

DRAFT

February __, 2020

John L. Garvin
General Deputy Assistant Secretary for Housing
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 9100
Washington, D.C. 20410

Re: Tribal Consultation on Tribal Government Authority and Downpayment Assistance Transactions

Dear Deputy Assistant Secretary Garvin:

I am in receipt of your February 14, 2020 letter to Tribal Leaders regarding *“Tribal Consultation on HUD’s Proposed Rule on Mortgaged Insurance for Transactions Involving Downpayment Assistance”*. In your letter, you indicate that HUD is developing a proposed rule to establish where a tribal government may operate as a government entity and additional restrictions on downpayment assistance (“DPA”) programs. Your letter briefly touches upon a single subsection of the National Housing Act (“NHA”), references a couple of prior HUD actions relating to that NHA subsection, and indicates that “HUD intends to propose revisions in its regulations” to address some “continuing issues”. Your letter does not identify the existing regulations that HUD plans to revise. The letter requests our views on these generalized 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).

On behalf of the [_____ Tribe], I urge you to adhere to both the letter and spirit of the Department’s *Government-to-Government Tribal Consultation Policy* and to timely provide enough background and context to help explain why HUD believes it is necessary to target Tribes specifically through new policies and revised regulations. Your letter simply doesn’t provide the information needed for us to understand what HUD’s concerns are, how prevalent the concerns might be, or how HUD believes revisions in regulations will help address those concerns. Since your letter does not provide this crucial context, we believe HUD’s currently planned approach to tribal consultation cannot result in the “meaningful consultation” HUD’s policy requires. Further, HUD’s policy calls for “formal, face-to-face discussion.”

To further the goals of the Department’s Tribal Consultation Policy, I am requesting first, that HUD 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 second, that HUD extend the deadline to respond to its request to allow for these consultative discussions to occur.

To facilitate such face-to-face discussions, I recommend that (as HUD’s Office of Native American Programs has done in the recent past and other federal agencies do) HUD reach out to Indian Country national and regional organizations to explore scheduling a face-to-face tribal consultation session with the member tribes. I also want to let you know that the NAFOA Annual Spring Conference is coming up in April, and the NCAI Mid Year Conference & Marketplace and the 2020 Mid-Year USET/BIA ERO/IHS NAO Partnership Meeting are coming up in June. Each of these may prove to be a good venue for an

opportunity for face-to-face discussions with representatives from the member Indian Tribes and Nations.

Nevertheless, to the extent that HUD decides to proceed in the absence of meaningful Tribal Consultation, we provide the following comments:

(1) HUD Lacks the Expertise and the Statutory Authority to Delineate When and Where Indian Tribes Can Exercise Governmental Authority. 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" or that the borrower is a member of the Tribe. 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. This raises several questions:

- What data is HUD relying on to support the need to limit the ability of tribal governments to operate off of tribal lands and to engage with non-enrolled members in providing services?
- Relatedly, what data is HUD relying on to show that DPA provided by tribal entities poses any greater risk to the Mutual Mortgage Insurance Fund than DPA provided by non-tribal entities, such that tribal DPA providers should be limited to their geographic jurisdiction and enrolled tribal members?
- How do HUD's proposed limitations on tribal jurisdiction lower risks to HUD or benefit borrowers?
- What policy objectives are furthered by HUD stepping into the role of determining over what lands individual tribes can exercise governmental authority?
- What is HUD's reasoning that limiting the ability of tribal governments to operate off of tribal lands will further these policy objectives?
- What other options has HUD considered to advance these policy objectives? Is the anticipated approach the one least likely to have an adverse impact on Indian tribes and their members?
- Is it HUD's intention that Tribal DPA should be limited to lands over which the Tribe exercises governmental authority *and* in respect to borrowers who are enrolled members of the Tribe? Or would HUD permit Tribes to provide DPA either with respect to lands over which a Tribe exercises governmental authority *or* with respect to borrowers who are enrolled members of the Tribe (or of other Tribes)?
- What is HUD's legal basis for suggesting that any action by a tribal government is not an exercise of governmental authority?

- What legal authority permits HUD to restrict Federally Recognized Indian Tribes to providing DPA “in respect to property over which it exercises governmental authority,” and not to any other property?
- What legal authority permits HUD to restrict Federally Recognized Indian Tribes to providing DPA only to enrolled members of the Tribe, and not to other individuals, including enrolled members of other Tribes?
- Commercial activity by Indian tribes is an exercise of governmental authority. The effort to distinguish between tribes acting in a commercial capacity and tribes acting in a governmental capacity, or tribes acting on or off their lands, for purposes of tribal sovereign immunity has been rejected by the U.S. Supreme Court. *See Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). How does HUD’s proposed action square with legal precedent? Has HUD considered that its effort to impose an artificial “governmental authority” distinction may undermine the settled scope of tribal sovereign immunity? Has HUD examined what the implications might be?
- What documentation is sufficient to satisfy HUD that governmental DPA is permissible? What standards will HUD apply in assessing the documentation?
- Since HUD lacks the expertise and authority to determine or delineate the scope of an Indian tribal government’s sovereign authority, will HUD rely upon or coordinate with other federal agencies with this expertise? If so, which agencies, and what will their role be, and what opportunities for further Tribal consultation would those agencies provide?
- Will DPA providers be required to obtain legal opinions on exercising governmental authority? Is this a cost universal to all DPA transactions or just Tribal transactions?
- Land title and tenure in Indian country is complicated, as is what constitutes “Indian country” in the first instance. Also, while some Indian tribes have readily identifiable land bases, others do not. Moreover, some Indian tribal governments may be in the process of acquiring or reacquiring lands they lost over the years. What approach does HUD plan to take on determining when newly acquired or reacquired lands qualify for the “exercise of governmental authority” for its purposes? Because of the nature of the history behind Indian country land title, will any requirement that DPA providers obtain legal opinions be more expensive for Tribal DPA transactions than non-Tribal DPA transactions?
- Will a requirement of obtaining legal opinions raise the cost of obtaining homes through FHA-insured mortgages?
- Will the increased costs of compliance with any new requirements make home ownership less affordable for the American public? Or will it only increase the costs of homeownership for Indian borrowers or borrowers using Tribal DPA?

(2) Indian Tribes Regularly Act In A “Governmental Capacity” In Off-Reservation Activities. Indian tribes, officials and instrumentalities regularly engage in off-reservation conduct. Indeed, Indian tribal representatives (as well as state and local government representatives) occasionally travel in their governmental capacity to Washington, DC or other states and jurisdictions for a variety of official reasons. The approach HUD took in its since-withdrawn April 2019 Mortgagee Letter (ML 19-06) was that Indian Tribes, their officials and their instrumentalities are not acting in a “governmental capacity” when engaging in conduct with off-reservation implications, such as providing DPA to otherwise qualified and credit-worthy off-reservation borrowers seeking to purchase off-reservation homes. It appears that HUD may be revisiting that withdrawn position.

- As noted above, land tenure in Indian country is complex, and each Indian Tribe’s land holdings and history is unique. Indeed, Indian country is not limited to reservation land and, on some reservations, the legacy of the allotment era of the 1800s has left a patchwork of tribal and non-tribal lands. Has HUD looked at what the ramifications would be for individual tribes if this becomes the official position of the United States?
- Currently, hundreds of Indian tribal governments have entered into contracts with federal agencies to undertake federal agency programs under various legal authorities, including the Indian Self-Determination and Education Assistance Act (ISDEAA). Tribal performance under these agreements comes with Federal Tort Claims Act (FTCA) coverage. Many tribal officials and employees in performing duties under these federal contracts will at times find themselves off reservation lands when performing duties thereunder. HUD’s rationale would appear to suggest that those officials and employees, when off reservation lands, will not be acting in a governmental capacity. Will the United States refuse to extend FTCA coverage for torts occurring off-reservation in the performance of federal contracts? Has HUD addressed the potential FTCA implications with the Department of the Interior, Department of Health and Human Services and Department of Justice ? Will HUD’s approach have increased costs for federal agencies required to take into account FTCA coverage when providing liability insurance for Indian tribes under the ISDEAA, 25 U.S.C. § 5321(c)? Will HUD’s approach, if it results in a narrowing of the scope of FTCA coverage, expose tribal government officials and employees to additional personal liability, following the U.S. Supreme Court’s decision in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), and require Indian tribes to obtain additional insurance coverage, thereby increasing overall tribal costs?

(3) Any Regulatory Action HUD Takes Should Include Steps To Limit Adverse Tribal Consequences. Consistent with the principles of tribal self-determination and tribal self-governance and the federal obligation 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”, 25 U.S.C. § 4101(4), 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 (i) ensure that the proposed change is either mandated by statute or supported by relevant data, (ii) be transparent and comprehensive in its data collection and its programmatic concerns and

objectives, and (iii) where the anticipated change is not mandated by statute, solicit appropriate information and data, including from tribal sources, 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.

Had HUD shared more context in the notice, and had HUD built in time and opportunity for the face-to-face discussions its Government-to-Government Policy calls for, we could meaningfully engage with HUD on these issues in greater detail.

We again urge HUD to commit to, and engage in, formal, face-to-face tribal consultation, with sufficient information provided in advance and time afforded so that the Tribal Consultation process is meaningful, broad reaching, and consistent with the United States' trust obligations to Indian tribes.

Sincerely,