is \$450,000 or \$900,000 for presidentially declared disasters. The IT grants are made available as needed, outside the annual NOFA process that applies to the non-IT ICDBG program.

*Who is eligible?* Federally recognized tribes and Alaska Native Villages are eligible to apply. In addition, tribal organizations, including TDHEs, may apply if authorized by tribal government resolution and if qualified under the Indian Education and Self-Determination Act of 1975.<sup>53</sup>

*What are the principal program requirements?* A single-purpose grant must meet an identified community need. The rating criteria are published annually in HUD’s Notice of Funding Availability in the Federal Register. An applicant can demonstrate compliance with program requirements by demonstrating that (1) the project benefits all residents of an area in which at least 51% of the residents are low and moderate income persons (LMI); (2) the project benefits a limited clientele of which at least 51% are LMI persons; (3) housing developed with program funds is occupied by LMI persons or, in case of multi-family housing, is at least 51% occupied by LMI persons; or (4) at least 51% of jobs to be created in a job creation project are designated for LMI persons.

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<sup>49</sup> Title I, Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5303; 24 C.F.R. part 1003.

<sup>50</sup> 42 U.S.C. § 5306(a)(1)

<sup>51</sup> 24 C.F.R. Part 1003, Subpart E.

<sup>52</sup> <https://www.hud.gov/sites/documents/2017-01IMMINENTTGT.PDF>

<sup>53</sup> See, 25 U.S.C. §§450 et seq.

*How do I apply?* An application announcement is made annually in accordance with a Notice of Funds Available. See the HUD website for details.<sup>54</sup> The program is competitive. The process for the ICDBG IT program is described in the program guidance.<sup>55</sup>

## 5. Section 202 Supportive Housing for the Elderly

*What does the program offer?* Until 2012, the Section 202 program provided capital advances for new construction, rehabilitation or acquisition of housing for occupancy, for at least 40 years, by very low-income elderly persons.<sup>56</sup> After 2012, Congress had appropriated no funds for capital advances but appropriated funds for rental assistance for existing Section 202-funded facilities. Capital advances were, however, again available in 2019.<sup>57</sup>

*Who is eligible?* Private nonprofit organizations and nonprofit consumer cooperatives are the only eligible applicants under this program. Neither a public body nor an instrumentality of a public body is eligible to participate in the program. Section 202 has rarely been used in Indian Country because tribal governments and TDHEs are not eligible applicants. Several tribes in recent years have, however, teamed with nonprofits to meet the needs of tribal elders. In order to access the program, a tribe must grant a long-term lease to a nonprofit developer/applicant.

*How do I apply?* By the Housing and Economic Recovery Act of 2008, Congress delegated the authority to review applications for 202 funding to state housing finance agencies.<sup>58</sup> For Indian Country projects, applications are made by a nonprofit entity, with the tribe's support. For more information, visit the HUD Section 202 website.<sup>59</sup>

## 6. Section 811 Supportive Housing for Persons with Disabilities

*What does the program offer?* Section 811 of the National Affordable Housing Act of 1990<sup>60</sup> resembles the Section 202 program but with a different focus. The Section 811 program offers (i) interest-free capital advances and rental assistance to private nonprofit organizations to finance acquisition, construction, rehabilitation and/or operation of rental housing that provides supportive services for persons with disabilities and (ii) project rental assistance, through state housing finance

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<sup>54</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/grants/icdbg](https://www.hud.gov/program_offices/public_indian_housing/ih/grants/icdbg)

<sup>55</sup> <https://www.hud.gov/sites/documents/2017-01IMMINENTTGT.PDF>

<sup>56</sup> Section 202 of the Housing Act of 1959, (12 U.S.C. 1701q), as amended by Section 202 Supportive Housing for the Elderly Act of 2010, Pub. L. 111-372; section 801 of the Cranston-Gonzalez National Affordable Housing Act (Pub. L. No. 101-625); Housing and Community Development Act of 1992 (Pub. L. No. 102-550; Rescissions Act (Pub. L. No. 104-19; enacted on July 27, 1995); American Homeownership and Economic Opportunity Act of 2000 (Pub. L. No. 106-569; approved December 27, 2000); and the Consolidated Appropriations Resolution, 2003 (Pub. L. No. 108-7, approved February 20, 2003). HUD Handbook 4571.3; Program regulations are found at 24 C.F.R. Part 891.

<sup>57</sup> Pub. L. 115-141, Division L, Title II. <https://www.grants.gov/web/grants/view-opportunity.html?oppId=314547>

<sup>58</sup> Pub. L. 110-298 § 2835(b), 122 Stat. 2872; For a list of state housing finance agencies, see <https://www.ncsha.org/housing-finance-agencies-list/>

<sup>59</sup> [https://www.hud.gov/program\\_offices/housing/mfh/progdsc/eld202](https://www.hud.gov/program_offices/housing/mfh/progdsc/eld202)

<sup>60</sup> Section 811 of the National Affordable Housing Act of 1990, Pub. L. No. 101-625, Title VIII, 42 U.S.C. § 8013. Program regulations are in 24 C.F.R. Part 891. Section 811 Supportive Housing for Persons with Disabilities (HUD Handbook 4571.2) and Supportive Housing for Persons with Disabilities.

agencies,<sup>61</sup> to sponsors who operate housing with community-based supportive services for persons with disabilities. Eligible housing includes group homes, independent living facilities, multifamily housing, condominium housing and cooperative housing. Services must address the individual needs of persons with disabilities, provide them with opportunities for optimal independent living and participation in normal daily activities and facilitate access to the community at large and to suitable employment opportunities.

A capital advance does not have to be repaid as long as the housing remains available for very low-income persons with disabilities for at least 40 years. Under the rental assistance program, state housing finance agencies enter into rental assistance contracts with project sponsors, which may include tribes, which cover the difference between the HUD-approved operating costs of the project and the tenants' contribution toward rent, usually 30% of adjusted income. The initial term of the project rental assistance contract is five years and can be renewed if funds are available. The program is limited to very low-income households whose income does not exceed 50% of the area median income.

For purposes of program eligibility, a "person with disabilities" is someone determined to have a physical, mental, or emotional impairment, which (1) is expected to be of long-continued and indefinite duration; (2) substantially impedes his or her ability to live independently; and (3) is of such a nature that such ability could be improved by more suitable housing conditions. A person with a developmental disability, as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act also qualifies if certain conditions are met.

*Who is eligible?* Capital advances may be made only to private nonprofit organizations, which could include nonprofits serving tribal communities. Tribes may qualify as project sponsors for purposes of applying for rental assistance provided they meet the project sponsor criteria established by the state housing finance agency.

*How do I apply?* For information on the application process, visit the HUD website<sup>62</sup> or contact the state housing finance agency.<sup>63</sup>

## 7. Tribal HUD-Veterans Affairs Supportive Housing Program

*What does the program offer?* The VA and HUD established the HUD-Veterans Affairs Supportive Housing (HUD-VASH) program to serve homeless Veterans and their immediate families. The VA provides case management and eligibility screening services, while HUD allocates permanent housing subsidies from its "Housing Choice" program. The primary goal of the program is to move Veterans and their families out of homelessness. The program combines Housing Choice Voucher (HCV) rental assistance for homeless Veterans with case management and clinical services provided by the Department of Veterans Affairs (VA). The VA provides these services for participating Veterans at VA medical centers (VAMCs) and community-based outreach clinics.

Every year since 2008, HUD and VA have awarded HUD-VASH vouchers based on geographic

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<sup>61</sup> For a list of state housing finance agencies, see <https://www.ncsha.org/housing-finance-agencies-list/>

<sup>62</sup> [https://www.hud.gov/program\\_offices/housing/mfh/progdesc/disab811](https://www.hud.gov/program_offices/housing/mfh/progdesc/disab811)

<sup>63</sup> [https://www.hud.gov/program\\_offices/housing/mfh/progdesc/disab811](https://www.hud.gov/program_offices/housing/mfh/progdesc/disab811)



need and public housing agency (PHA) administrative performance. The allocation process for HUD-VASH relies on (i) HUD’s point-in-time data submitted by Continuums of Care (CoCs), (ii) VAMC data on the number of contacts with homeless Veterans, and (iii) performance data from PHAs and VAMCs. After determining which areas of the country have the highest number of homeless Veterans, the VA Central Office identifies VA facilities in the corresponding communities. HUD then selects PHAs near to the identified VA facilities, taking into consideration the PHAs’ administrative performance, and sends the PHAs invitations to apply for the vouchers. There is at least one site in each of the 50 states, in the District of Columbia, Puerto Rico and Guam.

Generally, the HUD-VASH program is administered in accordance with regular HCV program requirements (24 CFR Section 982). However, the 2008 Consolidated Appropriations Act (Public Law 110-161) allows HUD to waive or specify alternative requirements for any provision of any statute or regulation affecting the HCV program in order to effectively deliver and administer HUD-VASH voucher assistance. The alternative requirements are established in the HUD-VASH Operating Requirements (including the waivers and alternative requirements from HCV program rules), which were published in the Federal Register on May 6, 2008 and updated March 23, 2012. The operating requirements, notices related to HUD-VASH, and other helpful tools and resources are provided in the sections below.

For FY 2015, Congress authorized a rental demonstration Tribal HUD–VA Supportive Housing (Tribal HUD–VASH) program.<sup>64</sup> Regulations were published in 2015.<sup>65</sup> The program is not managed under the Housing Choice Voucher program that applies to the non-tribal HUD-VASH program. For its part, the VA provides case management and supportive services. Rental assistance, which may be tenant-based or project-based, is generally subject to all requirements of the NAHASDA and its regulations.

Under the Tribal HUD-VASH, HUD initially provided a total of \$5.9 million to 26 tribes for rental assistance for homeless American Indian or Alaska Native Veterans or those at risk of homelessness, and living on or off tribal lands (within the authorized tribal/tribally designated housing entities (TDHEs) service areas. Grants ranged from \$123,288 to \$391,740. The Consolidated Appropriations Act of 2017 provided an additional \$7 million, approximately half of which went to existing program recipients and the remainder to fund new grants to IHBG-eligible entities. The future of the Tribal HUD-VASH program is uncertain.



*AHA Supportive Housing IHBG, HOME Funds, NY Homeless Housing  
Photo courtesy of AHA*

<sup>64</sup> Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235, approved December 16, 2014)

<sup>65</sup> 80 Fed. Reg. 63822; See also, Guide, available at [www.va.gov/homeless/docs/Tribal\\_HUD-VASH\\_Grants\\_Guide.pdf](http://www.va.gov/homeless/docs/Tribal_HUD-VASH_Grants_Guide.pdf).

## 8. Community Compass Technical Assistance

Under the Community Compass Technical Assistance (TA) program<sup>66</sup> is designed to “help HUD’s customers navigate complex housing and community development challenges by equipping them with the knowledge, skills, tools, capacity, and systems to implement HUD programs and policies successfully and provide effective administrative and managerial oversight of HUD funding.”<sup>67</sup> Under the Native American Housing and Community Development sub-program, HUD contracts with service providers to provide technical assistance to tribes to enable them to better understand and take advantage of the above-described HUD programs. Tribes are free to request assistance in other areas, as well. Through subcontract relationships, contractors can offer tribes expertise in a broad range of areas. While service providers may not write grants for tribes, they can significantly advance tribes’ ability to pursue housing development by increasing tribes’ knowledge of funding sources by assisting in the preparation of strategic development plans. Tribes can request TA by contracting the HUD ONAP regional coordinator. Request forms are available on the HUD ONAP website.<sup>68</sup>

## 9. Housing Assistance to Native Hawaiians

Hawaii was an independent kingdom until it suffered a coup instigated by American commercial interests in 1893. The country was annexed to the United States in 1898, became a territory in 1900 and a state in 1959. While Native Hawaiians are not considered a tribe for purposes of federal law,<sup>69</sup> Congress has nevertheless enacted extensive legislative specially benefitting Native Hawaiians, either exclusively or together with Indian tribes.<sup>70</sup> There are no trust lands in Hawaii. In 1920, however, Congress enacted the Hawaiian Homes Commission Act,<sup>71</sup> which set aside approximately 200,000 acres of public lands that became known as Hawaiian Home Lands in the Territory of Hawaii and that had been ceded to the United States for homesteading by Native Hawaiians.

The Hawaiian Homelands Homeownership Act of 2000 (HHHA)<sup>72</sup> amended NAHASDA to create a new title VIII, “Housing Assistance for Native Hawaiians,” modeled on the provisions

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<sup>66</sup> According to the FY 2017 NOFA, the program is authorized under the Consolidated Appropriations Act, 2017 (Public Law 115-31), approved May 5, 2017, the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4111 et seq.), Section 6(j)(3) of the United States Housing Act of 1937 (42 U.S. C. 1437d(j)(3)) and Section 17 and 18 of the Annual Contributions Contract (HUD 53012A 7/95), and McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11361b and 42 USC 11408.

<sup>67</sup> See 2017 NOFA, p. 2 <https://www.hud.gov/sites/documents/2017CCTANOFAPDF>

<sup>68</sup> [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/ih/codetalk/training](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/codetalk/training)

<sup>69</sup> Native Hawaiians do not fall with the definition of “Indian tribe” under NAHASDA, 25 U.S.C. §4103 (13) or the Indian Self-Determination and Education Assistance Act. They are not included in Department of Interior’s annual list of “Tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.” 84 Fed. Reg. 1200, February 1, 2019.

<sup>70</sup> These enactments are catalogued in congressional findings supporting the Hawaiian Homelands Homeownership Act of 2000.

<sup>71</sup> 42 Stat. 108 et seq. The Department of Interior’s proposed rule, “Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, published in the Federal Register October 1, 2015, 80 Fed. Reg. 59113, provides extensive background on the relationship between the United States and Hawaiian Natives.

<sup>72</sup> Pub. L. 106–569, title V.

of NAHASDA applicable to Indians. Title VIII block grants are not made to a Native Hawaiian government because none exists. The HHA provides that the Secretary “shall (to the extent amounts are made available to carry out this subchapter) make a grant under this subchapter to the Department of Hawaiian Home Lands to carry out affordable housing activities for Native Hawaiian families<sup>73</sup> who are eligible to reside on the Hawaiian Home Lands.”<sup>74</sup> The HHA also amended the Housing and Community Development Act of 1992<sup>75</sup> to create a new Section 184A<sup>76</sup> extending the Section 184 guaranteed loan program to Native Hawaiians.<sup>77</sup>

## C. USDA Rural Development Programs

### About Rural Development

The United States Department of Agriculture (USDA), particularly its Rural Development mission area, offers many programs of great value to Indian Country. Rural Development is comprised of three agencies that assist rural communities. The Rural Housing Service (RHS) administers rural housing programs as well as rural community facilities programs. The Rural Business-Cooperative Service (RBS) administers business, cooperative development and technical assistance programs. The Rural Utilities Service (RUS) administers water and sewer programs, as well as broadband, telephone, and electric programs.<sup>78</sup>

The Secretary of Agriculture, a cabinet officer, leads the USDA. Rural Development is led by the Assistant to the Secretary for Rural Development, who reports directly to the Secretary. The RHS, RBS, and RUS programs each have an Administrator, who reports to the Assistant to the Secretary. Rural Development’s National Office employs two Tribal Coordinators to educate and provide outreach on RD programs and promote their use by tribes and tribal members.

Each state has a USDA Rural Development State Office, which coordinates Rural Development activities and budget within the state. Additionally, there are Rural Development Area and Field offices that report through the state office, to help implement programs. In addition to the three Headquarters Administrators of RHS, RUS and RBCS, the President appoints a State Director of Rural Development for each state. The State Directors oversee the State Office and the Rural Development programs within their respective states, except the telecommunications and electric programs, which are administered by the National Office, with General Field Representatives (GFRs) as the local program contacts. Tribes and TDHEs should develop good relationships with their respective Rural Development State Directors and state, area and local RD office personnel.

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<sup>73</sup> The HHA defines “Native Hawaiian” to include descendants of “the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii, as evidenced by— (i) genealogical records; (ii) verification by kupuna (elders) or kama’aina (long-term community residents); or (iii) birth records of the State of Hawaii.” 25 U.S.C. § 4221.

<sup>74</sup> 25 U.S.C. § 4222. Under the Hawaiian Home Lands Commission Act of 1921, only persons of one-half aboriginal ancestry are eligible to reside on Hawaiian Home Lands.

<sup>75</sup> Pub. L. 102–550, title I, §184, Oct. 28, 1992, 106 Stat. 3739; Codified at 12 U.S.C. §1715z–13a.

<sup>76</sup> 12 USC 1715z–13b.

<sup>77</sup> As of late 2019, two bills reauthorizing NAHASDA had been introduced in the Congress. Senate bill S. 1895 would include housing assistance for Native Hawaiians while House Bill H.R. 3864 would not.

<sup>78</sup> <https://www.rd.usda.gov/>

## 1. Homeownership - Section 502 Rural Housing Direct Loans

*What does the program offer?* Under the Section 502 direct loan program,<sup>79</sup> RHS provides loans at below-market interest rates to very low-income (50% of AMI or less) and low-income (80% of AMI or less) home buyers. Loans terms are up to 33 years and, for households with income less than 60% of AMI, may extend longer. The program offers subsidies, based on the home buyer's income, that may reduce the interest rate to as low as 1%. Although the monthly payment may rise if the homeowner's income rises, the fixed interest rate establishes a cap on monthly payments. Loans may cover 100% of the cost of purchasing a new or existing home, as well as costs of appraisal, title insurance and other closing costs. Funds may also be used to repair or relocate a home, prepare a site, or provide water and sewer facilities.

*What does the program require of the home buyer?* Home buyers must show that they are unable to obtain financing from conventional sources on reasonable terms and that they can repay the loan. Generally, a low-income applicant's repayment ability is demonstrated if principal, interest, taxes and insurance do not exceed 33% of income and total monthly debt does not exceed 41% of income. For very low-income borrowers, the percentages are 29% and 41%. The home buyer signs a note promising to repay the RHS loan at the "note rate" (a current rate of interest) and gives RHS a mortgage on the home. As discussed above, actual monthly payments may be subsidized. In rare circumstances, the home buyer must agree to refinance the home if the home buyer is able. When the owner sells the home, he or she may be required to repay part of the subsidy, as described in a retention agreement.

*What does the program require of the tribe?* In order for tribal members living on trust land to participate in this program, RD must review the Tribe's home site lease to the member and assure that the tribe's mortgage ordinance/code provides for priority of lien, eviction and foreclosure. While not required, the Tribe may enter into a Memorandum of Understanding with the USDA that addresses the relationship between the Tribe and the Agency. A tribe may elect to adopt the One Stop model code, lease and MOU that were developed through an inter-agency initiative of HUD/USDA/VA without any changes to satisfy the RD, VA and HUD requirements.<sup>80</sup>

*What is the role of the TDHE?* Although the home buyer, rather than the tribe or TDHE, applies for a Section 502 loan at the local RD Office, the TDHE can play an important role. The TDHE can facilitate the Section 502 loan process by providing information and counseling to interested tribal members and by acting as "packager," putting together home specifications, assisting in the hiring of a general contractor and helping to prepare applications. Section 502 permits the TDHE (or the tribe or a non-profit) to receive a packager fee, funded from loan proceeds, for these services to the borrower. If a tribal member can no longer meet his or her loan obligations, the TDHE or tribe can purchase the home and then either sell, or lease the home to the same tribal member or another eligible member, as appropriate.

*Using the Section 502 Program for a rent-to-own program.* The TDHE Section 502 can also be used as part of a rent-to-own program. TDHEs can develop and own the homes initially, using

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<sup>79</sup> Section 502, Housing Act of 1949, 42 U.S.C. § 1472; 7 C.F.R. § 1980.301; 7 C.F.R. Part 3550; HB-1-3550. See also, <https://www.rd.usda.gov/programs-services/single-family-housing-direct-home-loans>

<sup>80</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/leasing](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/leasing)

other financing programs. Over a period of time, tribal members could rent the property from the TDHE, while working to improve their credit. When the borrower is ready to purchase the home from the TDHE, he or she can work with RD staff and the TDHE to receive a 502 direct loan to finance purchase the property and issuance of a long-term lease by the Tribe to the member.

*How do I apply?* For information regarding applications and other information on the Section 502 program, tribes should contact their USDA State Office. Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>.

## 2. Homeownership - Section 502/523 Mutual Self-Help Technical Assistance Housing Program

*What does the program offer?* This program is a combination of the Section 502 Direct Loan Program and the Section 523 Mutual Self-Help Technical Assistance Grant Program.<sup>81</sup> Section 502 provides the assistance to the individual home buyers, as described above. Section 523 provides a grant to a sponsor, including a tribe or TDHE, to provide technical assistance to the participating families.<sup>82</sup> The program contemplates the participation of a group of families working together to help build each other's homes. The Section 523 grant covers the TDHE's personnel costs for a construction supervisor and a case worker; office expenses; bookkeeping; purchase of tools; insurance; fees for training of grantee personnel, including board members; and consulting, accounting and legal fees required to administer the grant. The TDHE's construction supervisor teaches the participants how to build their own, and each other's, homes. The home buyers learn building trade skills and, by investing "sweat equity" into the home, reduce the cost of construction and the amount they must borrow. Home buyers can also use down payment assistance programs in conjunction with the 502 direct loan, significantly reducing monthly debt payments. Section 524 also authorizes RD to make loans to eligible sponsors, including tribes, for the acquisition and development of sites for housing to be constructed under the self-help method.<sup>83</sup>

*How does the program differ from the HUD "Mutual Help" program?* The RHS Program differs significantly from the pre-NAHASDA HUD Mutual Help Homeownership Opportunity Program (HUD Program). Although there was a version of the HUD Program that allowed home buyers to reduce the cost of their homes by helping to build them, this was not a requirement of the HUD program commonly implemented in Indian Country. Instead of entering into a Mutual Help and Occupancy Agreement (MHOA) with the housing authority, as was done under the HUD program, the home buyer under the RHS program borrows money (albeit at a subsidized rate of interest) and signs a mortgage and note. Monthly payments under the RHS program are based on the amount of the loan and the rate of interest rather than a minimum monthly payment. The homeowner takes legal title to the home immediately, subject only to the mortgage. Under the HUD program, by contrast, the tribal member remained a renter until all payments were made, typically after fifteen years. If the homeowner fails to make monthly payments under the Section 502 program, the lender may foreclose and evict the homeowner. Homes financed under the RHS program are not part of the TDHE's housing stock and the TDHE, though it plays a major role during development,

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<sup>81</sup> Section 523, Housing Act of 1949; 42 U.S.C. § 1490c, as added Pub. L. No. 90-448, 82 Stat. 553; for Section 502 component, see authorities cited in previous section.

<sup>82</sup> <https://www.rd.usda.gov/programs-services/mutual-self-help-housing-technical-assistance-grants>

<sup>83</sup> <https://www.rd.usda.gov/programs-services/rural-housing-site-loans>

has no role in maintaining them once they are occupied.

*What does the program require of the homeowner?* The requirements for the homeowner in connection with the direct loan from RHS are summarized in the section relating to the Section 502 Direct Loan Program. Participants must have acceptable credit, although RHS will not apply standards as stringent as those of a commercial lender. In addition, the participating family is expected to perform 65% of the labor associated with construction of the home. Participating low-income families must be approved for a Section 502 loan or similar loans from other Federal, state, and private lenders that use income guidelines substantially similar to HUD income guidelines before the start of construction, have sufficient time available to assist in building their own homes, and show a desire to work with other families.

*What does the program require of the tribe?* In order for tribal members living on trust land to participate in this program, RD must review the Tribe's home site lease to the member and assure that the tribe's mortgage ordinance/code provides for priority of lien, eviction and foreclosure. While not required, the Tribe may enter into a Memorandum of Understanding with the USDA that addresses the relationship between the Tribe and the Agency. A tribe may elect to adopt the One Stop model code, lease and MOU that were developed through an inter-agency initiative of HUD/USDA/VA without any changes to satisfy the RD, VA and HUD requirements.<sup>84</sup>

*What does the program require of the TDHE?* If the TDHE is the recipient of the Section 523 grant, it will identify the families who will participate, explain the program to them, locate sites, assist in developing house plans and obtain cost estimates, help with loan applications, supervise and train families in home construction, and generally oversee the project. The TDHE also coordinates the bidding for the aspects of the construction that require professionals, such as foundation laying and certain electrical and plumbing work. Rather than apply for assistance directly, a TDHE can also partner with a nonprofit housing entity to apply for and administer the grant and provide related services while the TDHE focuses on identifying and assisting potential home owners

*How do I apply?* For information on the application process and other information on the Section 502/523 program, tribes should contact their USDA State Office. Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>.

### 3. Homeownership - Section 502 Guaranteed Loan Program

*What does the program offer?* In addition to the Direct Loan program described above, Section 502<sup>85</sup> also authorizes RD to guarantee 30-year, fixed-rate mortgage loans made by commercial lenders to low- and moderate-income homebuyers for new construction or repairs of an existing home. The Section 502 guarantee is not available for multifamily housing and, unlike the HUD Section 184 guarantee program, is available only to individuals, not to tribes or TDHEs. A guaranteed loan may provide up to 100% loan-to-value financing, enabling tribal members who lack funds for a down payment to purchase a home. Guaranteed loan proceeds may also be used to purchase and prepare sites and provide water and sewage facilities.

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<sup>84</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/leasing](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/leasing)

<sup>85</sup> Section 502, Housing Act of 1949, 42 U.S.C. § 1472(h); 7 C.F.R. Pt. 1980, Subpart D, § 1980.301. See also, <https://www.rd.usda.gov/programs-services/single-family-housing-guaranteed-loan-program>

*Whom does the program serve?* The program is intended for low and moderate-income families who are without adequate housing and are unable to obtain financing at reasonable rates from conventional lenders. “Moderate” income means the greatest of (i) 115% of U.S. median family income or (ii) 115% of the state-wide and state non-metro Median family income or (iii) 115/80th of the area low-income limit.

*What does the program require?* In order for tribal members living on trust land to participate in this program, RD must review the Tribe’s home site lease to the member and assure that the tribe’s mortgage ordinance/code provides for priority of lien, eviction and foreclosure. While not required, the Tribe may enter into a Memorandum of Understanding with the USDA that addresses the relationship between the Tribe and the Agency. A tribe may elect to adopt the One Stop model code, lease and MOU that were developed through an inter-agency initiative of HUD/USDA/VA, without any changes, to satisfy the RD, VA and HUD requirements.<sup>86</sup> Generally, prospective homeowners must show that they are unable to obtain mortgage credit through conventional financing without a guarantee from RHS. Borrowers must be able to afford mortgage payments, taxes and insurance, which may not exceed 29% of gross income. Total debt may not exceed 41% of gross income.

*How do I apply?* The borrower must first negotiate the terms of a loan with a private lender.<sup>87</sup> The lender then applies to the local office of RHS for the loan guarantee. For more information on the Section 502 guarantee program, tribes should contact their USDA State Office.

#### 4. Homeownership - Section 504 Home Repair Grant/Loan Program

*What does the program offer?* This Section 504 program<sup>88</sup> makes funds available to very low-income families (i.e., household income is not more than 50% of AMI) who own and occupy a dwelling in need of repairs. Funds may be used to improve or modernize a home or to remove health and safety hazards. The loan has a 1% interest rate and may be repaid over 20 years. The maximum loan amount is \$20,000. Grants up to \$7,500 are available to homeowners who are at least 62 years old and cannot repay a loan.

*What does the program require of the home owner?* A promissory note is required for loans less than \$7,500. For loans of more than \$7,500, a mortgage is also required. If a mortgage is required and the home is on trust land, RD must review the tribe’s mortgage ordinance/code as mentioned above for 502 loans. If a home is sold within three years, the grant must be repaid. Water and sewage work must meet RHS standards. Other work must meet local codes and standards but need not meet RHS code requirements.

*What is the role of the TDHE?* The TDHE can provide valuable assistance to the homeowners by providing program information and helping the homeowner apply for Section 504 funds. The TDHE may be able to assist with finding contractors to perform the work or, if the TDHE has a

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<sup>86</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/leasing](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/leasing)

<sup>87</sup> For a list of nationally approved lenders, see <https://www.rd.usda.gov/files/SFHGLDApprovedLenders.pdf>

<sup>88</sup> Section 504, Housing Act of 1949, 42 U.S.C. § 1474; 7 C.F.R. § 1980.301; 7 C.F.R. Ch. XXXV, Part 3550 Subpart C, § 3550.101 et seq. and HB-1-3550. See also, <https://www.rd.usda.gov/programs-services/single-family-housing-repair-loans-grants>

work crew that is certified, perform the rehabilitation work for the homeowner.

*How do I apply?* Individuals apply with the local RHS office. For more information on the Section 504 program, tribes should contact their USDA State Office.<sup>89</sup>

## 5. Homeownership & Rental - Section 533 Housing Preservation Grants

*What does the program offer?* The Section 533 Housing Preservation Grant (HPG) Program<sup>90</sup> provides grant funds to eligible organizations, including tribes, to help very low and low-income homeowners repair and rehabilitate their homes and to help rental property owners, including tribes and TDHEs, repair and rehabilitate their units, provided such units are made available to very low and low-income persons. The grantee enters into a one- or two-year grant agreement with RHS. Points are awarded based on the percentage of very low-income persons to be assisted, the amount of other funds used, administrative capacity, the remoteness of the location, and the extent to which the proposal is likely to alleviate overcrowding.

*How do I apply?* RHS publishes a Notice of Solicitation of Application in the Federal Register. For more information on the Section 533 program, tribes should contact their USDA State Office.<sup>91</sup>

## 6. Rental - Section 515 Rural Rental Housing Loans



*Kiishkimaan - Photo courtesy of Lac du Flambeau  
Chippewa Housing Authority*

*What does the program offer?* Under Section 515 of the 1949 Housing Act,<sup>92</sup> RHS can make loans to TDHEs at a 1% rate of interest for the development of new, or rehabilitation of existing, low-income rental housing for families whose income does not exceed 80% of area median income. Loans are approved at current interest rates but, upon project completion, the TDHE signs an “Interest Credit and Rental Assistance Agreement,” reducing the interest rate to 1%. While the loan is amortized over 50 years, the term is 30 years, at the end of which the loan may be continued or RHS may require a balloon payment. Loans normally may not exceed \$1 million. Loans may cover up to

100% of the development costs for non-tax credit projects. If the program is used together with the low-income housing tax credit program, 95% of development costs may be funded. Pursuant to Section 521 of the Housing Act of 1949, applicants may apply for rental assistance in connection with a Section 515 application where the project targets very low-income tenants (i.e., household income does not exceed 50% of AMI). As a result of changes made by the Housing and Economic

<sup>89</sup> Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>

<sup>90</sup> Section 533, Housing Act of 1949; Pub. L. No. 98-181, § 522, 42 U.S.C. § 1490m; 7 C.F.R. Part 1944, Subpart N, 7 C.F.R. Part 3550. See also, <https://www.rd.usda.gov/programs-services/housing-preservation-grants>

<sup>91</sup> Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>.

<sup>92</sup> Section 515, Housing Act of 1949; 42 U.S.C. § 1485; 69 Fed. Reg. 69106, 7 C.F.R. Part 3560, HB-1-3560, HB-2-3560, HB-3-3560; Section 521, Housing Act of 1949, 42 U.S.C. § 1490a. See also, <https://www.rd.usda.gov/programs-services/multi-family-housing-direct-loans>



Recovery Act of 2008,<sup>93</sup> the Section 515 program, assuming funding for new construction, could be especially valuable when used with low-income housing tax credits because borrowers are no longer required to deduct the amount of a Section 515 loan from eligible basis for purposes of calculating tax credits. As a result, tribes may be able to obtain 1% interest Section 515 loans, plus rental assistance, without losing tax credit equity.

*Funding Uncertainty.* A number of tribes have successfully used the Section 515 program. In recent years, however, Congress' has appropriated funds solely to preserve existing Section 515 housing stock. The usefulness of the program in the future will depend on Congress' willingness to appropriate funds for new construction. Tribes with existing Section 515-financed properties can, however, utilize 515 funds to rehabilitate those projects.

*What does the program require?* Section 515 program requirements resemble the requirements typically applicable to a commercial real estate transaction. To secure the loan, the TDHE gives RHS a mortgage in its leasehold in the property and executes a UCC-1 financing statement. The lease itself, as well as the mortgage, is recorded. Casualty insurance and title insurance (or equivalent) is required.

*How do I apply?* For current information on the availability of Section 515 funds, tribes should contact their USDA State Offices.<sup>94</sup>

## 7. Rental - Section 538 Guarantee Program

*What does the program provide?* The Section 538 Program<sup>95</sup> finances the construction, acquisition, or rehabilitation of new and improved multifamily housing for low- and moderate-income households (i.e., incomes do not exceed 115% of area median income). A nonprofit developer, such as a TDHE, must first negotiate the terms of the loan with a private lender, which then applies for a guarantee. RHS guarantees 90% of the total development cost and will not pay more than 90% of the outstanding principal and interest in the event of default.

*What does the program require?* The lender must pay an initial 1% guarantee fee and a recurring annual guarantee fee (currently .5%) of the outstanding principal amount of the loan as of December 31. There are also a number of service fees that may apply to any given project for initial and subsequent extension guarantee term requests, to reopen requests after a commitment has expired and to approve the transfer of property or a change in composition of the ownership entity. Selection criteria include (1) size of population; (2) neediness (based on median income); (3) partnering and leveraging with local communities; (4) responses that include equity from low income housing tax credits; (5) percentage of three to five bedroom units in the project; (6) responses for the revitalization, repair, and transfer of existing direct Section 515 and Section 514/516 FLH and properties involved in the Agency's MPR Demonstration program; and (7) Energy Efficiency.

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<sup>93</sup> Pub. L. No. 110-289, Division C (HERA)

<sup>94</sup> Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>

<sup>95</sup> Section 538, Housing Act of 1949; Pub. L. No. 104-120 § 5, 42 U.S.C. § 1490p-2i; 5 USC 301; 7 USC 1989; 42 USC 1480; 64 Fed. Reg. 32369-72 (final rule of 6/16/99); 7 C.F.R. 3565; Handbook HB-1-3565. See also, <https://www.rd.usda.gov/programs-services/multi-family-housing-loan-guarantees>

*How do I apply?* Applications are accepted and processed on a continuous basis, year-round.<sup>96</sup> Regulations give priority to projects: “In smaller rural communities, in the neediest communities having the highest percentage of leveraging, having the lowest interest rate, having the highest ratio of 3–5-bedroom units to total units, or on tribal lands.”<sup>97</sup> For more information on the Section 538 program, tribes should contact their USDA State Office.<sup>98</sup>

## 8. Community Facilities Program

### *What Does the Program Offer?*

The Community Facilities Program,<sup>99</sup> administered by the Rural Housing Service of Rural Development, is primarily a direct loan program that also offers loan guarantees and limited grant funding. Program funds may be used for “essential community facilities,”<sup>100</sup> including, but not limited to facilities for (1) fire, rescue, and public



*Red Cliff New Hope - Photo courtesy of Red Cliff Chippewa Housing Authority*

safety; (2) health services; (3) community, social, or cultural services; (4) transportation facilities such as streets, roads and bridges, (5) hydroelectric generating facilities and related connecting systems and appurtenances, when not eligible for RUS financing, (6) telecommunications equipment as it relates to medical and educational telecommunications links, (7) supplemental and supporting structures for other rural electrification or telephone systems (including facilities such as headquarters and office buildings, facilities, and maintenance shops) when not eligible for RUS financing, (8) natural gas distribution systems and (9) industrial park sites for land acquisition and necessary site preparation, including access ways and utility extensions to and throughout the site. CF loan funds may be used to acquire land needed for a facility, pay necessary professional fees, and purchase equipment required for its operation. Eligible applicants for the community facilities program include public bodies (including tribes) as well as nonprofit corporations and associations, that have the legal authority to own, construct, operate, and maintain the proposed facility.

*How grant and loan funding works?* Program funding for CF Projects is based on a number of factors, which determine the amount of loan and grant available for a project. Grants are limited and vary in amount. Currently grants are limited to \$50,000 or less and average closer to \$30,000 per project. Loan limits are based on the amount an applicant can afford and the amount of funding available. For the loan component of the program interest rates are similar to those under the RUS utilities program. The maximum loan term is 40 years. Bonds or notes pledging revenues

<sup>96</sup> 7 C.F.R. § 3565.4; 84 Fed. Reg. 55035, October 15, 2019

<sup>97</sup> 7 C.F.R. § 3565.5(b)

<sup>98</sup> Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>

<sup>99</sup> Section 306(a)(19), Consolidated Farm and Rural Development Act; Rural Development Community Facilities Program (7 U.S.C. § 1926(a)(19); 7 CFR, Part 1942 for loans; 7 CFR, Part 3570 for grants. See also, <https://www.rd.usda.gov/programs-services/community-facilities-direct-loan-grant-program>

<sup>100</sup> 7 C.F.R. 3570.62

are accepted as security if they meet statutory requirements. Tax-exempt notes or bonds may be used to secure direct loans but cannot be used for guaranteed loans. The facilities must be located in a rural area of 20,000 people or less. CF loan guarantees are also available to incentivize third party loans to help finance CF eligible projects.

*How do I apply?* Applications are accepted year-round. For information on how to apply, tribes should contact their USDA State Office.<sup>101</sup>



Red Cliff New Hope - Photo courtesy of Red Cliff Chippewa Housing Authority

## 9. Community Facilities Technical Assistance and Training Grants

*What does the program offer?* RD offers Community Facilities Technical Assistance and Training Grants,<sup>102</sup> up to \$150,000, to assist applicants, including tribes in (i) identifying and planning for community facility needs, (ii) identifying resources to finance community facility needs from public and private sources, (iii) preparing reports and surveys necessary to request financial assistance to develop community facilities, (iv) preparing applications for financial assistance and (v) improving management, including financial management, related to the operation of community facilities.

*How do I apply?* Applications for technical assistance and training grants are submitted pursuant to an annual NOFA. The grants are awarded competitively. The applicant is not required to match the grant but applications that include cash matching funds will receive preference.

## 10. Community Facilities Rural Community Development Initiative Grant Program

*What does the program offer?* The Rural Community Development Grant Initiative (RCDI)<sup>103</sup> provides grants to public bodies, nonprofits and tribes to improve housing, community facilities, and community and economic development projects in rural areas. Grants may be used for, but are not limited to (i) training sub-grantees to conduct home-ownership education or minority business entrepreneur education and (ii) providing technical assistance to sub-grantees on strategic plan development, accessing alternative funding sources, board training, developing successful child care facilities, creating training tools, such as videos, workbooks, and reference guides and effective fundraising techniques. Minimum and maximum grant awards are \$50,000 and \$250,000, respectively. Applicants must contribute matching funds, which may include in-kind contributions.

*How do I apply?* RCDI grants are awarded competitively through a NOFA process.

## 11. Rural Utilities Service (RUS) Water and Environmental Program

*What does the program offer?* Many tribes have benefited from the RUS Water and Environmental

<sup>101</sup> Contact information for the State Offices is available at <https://www.rd.usda.gov/contact-us/state-offices>.

<sup>102</sup> <https://www.rd.usda.gov/programs-services/community-facilities-technical-assistance-and-training-grant>

<sup>103</sup> See <https://www.rd.usda.gov/programs-services/rural-community-development-initiative-grants>

Program<sup>104</sup> to finance construction or improvement of water and waste water facilities. The program provides below-market rate loans<sup>105</sup> and grants to public bodies, including tribes, as well as nonprofit corporations and associations, in areas with a population of less than 10,000, that have the legal authority to own, construct, operate and maintain water and waste disposal facilities, including water lines, pumping stations, wells, storage tanks, and sewage treatment facilities. Many tribes have benefitted from

*What are the program limitations?* Up to 75% of project costs may be covered by a grant where the median income in the service area is below either 80% of the state nonmetropolitan median income or below the federal poverty line. Where the income in the service area is between 80% and 100% of AMI, the maximum grant is 45% of project costs. Grants are not available where the median income in the service area exceeds 100% of the state nonmetropolitan median income. Where funds will be used by federally recognized tribes to alleviate health risks, Congress has legislatively mandated funds that can be used to fund 100% of project costs.<sup>106</sup> Projects may be funded up to \$2 million depending on underwriting and the availability of funds. Additional statutory requirements for the tribe-specific funding include per capita and unemployment rates within the project's service territory. Funds are limited and eligible projects compete nationally. Projects are funded on a first come first served basis once complete applications are received and approved.

*What does the program require?* Loans will be secured by the best security position practicable in a manner which will adequately protect the interest of RUS during the repayment period of the loan. Specific security requirements for each loan will be included in a letter of conditions. Security for loans will depend on the project and the amount of the loan. There may be a preference in security as a bond, but this is not a requirement. Loans to federally recognized tribes will be evidenced by notes, bonds, warrants, or other contractual obligations as may be authorized by relevant laws and by borrower's documents, resolutions, and ordinances. Security, in the following order of preference, will consist of: (1) the full faith and credit of the borrower when the debt is evidenced by general obligation bonds; and/or (2) pledges of taxes or assessments; and/or (3) pledges of facility revenue. The RUS bond requirements are not, however, as onerous as the requirements for issuance of most municipal bonds.

## 12. RUS Telecom Programs<sup>107</sup>

*What Does the Program Offer?* The Community Connect Grant Program provides grants to service providers, including tribes, to provide broadband service in a "Proposed Funded Service Area (PFSA)" where no broadband service currently exists. Permissible uses of grant funds include (1) construction, acquisition, or leasing of facilities, including spectrum, land or buildings, used to deploy service to all residential and business customers located within the PFSA and all participating

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<sup>104</sup> See Sections 306C, 307, Consolidated Farm and Rural Development Act, Pub. L. No. 87-128, 7 U.S.C. 1926; Section 112, 1972 Amendments to Consolidated Farm and Rural Development Act, Pub. L. No. 92-419; 7 C.F.R. Pt. 1777. See also, <https://www.rd.usda.gov/programs-services/water-waste-disposal-loan-grant-program>

<sup>105</sup> Loan rates depend on the income levels of the tenant population served and are published quarterly. See <https://www.rd.usda.gov/programs-services/services/rural-utilities-loan-interest-rates>

<sup>106</sup> Section 306C, Consolidated Farm and Rural Development Act; 7 U.S.C. 1926(c);

<sup>107</sup> 7 C.F.R. Part 1739; See also, <https://www.rd.usda.gov/programs-services/all-programs/telecom-programs>.

Critical Community Facilities, which are defined as any public school, public education center, public library, public medical clinic, public hospital, community college, public university; or law enforcement, fire or ambulance station in the Proposed Funded Service Area,” (2) improvement, expansion, construction, or acquisition of a Community Center and provision of Computer Access Points (not to exceed 10% or \$150,000 of the requested grant amount) and (3) costs of providing the necessary bandwidth for service free of charge to the Critical Community Facilities for 2 years. Grant funds may not be used to duplicate existing broadband services provided by others. Applicants are required to provide at least 15% of project costs from non-federal sources. Matching funds may be used for operating costs. Other than costs of leasing facilities to deploy broadband, operating costs are not permissible but may be covered with matching funds. In recent years, minimum and maximum grants were \$100,000 and \$3,000,000, respectively.

In addition to its grant program, RUS offers a Rural Broadband Access Loan and Loan Guarantee Program.<sup>108</sup> The program furnishes loans and loan guarantees to provide funds for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide service at the broadband lending speed in eligible rural areas. Direct loans are provided at “cost of money.”

*How Do I Apply?* RUS publishes a Notice of Solicitation of Applications (NOSA) periodically in the Federal Register. Additional information may be obtained by contacting RUS at (202) 720-0800 or Email: [community.connect@wdc.usda.gov](mailto:community.connect@wdc.usda.gov) or through by contacting the RUS Telecommunications Program General Field Representative (GFR). Contact information for the Telecom GFRs is available at <https://www.rd.usda.gov/contact-us/telecom-gfr>.

### 13. RUS Electric Programs<sup>109</sup>

*What Does the Program Offer?* RUS, through the Federal Financing Bank (FFB),<sup>110</sup> offers direct loans, loan insurance and loan guarantees to nonprofit and cooperative associations, public bodies, and tribes for the construction of electric distribution, transmission, and generation facilities, including system improvements and replacement required to furnish and improve electric service in rural areas, as well as demand side management, energy conservation programs, and on-grid and off-grid renewable energy systems. Funds may be used for maintenance, upgrades, expansion, replacement of distribution, sub transmission and headquarters (service, warehouse) facilities, energy efficiency and renewable energy systems. The FFB may guarantee up to 100% of loans, including for construction.

*Limitations and Terms.* Generally, repayment may not exceed the useful life of the facility being financed, with a maximum repayment schedule of 35 years. Loan Guarantees and Treasury Rate Loans: interest rates are based on rates established daily by the United States Treasury plus 1/8 of 1%. Hardship loan interest rates are fixed at 5% for up to 35 years. Borrowers must have legal authority to provide, construct, operate and maintain the proposed facilities or services and facilities receiving federal financing must be used for a public purpose. This program has been undersubscribed in recent years.<sup>111</sup>

<sup>108</sup> 7 C.F.R. Part 1738; See also, 83 Fed. Reg. 13225

<sup>109</sup> Section 313A of the Rural Electrification Act of 1936, as amended, codified at 7 U.S.C. 940c-1; 7 C.F.R. Part 1720; See also, <https://www.rd.usda.gov/programs-services/all-programs/electric-programs>;

<sup>110</sup> The FFB is a lending arm of the U.S. government. See, <https://ffb.treasury.gov/>

<sup>111</sup> [https://www.rd.usda.gov/files/UEP\\_Boxscore.pdf](https://www.rd.usda.gov/files/UEP_Boxscore.pdf)

*How Do I Apply?* RUS General Field Representatives in each RD state office accept applications year-round. Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>. Tribes can also contact the national Electric Program office at 202-720-1422.

#### 14. RUS High Energy Cost Grant Program

*What does the program offer?* RUS' high energy cost grant program<sup>112</sup> provides grants to energy providers and other eligible entities for the purpose of lowering energy costs for families and individuals in areas with whose per-household energy costs equal or exceed 275% of the national average. Eligible applicants include retail or power supply providers serving eligible rural areas, including tribes and tribal entities and nonprofits. Eligible activities include acquisition, construction, replacement, repair, or improvement of (i) electric generation, transmission, and distribution facilities, equipment, and services, (ii) natural gas distribution or storage facilities and associated equipment and activities, (iii) petroleum product storage and handling facilities serving residential or community use, (iv) renewable energy facilities used for on-grid or off-grid electric power generation, water or space heating, or process heating and power for the eligible community, (v) backup up or emergency power generation or energy storage equipment, including distributed generation, to serve the eligible community and (vi) implementation of cost-effective energy efficiency, energy conservation measures.<sup>113</sup> Minimum and maximum grants recently were \$100,000 and \$1,000,000, respectively.<sup>114</sup>

*How do I apply?* Grants are awarded competitively pursuant to a Notice of Solicitation of Applications (NOSA) published in the Federal Register.

#### 15. RUS Program Preference for Substantially Underserved Trust Areas

The 2008 Farm Bill amended the Rural Electrification Act to add the “Substantially Underserved Trust Area (SUTA)” initiative.<sup>115</sup> Tribal trust lands fall within the scope of trust lands covered by Section 306F. The SUTA initiative gives the Secretary of Agriculture certain discretionary authority in connection with electric, water and waste, and telecommunications and broadband utilities programs. Specifically, the Secretary may

- (1) Make available to qualified applicants financing with an interest rate as low as two percent;
- (2) Extend repayment terms;
- (3) Waive (individually or in combination) non-duplication restrictions, matching fund requirements, and credit support requirements from any loan or grant program administered by RUS; and
- (4) Give the highest funding priority to designated projects in substantially underserved trust areas.<sup>116</sup>

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<sup>112</sup> 7 U.S.C. § 901; 7 C.F.R. Part 1709; see also, <https://www.rd.usda.gov/programs-services/high-energy-cost-grants>

<sup>113</sup> 7 C.F.R. § 1709.109

<sup>114</sup> [https://www.rd.usda.gov/files/UEP\\_HECG\\_App\\_Guide\\_2017.pdf](https://www.rd.usda.gov/files/UEP_HECG_App_Guide_2017.pdf)

<sup>115</sup> Pub. L. 110-246, § 6105, adding Section 306F to the REA, codified at 7 U.S.C. 936e. Final regulations implementing SUTA were published June 13, 2012 at 77 Fed. Red. 35245, codified at 7 C.F.R. Part 1700.

<sup>116</sup> 7 C.F.R. § 1700.106(a)

Under SUTA regulations, an “underserved” trust area is “an area or community lacking an adequate level or quality of service in an eligible program, including areas of duplication of service provided by an existing provider where such provider has not provided or will not provide adequate level or quality of service.”<sup>117</sup> A “substantially underserved” trust area means “a community in trust land with respect to which the Administrator determines has a high need for the benefits of an eligible program.” Applications for special consideration under the SUTA rules must be made to the RUS Administrator, to whom the Secretary has delegated is authority.

*How do I apply?* Applications for SUTA consideration are accepted along with complete applications in the respective programs. For information on how to apply, tribes should contact their USDA State offices. Contact information for the state offices is available at <https://www.rd.usda.gov/contact-us/state-offices>.

#### 16. Rural Business Cooperative Service - Rural Business Development Grant Program



*Quileute Reservation -*

*What does the program offer?* The mission of the Rural Business-Cooperative Service (RBS) is to assist in creating businesses and jobs throughout rural America. Section 310B of the Consolidated Farm and Rural Development Act<sup>118</sup> authorizes the Secretary of Agriculture to provide grants and loans in rural areas to public bodies, governments,

including tribes, and nonprofits. The Rural Business Development Grant (RBDG) program combines the former Rural Business Enterprise Grant and Rural Business Opportunity Grant programs.<sup>119</sup> RBDG funding is limited and the program is quite competitive.

“Enterprise” type grants are available to support small and emerging rural businesses for training and technical assistance, such as project planning, business counseling/training, market research, feasibility studies, professional/technical reports, or product/service improvements, acquisition or development of land, easements, or rights of way; construction, conversion, renovation, of buildings, plants, machinery, equipment, access streets and roads, parking areas, utilities; Pollution control and abatement; capitalization of revolving loan funds including funds that will make loans for start-ups and working capital; distance adult learning for job training and advancement; rural transportation improvement; community economic development; technology-based economic development; feasibility studies and business plans; leadership and entrepreneur training; rural business incubators and long-term business strategic planning.

“Opportunity” type grants can be used for community economic development, technology-based

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<sup>117</sup> 7 C.F.R. § 1700.101

<sup>118</sup> 7 U.S.C. 1932

<sup>119</sup> Interim Final Rule, 80 Fed. Reg. 15665; 7 C.F.R. Parts 4280 and 4284. See also, <https://www.rd.usda.gov/programs-services/rural-economic-development-loan-grant-program> and <https://www.rd.usda.gov/programs-services/rural-business-development-grants>

economic development, feasibility studies and business plans, leadership and entrepreneur training, rural business incubators and long-term business strategic planning.

RBDG Grants range from \$10,000 to \$500,000. There is no cost share requirement but scoring criteria incentivize leveraging with additional funding.<sup>120</sup> Congress has mandated that a certain level of RBDG funding be reserved for projects that benefit members of tribes. Tribe-specific applications are ranked and compete only against other tribal projects in a national competition. Funding is much more limited in the regular RBDG program, as RD State Offices only receive a certain amount for projects (non-tribal and tribal) within its jurisdiction.

*How do I apply?* Applications are solicited annually to compete for limited funds. For information on how to apply, tribes should contact their USDA State Offices. Contact information for the State Offices is available at <https://www.rd.usda.gov/contact-us/state-offices>.

## **D. Federal Home Loan Bank Programs**

### **1. Affordable Housing Program (AHP) Subsidy**

*What is the Federal Home Loan Bank (FHLB)?* There are eleven regional FHLBs nationwide, each responsible for a particular territory. They are located in Chicago (Wisconsin and Illinois); Indianapolis (Michigan and Indiana); Des Moines (Minnesota, the Dakotas, Iowa, Missouri, Montana, Wyoming, Idaho, Utah, Oregon and Washington, Alaska and Hawaii); Topeka (Nebraska, Kansas,



*Little Pines II - Photo courtesy of Lac du Flambeau Chippewa Housing Authority*

Oklahoma and Colorado); San Francisco (California, Nevada and Arizona); Dallas (southern states from Mississippi to New Mexico); Atlanta (southern coastal states from Alabama to Maryland); Pittsburgh (Pennsylvania, Delaware and West Virginia); New York City (New York and New Jersey); Cincinnati (Ohio, Kentucky and Tennessee) and Boston (New England). The FHLBs promote housing finance and community development by providing low-cost funding and other services to member financial institutions.<sup>121</sup> Member banks can sponsor applications for projects located anywhere in the country and are not limited to sponsoring projects within the defined region.

*Overview.* The Affordable Housing Program (AHP)<sup>122</sup> offers subsidies, essentially grants, for both rental and homeownership programs. Regional FHLB have the option of using AHP subsidy for revolving loan funds and loan pools. Each regional FHLB is required to publish its “AHP Implementation Plan” on its website, describing its program requirements relating to income

<sup>120</sup> <https://www.rd.usda.gov/files/fact-sheet/RD-FactSheet-RBS-RBDG.pdf>

<sup>121</sup> For more information on the FHLB banks, see <http://www.fhlbanks.com/>

<sup>122</sup> Section 10(j)(1) of the Federal Home Loan Bank Act, 12 U.S.C. § 1430(j)(1): Federal Home Loan Bank Act, Act of July 22, 1932, ch. 522, Sec. 1, 47 Stat. 725, 12 U.S.C. 1421 et seq.; 12 C.F.R. Part 1291, 83 Fed. Reg. 61186, November 28, 2018. .



standards, competitive application program requirements, homeownership set-aside programs, revolving loan funds (if applicable), loan pools (if applicable), monitoring requirements and retention agreement requirements. Tribes and TDHEs interested in the program should review the AHP Implementation Program of the relevant regional FHLB.

*What does the rental program offer?* The AHP provides subsidies (grants), typically in the range of \$500,000-\$2,000,000 for the purchase, construction and/or rehabilitation of rental housing, at least 20% of the units of which will be occupied by and affordable for very low-income (not more than 50% of AMI) households. Rents may not exceed 30% of adjusted household income. The AHP gives priority to housing sponsored by nonprofits, states or political subdivisions of states, local housing authorities or state housing finance agency.<sup>123</sup> In practice, AHP is often awarded to projects that have been allocated low-income housing tax credits. The grantee must retain the project as affordable housing for fifteen years from completion. Reports to FHLB must be filed periodically by the sponsoring member bank and the owner (TDHE in the case of rental housing). FHLB AHP funding is flexible and can be matched readily with many other sources, including LIHTC, USDA RDS, HUD, and NAHASDA. AHP typically pays for a portion of a project.

*What does the homeownership program offer?* The AHP subsidy may be used to finance the purchase, construction, or rehabilitation of an owner-occupied project by or for very low-income or low- or moderate-income households. The program can be used to fund a down-payment assistance program. A household must have an income meeting the income targeting commitments in the approved AHP application at the time it is qualified by the project sponsor for participation in the project. The member bank must ensure that the home is subject to a deed restriction or other enforceable retention agreement requiring that, during the five-year retention period (1) the regional bank be given notice of any sale or refinancing of the unit occurring prior to the end of the retention period, (2) in the case of a sale or refinancing of the unit prior to the end of the retention period, the AHP subsidy be repaid based on pro rata formula unless certain conditions are met. The grantee must retain the project as affordable housing for five years from the closing of the mortgage loan. Reports to FHLB must be filed periodically by the sponsoring member bank and the owner. For first-time homebuyers, homeownership counseling is mandatory.

*How do I apply?* The entities involved in an AHP application include (1) the regional FHLB, which scores applications and makes awards, (2) the member bank, which makes the application to the regional FHLB of which is a member, and the (3) project sponsor, which has an ownership interest in the project and is involved in development and management, in the case of a rental project, or provides financing to individuals in the case of the homeownership program. The Tribe or TDHE typically acts as sponsor. The Tribe must identify a bank that is a member of the regional FHLB and work with the bank in the preparation of the application. Often, the sponsor, or the sponsor's consultant, plays a major role in the preparation of the application. The websites of the regional FHLBs list the banks within each area that are FHLB members. Most regional FHLBs have two application rounds annually. See regional FHLB websites for more information.

An AHP application must establish (1) need, including a complete description of proposed sources and uses of funds, (2) a project budget, which must reflect reasonable project costs, (3) developmental feasibility, based on development budget, market analysis, project sponsor experience and other

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<sup>123</sup> For a list of state housing finance agencies, see <https://www.ncsha.org/housing-finance-agencies-list/>

factors, (4) operational feasibility of rental projects, as demonstrated by the project's operating performance. Donation of land for less than fair market value, sponsorship by a tribe, and reservation of at least 60% of project units for families with income not exceeding 50% of AMI are both positive scoring considerations that often favor tribal applications.

## 2. Community Investment Program<sup>124</sup>

*What does the program offer?* Each regional FHLB is required to establish a program to provide funding to member banks to undertake community-oriented mortgage lending in targeted areas. Community-oriented mortgage lending includes below-market loans to families earning less than 115% of area median income for the purchase or rehabilitation of homes. CIP funds may also be used to finance commercial and economic development projects that benefit low- and moderate-income families. Indian areas, as defined under NAHASDA, meet the CIP definition of a "targeted area" eligible for CIP funds.

The interest rate advantage of the CIP program with respect to a particular project depends on several factors. The regional FHLBs borrow from Wall Street and, based on their status as government-sponsored entities, obtain a lower rate of interest than most banks. The rate that the regional FHLBs charge their member bank is normally slightly marked up and the member bank, in turn, typically marks up the loan to its customer. The net interest rate advantage to the customer (e.g. a tribe or TDHE) may or may not be significant. In pursuing sources of financing, however, tribes and TDHEs should be mindful of the program and explore its potential advantages.

*How do I apply?* Unlike the AHP, the CIP is not a competitive program. A CIP application and application for an advance can be made at any time. The application is relatively simple. A tribe or TDHE wishing to take advantage of the program must work with a bank that is a member of the regional FHLB. The member bank applies to the regional FHLB for the funds. The Tribe or TDHE, as borrower, must demonstrate that the project being financed meets program eligibility requirements. Each regional FHLB is required to appoint a community investment officer to implement community lending and affordable housing advance programs. Interested tribes and TDHEs should contact the community investment officer in their region.

## 3. Down Payment Assistance Set-Aside Programs

What does the program offer? Federal regulations provide that regional FHLBs may establish non-competitive set-aside programs to assist low and moderate income homebuyers, especially those purchasing a home for the first time.<sup>125</sup> Each of the regional FHLBs has established such a program. Examples include the Downpayment Plus Program offered by FHLB Chicago, Topeka FHLB's Rural First-Time Homebuyer Program and San Francisco FHLB's Homeownership Set-Aside Program.

FHLB Homeownership set-aside programs typically provide grants (from \$5,000-\$15,000, depending on the regional program) to low- and moderate-income borrowers (i.e., with adjusted incomes up to 80% of AMI) to cover down payment, closing costs, homebuyer counseling and up to two months of principle, interest, taxes and insurance (PITI). The program may be used in

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<sup>124</sup> 12 USC § 1430(i); 12 C.F.R. Chapter IX, Part 952.

<sup>125</sup> 12 C.F.R. § 1291.6

connection with conventional as well as government mortgage loan programs and can be combined with federal, state and local grants. It may not, however, be combined with an AHP competitive program subsidy.

*What does the program require?* The tribal member borrower must identify a lender that is a member of the regional FHLB. The lender takes a mortgage on the principal loan and a junior mortgage to secure the down payment grant. The grant is forgiven over a five-year period. If the borrower sells the home at a profit within five years, the home buyer must repay a pro-rata share of the grant. Most programs require a matching contribution by the homebuyer and pre-purchase homebuyer counseling.

*How do I apply?* After negotiating the purchase of a home, the home buyer contacts an FHLB member bank and applies for a first mortgage. The FHLB member bank determines income eligibility, arranges with the program administrator to reserve the grant funds, assures that the

home buyer completes home buyer counseling and disburses funds at closing. Tribe and TDHEs that have established home ownership agencies can help members access the program.

## **E. BIA HIP Program**

*What does the program offer?* The Bureau of Indian Affairs (BIA) Housing Improvement Program (HIP)<sup>126</sup> provides grants to repair, renovate, replace or provide housing for the neediest Indian families. HIP grants may be for interim improvements (up to \$2,500), repairs and renovation (up to \$35,000) or replacement of housing (sufficient for a “modest dwelling”). The program is administered by the BIA in cooperation with tribal governments or by a tribal government through a Pub. L. No. 93-638 contract or self-governance contract. The program is coordinated with the Indian Health Service’s (IHS) Sanitation Facilities Program, which provides water and wastewater facilities for HIP homes.

*Who is eligible?* A member of a federally-recognized tribe who lives in an approved tribal service area is eligible if (1) household annual income does not exceed 125% of poverty income guidelines; (2) present housing is substandard; (3) he or she has not received assistance after October 1, 1986 for repairs, renovation, replacement, housing or down payment assistance; (4) the present home was not acquired through a federal housing program, such as the Housing Act of 1937 or NAHASDA; (5) he or she is without alternative housing assistance; and (6) ownership requirements are met. In order to receive a grant for repairs and renovation, the program participant must either own the home or have a leasehold extending 25 years beyond the grant date.

*How do I apply?* The individual tribal member applies by filing an application form, together with documentary evidence of membership, household income and land tenure. Applications are then ranked by the HIP Servicing Office according to need. The Servicing Office determines what work should be done on the home and coordinates with the IHS with regard to funding for sanitation facilities. The Servicing Office also selects contractors and manages the project. Funds are allocated based on information provided by tribes to their regional BIA offices based on a competitive process that takes into account the number of members who meet age, income, disability and family size criteria.

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<sup>126</sup> 25 USC § 13; Act of Nov. 2, 1921, ch. 115, 42 Stat. 208, as amended; 25 C.F.R. Part 256; 80 Fed. Reg. 69597, November 10, 2015; See also <https://www.bia.gov/bia/ois/dhs/housing-improvement-program>

## F. DOT/BIA Tribal Transportation Program

Congress established the Tribal Transportation Program (TTP) as part of the 2012 “Moving Ahead for Progress in the 21st Century Act.”<sup>127</sup> The Program, administered by the Office of Federal Lands Highway within the U.S. Department of Transportation (DOT) and the Bureau of Indian Affairs (BIA), provides funding for “tribal transportation facilities,” which is broadly defined to include “a public highway, road, bridge, trail, transit system, or other approved facility that is located on or provides access to Tribal land” and appears on the National Tribal Transportation Facility Inventory (NTTFI).<sup>128</sup> The NTTFI is comprised of “transportation facilities that are eligible for assistance under the Tribal transportation program that an Indian Tribe has requested” and that fall within designated, very broad, categories. Federal regulations were issued in 2016.<sup>129</sup>

It is essential that roads, or proposed roads, required for housing development, be included on the NTTFI, pursuant to the procedures described in federal regulations.<sup>130</sup> Moreover, the TTP sets aside funding for improving deficient bridges and to address safety issues.<sup>131</sup> BIA issues a Notice of Funding Opportunity annually to solicit applications for Safety funds. Tribes should use planning funds, which are provided on a pro rata basis under the TTP, to identify transportation facilities that may qualify for set-asides. Funding under the TTP was projected at approximately \$500 million for FY 2020.

## G. Indian Health Service Housing Sanitation

*What does the program offer?* The Indian Health Care Improvement Act requires the IHS to maintain an inventory of sanitation deficiencies for each tribe, including the amounts necessary to eliminate deficiencies.<sup>132</sup> IHS normally enters into a memorandum of understanding with a tribe to provide funds, as well as technical, engineering and construction management services, for the installation of sanitation facilities for Indian homes, communities and lands.<sup>133</sup> Sanitation facilities include both water supply and waste disposal facilities. IHS provides technical assistance free of charge. Engineering services, including preparation of specifications, contracts, drawings, inspections, etc., are furnished for a fee equal to 2% to 5% of the project cost. A project may be administered directly by IHS or by a tribe under contract with IHS.

*What are the program limitations?* Funding is generally limited to (1) homes built or renovated with funds provided under the BIA HIP (see previous section) or (2) non-HIP homes that have been built or renovated within the past funding year or the previous year. HIP-related projects generally are given priority. A sanitation deficiency program addresses sanitation problems at older homes but funding is limited and the program is competitive. Currently, program funds may not be used in connection with homes built with NAHASDA funds. Although the program is not competitively

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<sup>127</sup> P.L. 112-141, Div. A, Title I, § 1119(a), codified, as amended by the Fixing America’s Surface Transportation (FAST) Act, P.L. 114-94, Div. A, Title I, §§ 1117(a), 1120, 23 U.S.C. § 201 et seq.

<sup>128</sup> 25 C.F.R. § 170.5

<sup>129</sup> 81 Fed. Reg. 78456-91; 25 C.F.R. Part 170

<sup>130</sup> 25 C.F.R. § 170.443

<sup>131</sup> 25 C.F.R. §§ 170.127, 170.510

<sup>132</sup> 25 U.S.C. § 1632

<sup>133</sup> See, Pub. L. No. 86-121, § 1, 73 Stat. 267 (7/31/59), 42 USC § 2004a; 25 USC § 3905. See also, <https://www.ihs.gov/dsfc/>

scored, the funds appropriated for the program each year are limited and IHS uses its discretion in allocating funds to provide the greatest benefit. Because IHS funding is sometimes insufficient to fully fund a project's sanitation facilities, it is normally necessary to combine IHS grants with other programs, such as the RUS Water and Waste Facility Program (described above), a private loan, bond or tribal contribution.

*How do I apply?* Tribes should contact the local IHS Office to assure that priority water and waste water projects are included in IHS deficiency inventory. Individual tribal members should contact their tribal government to request that the member's home be included in the tribe's inventory submitted to the IHS. More information is also available from the national Office of Environmental Health and Engineering at 301-443-1046.

## **H. US Military Assistance Programs**

### **1. Department of Defense**

From time to time, the Department of Defense (DoD) conveys unused relocatable military housing units to tribes. In 2018, Congress authorized the Air Force to convey "at no cost to the Air Force, military housing at designated air force bases "that are excess to the needs of the Air Force."<sup>134</sup> Request were required to be submitted by to the Secretary of the Air Force "by the Operation Walking Shield Program on behalf of Indian tribes located in the States of Nevada, Idaho, North Dakota, South Dakota, Montana, Oregon, Minnesota, and Washington." Tribes with an acute shortage of housing may wish to consider the availability of excess military housing as a short term means of meeting the needs of tribal members.

The Department of Defense's Innovative Readiness Training (IRT) program was established to "produce mission-ready forces through military training opportunities that provide key services for American communities."<sup>135</sup> Tribes are eligible to request services through the program. Through IRT, the DoD has provided housing construction services on the Blackfeet, Crow, Rosebud Sioux, Pine Ridge Oglala Sioux and Navajo reservations in recent years. Engineering and other services are potentially available through the program. IRT projects must have both community value and military training value. Projects must avoid competing with private section entities. The procedures for applying for assistance are described at the IRT Program website.<sup>136</sup>

### **2. Army Corps of Engineers Water Resource**

Section 22 of the Water Resources Development Act of 1974<sup>137</sup> authorizes the Army Corps of Engineers to assist and make grants of up to \$100,000 to states, tribes, non-Federal entities working with a state or regional coalition of governmental entities for the preparation of comprehensive

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<sup>134</sup> <https://www.ihs.gov/dsfc/>

<sup>135</sup> <https://irt.defense.gov/About/> See also, 10 U.S.C. Code Section 2012; DoD Directive 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense, dated April 12, 2004, <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/110020p.pdf>; <https://irt.defense.gov/TEST.aspx>

<sup>136</sup> <https://irt.defense.gov/Projects/>

<sup>137</sup> Pub. L. 93-251; Sec. 3015 of WRDA 2014 (P.L. 113-121) further amends Sec 22 of WRDA 1974 to increase the annual per-state funding limit to \$5,000,000. See also 42 U.S.C. § 1962d-16(c)(1).

plans for the development, use and conservation of water and related land resources. Related studies include inundation mapping, dam safety and failure modeling, water supply and demand analysis, water quality assessments, environmental restoration concepts, flood damage reduction assessments, wetlands delineation and biological assessments. The program requires a 50% cost share.<sup>138</sup>

The Tribal Partnership Program<sup>139</sup> established by the Water Resources Development Act of 2000,<sup>140</sup> as amended by the Water Resources Development Act of 2007,<sup>141</sup> authorizes the Secretary of the Army to carry out water-related planning activities, or activities relating to the study, design, and construction of water resources development projects, that will substantially benefit tribes and are located primarily within Indian country. Authorized activities include projects for flood damage reduction, environmental restoration and protection, and preservation of cultural and natural resources, as well as watershed assessments, planning activities, feasibility studies and “such other projects as the Secretary, in cooperation with Indian tribes and the heads of other Federal agencies, determines to be appropriate.”

A tribe wishing to obtain assistance from the Army Corps of Engineers under either above-described program should contact its local Army Corps district office.<sup>142</sup>

## **I. Environmental Protection Agency Water and Waste Water Programs**

The EPA administers a Clean Water Indian Set-Aside (CWISA) program<sup>143</sup> under the Clean Water Act.<sup>144</sup> Funds are distributed directly to IHS regional offices. The statutory tribal set-aside is equal to .5% of the funds appropriated for the nationwide program, though Congress has increased the tribal set-aside in recent years.<sup>145</sup> Funds may be used for the planning, design, and construction of wastewater treatment plant facilities that serve federally recognized Indian tribes, Alaska Native Villages and certain tribes in Oklahoma (referred to herein as “tribes”). EPA uses sanitation deficiency system (SDS) priority lists prepared by IHS to identify waste water projects for funding. To get on the list, tribes need to meet with IHS area office representatives.<sup>146</sup> The EPA Administrator has delegated CWISA authority to the EPA regions. Since tribes cannot apply directly for these funds, it is important that tribes work with their local IHS offices to assure that their priority projects are included on the IHS SDS list.

EPA’s Drinking Water Infrastructure Grants Tribal Set-Aside (DWIG-TSA) program, authorized

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<sup>138</sup> 33 U.S.C. § 2310 provides for cost-share waiver of up to \$200,000 for Indian tribes and territories. See also, 42 U.S.C. § 1962d-16(f).

<sup>139</sup> 33 U.S.C. § 2269.

<sup>140</sup> Pub. L. 106-541

<sup>141</sup> Pub. L. 110–114, § 2011

<sup>142</sup> For more information, see website: [https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/tribal\\_otherpolicies/](https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/tribal_otherpolicies/) and <https://www.spa.usace.army.mil/Portals/16/docs/civilworks/tribal/guide.pdf>

<sup>143</sup> 33 U.S.C. § 1377; See program guidelines: [https://www.epa.gov/sites/production/files/2015-11/documents/cw\\_indian\\_set-aside\\_program\\_guidance.pdf](https://www.epa.gov/sites/production/files/2015-11/documents/cw_indian_set-aside_program_guidance.pdf) EPA’s Section 106 tribal grant program provides funds to establish water quality programs and is outside the scope of the Handbook.

<sup>144</sup> Pub. L. 94-217, 33 U.S.C. § 1251 et seq.

<sup>145</sup> The FY 2018 and 2019 appropriations were, each year, the greater of 2% of funds appropriated for the general program or \$30 million.

<sup>146</sup> See FAQ, pp 1-2 <https://www.epa.gov/sites/production/files/2015-03/documents/cwisa-tribal-faq-highres.pdf>

under the Safe Drinking Water Act (SDWA),<sup>147</sup> provides funds to “address the most significant threats to public health associated with public water systems that serve Indian tribes, as determined by the Administrator in consultation with the Director of the Indian Health Service.”<sup>148</sup> Funds can be used for drinking water infrastructure needs assessments and construction of facilities for water treatment, storage and distribution. The statutory set-aside is equal to 1.5% of the funds appropriated for state revolving loan funds under the SDWA, though Congress has sometimes increased the percentage in annual appropriations.

In addition, the SDWA authorizes grants to eligible entities, which include “a water system that is located in an area governed by an Indian tribe,” that is determined to be a “underserved community.” An underserved community may be either a community designated “disadvantaged” under state-established criteria or a community with a population under 10,000 that EPA has determined cannot finance the necessary facilities.<sup>149</sup> Program funds may be used for investments necessary for the public water system to comply with the Safe Drinking Water Act, assistance that directly and primarily benefits the underserved community on a per household basis and programs for water testing. A 45% nonfederal cost share is required but may be met through the provision of services, materials, supplies and other in-kind contributions.

## **J. Tax-Exempt Bonds**

*What does the program offer?* Under the Indian Tribal Government Tax Status Act of 1982,<sup>150</sup> Indian tribes have the ability, like states and municipal governments, to issue an unlimited amount of tax-exempt bonds to finance projects relating to essential government functions, such as schools, roads, and water systems. Tribal subdivisions, including TDHEs, to which tribes have delegated essential governmental functions, may apply to the IRS for the same authority and many have done so.

*Tribal Economic Development Bonds.* The 2009 American Recovery and Reinvestment Act<sup>151</sup> expanded the authority of tribes to issue tax exempt bonds by authorizing the Secretary of the Treasury, in consultation with the Secretary of the Interior, to allocate up to \$2 billion in Tribal Economic Development Bonds (TEDBs). Previously, tribes could issue bonds only for essential governmental functions, which the IRS had construed narrowly. Tribes that receive an allocation of TEDBs can issue bonds on the same basis as state and municipal governments. Bonds cannot, however, be issued to finance gaming facilities. In addition to expanding tribal tax exempt bond authority beyond “essential government functions,” the TEDBs also permit tribes to issue qualified private activity bonds tax exempt. Qualified private activity bonds include bonds to finance residential rental projects that are privately owned, provided income limitations are satisfied. TEDBs would also permit tribes, for the first time, to issue tax exempt qualified mortgage bonds to finance home purchases for members. As of late 2019, the \$2 billion in TEDB authority approved by Congress in the ARRA had still not been exhausted. Whether Congress will increase the volume cap is uncertain.

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<sup>147</sup> 42 U.S.C. § 300j- et seq.

<sup>148</sup> 42 U.S.C. § 300j-12(i)(2); See program guidelines: <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100MAGP.txt>

<sup>149</sup> 42 U.S.C. § 300j-19a

<sup>150</sup> Indian Governmental Tax Status Act of 1982, Pub. L. No. 97-473, Title II, § 202(a); Pub. L. No. 100-203, Title X, § 10632(a); 26 USC § 7871; 26 C.F.R. Part 305, § 305.7701 et seq.

<sup>151</sup> Pub. L. No. 111-5.

*What are the advantages of bonds?* Bonds are a borrowing device. The tribe sells the bonds, which represent its promise to repay the loan at a fixed interest rate. Because bondholders do not pay federal income tax on the interest they earn, they are willing to accept a lower interest rate than that offered by a nonexempt bond, reducing the tribe's borrowing costs. Bonds can often be repaid over a longer period of time than bank loans. Borrowing through bond issuance may be combined with other financing sources.

*What are the program limitations?* When using their pre-2009 authority under the Tribal Governmental Tax Status Act, tribes (or their political subdivisions) can issue tax exempt bonds only if substantially all (at least 90%) of the proceeds are used for "essential government functions" customarily provided by state or local governments. Bond proceeds may be used to finance facilities owned and operated by a tribal government for the general benefit of tribal members, including housing projects, schools, health care facilities, water, sewer, police and fire, convention halls, administration buildings, child welfare, drug and alcohol treatment centers, etc. Bonds may not be used to finance purely commercial enterprises, although they may be used to support infrastructure, such as roads, water and sewer facilities, that tangentially benefit commercial enterprises. As described above, tribes' tax exempt bond authority is greatly expanded if TEDBs are used. TEDBs, however, require an allocation from the Secretary of the Treasury.

*How do bonds work?* Typically, the tribal government, TDHE or a tribally chartered corporation or utility issues the bonds, collects the proceeds, applies them to the project and takes responsibility for repayment to the bondholder, often over a period of 30 years. Potential purchasers of a tribe's bonds include local banks or the RD Office of the USDA. For a larger bond issue, a securities underwriter can arrange a public sale of the bonds. Because the bonds represent a loan to the tribe, a tribe's creditworthiness will affect its ability to sell bonds.

*What are the costs?* The issuance of bonds is a complex process and requires significant investment of time and money. Therefore, the savings that a tribe can realize over the long term should be weighed against the costs of issuance. Smaller bonds may not make sense because, although the tribe receives a favorable rate of interest, the transaction costs (amount of time, attorneys' fees, bank fees, etc.) offset any savings.

## **K. State-administered Federal Programs**

### **1. Low-Income Housing Tax Credits**

*Recent Developments.* The low-income housing tax credit (LIHTC) program<sup>152</sup> continues to be a major engine of affordable housing development in the United States, producing or preserving homes for an estimated 6.7 million low-income households since 1986.<sup>153</sup> The program achieved an important milestone when it was made permanent by the 2016 Consolidated Appropriations

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<sup>152</sup> 26 U.S.C. §§ 42, 49; 26 C.F.R. Part 1, sec. 1-42; 65 Fed. Reg. 2323-29 (Final Regulations, Jan. 14, 2000); 59 Fed. Reg. 10067 (Final regulations 3/3/94); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, Division C.

<sup>153</sup> <https://static1.squarespace.com/static/566ee654bfe8736211c559eb/t/57e939ccbeba411361eb4/1474902477460/National+2016.pdf>





*Spokane Tribe Sockeye Housing - Photo courtesy of Spokane Indian Housing Authority*

Act.<sup>154</sup> The 2018 Appropriations Act increased the total amount of available credits by 12.5% for the years 2019 – 2021<sup>155</sup> and amended 26 U.S.C. § 42(g) to allow income averaging, which permits project owners to accommodate families with incomes up to 80% of AMI, provided there is an off-setting commitment to extremely low income households. This new rule could be especially valuable to tribes with strong employment.

Many tribes have successfully used LIHTCs to develop new units or to rehabilitate existing units.

Several IRS rulings have facilitated the use of LIHTCs with IHBGs. The IRS has determined that certain rental assistance payments made from IHBG funds are not “federal grants” for purposes of the LIHTC<sup>156</sup> program and, therefore would not reduce the eligible tax basis, which otherwise would have resulted in decreased LIHTC funding for IHBG-assisted housing. IHBG funds may be used for project-based or tenant-based rental assistance, including in connection with LIHTCs.<sup>157</sup>

### *What the Program Offers*

Congress encourages the development of affordable housing by giving investors a credit against their income taxes in return for their investment in projects that serve low-income families. There are two versions of the LIHTC program. The competitive 9% program and non-competitive 4% programs allow investors to claim a credit equal to 9% or 4%, respectively, of their investment each year for ten years. Depending on market conditions, the competitive 9% tax credits may provide up to 70% or more of the cost of new construction or rehabilitation. The 4% program is non-competitive and the credits are typically awarded with an allocation of tax exempt multifamily housing bonds. Historically, tribes have focused on the 9% program because it delivers more equity.

The investor’s equity contribution is not a loan that the tribe or TDHE must repay. Instead, the investors are repaid by the U.S. Treasury when they take credits against their taxes over a 10-year period. Under the LIHTC program, developers, including tribes and TDHEs, are entitled to earn as much as 15% of the eligible project basis as a developer fee. Because tribes and TDHEs typically are not profit-motivated, they often contribute some or all of their development fee to the project. Developer fees can also be used to cover professional fees (e.g., consultant, accountants, attorneys, etc.).

The vast majority of Indian country tax credits projects have involved the competitive 9% program, which provides significantly more equity than the 4% program. Because the 9% credits are highly competitive and scoring in some states all but excludes Indian country, the 4% credits deserve greater consideration. Sources of financing to cover the gap between the tax credit equity and

<sup>154</sup> December 18, 2015, Pub. L. 114-113.

<sup>155</sup> Pub. L. 115-141, Division T, § 102

<sup>156</sup> Rev. Rul. 2008-6.

<sup>157</sup> 72 FR 59003, 24 CFR 1000.103; HUD ONAP Program Guidance 2008-01.

total develop costs include loans guaranteed under NAHASDA Title VI or the HUD Section 184 program, tax-exempt bonds and Federal Home Loan Bank Affordable Housing subsidies. In order to obtain 4% credits, it is necessary to apply for an allocation of tax-exempt multifamily housing bonds.

*Leveraging.* LIHTCs can, and should, be combined with other financing sources to provide the greatest benefit. Potential sources of financing that can be used with tax credits include NAHASDA IHBG, NAHASDA Title VI guaranteed loan, HUD Section 184 guaranteed loans, RD Section 515 loans, RUS water/sewer grant/loans, FHLB AHP, HOME funds, renewable energy investment tax credits, etc.

*Whom does the program serve?* The program is intended to encourage the construction or rehabilitation of rental housing for low-income households. For purposes of the tax credit program, a low-income household is one whose income is not more than 60% of Area Median Income (AMI). Compliance is determined at the time a tenant moves into a unit. No tenant is evicted for improving his or her economic circumstances. If the tenant is “income qualified” upon move-in, the project remains in compliance. Gross rents, including utilities, may not exceed 30% of the maximum qualifying income based on 1.5 persons per bedroom. The program may be used for multifamily or single-family housing. Single-family housing may be built as part of a subdivision or as a scattered site.



*AHA Solar Farm Under Construction - Photo courtesy of Akwesasne Housing Authority*

*Can the program be used for homeownership?* The tax credit program is a rental program. Tenants can, however, be given the opportunity to purchase their homes after the initial 15-year compliance period for the amount of the debt, if any, associated with their unit. For a homebuyer who perseveres, this is an excellent opportunity because the tax credits subsidize a large portion of the construction costs, reducing the debt that the homebuyer may need to assume.

*What are the program requirements?* The project owner must guarantee that the units are occupied by low-income families, consistent with the representations made in the application, for the initial 15-year compliance period and for an additional 15 years thereafter. A qualified low-income project

is one in which either at least 20% of tenants have income under 50% of AMI or at least 40% of tenants have income under 60% of AMI. The amount of credits awarded is directly related to the number of low-income units. Congress in 2018 permanently authorized income averaging, which permits developers to apply the 60% ceiling to the average of all apartments.<sup>158</sup>

The TDHE must answer to both the state housing agency, which is responsible for assuring that the project complies with federal law, and to the investors, whose only return comes in the form of tax benefits. The management of the project is typically in the hands of the TDHE, though some owners choose to hire a management agent with tax credit experience. If there is a violation of the program requirements (for example, the renting of a unit to an over-income person), the IRS may disallow a portion of the tax credits. In that event, the investors will hold the TDHE, as general partner, financially responsible for their lost tax benefits. The TDHE must prepare periodic reports for both the state agency and the limited partners, verifying occupancy and income levels, and provide the limited partners with the tax forms they need to claim the credits on their tax returns.

*How is the project structured?* The tribe, TDHE, or a related entity, forms a limited partnership or limited liability company (LLC) in which the investors are limited partners of the partnership or non-managing members of the LLC. The partnership or LLC must own the project so that the limited partners (or non-managing members) can take advantage of the project credits as well as other tax benefits, such as depreciation and loss deductions. The TDHE serves as the general partner or managing member and retains overall management responsibility. The TDHE may manage the project units so that, from a tenant's perspective, the project differs little from any other TDHE housing unit. If the units are on trust land, the tribe typically gives the TDHE (or the limited partnership or LLC directly) a long term (at least 50 year) lease. The leasehold units are assigned, or sub-leased, by the TDHE to the limited partnership or LLC.

While the TDHE must commit to preserving the project for low-income tenants for at least 30 years, the investor limited partners or non-managing members will satisfy all of their legal obligations during the initial 15-year compliance period. Once the 15-year compliance period ends, the limited partnership or LLC agreement generally provides that the TDHE, or a related entity, can buy out the interest of the investors, leaving the project again in the sole possession of the TDHE.

*How do I apply?* Each state has a housing credit agency that accepts and scores applications and allocates credits. An application fee must be paid upon initial application and again to reserve the credit allocation. Scoring is based on the priorities set forth in the state's qualified allocation plan (QAP). Need is normally a major consideration in scoring tax credit applications. Because many tribes have long waiting lists and a population that is geographically rooted in the reservation, tax credit applications submitted by tribes are often very competitive. Because of the complexity of tax credit applications, many tribes have engaged consultants to assist. Consultants are normally paid from the developer fee that the tribe, or TDHE, earns.

## 2. HOME Program

*About Home Funds.* The HOME program, created by Title II of the National Affordable Housing Act

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<sup>158</sup> Pub. L. 115-141, Division T, § 103

of 1990 (Cranston-Gonzalez Act)<sup>159</sup> is the largest Federal block grant to state and local governments for housing for low-income households. Its primary purpose is to expand the supply of decent and affordable housing, with primary attention to rental housing, for very low-income and low-income Americans. Other purposes identified by Congress include promoting rental assistance as a means of making housing more affordable, expanding the capacity of nonprofits to develop and manage affordable housing, increasing the investment of private capital in affordable housing, and assisting low-income families in acquiring the skills to become responsible homeowners and tenants.

*Uses of HOME Funds.* HOME funds can be used for wide range of affordable housing-related purposes, including acquisition, rehabilitation, and new construction, tenant-based rental assistance, administrative and planning costs, and operating expenses of Community Housing Development Organizations (CHDOs). HOME funds may be used to assist multi-unit projects. Assistance may be in the form of loans, deferred payment loans, grants, equity investments, interest subsidies, guarantees of third-party loans and other forms of assistance approved by HUD. HOME funds must generally be matched by nonfederal sources.

*How Funds Are Distributed.* Congress appropriates funds to “participating jurisdictions,” also sometimes called “PJs.” All states are PJs and municipalities may also qualify based on a formula. Each PJ must submit a Consolidated Plan together with its application to HUD. The Consolidated Plan describes the PJ’s goals for community planning and housing development programs funded under 17 specified HUD programs, HOME, and its strategy for achieving stated goals and serves as a basis for measuring performance. Under the program, HUD establishes a HOME Investment Trust Fund for each PJ, which provides a line of credit for investment in affordable housing. Program revenue flows back into the trust fund for reinvestment in affordable housing.

*Community Housing Development Organizations.* Participating jurisdictions must allocate 15% of their HOME funds to projects developed, sponsored, or owned by Community Housing Development Organizations (CHDOs), nonprofit, 501(c)(3) entities that satisfy requirements set forth in federal regulations. Public bodies, such as tribes or TDHEs, do not qualify as CHDOs but could form a CHDO, provided no more than one-third of the CHDO’s board members are officials or employees of the tribe.

*Strategic Considerations.* Indian Country has traditionally been underserved by state HOME programs. State housing agencies often mistakenly believe they have no obligation to serve Indian Country because tribal members’ needs are served by the federal government. In reauthorizing NAHASDA in 2008, Congress clarified that NAHASDA does not prevent tribes or TDHEs from receiving funds from programs funded under the Home Investment Partnerships Act.<sup>160</sup> HOME regulations<sup>161</sup> provide that a state “may fund projects on Indian reservations located within the State provided that the State includes Indian reservations in its consolidated plan.”

Tribes and TDHEs should review their states’ Consolidated Plans and meet with state housing officials to learn about their programs and educate state officials concerning the acute housing

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<sup>159</sup> Pub. L. No. 101-625, Title II, as amended and reauthorized by the Housing and Community Development Act of 1992. 42 U.S.C. § 12721-12840; 24 C.F.R. Parts 91 and 92.

<sup>160</sup> 25 U.S.C. § 509

<sup>161</sup> 42 C.F.R. § 92.201(b)(5)

needs of Indian Country.<sup>162</sup>

### 3. National Housing Trust Fund

*About the Program.* The National Housing Trust Fund (HTF) program was established in Title I of the Housing and Economic Recovery Act of 2008.<sup>163</sup> HUD administers the program. The statute provided for funding through contributions by a set-aside equal to .042 percent of new mortgages purchased by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac.) Contributions were immediately suspended but reinstated, and funded for the first time, in 2016. States may distribute funds directly or through a designated entity, such as a housing finance agency.

*Purpose.* The purpose of the HTF Program is to provide grants to State governments to increase and preserve the supply of rental housing for extremely low- (less than 30% of AMI) and very low-income (less than 50% of AMI) families, including homeless families, and to increase homeownership for families in those categories. Eligible activities include “new construction, reconstruction, or rehabilitation of non-luxury housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations; for operating costs of HTF-assisted rental housing; and for reasonable administrative and planning costs.”<sup>164</sup>

*What amounts are available?* Funds are allocated to states based on a formula, with each state receiving a minimum of \$3 million. No matching funds are required. As in the case of low-income housing tax credits, program benefits are distributed to qualified projects in accordance with a state allocation plan, which may prioritize applications based on leveraging with non-federal sources, location in a high need area, availability of LIHTCs, RD Section 515, Section 8 vouchers or other sources, amounts requested, etc. One state’s scoring criteria permitted applications for as much as \$30,000 per units but awarded points for projects requesting less than \$15,000 per unit.<sup>165</sup>

*Who can apply?* Nonprofits, for-profits, public housing entities and tribal housing authorities are eligible to apply for HTF funds. Applicants must have experience and capacity to conduct an eligible HTF activity as evidenced by its ability to own, construct or rehabilitate and manage and operate an affordable multifamily rental housing development

*How do I apply?* Interested tribes should check the websites of their state housing finance agencies.<sup>166</sup>

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<sup>162</sup> For a list of state housing finance agencies that administer the HOME program, see <https://www.ncsha.org/housing-finance-agencies-list/>

<sup>163</sup> Pub. L. 110-289, §§ 1337, 1338; See regulations at 24 C.F.R. Part 93.

<sup>164</sup> 24 C.F.R. § 93.200

<sup>165</sup> See Wisconsin 2017 Allocation Plan, available at <https://www.wheda.com/Developers/National-Housing-Trust-Fund/>

<sup>166</sup> For a list of state housing finance agencies, see <https://www.ncsha.org/housing-finance-agencies-list/>

## L. **Financing Renewable Energy Facilities**

### 1. Why Renewables?

Most tribes and TDHEs purchase electric energy from state-regulated, off-reservation utilities. In most cases, this energy is produced by the burning of fossil fuels, which pollutes the air, endangers public health, contributes to climate change and threatens traditional subsistence hunting, fishing and gathering activities. By transitioning away from energy based on fossil fuels to clean, renewable energy, tribes (1) promote tribal energy independence, thus strengthening tribal sovereignty, (2) advance tribal environmental values and (3) significantly reduce the monthly electricity costs of the Tribe and its members. Contrary to popular belief, solar panels can be cost-effective anywhere in the United States. While the Southwest certainly produces more solar power than the Pacific Northwest or New England, solar facilities produce significant savings in the latter areas. Solar facilities produce energy only when the sun shines.

### 2. Solar Basics<sup>167</sup>

Solar facilities consist of solar panels, which absorb energy from the sun, racking, which secure the panels to roofs or to the ground, and inverters, which convert direct current into alternating current use in most homes and businesses. Solar facilities produce energy only when the sun shines. In order for solar installations to be economical, it is necessary that a tribe be able either to (1) sell energy into the grid when the tribe is not using it or (2) store the energy in batteries until needed. The former arrangement, known as “net-metering,” allows the tribe to draw on energy from the grid when needed (at night, for example) and obtain a credit against utility bills for the value of the energy that tribal facilities produce but do not use. A tribe achieves “net zero” when the amount of energy that it produces from its solar facilities matches or exceeds the amount of energy that it draws from the utility. Solar facilities are typically warranted to produce a designated volume of kilowatts for 25 years. Facilities continue to produce energy for years thereafter but at slowly decreasing production levels.

Until recently, the alternative to net metering, battery storage, was rarely given serious consideration because of the high cost of batteries. In recent years, however, the price of batteries has declined sharply. Battery storage is likely to become increasingly attractive as costs come down further.

Once renewable energy facilities are installed, energy is produced by sources that cost nothing (sun, wind), or almost nothing (biomass). The costs that a tribe incurs to operate renewable facilities, including periodic inspections, occasional replacement of parts and insurance, are a fraction of the amounts the tribe would otherwise pay to local utilities for fossil-based energy each month. The long term benefits of renewable energy are substantial. The primary challenge tribes face is financing the installation of solar, wind and other renewable energy facilities. The remainder of this Section summarizes some of the funding sources available to meet this challenge.

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<sup>167</sup> Many of the same considerations apply to wind and other renewable energy sources. We focus on solar because it is normally the best fit for tribal housing and because the renewable energy investment tax credit, discussed below, make solar attractive.

### 3. IHBG and NAHASDA Title VI



*Spokane Tribe Fish Hatchery  
Photo Courtesy of Spokane Indian Housing Authority*

Title II of NAHASDA defines the “eligible affordable housing activities” for which Indian Housing Block Grants may be used, including development of “utilities, necessary infrastructure and utility services and ... improvement to achieve greater energy efficiency.”<sup>168</sup> The NAHASDA Title VI loan guarantee program may be used for the same purposes. While NAHASDA funds are hardly a preferred source of financing for renewable energy facilities, they are

available. For more information on NAHASDA and the Indian Housing Block Grant program, see Sections B.1 and B.2, above.

### 4. ICDBG

Tribes have historically used the Indian Community Development Block Grant (ICDBG) Program to rehabilitate existing housing. ICDBG regulations, however, explicitly include in the list of eligible grant uses “improvements to increase energy efficiency through installation of storm windows and doors ... [etc.] and modification or replacement of heating and cooling equipment, including the use of solar energy equipment.”<sup>169</sup> Eligible uses include “public facilities and improvements,” private facilities and technical assistance to increase capacity to carry out neighborhood revitalization or economic development activities. Several tribes have received large ICDBG awards for the purpose of installing solar facilities. Some of these tribes have leveraged the ICDBG with equity provided by investors taking advantage of renewable energy tax credits. For more information on the ICDBG program, see Section B.5, above.

### 5. Department of Energy Tribal Energy Grants

The Department of Energy (DOE) offers Tribal Energy grants under the Indian Tribal Energy Development Act.<sup>170</sup> In recent years, DOE has targeted different “areas of interest,” including energy efficiency measures, community scale generation and energy systems for autonomous operation. Grants up to \$1 million for community scale facilities and up to \$500,000 for energy efficiency and clean energy systems for tribal buildings. The DOE Tribal Energy Grant program is highly competitive. The application requires technical data that most tribes would obtain from industry consultants.

The DOE grant, unlike the ICDBG, requires that tribes cover half of the allowable project costs with nonfederal grant sources. For purposes of the DOE cost share requirement, IHBG are not

<sup>168</sup> 24 U.S.C. § 4132(2)

<sup>169</sup> 24 C.F.R. § 1003.202(b)(4)

<sup>170</sup> 25 USC §3501 et seq.; 25 CFR 224

“federal funds.”<sup>171</sup> The cost share requirement can also be satisfied with funds provided by investors seeking to claim renewable energy investment tax credits. Counsel to the Federal Housing Finance

Board has opined that Federal Home Loan Bank Affordable Housing Program funds are “derived from private funding sources and, therefore are not Federal funds.”<sup>172</sup>

#### 6. Department of Interior Tribal Energy Development Capacity Grant Program

The Office of Indian Energy and Economic Development (IEED) Division of Energy and Mineral Development (DEMD) administers the Tribal Energy Development Capacity (TEDC) competitive grant program.<sup>173</sup> Tribes may use grants to conduct studies to assess, develop, and obtain the managerial, organizational and technical capacity needed to develop energy resources on Indian lands and properly accounting for energy resource production and revenues.

TEDC grants may be used “to build capacity through the establishment of organizational structure(s) and/or business entity structure(s) capable of engaging in commercial energy development or management activities” and to “provide funding for the development or enhancement of key regulatory activities.”<sup>174</sup> Eligible projects include forming tribal utilities, establishing tribal policies and enacting tribal regulations for energy development and preparing ordinances for regulating and developing energy resources. The TEDC is a good source of funding for tribes wishing to assume a measure of control over the public utilities that do business on the reservation.

#### 7. USDA Rural Energy for America (REAP)

Rural Energy for America Program (REAP)<sup>175</sup> offers Renewable Energy Systems & Energy Efficiency Improvement Loans and Grants, including competitive small grants of \$20,000 or less available and competitive unrestricted Grants up to \$500,000. Competitive loan guarantees are available continuously throughout the year. Funds may also be used for the purchase, installation and construction of energy efficiency improvements, including high efficiency heating, ventilation and air conditioning systems (HVAC), insulation, lighting, cooling or refrigeration units, doors and windows, and replacement of energy-inefficient equipment.

Eligible REAP grant applicants are agricultural producers with at least 50% of gross income coming from agricultural operations and small businesses (including tribal businesses) in eligible rural areas. Maximum renewable energy systems and energy efficiency grants are \$500,000 and \$250,000, respectively. Projects greater than \$200,000 require a technical report. Energy efficiency projects require an energy audit or assessment. USDA will guarantee loans covering up to 75% of total eligible project costs. Grants may account for up to 25% of total eligible project costs and combined grant and loan guarantees may cover up to 75% of total eligible project costs.

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<sup>171</sup> <https://eere-exchange.energy.gov/FAQ.aspx?FoaId=4a7967f3-f608-497f-a02d-95c215342d15> Deployment of Clean Energy and Energy Efficiency Projects on Indian Lands – 2015

<sup>172</sup> <https://www.fhfa.gov/SupervisionRegulation/LegalDocuments/Documents/FHFB-General-Counsel-Opinions/1992/1992-GC-09.pdf>

<sup>173</sup> See <http://www.grants.gov/web/grants/view-opportunity.html?oppId=275611>

<sup>174</sup> Id.

<sup>175</sup> 16 USC §3451; 7 CFR Part 4280



## 8. State Incentives

Many states have programs to incentivize the installation of renewable energy facilities. State incentives for Renewables and Efficiency can be very significant and should be thoroughly explored. NC Clean Energy maintains a database that attempts to catalogue state incentives.<sup>176</sup>

## 9. Renewable Energy Investment Tax Credit

In order to promote the development of solar and small wind renewable energy facilities, Congress has authorized investors to claim a credit against their income taxes equal to 30% of eligible costs.<sup>177</sup> Tribes do not pay federal income taxes and, for that reason, cannot claim the renewable energy investment tax credit (ITC). Tribes can, however, partner with investors to benefit from the ITC by forming a limited liability company in which the investors hold a 99% interest and the tribe owns a 1% interest. Investors will often share the value of the ITC, thus reducing the cost of the facilities to the tribe.

The ITC is similar in some respects to the Low-Income Housing Tax Credit (LIHTC). (See Part III, Section D). As in the case of LIHTCs, tribes form a partnership or limited liability company to take advantage of tax credits that would otherwise be unavailable. The investor owns 99% or more of the LLC in order to claim 99% of the ITCs. Once the legal requirements of the tax code have been satisfied and the investors have received bargained-for benefits, they typically exit the project, leaving the Tribe with full ownership of the facilities enjoying the benefits of clean, cheap energy for many years. Notwithstanding these similarities, ITCs are much simpler than LIHTCs. There is no application to a state agency that allocates the credits under state-mandated criteria. The state has no role in allocating ITCs. There is no vigorous competition for ITCs. Investors simply claim them on their tax returns. While investors must maintain their involvement in an LIHTC-finance housing project for at least fifteen years, investors in an ITC project need not retain an ownership interest beyond five years.



*AHA Sunrise Acres Supportive Housing Solar  
Photo courtesy of Akwesasne Housing Authority*

The ITC has proven to be an especially effective tool for the financing of solar. Each project is unique and different investors have different expectations. In some cases, however, investors have been willing to contribute the full value of the ITC and in return for the depreciation tax deduction. In such a case, the investor would provide about \$300,000 of the total cost of a \$1 million project.

Beginning December 31, 2019, the ITC will phase down,<sup>178</sup> declining to 26% for projects whose construction begins after December 31, 2019 and before January 1, 2021, 22% for projects whose

<sup>176</sup> <http://www.dsireusa.org/>

<sup>177</sup> IRC §§ 38, 46, 48

<sup>178</sup> IRC §on 48(a)(6)

construction begins after December 31, 2020 and before January 1, 2022 and 10% for projects whose construction begins before January 1, 2022 and which is not place in service before January 1, 2024.

#### 10. Finance Strategies

Some tribes have successfully financed the installation of solar facilities by combining one or more of the grants discussed above with ITCs. A tribe that receives a \$1 million DOE grant, for example, may be able meet its 50% cost share with (approximately) \$300,000 provide by investors under the ITC. The remaining \$200,000 could be provided from IHBG, a Title VI loan, a tribal contribution or other source. Investors have sometimes been prepared to finance the additional cost through a power purchase agreement (PPA). Under a PPA, the tribe purchases electricity from the LLC that owns the solar facilities at a cost that is approximately equal to amounts the tribe previously paid to the utilities for the same amount of energy. At the end of 5-6 years, or other period agreed upon, the investors have been repaid and can exit the LLC. The tribe then assumes full ownership for the remaining 20 + years of the project's life. Renewable energy finance in among the topics for which tribes may request technical assistance under the HUD Community Compass program described in Section B.8, above.



*Ho-Chunk HHCD Indian Heights ICDBG Solar Project  
Photo courtesy of Ho-Chunk Housing and Community  
Development Agency*

## **PART FOUR: THE LEGAL ENVIRONMENT: WHAT YOU NEED TO KNOW ABOUT INDIAN LAW**

### **I. TRIBAL AUTHORITY**

#### **A. Tribes Are Sovereign Governments, Not State Subdivisions, Corporations or Nonprofit Organizations**

The status of Indian tribes within the American political system is complex. As the United States Supreme Court explained in *Plains Commerce Bank v. Long Family Land and Cattle Company*:

For nearly two centuries now, we have recognized Indian tribes as distinct, independent political communities,... qualified to exercise many of the powers and prerogatives of self-government.... We have frequently noted, however, that the sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation.... As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers.<sup>179</sup>

The Supreme Court has generally restricted tribal authority over nonmembers except under certain extraordinary situations or in cases where nonmembers have explicitly or implicitly consented to tribal jurisdiction. For purposes of Indian housing development, it is sufficient to understand that tribes possess some of the same attributes as states. They provide governmental services to members, enact laws that apply within their territories and enjoy immunity from suit.

#### **B. Indian Country Defines Tribal Territorial Jurisdiction**

The key operative term for jurisdictional purposes is “Indian Country.” As the Supreme Court has affirmed, “[g]enerally speaking, primary jurisdiction over land that is Indian Country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States.”<sup>180</sup> “Indian Country” includes “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”<sup>181</sup>

The Supreme Court has held that “the test for determining whether land is Indian Country does not turn upon whether that land is denominated ‘trust land’ or ‘reservation.’ Rather, we ask whether the area has been ‘validly set apart for the use of the Indians as such, under the superintendence of the

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<sup>179</sup> 128 S.Ct. 2709, 2718 (2008) [Citations and internal quotations omitted.]

<sup>180</sup> *Alaska v. Native Village of Venetie*, 522 U.S. at 527, 140 L. Ed. 2d 30, 38 n. 1 (1998).

<sup>181</sup> 18 U.S.C. § 1151.

Government.”<sup>182</sup> Thus, lands taken into trust by the Secretary of the Interior pursuant to Section 5 of the Indian Reorganization Act,<sup>183</sup> if not formally declared to be reservations, are generally considered informal reservations and, as a consequence, Indian Country.<sup>184</sup>

### C. Tribes and Tribal Agencies Are Immune From Suit

Like the United States and the individual states, Indian tribes, based on their inherent sovereign authority, have immunity from lawsuits absent a clear waiver by the tribe or Congress.<sup>185</sup> Tribal sovereign immunity extends to a tribe’s business activities, whether on or off-reservation.<sup>186</sup> Tribal subsidiaries share the immunity of their tribal owners, provided they satisfy the multipart tests the courts have devised to determine whether tribes and their subsidiaries are sufficiently linked.<sup>187</sup> Courts have generally acknowledged that tribal subdivisions, including tribal housing authorities, also enjoy sovereign immunity.<sup>188</sup> AMERIND, a risk pool of tribal housing authorities chartered by the Secretary of the Interior pursuant to Section 17 of the Indian Reorganization Act, provides insurance to many tribal housing authorities. In 2011, the Eighth Circuit Court of Appeals ruled that AMERIND shared the sovereign immunity of its charter tribes.<sup>189</sup>

The immunity of tribal housing authorities, theoretically beyond debate, is complicated by the HUD 1976 model housing ordinance<sup>190</sup> adopted by many tribes, which empowers tribal housing authorities to “sue and be sued.” While most courts agree that the “sue and be sued” clause only authorizes waivers of immunity by contract, several courts have construed it as a blanket waiver

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<sup>182</sup> *Oklahoma Tax Com. v. Potawatomi Tribe*, 498 U.S. 505, 511, 112 L. Ed. 2d 1112, 1121, 111 S. Ct. 905 (1991).  
<sup>183</sup> 25 U.S.C. § 5108. The authority of the Secretary to acquire lands in trust under the IRA is limited to tribes that were “under federal jurisdiction” when the IRA was enacted in June 1934. *Carciere v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009). Depending on the interpretation of “under federal jurisdiction” ultimately adopted by the courts, this decision may have an adverse impact on the ability of tribes acknowledged by the Department of the Interior after 1934.

<sup>184</sup> *See, e.g., United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999); *Narragansett Indian Tribe v. Narragansett Electric*, 89 F.3d 901 (1st Cir. 1996); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *Santa Rosa Band v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975).

<sup>185</sup> *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991).

<sup>186</sup> *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014); *Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 118 S. Ct. 1700, 1702, 140 L.Ed.2d 981 (1998).

<sup>187</sup> *See, e.g., Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010); *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014); *People v. Miami Nation Enterprises*, 2016 2 Cal.5th 222 386 P.3d 357 (Cal. 2016); *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538 (N.Y. 2014).

<sup>188</sup> *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2d Cir. 2001); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000); *Buchanan v. Sokaogon Chippewa Band*, 40 F. Supp. 1043 (E.D. Wis. 1999); *Fritcher v. Zucco*, *Not reported in F.Supp.*, 2012 WL 78257 (E.D. Cal. 2012)

<sup>189</sup> *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011)

<sup>190</sup> *See supra*, 41 Fed. Reg. 10157-60.

of immunity.<sup>191</sup> For those tribes operating under the model ordinance, any doubt regarding the housing authority's sovereign immunity can easily be resolved by amending the ordinance to provide that waivers may be granted only by housing board resolution and only with respect to particular transactions.<sup>192</sup>

Tribal sovereign immunity means that contracts are not enforceable by lawsuits against tribes and tribal housing authorities in the absence of a waiver of immunity. There is no "magic" language required for an effective waiver of sovereign immunity. Normally, a contract provision for dispute resolution that includes judicial enforcement and designates the court or courts that can hear the dispute will be an effective waiver.<sup>193</sup>

#### **D. Tribal Law Generally Controls in the Absence of Applicable Federal Law**

Tribal jurisdiction normally does not extend to nonmembers of the tribe but the Supreme Court recognized two exceptions to the rule in its 1981 decision in *Montana v. United States*. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>194</sup> Second, a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>195</sup> These rules, known as the *Montana* exceptions, have been the subject of much Supreme Court litigation, most recently in *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*<sup>196</sup>

With respect to housing development in Indian Country, many activities of contractors, lenders and

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<sup>191</sup> The Second circuit, in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76 (2d Cir. 2001), held that the "Sue and be sued" clause waived the housing authority, "if at all," only for tribal court. The Eighth Circuit, *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998), and the First Circuit, *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30 (1st Cir. 2000), have both held that the standard "sue and be sued" clause is not a waiver. A Wisconsin federal court reached the same conclusion in *Buchanan v. Sokaogon Chippewa Community*, 40 F. Supp. 1043 (E.D. Wis. 1999). Several decisions, however, have held the "sue and be sued" clause to be a blanket waiver. *Francis v. Pleasant Point Passamaquoddy Housing Authority*, 740 A.2d 575 (Me. 1999); *Smith Plumbing Company v. Aetna*, 720 P.2d 499 (Ariz. 1986); *Duluth Lumber v. Delta Development Corp.*, 281 N.W.2d 377 (Minn. 1979). In *Marceau et al. v. Blackfeet Housing Authority*, the Ninth Circuit initially held that the "sue and be sued" clause in the standard Indian housing authority ordinance constituted a waiver of sovereign immunity permitting tenants of the Housing Authority to sue for damages arising out of deficient construction, 455 F.3d 974 (9th Cir. 2006), but later vacated its decision and dismissed on the ground that the plaintiffs had failed to exhaust tribal court remedies. 540 F.3d 916, 921 (9th Cir. 2008). Later still, in *Cook v. Avi Casino Enterprises, Inc., et al.*, 548 F.3d 718 (9th Cir. 2008), the court noted its vacation of the original Marceau decision but stated that "the issue whether a 'sue and be sued' clause in a tribe's enabling ordinance effectuates a waiver of tribal sovereign immunity remains a live issue for determination in this circuit."

<sup>192</sup> For other decisions holding tribal housing authorities immune, see *Eagleman v. Rocky Boys Chippewa-Cree Tribal Business Committee*, 2015 WL 7776887 (D. Mont. 2015); *Sanders v. Anootubby*, 631 Fed.Appx. 618, 2015 WL 7423038 (10th Cir. 2015)

<sup>193</sup> *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589 (2001)

<sup>194</sup> *Montana v. United States*, 450 U.S. 544, 565 (1981).

<sup>195</sup> *Id.* at 566.

<sup>196</sup> 128 S.Ct. 2709 (2008).

others are likely to fall within the *Montana* exception for “consensual relations with the tribe and its members.” A first step for lenders and firms working with tribes, therefore, is to request a copy of applicable tribal laws.

State law does not apply to tribal housing development on tribal lands. In the absence of tribal law, issues relating to land use, building standards, leasing, lien priority, environmental protection, etc., may be addressed by agreement. A better solution for tribes, however, is to fill the legal vacuum by enacting laws. Section III, below, discusses tribal laws that may facilitate housing development.

### **E. Tribal Courts Normally Exercise Jurisdiction in Indian Country**

The *Montana* exceptions that govern a tribe’s regulatory jurisdiction, discussed in the previous section, also apply to the jurisdiction of tribal courts to adjudicate civil disputes.<sup>197</sup> Thus, entities that enter into “consensual relations with the tribe and its members” and perform contracts within Indian country will likely be subject to tribal court jurisdiction in the absence of another contractual forum selection.

A judicial branch of government is an important attribute of tribal sovereignty. Unfamiliarity has historically led outside lenders and others to insist that tribes waive their immunity from suit and, in addition, agree that any dispute will be heard in federal or state court. Since almost no housing-related dispute presents a matter of federal law sufficient to satisfy federal jurisdictional requirements, disputes subject to such waivers would necessarily be heard in state court. Reflexive insistence on state court over tribal court is disrespectful of tribal sovereignty. Most tribal courts are very protective of their reputations for integrity and independence. The danger that an outsider will get “home-towned” in tribal court may be no greater than in a rural county before a state court judge. Moreover, tribal court has distinct advantages for litigants. County judges are often reluctant to assert jurisdiction over reservation-based disputes. County law enforcement personnel typically are not eager to enter an Indian reservation to enforce state court orders.

Rather than reflexively insist on state court for dispute resolution, development partners should consider the capability of the particular tribal court in question with respect to (1) qualifications of judges, (2) independence of the judicial branch from the political branches of tribal government, both constitutionally or as evidenced by decisions that the court has rendered adverse to the tribal government, (3) the availability of written decisions, (4) the court’s experience with commercial matters, and (5) appeal rights. The tribe’s in-house legal counsel can normally assist in obtaining this information.

While reflexive rejection of tribal court jurisdiction is poor strategy for development partners, tribal insistence on tribal court jurisdiction does not always serve tribal interests, particularly where tribal court judges have little or no experience with high-stakes, complex commercial litigation. Requiring lenders to pay their lawyers to research an unfamiliar tribal law code and tribal court system can cause delay and increase transaction costs. Arbitration, with tribal court enforcement of awards, has become a common middle ground approach.

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<sup>197</sup> While the Supreme Court had held in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) that tribes have no jurisdiction over non-Indians, Congress amended the Indian Civil Rights Act in 2013 to provide for domestic violence jurisdiction over non-Indians under specified circumstances. 25 U.S.C. § 1304.

## II. FEDERAL AUTHORITY

### A. Tribal Sovereignty Is Subject to Federal, but Not State, Authority

Article I, § 8, Clause 3 of the U.S. Constitution gives Congress the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” As a result, the Supreme Court has held, “[t]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.”<sup>198</sup> The Supreme Court has described Congressional authority over Indian affairs as “plenary and exclusive.”<sup>199</sup>

The federal government’s exercise of its responsibility for Indian affairs is reflected in hundreds of treaties, countless federal court decisions, Title 25 of the United States Code, Title 25 of the Code of Federal Regulations, and a web of statutes and regulations scattered throughout the remainder of the federal code. Collectively, this body of authority comprises federal Indian law. For the purposes of this handbook, the relevant aspects of federal law are (1) the general exclusion of state regulatory authority within Indian Country, (2) the federal trust obligation, (3) the federal policy of self-determination, and (4) the federal trusteeship over tribal lands.

**“The Congress shall have Power...  
To regulate Commerce with foreign,  
Nations, and among the several States,  
and with the Indian Tribes”**

*U.S. Const., Art. I, Section 8*

Most federal courts have taken the position, first articulated by the Ninth Circuit Court of Appeals in *Donovan v. Coeur d’Alene Tribal Farm*,<sup>200</sup> that federal laws of general applicability apply to tribes unless (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended that the law not apply to Indians on their reservations.<sup>201</sup> Because tribal housing involves a tribal governmental responsibility to tribal members, federal laws would normally be found inapplicable pursuant to the first of the three *Coeur d’Alene* exceptions.<sup>202</sup>

State jurisdiction over Indians in Indian Country is generally barred on either of two grounds, federal preemption or infringement of the tribal right of self-government.<sup>203</sup> Thus, state laws

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<sup>198</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

<sup>199</sup> *United States v. Lara*, 541 U.S. 193, 200 (2004)

<sup>200</sup> 751 F.2d 1113 (9th Cir. 1985).

<sup>201</sup> Accord, *United States v. Funmaker*, 10 F.3d 1327, 1330-31 (7th Cir. 1993); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 at 932-933 (7th Cir. 1989); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996). *Florida Paralegic Association v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999).

<sup>202</sup> In *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001), the Ninth Circuit, applying the *Coeur d’Alene* rule, rejected federal discrimination claims brought by an employee, holding that that the employment practices at the Karuk Tribe Housing Authority are “purely intramural matters touching on the tribes exclusive rights of self-government.”

<sup>203</sup> *White Mountain Apache Tribe v. Bracker*, 446 U.S. 132, 142 (1980).

relating to taxation, land use,<sup>204</sup> building permits, leasing, foreclosure, evictions, probate, lending, etc., normally do not apply to a tribe and its members within Indian Country.<sup>205</sup> If a tribe purchases goods or services for delivery in Indian Country, the state cannot require payment of a sales tax. If a tribe does not enact its own laws, or agree to be bound by state laws, then there is a legal vacuum. Section III below addresses the tribal legal infrastructure required to fill this vacuum.

## **B. The Federal Trust Obligation**

In addition to exercising paramount authority over tribes, the federal government has a fiduciary duty to act in tribes' best interests. The federal trust responsibility has been recognized by the Supreme Court,<sup>206</sup> as well as by Congress. In its 1983 decision in *United States v. Mitchell*, the Court observed that "construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. This principle has long dominated the Government's dealings with Indians."<sup>207</sup>

With respect to Indian housing, Section 2 of Native American Housing Assistance and Self-Determination Act<sup>208</sup> is emphatic in its affirmation of the federal trust responsibility:

Congress finds that

(1) there exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;

(2) the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people;

(3) the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition;

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<sup>204</sup> In *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002) The Ninth Circuit Court of Appeals rejected the attempt of Snohomish County, Washington, to enforce its zoning laws against Tulalip tribal members residing on fee lands within the Tulalip reservation.

<sup>205</sup> See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation, except where Congress has expressly provided that State laws shall apply.")

<sup>206</sup> *United States v. Mitchell*, 463 US 206, 225 (1983); *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)

<sup>207</sup> 463 U.S. 206, 225 (1983) (Cites and internal quotes omitted.)

<sup>208</sup> 25 U.S.C. § 4101.



(4) providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status;

(5) the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal Government shall work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members; and

(6) Federal assistance to meet these responsibilities shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.).

The federal government's unique trust responsibility to tribes and the dire housing needs of Indian Country combine to give tribes a moral and legal claim on federal financial resources unmatched by any competing interest.<sup>209</sup>

### C. The Self-Determination Policy of the Federal Government

In addition to its roots in tribes' aboriginal power pre-dating the establishment of the United States, tribal sovereignty is further supported by the United States policy of tribal self-determination. Tribal self-determination was a primary goal of the Indian Reorganization Act of 1934,<sup>210</sup> which encouraged tribes to adopt constitutions and pursue economic development. Congress reversed course in 1953, declaring termination of tribes as governments to be federal policy<sup>211</sup> but the tide began to turn back in the 1960s. In 1970, President Nixon formally declared tribal self-determination to be federal policy



*Penokee Hills – Upriver of the Bad River Reservation Sloughs*

<sup>209</sup> The Ninth Circuit court of appeals has held that the federal trust obligation does not provide a basis for liability of the Department of Housing and Urban Development for deficient construction of homes financed by HUD under the 1937 Housing Act. *Marceau et al. v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008).

<sup>210</sup> Pub. L. No. 73-383, 25 U.S.C. §§ 5101 et seq.

<sup>211</sup> House Concurrent Resolution 108, August 1, 1953

and the federal government has adhered to this policy ever since,<sup>212</sup> as reflected in numerous pieces of federal legislation, including the Indian Self-Determination Act of 1975,<sup>213</sup> and, particularly relevant here, the Native American Housing Assistance and Self-Determination Act of 1996.<sup>214</sup>

The contradiction between the federal government's extensive oversight over Indian affairs and the policy of self-determination is apparent. Under federal supervision during the period 1887-1934, tribes lost much of their land base and culture, with disastrous consequences. The current web of federal laws and regulations relating to tribes is intended, to a large degree, to avoid further losses of tribal resources. Taking back authority from the federal government, without releasing the federal government from its trust obligation, will be a crucial undertaking for tribes as they assert increasing control over their lands.

#### **D. Tribal Preference and Indian Preference**

Housing developers outside Indian Country are eager to avoid violating the many state and federal laws forbidding race discrimination in connection with employment, contracting, and housing. There are numerous federal laws, however, that relate only to Indians. These laws do not violate anti-discrimination laws. The United States Supreme Court affirmed the validity of Indian-specific laws in its 2000 *Rice v. Cayetano*<sup>215</sup> decision, echoing the Court's earlier observation in *United States v. Antelope*,<sup>216</sup> that "federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as a 'separate people' with their own political institutions. Federal regulation of tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"

The Indian Self-Determination Act of 1975<sup>217</sup> does not merely permit, but mandates, Indian preference, not only in connection with contracts under the Self-Determination Act but also in connection with contracts under any other act authorizing contracts or grants to tribes. Preferences extend to training, employment and contracting.<sup>218</sup> The Native American Housing Assistance and Self-Determination Act of 1996,<sup>219</sup> also mandates Indian preference, except in specified limited circumstances.<sup>220</sup> Tribal member preference (preference for the members of a particular tribe) is specifically permitted in the selection of tenants.<sup>221</sup> Federal regulations implementing NAHASDA expressly provide that tribes are not subject to Title VI of the Civil Rights Act of 1964 or Title VIII of the Civil Rights Act of 1968.<sup>222</sup>

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<sup>212</sup> Special Message to Congress on Indian Affairs, July 8, 1970; Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76

<sup>213</sup> Pub. L. No. 93-638, Title I, 25 U.S.C. §§ 450 et seq.

<sup>214</sup> Pub. L. No. 104-330, 110 Stat. 4030, 25 U.S.C. §§ 4101 et seq.

<sup>215</sup> 528 U.S. 495, 519-20 (2000).

<sup>216</sup> 430 U.S. 641, 646 (1977).

<sup>217</sup> Pub. L. No. 93-638, as amended, Act of Jan. 4, 1975, 88 Stat. 2203, codified at 25 U.S.C. § 450 et seq.

<sup>218</sup> See 25 U.S.C. § 450(b).

<sup>219</sup> Pub. L. No. 104-330, 110 Stat. 4030, 25 U.S.C. 4101 et seq.

<sup>220</sup> 25 U.S.C. § 4131(b)(1).

<sup>221</sup> 25 U.S.C. § 4131(b)(5).

<sup>222</sup> See also 24 C.F.R. § 1000.12.

Title VII of the Civil Rights Act of 1964<sup>223</sup> generally prohibits employment discrimination based on race, color, religion, sex, or national origin but expressly excludes tribes from the definition of covered employers.<sup>224</sup> Title VII explicitly authorizes Indian preference by private employers: “Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”<sup>225</sup> The Equal Employment Opportunity Commission has taken the position that tribal preference (as distinct from Indian preference) is permissible for tribal employers but not for non-tribal employers<sup>226</sup> but the Ninth Circuit Court of Appeals rejected its argument that tribal preference by a private employer operating under a tribal lease was “national origin” discrimination forbidden by Title VII of the Civil Rights Act.<sup>227</sup>

Title I of the Americans with Disabilities Act (ADA)<sup>228</sup> (relating to employment) also excludes tribes from the definition of employers. Title II of the ADA prohibits discrimination based on disability in any public program, service or activity by any “public entity,” defined to include state and local, but not tribal, governments. The Eleventh Circuit Court of Appeals has held that tribes are subject to Title III, relating to public accommodations, but that only the United States, and not private parties, can bring suit to enforce the Act.<sup>229</sup>

While Indian preference and tribal member preference are generally permitted in connection with tribal housing, according to the Department of Housing and Urban Development (HUD) regulations,<sup>230</sup> the following laws do apply to tribes and tribal housing authorities: Age Discrimination Act of 1975,<sup>231</sup> prohibiting discrimination based on age in any federal program or activity, Section 504 of the Rehabilitation Act of 1973<sup>232</sup> prohibiting discrimination based on handicap in any federal program or activity; and the Indian Civil Rights Act,<sup>233</sup> with respect to federally recognized Indian tribes that exercise powers of self-government.

## **E. Federal Authority Over Tribal Trust or Restricted Land**

### **1. Historical Background**

One of the unique challenges to the development of housing in Indian Country is the inalienability of tribal trust and restricted lands. After the federal government had purchased tribal lands by treaty or act of Congress during the 18th and 19th centuries, most remaining tribal lands were held in common by tribes. With the passage of the General Allotment Act of 1887,<sup>234</sup> assimilation

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<sup>223</sup> Pub. L. No. 88-352, Title VII, Sec. 703, July 2, 1964, 78 Stat. 255.

<sup>224</sup> 42 U.S.C. § 2000e(b)(1).

<sup>225</sup> 42 U.S.C. § 2000e-2(i).

<sup>226</sup> EEOC Policy Statement on Indian Preference, No. 915-027, May 16, 1988

<sup>227</sup> *EEOC v. Peabody Western Coal Co.*, 773 F.3d 977 (9th Cir. 2014)

<sup>228</sup> 42 U.S.C. § 12131 et seq.

<sup>229</sup> *Florida Paraplegic Assn. v. Miccosukee Tribe*, 166 F.3d 1126 (11th Cir. 1999).

<sup>230</sup> 24 C.F.R. § 1000.12.

<sup>231</sup> 42 U.S.C. § 6101-6107.

<sup>232</sup> 29 U.S.C. 794.

<sup>233</sup> Title II of the Civil Rights Act of 1968; 25 U.S.C. § 1301-1303.

<sup>234</sup> Ch. 119, 24 Stat. 388 (Allotment Act).

of Indians and the termination of Indian tribes and reservations became the cornerstone of federal Indian policy. Under the Allotment Act, reservations were divided into 40, 80, or 160-acre parcels and distributed (allotted) to individual Indians. Once this process was completed, the “surplus” lands were sold to non-Indians. The allotted lands were initially subject to restrictions against alienation but the restrictions were eventually lifted in many cases, with disastrous results. By 1934, 90 million acres of tribal lands had been lost. That year, Congress passed the Indian Reorganization Act,<sup>235</sup> which, among other provisions, put an end to additional alienation of Indian lands and created a mechanism for restoration of tribal territories through the acquisition of land by the United States in trust for tribes and individual tribal members.<sup>236</sup>

The assimilationist policies underlying the Allotment Act have been repudiated by the federal government but the Act’s effects continue. Today, many reservations are a “checkerboard” of (1) lands titled to the United States in trust for the tribe or, substantially equivalent, lands technically held in “fee” by a tribe but subject to a deed restriction against alienation without federal approval; (2) lands titled to the United States in trust for individual Indians or, substantially equivalent, lands technically held in “fee” by individual Indians subject to a deed restriction against alienation without federal approval; (3) lands owned by tribes, or tribal members in fee simple; and (4) lands held by non-Indians in fee simple. A summary of the federal laws intended to protect tribes from further loss of their lands follows.

## 2. Requirement that the Federal Government Approve Conveyances of Indian Lands

Section 12 of the Trade and Intercourse Act of 1834,<sup>237</sup> first codified at § 2116 of the 1874 Revised Statutes but now codified at 25 U.S.C. § 177 provides that “[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.” Similar provisions were enacted by colonial governments to prevent purchases of Indian lands by private individuals. King George III made acquisitions of Indian land a crown monopoly in his Proclamation of 1763. Section 177 is the legal foundation for the land claims brought in the late 20th century by eastern tribes claiming that purchases of their lands by several of the original thirteen states were illegal.

Section 1 of the Indian Reorganization Act of 1934 ended allotment of Indian lands. Section 2 extended federal protections against alienation indefinitely. Section 4 provides that, except in rare described circumstances, “no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or

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<sup>235</sup> 25 U.S.C. 5101 §§ et seq.

<sup>236</sup> The ability of Alaska Native Villages to have land taken into trust is uncertain. The government had long asserted that the Alaska Native Claims Settlement Act foreclosed acquisition of land in trust for Alaska Natives. Department of Interior Solicitor Opinion M-37043, issued in the waning days of the Obama Administration, reversed this position but Solicitor Opinion M-37053, issued by the Trump administration, withdrew M-37043 “so that we may conduct the regulatory review process mandated by the President’s Chief of Staff and prepare for consultation with the Indian and Alaska Native communities on an interim policy for off-reservation land-into-trust acquisitions within and outside of Alaska.”

<sup>237</sup> Ch. 161, 4 Stat. 729, Chapter 161.

approved.” Thus, today tribal lands held in restricted fee<sup>238</sup> or trust status on tribal trust land for housing development necessarily require leases (See following section). Individual trust lands, by contrast, are not subject to the same restrictions on alienation. Such lands, in theory at least, may be sold outright or mortgaged with the approval of the Secretary of the Interior. 25 U.S.C. §§ 483, 483a. If sold to a non-Indian a fee simple title is issued. If a mortgage is foreclosed and the eventual title holder is non-Indian, a fee simple title is issued. If the eventual title holder is Indian, restrictions may be removed upon application to the Secretary.

The weight of legal authority is that Section 177 does not apply to lands held by tribes in unrestricted fee title.<sup>239</sup> Some title companies, however, have taken the position that Section 177 is broadly worded and not limited to trust or restricted lands. They assert that tribes must obtain BIA approval or an act of Congress for any sale of such lands by a tribe to a third party. A 2009 opinion of the Solicitor of the Department of the Interior that Section 177 does not apply to off-reservation fee lands may clarify the question, at least for lands in that category.<sup>240</sup> To avoid uncertainty, tribes occasionally obtain legislation explicitly authorizing alienation of their fee lands.<sup>241</sup> The Interior Board of Indian Appeals has rejected a tribe’s assertion that it could permanently “assign” tribal lands to tribal members without regard to Section 177.<sup>242</sup>

### 3. Requirement that the Bureau of Indian Affairs (BIA) Approve Leases and Easements for Rights of Way Relating to Tribal Trust and Restricted Lands

#### a. The Long-Term Leasing Act and the HEARTH ACT

Leases play a major role in tribal housing development since direct conveyance of tribal trust lands is blocked by federal laws and tribes prefer a legal structure that protects tribal lands from permanent loss to outsiders. Typically, a tribe provides a long-term lease to its housing authority, which then develops homes on the leasehold through financing secured by a leasehold mortgage. If low-income housing tax credits are part of the financing, the housing authority may assign, or sublease, the lease to a limited partnership or limited liability company which, in turn, mortgages the property to obtain additional financing. Tribal mortgage lending laws normally provide that, in the event of a default and foreclosure, the tribe is given an option to purchase and, failing that, the mortgage holder must sell to a tribal member.

Under the Long Term Leasing Act of 1955,<sup>243</sup> restricted or trust lands, whether tribally or individually owned, may be leased by their Indian owners, with the approval of the Secretary of the Interior, “for public, religious, educational, recreational, residential, or business purposes....” The Secretary has delegated this authority to BIA officials. The law requires that BIA also approve mortgages,

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<sup>238</sup> “Restricted Fee” means title is in the tribe subject to a deed restriction requiring federal approval for conveyance. “Trust” means title is in the United States for the benefit of a named tribe or individual Indian.

<sup>239</sup> *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538 (1st Cir. 1997); *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993). See also, Brian L. Pierson, *Resolving a Perilous Uncertainty*, Federal Lawyer March/April 2010.

<sup>240</sup> Memorandum from the Solicitor to the Secretary of the Interior, M-37025, January 18, 2009

<sup>241</sup> See, e.g. Pub. L. 115-179

<sup>242</sup> *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900 (9th Cir. 2014), affirming *Chemehuevi Indian Tribe v. W. Reg’l Dir.*, 52 IBIA 192, 192–93 (2010).

<sup>243</sup> 25 U.S.C. § 415(a).

subleases and assignments of leases. BIA plays an important role, therefore, in connection with homeownership pursuant to long-term leases, tax credits in which leases are assigned by housing authorities to limited liability companies or limited partnerships, and other development structures involving long-term leases.

For most tribes, the term of a lease may not exceed 25 years, with a 25-year renewal. Over 40 tribes have obtained special acts of Congress authorizing leases for 99 years. Two tribes, the Tulalip and the Navajo, have obtained special legislation permitting them to lease land without BIA approval, provided certain conditions are satisfied.<sup>244</sup>

In 2012, Congress' enacted the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act.<sup>245</sup> The HEARTH Act permits tribes to lease their lands without BIA approval under their own leasing ordinances provides the ordinances meet certain requirements and obtain BIA approval. As of 2020, over 45 tribes had obtained approval of leasing ordinances under the HEARTH Act.

While Section 415 generally limits some tribes to 25-year leases, renewable for one additional 25-year term, Section 702 of the NAHASDA authorizes fifty-year leases of tribal or individual trust land for "housing development and residential purposes," subject to the approval of the tribe and the Secretary of the Interior. The HEARTH Act permits participating tribes to issue 75-year leases. Month-to-month or year-to-year dwelling leases under rental programs convey only the right to occupy a dwelling and are not subject to BIA approval under Section 415.

#### b. Part 162 Leasing Regulations

Tribes that have not adopted HEARTH-compliant regulation remain subject to BIA's 2012 regulations, published at 25 C.F.R. Part 162 (Part 162 Regulations), which include separate subparts for Residential Leases, Business Leases, Wind Energy Evaluation Leases (WEELs) and Wind and Solar Resource (WSR) Leases. Consistent with the self-determination doctrine and tribal sovereignty, the Part 162 Regulations provide for increased deference to tribal governments with respect to leases of tribal trust and restricted lands, including

- mandatory approval of leases, amendments, subleases, assignments, and leasehold mortgages unless the BIA identifies a "compelling reason" that justifies non-approval;
- establishment of deadlines for BIA approval and remedies for non-compliance, including automatic approval if a lease amendment or sublease is not approved within 30 days;
- elimination of the requirement that permits be approved by BIA;
- elimination of insurance and bonding requirements;
- deference to tribes' decision to lease land at less than fair rental value; and
- deference to a tribe's negotiated valuation rather than requiring an costly appraisal

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<sup>244</sup> Pub. L. No. 91-274, Section 3, 25 U.S.C. § 415 (b)(Tulalip); Pub. L. No. 106-568, 25 U.S.C. § 415 (e) (Navajo).

<sup>245</sup> 126 Stat. 1150; Pub. L. 112-151 July 30, 2012

The Part 162 regulations clarify that subleases for office space, in BIA’s view, require approval, although this requirement can be avoided by providing for subleases in the principal lease. Mortgages of subleases do not require BIA approval unless the lease otherwise provides. State and municipal governments have sometimes sought to reach into Indian Country and tax improvements, services, and other value allegedly generated by non-Indian lessees. The new rule rejects these efforts, though courts have reached conflicting decisions on the issue.<sup>246</sup> The Part 162 regulations also affirm the right of tribes to require tribal employment preference for activities undertaken pursuant to leases, another issue subject to litigation in recent years.<sup>247</sup>

c. Rights-of-Way

Congress has also delegated to the Secretary of the Interior the authority to grant easements for rights of way over Indian trust lands<sup>248</sup> with the consent of the tribe.<sup>249</sup> With respect to individual trust lands, the Secretary is authorized to grant rights of way unilaterally only under certain limited, specified circumstances. Federal regulations at 25 C.F.R. Part 169 describe procedures third parties must follow to request rights-of-way over Indian lands. The Part 169 regulation were extensively updated and revised in 2015 to conform with the federal policy of devolving authority from the federal government to the tribes.<sup>250</sup> While the 1948 act continues to require BIA approval of rights-of-way, the 2015 regulations shift authority to the tribes and require BIA to largely defer to tribal decisions.

4. Requirement that BIA Approve Encumbrances of Tribal Trust Lands

Enacted in 1871 to protect tribes from entering into contracts with attorneys to pursue land claims against the United States, 25 U.S.C. § 81 originally provided that any agreement “relative to” Indian lands was invalid without federal approval. Following its amendment in 2000, the operative portion of the law now provides that “[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of seven or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”<sup>251</sup>

Federal regulations adopted under Section 81 provide that, “[e]ncumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.”<sup>252</sup> Under this definition, presumably, a restrictive covenant on tribal trust or restricted land that can be enforced by equitable relief (an injunction), but not by foreclosure, would not require secretarial approval. The Ninth Circuit Court of Appeals has upheld a determination by the Interior Board of Indian Appeals that a tribal land assignment that is intended to be perpetual is an “encumbrance” within the meaning of Section 81 but is nonetheless beyond the Secretary’s approval authority

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<sup>246</sup> See, e.g., *Desert Water Agency v. United States Department of the Interior*, 849 F.3d 1250 (9th Cir. 2017); *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015); *Confederated Tribes of Chehalis v. Thurston County*, 724 F.3d 1153 (9th Cir. 2013).

<sup>247</sup> *Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012)

<sup>248</sup> 25 U.S.C. §§ 311, §319, 323.

<sup>249</sup> 25 U.S.C. § 324.

<sup>250</sup> 80 Fed. Reg. 72492 , November 19, 2015

<sup>251</sup> 25 U.S.C. § 81(b).

<sup>252</sup> 25 C.F.R. §84.002.

based on the prohibition against alienation of Indian lands under 25 U.S.C. § 177.<sup>253</sup>

Section 81 does not apply to contracts otherwise subject to approval by the Secretary. Thus, leases and leasehold mortgages subject to approval under 25 C.F.R. Part 162 and easements for rights of way subject to 25 C.F.R. Part 169 are outside the scope of Section 81.

#### 5. Requirement that the BIA Land Title Offices Record Interests in Indian Lands

Land ownership constitutes one of the most important sources of private and public wealth in America. A system of land records that assures accurate descriptions of property boundaries, ownership interests, easements, restrictions, rights of way, etc. is an essential foundation of our legal system. State law typically provides for each county to have a register of deeds responsible for maintaining this land records system. When a home is sold outside Indian Country, the owner typically provides the buyer with title insurance that effectively guarantees to the buyer that the seller owns the property and has the right to sell. The title insurer relies on records kept by the register of deeds when issuing the title insurance policy. When the homeowner borrows money and mortgages his or her home as collateral for the loan, the lender relies on records kept by the register of deeds to assure that the property does not carry any other mortgages that would prevent the lender from being able to sell the home and use sale proceeds to pay off the loan in the event of default. State law normally provides that a lender who records a mortgage with the register of deeds has priority over any holder of a mortgage filed thereafter.

The legal framework described in the preceding paragraphs does not apply to tribal trust and restricted lands. In lieu of the state land records systems, federal regulations provide for a federal land records system for trust and restricted lands.<sup>254</sup> All “title documents,” a term defined to include “any document that affects the title or encumbers Indian land,” must be submitted to the appropriate Land Titles and Records Office (LTRO) of the BIA immediately after approval, issuance or acceptance by the BIA Agency with approval authority. The LTROs and other BIA agencies with recording responsibilities, and their respective geographical jurisdictions, are described at 25 C.F.R. §§ 150.4 and 150.5.

The purpose of a recording with an LTRO is “to provide evidence of a transaction, event, or happening that affects land titles; to preserve a record of the title document; and to give constructive notice of the ownership and change of ownership and the existence of encumbrances to the land.”<sup>255</sup> Outside Indian Country, one of the first steps for a mortgage lender is to order a title commitment showing the status of title, as reflected in the records of the register of deeds. On trust and restricted lands, by contrast, the lender’s first step is to order a title status report (TSR) from BIA. The TSR is prepared by the LTRO after an examination of title by LTRO personnel and “shows the proper legal description of a tract of Indian land; current ownership, including any applicable conditions, exceptions, restriction, or encumbrances on record; and whether the land is in unrestricted, restricted, trust or other status.”<sup>256</sup> Outside Indian Country, a final post-closing,

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<sup>253</sup> *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900 (9th Cir. 2014), affirming *Chemehuevi Indian Tribe v. W. Reg’l Dir.*, 52 IBIA 192, 192–93 (2010).

<sup>254</sup> 25 C.F.R. Part 150

<sup>255</sup> 25 C.F.R. § 150.2(m).

<sup>256</sup> 25 C.F.R. § 150.2(o).



lender requirement is the issuance of a title insurance policy showing the lender's mortgage as an encumbrance on the title. In Indian Country, a final post-closing lender requirement is the issuance by BIA of a TSR reflecting the lender's mortgage.

### **III. TRIBAL LEGAL INFRASTRUCTURE TO SUPPORT HOUSING**

#### **A. Transitioning to a Sovereignty-Based Legal Framework for Homeownership**

In an era when tribal self-determination is not only the principal goal of tribes but also the official policy of the federal government, there is little justification for BIA oversight and approval of virtually all transactions relating to trust and restricted lands owned by tribes. Federal oversight over housing-related decisions not only contradicts tribal sovereignty but also poses significant practical impediments to homeownership. The BIA is chronically understaffed relative to its vast range of duties. Outside Indian Country, lenders are accustomed to closing transactions, without obtaining government approval, based on prompt issuance of title reports and instantaneous recording by the register of deeds. In Indian Country, by contrast, delays in issuance of TSRs, approval of leases and mortgages and recording are common. These obstacles cause many mortgage lenders to lose interest. Removal of federal oversight over Indian housing will require federal legislation. In the meantime, many tribes are beginning the process of assuming greater control. This section summarizes components of a tribal legal infrastructure that might both support homeownership and strengthen tribal sovereignty.

#### **B. Tribal Law Governing Homesite Leases**

Tribes commonly deal with two types of leases. With respect to a month-to-month or year-to-year lease (i.e., "dwelling lease"), a tribe or TDHE is the landlord and the tribal member is the tenant. In return for an agreed monthly rent, the tenant receives the right to occupy a home. The tribe or TDHE, as *homeowner*, has the responsibility to maintain the home and make necessary replacements. This type of dwelling lease is typical of the rental housing programs operated by most tribes under their NAHASDA<sup>257</sup> block grants. Section 207 of NAHASDA prescribes certain terms that must be included in leases of NAHASDA-financed units. A dwelling lease involves a relatively short-term commitment by the tenant and the TDHE. The tenant right is solely one of occupancy, not ownership.

A long-term lease of tribal trust land issued by a tribe to a tribal member for homeownership purposes (sometimes called a "homesite lease") is quite different from a dwelling lease. The lessor is often the tribe itself rather than the TDHE. Since the goal is to give the tribal member something resembling homeownership, the term of the lease is typically 50 years rather than one year. The tribe normally has no responsibility to maintain or insure the home. The homesite lease essentially creates private property in Indian Country. Large scale creation of private property in Indian Country was tried before, during the Allotment era (see II.E.1, above), with disastrous consequences. Legal reforms must avoid the mistakes of the allotment era. Yet a tribal member who builds or buys a house on tribal trust land under a long-term homesite lease will have certain expectations of ownership rights. It is important that tribes enact leasing laws to define precisely what private ownership rights it is willing to recognize. These laws must balance the member's ownership expectations against the tribe's need to maintain its lands as tribal assets.

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<sup>257</sup> 25 U.S.C. § 4137.

Many tribes currently use the HUD “One-Stop” lease for homeownership on tribal trust lands.<sup>258</sup> The One-Stop lease was drafted in the 1990s to accommodate the HUD Section 184 program, the Rural Development 502 programs and the Veterans Administration lending program. The One-Stop lease attempts to create general rules for lessees. A lease, however, is not a law nor is it the best means of establishing tribal policies relating to leasing generally since leases are contracts that apply to particular tribal members. Where a mortgage loan is involved, the lease may focus on the needs of the particular lending program, as the One-Stop lease form does. Rather than have tribal leasing policies made, by default, through lease forms drafted by HUD, many tribes have enacted leasing laws reflecting tribal policies. The HEARTH Act, which became law in 2012, provides a compelling incentive for the enactment of tribal leasing laws. For homeownership purposes, a tribal leasing law should address:

- Who is eligible to receive a homesite lease;
- The application process, including the tribe’s environmental review process which, pursuant to the HEARTH Act, should
  - require the identification and evaluation of any significant effects of the proposed action on the environment;
  - require that the public be informed of, and have a reasonable opportunity to comment on, any significant environmental impacts of the proposed lease action that the tribe has identified; and
  - require the tribe to respond to relevant and substantive public comments on any such impacts before the lease is approved;
- Maximum lease terms; under the HEARTH Act, terms of up to 75 years are permitted for homeownership leases. Some tribes have authority to lease lands for 99 years; other tribes are constitutionally limited to the 25-year term with one 25-year renewal;
- Standard requirements (no illegal use of the premises, use only for principal residence, compliance with tribe’s laws, etc.);
- BIA regulatory requirements; see 25 C.F.R. Pt. 162 regulations;
- Ownership of improvements; the HUD One-Stop lease provides that the lessee owns the improvements that the lessee has paid for and has a period of time in which to remove them after expiration of the term; if the improvements are not removed, ownership reverts to the tribe;
- Circumstances under which mortgages will be permitted without further approval by the tribe, such as mortgages for home purchase, construction, or improvements;
- The lessee’s right, or lack thereof, to transfer the leasehold during the term of the lease; (this would normally be limited to tribal members);
- Upon the lessee’s death, the rights of his or her heirs to inherit the leasehold for the remainder of its term, either under a will, intestate succession or a special beneficiary designation

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<sup>258</sup> [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/homeownership/184/leasing](https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184/leasing)

outside of probate; most tribes will likely restrict eligible heirs to tribal members and limit the extent to which distant relatives can inherit by intestate succession;

- The right, or lack thereof, of a non-member to occupy the premises pursuant to a court order upon a divorce decree issued by tribal or state court;
- The right, or lack thereof, of a non-member spouse to occupy the premises upon the lessee's death. If such a right is granted, the interest in the leasehold would pass to eligible heirs subject to this occupancy right; and
- The right of the member, or the member's heirs, to obtain a new lease after the expiration of the initial lease term; and
- Dispute resolution procedures, presumably in tribal court where one exists.

Tribes will differ in striking the balance between the member's desire for meaningful ownership and the tribe's desire to maintain control over trust lands. It is important, however, to address these issues clearly so that a member who invests in a home on tribal trust land under a long-term lease knows what he or she is getting. Whether the home can be passed down to the next generation may affect the member's willingness to purchase a home on the reservation.

### **C. Tribal Right-of-Way Law**

Historically, utilities, gas and oil companies and other enterprises requiring ROWs would engage primarily with the BIA, which would perform its own "fair market value" determination, obtain a cursory consent from the tribal government and then issue a ROW. Major revisions to the federal right-of-way regulations in 2015 were intended to better reflect the federal policy of tribal self-determination. While the BIA retains the ultimate authority to approve ROWs, the Part 169 Regulations require tribal consent "in the form of a tribal authorization and a written agreement, if the tribe so requires" and require the BIA to defer to tribal decisions on a broad range of issues.

The Part 169 Regulations potentially give tribes the principal authority to determine whether, and on what terms, a ROW will be granted. To take full advantage of this authority, tribes should consider adopting their own ROW regulations addressing the conditions under which they will consent to a ROW, including environmental requirements, compensation, maximum terms, penalties for trespass, mandatory provisions of the ROW agreement and procedures for review and approval by the tribal government. ROWs that BIA granted routinely in the past may not pass muster under tribal ordinances if they pose undue environmental threats or fail to properly compensate the tribe.

### **D. Tribal Probate Law and Beneficiary Designations**

Outside Indian Country, the transfer of property at death is governing by the law of the state where the decedent resided at the time of death through a state court process. For Indians residing in Indian Country at the time of death, the matter is more complicated. With certain limited exceptions, the Bureau of Indian Affairs has the exclusive authority to probate Indian trust property, which includes interests in individually owned trust land,<sup>259</sup> structures affixed to allotments,<sup>260</sup> and funds

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<sup>259</sup> 25 U.S.C. §§ 372-73.

<sup>260</sup> 25 U.S.C. §2201(7).

held in trust by the United States.<sup>261</sup> Non-trust property, however, is subject to tribal law and tribal court probate.<sup>262</sup>

Tribal members' non-trust property not subject to BIA probate jurisdiction includes stocks, cash, furniture, vehicles, and other personal property and long-term leases of tribal trust land. In 2004, Congress passed the American Indian Probate Reform Act (AIPRA),<sup>263</sup> which created a uniform probate code applicable to trust assets probated by the BIA throughout Indian Country. Section 6(a) of the AIPRA,<sup>264</sup> however, permits tribes to enact tribal probate laws, subject to BIA approval, that will supersede the uniform code and be applied by BIA in probating individual trust assets. Tribes should consider enacting laws governing the transfer of non-trust property, including homes on trust land occupied under long-term leases, upon the death of the owner. A tribal probate law should expressly reference the tribal leasing law and any restrictions it places on inheritance. A tribal court probate process assures that the rights of heirs are protected and provides for orderly dispute-resolution.

With respect to interests in long-term leases, a self-executing beneficiary designation could serve as an alternative to a probate proceeding supervised by the tribal court. The lessee would be required to designate, in writing, a beneficiary to inherit his or her interest in the leasehold upon the lessee's death. The designation should conform to any tribal laws restricting eligibility to hold a tribal lease. The "beneficiary designation" document should be separate from the lease itself to avoid the requirement for an amendment of the lease in the event the lessee wishes to change the designation. The document should, however, be filed with the tribe's court or realty office.

## **E. Tribal Mortgage Lending law**

Currently, many tribes have no law providing for tribal court procedures in the event of a default by a tribal member under a leasehold mortgage. Most of those tribes that do have such laws have adopted a variation of an ordinance that was commissioned by HUD in 1995 to support its Section 184 guaranteed loan program. That model, while it achieves the key goal of virtually assuring that the leasehold will not pass out of tribal hands, fails to protect borrower equity, provides for the lender to take title to the leasehold after foreclosure, and requires the lender to initiate a separate procedure for eviction after obtaining a judgment of foreclosure. The provision for a lender or HUD to take title to a leasehold conflicts with some tribal laws that prohibit a non-member from holding a lease.

Tribes should consider adopting mortgage lending laws that (1) provide tribal court procedures for the exercise of rights of lenders; (2) provide for disposition of leaseholds by a receiver which, in the absence of an agreement to the contrary, would be the tribe, upon whom the lender typically must rely to identify a new lease holder; (3) provide protection of lessee's equity if the value of the home at time of default is greater than the outstanding loan balance; and (4) provide for a single

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<sup>261</sup> 25 U.S.C. §§2206(a)(1), 2206(a)(3).

<sup>262</sup> See, e.g., *Hicks v. Nevada*, 533 U.S. 353, 361 (2003)(tribes have authority to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members)

<sup>263</sup> Pub. L. No. 108-374, amending the Indian Land Consolidation Act, 25 U.S.C. § 2201 et seq. (ILCA).

<sup>264</sup> 25 U.S.C. §2205(a).

tribal court judgment of foreclosure and eviction, with enforcement by tribal law enforcement officers, if possible.

#### **F. Administrative Support for Homeownership: Tribal Realty Offices**

Currently, tribal trust land homeownership depends on the ability of the BIA to provide title status reports to lenders, process requests for approval of leases and mortgages, and record leases and mortgages. This bureaucratic framework impedes homeownership and violates basic principles of tribal sovereignty. In an age of self-determination, the trend will inevitably be for tribes to assume many of the administrative tasks now performed by BIA.

Tribes wishing to reassert control over their trust lands should consider establishing a realty department or other agency of tribal government to perform many of the functions currently carried out by the BIA Land Records and Titles Offices (LTRO). Such an agency could issue leases, facilitate BIA approvals, record mortgages and other encumbrances and generally function as a tribal register of deeds with respect to recording of title documents and establishment of priority among mortgage holders.

Establishment of a tribal realty office does not, by itself, eliminate the federal law requirements that the BIA approve leases and encumbrances of tribal trust land and that all title documents relating to trust land be recorded with the BIA LTROs. Some tribes have established realty offices pursuant to Indian Self-Determination Act contracts,<sup>265</sup> working closely with BIA to perform many BIA functions and expedite the lease preparation, approval, and recording process. Even in these cases, however, BIA is statutorily required to give final approval to leases.

The HEARTH Act, enacted in 2012, permits participating tribes to issue leases without BIA approval but still requires that copies of leases be provided to BIA in order that BIA can carry out its LTRO function. The Act does not authorize tribes to assume LTRO functions but requires the BIA to prepare and submit to the relevant Senate and House committees a report on tribes' performance of LTRO functions, including "[w]hether, in appropriate circumstances and with the approval of geographically proximate Indian tribes, the LTRO functions may be performed by a single Indian tribe or a tribal consortium in a cost effective manner."<sup>266</sup>

The need for federal oversight of leases between tribes and their own members for homeownership purposes is minimal or non-existent. As evidenced by the HEARTH Act, the trend toward tribal control over the leasing process and tribal land records is consonant with federal self-determination policies and is likely to accelerate both because it strengthens tribal sovereignty and because it better serves tribal members.

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<sup>265</sup> Pub. L. No. 93-638, Title I, 25 U.S.C. §§ 450 et seq.

<sup>266</sup> §3(c)(5)

## CONCLUSION

Successful housing development in Indian Country requires (1) a firm legal foundation, based on *tribal* law; (2) a dedicated development team; (3) thorough understanding of the financing tools *in addition* to the NAHASDA block grant; and (4) a strategy to meet not only the needs of low-income renters, but also the growing need of moderate income members who wish to become homeowners. Tribal housing departments and organizations must become skilled grant writers and developers to compete successfully for affordable housing dollars and execute projects that meet community needs.

## ABOUT THE AUTHOR

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