

***BACKGROUND ON HUD RULEMAKING ON TRIBAL DOWNPAYMENT ASSISTANCE
AND PROPOSED "TRIBAL CONSULTATION"***

HUD's 2/14 Proposed 30-Day Tribal Consultation falls short of meaningful.

The Cedar Band of Paiute Indians of Utah operates several economic development enterprises to generate funds that support tribal government programs, including the CBC Mortgage Agency. CBC Mortgage Agency is a five-year-old tribal business which has successfully developed a program that assists qualified borrowers in obtaining financing to advance their dreams of becoming homeowners. CBC Mortgage Agency provides downpayment assistance ("DPA") to qualified borrowers across the country, enabling them to obtain Federal Housing Administration-insured mortgages. CBC Mortgage Agency's highly qualified and dedicated staff have successfully administered this growing program for several years with HUD's full knowledge and consent. Other Indian tribes are actively or in the planning stages of implementing similar tribal down payment assistance programs with CBC Mortgage serving as an industry leader.

In 2019, however, without any notice to the Band or consultation with Indian Country, HUD issued a purported "guidance" letter called "Mortgagee Letter 19-06" that would have prohibited the manner in which the Cedar Band has chosen to participate in the federal mortgage access program. HUD's approach would disallow tribal government DPA to non-members off-Territory based on HUD's apparent position that Indian tribes can only engage in Tribe DPA in a governmental capacity and cannot engage in any governmental activity off their reservations. In doing so, HUD undermined the sovereign choices Indian tribes can make in administering governmental programs, failed to follow federal administrative law prior to making significant changes to the program, and failed to meaningfully consult with Indian country in accordance with their own Tribal Consultation Policy. So, the Cedar Band sued HUD and took active steps to inform Indian Country about what is happening.

Several Indian Country organizations adopted resolutions supportive of the Band and critical of HUD's actions. They have recognized the dangers of a federal agency taking actions adverse to Indian Country without tribal input.

- ATNI: Resolution #19-28, *Request Consultation with Administration of Federal Housing Programs to Discuss Mortgagee Declination Letter 2019-06* (May 2019)
- NCAI: Resolution # ABQ-19-025, *HUD Consultation before Proceeding with Rule Making Relating to Tribal Down Payment Assistance Programs* (October 2019)
- USET: Resolution 2020 SPF:014, *Urging Consultation Prior to Proceeding with Rulemaking on Tribal Down Payment Assistance Programs* (November 2019)

These resolutions request that HUD both refrain from efforts that undermine tribal governmental authority and engage in meaningful consultation with Indian Country before taking steps to modify or qualify federal programs in which Indian tribes are active participants.

While HUD has since withdrawn Mortgagee Letter 19-06, the Department has more recently indicated that it still plans to pursue rulemaking concerning down payment assistance programs.

On February 14, 2020, HUD issued a Dear Tribal Leader letter regarding “*Tribal Consultation on HUD’s Proposed Rule on Mortgaged Insurance for Transactions Involving Downpayment Assistance*”. In the letter, HUD indicates that it is developing a proposed rule to establish underwriting criteria that mortgagees must follow when underwriting a mortgage for FHA insurance that involves DPA provided by state, local and Tribal governments. The letter provides a brief overview of some provisions of the National Housing Act (“NHA”), identifies some of the past actions HUD has taken relating to the NHA provisions, and indicates that “HUD intends to propose revisions in its regulations” to address continuing issues that the letter alludes to. The letter does not identify any particular regulations HUD plans to revise. The letter requests that Tribal Leaders provide written “views” on these issues as HUD further develops its “policy proposals”, and to do so **within 30 days of the date of the letter (by Sunday, March 15th)**.

One major and troubling aspect of HUD’s letter is a reference to limiting Tribal DPA to circumstances where HUD can be satisfied that the home to be purchased is on land over which the Tribe “exercises governmental authority”. Certainly, HUD is not the agency within the federal government with the authority or the expertise to delineate the scope of an Indian tribal government’s sovereign authority. Additionally, the approach HUD took in its since-withdrawn 2019 Mortgagee Letter was that Tribes, their officials and their instrumentalities are not acting in a “governmental capacity” when engaging in conduct with off-Territory implications, such as providing DPA to otherwise qualified and credit-worthy off-reservation borrowers seeking to purchase off-reservation homes. Of course, Indian tribes, officials and instrumentalities regularly engage in off-reservation conduct and a determination by a federal agency that such conduct is not in a governmental capacity is likely to have broad, negative implications. In order for Tribes to properly respond to the consultation letter, HUD must provide greater detail of what the issue is, or why HUD believes it has the expertise and authority to make such determinations.

The letter and spirit of the Department’s *Government-to-Government Tribal Consultation Policy* calls for HUD to timely provide to Indian Country enough background and context to help explain why HUD believes it needs to pursue new policies by revising its regulations. The HUD Tribal Leader letter, however, simply doesn’t provide the information needed to convey to Indian Country what HUD’s concerns are, how prevalent the concerns might be, or how HUD believes revisions in regulations will help address those concerns. The letter also doesn’t provide for “formal, face-to-face discussion” with Indian Country leadership. Therefore, HUD’s currently planned approach to tribal consultation on DPA falls short of the “meaningful consultation” HUD’s policy requires.

Consistent with the principles of tribal self-determination and tribal self-governance, federal agencies should refrain from modifying federal programs in a manner that undermines the sovereign decisions of Indian tribes. When an agency believes such changes nevertheless should be made, the agency should (1) ensure that the proposed change is either mandated by statute or supported by available data, (2) be transparent and comprehensive in its data collection, (3) solicit the views of Indian Country on the federal programmatic area or issue of concern, (4) where the anticipated change is not mandated by statute, solicit appropriate data, including tribal data, to ensure the change is supported by facts and is the least disruptive approach that can be taken to achieve the underlying concern or

objective, and (5) meaningfully consult with Indian Country prior to engaging in formal rulemaking activity.

HUD should: (1) commit to, and engage in, formal, face-to-face tribal consultation, with sufficient information provided in advance so that the Tribal Consultation process is meaningful; and (2) extend the deadline, as needed, to allow for these consultative discussions to occur.

For more information about the Cedar Band of Paiutes, contact _____.

For more information about CBC Mortgage Agency and tribal down payment assistance programs, contact _____.