

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

July 22, 2021

Memorandum

To: Members, Committee on Financial Services
From: FSC Majority Staff
Subject: July 27, 2021, Subcommittee Hearing entitled, “NAHASDA Reauthorization: Addressing Historic Disinvestment and the Ongoing Plight of the Freedmen in Native American Communities”

The Subcommittee on Housing, Community Development and Insurance will hold a hearing entitled “NAHASDA Reauthorization: Addressing Historic Disinvestment and the Ongoing Plight of the Freedmen in Native American Communities” on Tuesday, July 27, 2021, at 2 p.m. ET in room 2128 of the Rayburn House Office Building. There will be one panel with the following witnesses:

- **Chuck Hoskin, Jr.**, Principal Chief, Cherokee Nation
- **Chris Kolerok**, Director of Public Policy & Government Affairs, Cook Inlet Housing Authority
- **Marilyn Vann**, President, Descendants of Freedmen of the Five Tribes Association
- **Anthony Walters**, Executive Director, National American Indian Housing Council
- **Jackson Brossy**, Executive Director, Native CDFI Network

Background on Native American and Native Hawaiian Housing Needs

Native Americans living in tribal areas experience some of the most severe housing needs in the United States. Due to the historic and ongoing dispossession of Native lands and resource extraction by non-Native people,¹ Native American communities disproportionately experience high poverty rates and low incomes, overcrowding, chronic homelessness, lack basic utilities such as plumbing, clean drinking water, and heat, and face barriers to housing and community development.² According to an extensive Congressionally-mandated report on American Indian and Alaska Native (AIAN) housing needs released by HUD in early 2017, some 6% of AIAN homes located in tribal areas had inadequate plumbing, 12% had heating deficiencies, and 16% were overcrowded, while nationwide, only 1 to 2% of homes suffered each of these conditions.³ At the same time, 38% of AIAN households were overrepresented among cost-burdened households (paying more than 30% of their income on housing costs), compared to 36% nationally.⁴ Researchers also estimated that between 42,000 and 85,000 people in tribal areas were doubling and tripling up with their friends or relatives because they had no place of their own.⁵ In 2020, 5% of Native American households, including Alaska Natives, Pacific Islanders, or Native Hawaiians, despite accounting for just 1% of the total U.S. population.⁶

¹ Through the Indian Removal Act of 1830, the United States government violently displaced Native Americans from their ancestral lands in the present-day Southeastern states of Georgia, Alabama, and Tennessee. This forced removal from the Southeast to the present-day state of Oklahoma between 1830 and 1850 is known as the Trail of Tears.

² HUD, *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs* (Jan. 2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ HUD Office of Community Planning, *The 2020 Annual Homeless Assessment Report (AHAR) to Congress* (Jan. 2021).

Housing conditions are exacerbated by underlying economic issues among Native American communities. Two of the most identified barriers to housing development are the geographic isolation of some reservations and insufficient infrastructure (such as road, water, and sewer systems), adding expenses and delays to housing development.⁷ In addition to physical challenges, the real and perceived financial characteristics of Native American borrowers have limited the creation of a lending market on reservations to support homeownership and finance new construction.⁸ Researchers have found that homeownership among Native Americans is constrained by challenges similar to those experienced by non-Native low-income individuals, such as a lack of mortgage financing, thin credit histories, and low incomes.⁹ Bureaucratic and legal barriers unique to Native communities, such as the legal status of trust land, further impede credit access and housing development on tribal lands because tribal lands held in trust cannot be used as collateral when securing a mortgage loan.¹⁰ Additionally, a lack of financial services and limited access to conventional lending markets make many Native American communities more likely to have to depend on subprime and predatory lending.¹¹ In fact, between 2002 to 2005, Home Mortgage Disclosure Act data revealed that Native American borrowers accessed high-cost lenders more than twice as often as White borrowers.¹²

Native Hawaiians. The Hawaiian Homes Commission Act of 1920 created the Hawaiian Home Land Trust, which includes more than 200,000 acres of land managed by the Department of Hawaiian Home Lands (DHHL).¹³ The amendment offered in 2000 that authorized the Native Hawaiian programs under NAHASDA was consistent with Congress' recognition that it has a "unique trust responsibility to promote the welfare of the aboriginal, indigenous people of the State [of Hawaii]," who were displaced by European and American settlement, beginning in the colonial era through the annexation of Hawaii.¹⁴ However, there is a waiting list to access leases to such home lands. Native Hawaiians who are on the wait lists experience lower incomes on average and have some of the most acute need for affordable housing and a lack of access to homeownership in Hawaii compared to other Native Hawaiians and the general non-Native population.¹⁵ Native Hawaiians, like Native Americans, also face unique geographic challenges such as those presented by remote rural locations that present barriers for home construction and community development.¹⁶ This exacerbates mutually reinforcing housing affordability and housing supply constraints. While Native Hawaiians and other Pacific Islanders account for approximately 10% of the State of Hawaii's population, they represented 33% of people experiencing homelessness in Hawaii in 2020.¹⁷

Background on Federal Native American and Native Hawaiian Housing Programs

To address the inequities among Native American communities, the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA) is the central statutory framework through which the federal government provides housing and community development assistance to tribal governments. NAHASDA is broadly intended to support safe, decent, and affordable housing in tribal

⁷ HUD Office of Policy Development and Research, [*Obstacles, Solutions, and Self-Determination in Indian Housing Policy*](#) (2015).

⁸ *Id.*

⁹ HUD *supra* note 1.

¹⁰ HUD *supra* note 1; See also Urban Institute, *Mortgage lending in Indian Country has jumped, but land policies remain a barrier* (Apr. 20, 2017).

¹¹ HUD *supra* note 4.

¹² *Id.*

¹³ Department of the Interior, [*Reference Guide to the Hawaiian Homes Commission Act, 1920 as amended*](#) (Sep. 2018).

¹⁴ *Id.*

¹⁵ HUD, [*Housing Needs of Native Hawaiians: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs*](#) (May 2017).

¹⁶ *Id.*

¹⁷ HUD, [*HUD 2020 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, Hawaii*](#) (Dec. 15, 2020).

areas, while respecting tribal sovereignty. It originally included authorization for the Native American Housing Block Grant (NAHBG) as well as the Title VI Loan Guarantee program (Title VI).

NAHBG funds are distributed on a formula basis to federally-recognized tribes (including Alaska Native villages) and some state-recognized tribes, and can be used for a wide range of affordable housing activities, including both rental housing and homeownership, as well as to provide associated infrastructure and services. NAHBG funds must go to benefit low-income households (with limited exceptions), and families living in NAHBG-assisted housing may not be charged more than 30 percent of their adjusted income for rent or homebuyer payments under lease purchase agreements.¹⁸ Since its inception, NAHBG funding has been used to build or acquire over 41,000 affordable housing units and rehabilitate over 102,000 affordable housing units.¹⁹

The Title VI Loan Guarantee Program allows tribes that receive NAHBG funds to pledge future NAHBG amounts as collateral for private financing. Title VI loans can be used towards all the same eligible affordable housing activities under NAHBG and the federal government guarantees the loans up to 95 percent of the remaining principal and interest. As of September of 2020, \$252 million had been guaranteed through Title VI loans for affordable housing and community development purposes,²⁰ and as of 2017, Title VI funding has been used to build, rehabilitate, or install infrastructure benefitting more than 3,100 families.²¹

The Housing and Community Development Act of 1992 authorized the Section 184 Native American Loan Guarantee program (Section 184) to encourage mortgage lending for single-family homes on tribal lands. Section 184 allows HUD to provide a 100% guarantee for mortgages that meet certain requirements. Loans under Section 184 have low downpayment requirements (2.25% on loans over \$50,000 and 1.25% on loans under \$50,000), and they can be used for purchase, new construction, rehabilitation, and refinancing.²² While the authorization for this program is not technically under NAHASDA, it has frequently been reauthorized alongside NAHASDA programs.²³

Native Hawaiians. An amendment to the Housing and Community Development Act of 1992 in 2000 established the Native Hawaiian Housing Block Grant (NHHBG) program and the Section 184A Native Hawaiian Housing Loan Guarantee program (Section 184A) to provide housing assistance for Native Hawaiians, similar to the assistance provided under the NAHBG and Section 184, respectively. These programs are intended to benefit low-income Native Hawaiians, defined as descendants of the aboriginal Hawaiian people who are U.S. citizens and who are eligible to live on Hawaiian Home Lands.

Indian Community Development Block Grant. By statute, Native American tribes also receive a 1% set-aside of the funding provided for the Community Development Block Grant (CDBG) program, which is known as the Indian CDBG program (ICDBG). However, Congress has appropriated funding for ICDBG at higher levels than the statutory requirement and has also provided ICDBG funding appropriations through HUD's Native American Programs account.²⁴ The ICDBG program provides tribes with an additional flexible funding source that can be used for a wide range of housing,

¹⁸ NAHBG funds can be used for some non-low-income families in limited circumstances, who will pay higher rents in accordance with their income levels; See 24 CFR 1000.130; See also 24 CFR 1000.10.

¹⁹ HUD, [FY 2022 Budget Justifications: Native American Programs](#) (2021).

²⁰ *Id.*

²¹ HUD *supra* note 1.

²² See 12 U.S.C. 1715z-13a(b)(5)(C); See also 12 U.S.C. 1715z-13a(b)(2).

²³ Reauthorizations of Section 184 have been included in NAHASDA reauthorization bills in recent years, and the law that reauthorized NAHASDA in 2002 (P.L. 107-292) changed authorizations for Section 184 to FY1997 through FY2007 rather than "each fiscal year." 2008 NAHASDA reauthorization (P.L. 110-411) did not include Section 184, as it was reauthorized separately in P.L. 110-37.

²⁴ Michael H. Cecire, [The Indian Community Development Block Grant \(ICDBG\) Program: An Overview](#), (Jan. 29, 2021).

infrastructure, and economic development activities. The Secretary of HUD has the authority to set aside up to 5% of each year's ICDBG allocation for "imminent threats," which are distributed on a noncompetitive, first-come-first-served basis, and are intended to address issues in tribal areas that pose an imminent threat to public health or safety.²⁵ The remainder of ICDBG funding goes towards "single purpose" grants, which are awarded on a competitive basis.

HUD's Office of Native American Programs. HUD's Office of Native American Programs (ONAP), which sits within HUD's Office of Public and Indian Affairs, is responsible for administering the housing and community development programs that benefit Native Americans and Native Hawaiians. In addition to their office at HUD headquarters in Washington D.C., ONAP has offices in six regions: Alaska (Anchorage, AK), the Northwest (Seattle, WA), the Southwest (Phoenix, AZ and Albuquerque, NM), the Northern Plains (Denver, CO), the Southern Plains (Oklahoma City, OK), and the Eastern Woodlands (Chicago, IL).

The Descendants of Black Native American Freedmen

Following enactment of the Indian Removal Act of 1830,²⁶ the United States government violently displaced Native Americans from their ancestral lands in the present-day Southeastern United States, removing the Cherokee Nation, for example, from their homelands in Georgia, North Carolina, South Carolina, and Tennessee.²⁷ This forced removal from the Southeast to the present-day state of Oklahoma between 1830 and 1850 is known as the Trail of Tears.²⁸ Prior to their inhumane removal from their ancestral lands by the U.S., and during the time that slavery was legal, certain tribes, including the Cherokee, Choctaw, Chickasaw, Muscogee Creek, and Seminole Nations ("the Five Tribes"), had purchased and enslaved Black people from Africa—who themselves were violently forced to the U.S. during the transatlantic slave trade—for the purposes of conducting unpaid slave labor.²⁹ Later, during the 1860s, the U.S. entered a civil war where the Confederate States of America ("the Confederacy") fought to secede from the U.S., in part to defend what Southern states believed was their right to enslave Black people and to uphold slavery as an institution. During the Civil War, the Five Tribes sided with the Confederate States.³⁰

In 1866, when the war had ended and slavery was abolished, the Five Tribes signed treaty agreements reinstating their government-to-government relationship with the U.S. The individual agreements signed by each of the Five Tribes, known as the Treaties of 1866, allocated tribal lands, memorialized the U.S.'s recognition of the Five Tribes as sovereign independent nations, and required the Five Tribes to abolish slavery by freeing any enslaved individuals and agree to treat them, and their

²⁵ U.S. Department of Housing and Urban Development, [Indian Community Development Block Grant Program](#) (Accessed on July 10, 2021).

²⁶ Act of May 28, 1830, §§ 2, 7, 4 Stat. 411. See 1 Cohen's Handbook of Federal Indian Law § 1.03 (LEXIS, 2019); "The Act did not authorize forcible removal; rather, it authorized the President to provide lands west of the Mississippi in exchange for eastern lands 'of such tribes or nations of Indians as may choose to exchange the lands where they now reside,' and declared that 'nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes.' Indians were advised, however, that refusal to emigrate meant the end of federal protection and abandonment to state jurisdiction." [citations omitted].

²⁷ Treaty of New Echota with the Cherokees, December 29, 1835, 7 Stat. 478.

²⁸ P.L 100-192 established the Trail of Tears as a National Historic Trail, consisting of "water routes and overland routes traveled by the Cherokee Nation during its removal from ancestral lands in the East to Oklahoma during 1838 and 1839, generally located within the corridor described through portions of Georgia, North Carolina, Alabama, Tennessee, Kentucky, Illinois, Missouri, Arkansas, and Oklahoma."

²⁹ See, e.g., *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 93 (D.C. 2017) ("[T]he Cherokee Nation was complicit in legitimizing slavery within the Nation.")

³⁰ University of Nebraska Lincoln, [As long as grass shall grow and water run: The treaties formed by the Confederate States of America and the tribes in Indian Territory, 1861](#) (Accessed on Jul. 21, 2021); See also [The Statutes At Large of the Confederate States of America, xiv–iv](#).

lineal descendants, equal to “native citizens.”³¹ Enslaved Black African individuals whom the tribes freed would come to be known as Freedmen, and many would go on to become integrated into their respective tribes, marrying and forming families, including with other non-Black Native Americans.

Despite the 1866 treaty obligations of the Five Tribes, which remain in effect to this day,³² many descendants of Black Native American Freedmen continue to be disenfranchised in direct violation of those treaty obligations, and they continue to fight for their respective recognition as legal citizens of the Five Tribes.³³ Without citizenship, descendants of Freedmen lack equal access to a myriad of rights and services, including the housing and community development funds provided by the U.S. federal government through NAHASDA. The discussion draft legislation to reauthorize NAHASDA that has been posted for consideration during this hearing includes a provision to ensure that any tribe that is found in violation of their treaty obligations to Freedmen and their descendants will be ineligible for federal NAHASDA funds from the U.S. government until they are determined to be in compliance.

Freedmen of the Cherokee Nation. In the past, the Cherokee Nation was at the forefront of the debate regarding treatment of descendants of Freedmen and the denial of their citizenship rights. Past legislation reauthorizing NAHASDA included specific language limiting funds to the Cherokee Nation based on their treatment of descendants of Freedmen.³⁴ After years of litigation, beginning as far back as 1984, a U.S. federal court ruled in *Cherokee Nation v. Nash* in 2017 that the 1866 treaty language granted the descendants of Cherokee Freedmen “a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees.”³⁵ This 2017 court decision resulted in full membership rights for descendants of Cherokee Freedmen.³⁶ The Cherokee Nation chose not to appeal this ruling and has taken action to come into compliance with the ruling and their treaty obligations.³⁷ Further, in February 2021, the Cherokee Supreme Court ruled that the U.S. federal district court decision in *Nash* was binding on the Cherokee Nation, which resulted in the striking of language in the Cherokee Nation’s constitution that discriminated against descendants of Cherokee Freedmen by denying their citizenship rights, as established in the nation’s 1866 treaty with the U.S. government.³⁸

³¹ Three of the treaties included language similar to that in the Cherokee treaty, guaranteeing that the Black persons among them, and their descendants, “shall have and enjoy all the rights and privileges of native citizens.” Article IX of the July 19, 1966 Treaty with Cherokee Nation, 14 STAT. 799, 801; Article II of the March 21, 1866 Treaty with the Seminole Nation of Indians, 14 STAT. 755, 756; Article II of the July 23, 1866 Treaty with the Creek Nation (14 STAT. 785, 786). The Treaty with the Choctaw and Chickasaw Indians included a guarantee “that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made...” Article IV of the April 28, 1866 Treaty with the Choctaw and Chickasaw Indians, 14 STAT. 785, 786. See *United States v. Choctaw Nation*, 318 U.S. 493 (1904) (indicating that subsequent legislation effected the obligation of the Choctaw Nation with regard to citizenship of the Freedmen).

³² In *McGirt v. Oklahoma*, ___ U.S. ___, 140 S. Ct. 2452 (2020), the U.S. Supreme Court ruled that a provision of the 1866 signed by the Muscogee Creek Nation was still in effect because Congress never explicitly abrogated that part of the treaty. The Court stated, “Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights.” Congress has never passed legislation explicitly abrogating the Freedmen’s right to tribal citizenship included in the 1866 treaties.

³³ In 2018, the Muscogee Creek Indian Freedmen Band sued the Creek Nation in federal court to affirm their rights of tribal citizenship. The court dismissed the suit without prejudice, saying that the Freedmen Band had not exhausted their tribal remedies. [Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt](#), 385 F. Supp. 3d 16 (D.D.C. 2019). They are now suing in Muscogee Creek Nation district court, however the litigation is being delayed as two judges have recused themselves from hearing the case and new judge has yet to be appointed. Ashley Jones, Black Wall Street Times, [Congresswoman Maxine Waters warns Tribes to stop discriminating against Freedmen Descendants](#) (July 9, 2021); See also [June 2020 letter](#) from Choctaw Nation Chief Gary Batton denying treaty obligations to Choctaw Freedmen descendants.

³⁴ Sec. 801 of the 2008 NAHASDA reauthorization ([P.L. 110-411](#)).

³⁵ Cherokee Phoenix, [A timeline for Cherokee Freedmen](#) (Feb. 1, 2021); *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017).

³⁶ *Id.*

³⁷ Associated Press, [Court: Cherokee Freedmen have right to tribal citizenship](#) (Aug. 31, 2017).

³⁸ Cherokee One Feather, [Cherokee Nation Supreme Court issues decision that ‘by blood’ reference be stricken from Cherokee Nation Constitution](#) (Feb. 22, 2021).

Appendix: Legislation

- **H.R. ___, the “Native American Housing Assistance and Self-Determination Reauthorization Act” (Waters)** is a draft bill to reauthorize and reform Native American housing programs and ensure equal access to housing and community development resources for the descendants of Black Native American Freedmen.