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Considerations for the Implementation of Title V, Coronavirus Relief Funding for Tribal Governments

On March 27, 2020 the House of Representatives passed the Coronavirus Aid, Relief, and Economic Security Act (CARES) and the President signed it into law the same day. The Act includes a number of tribal specific provisions including funds directly available to tribal governments' anticipated health care needs. It also includes tribal governments and their business entities in larger provisions such as partially forgivable loans under the Small Business Administration's 7(a) program. However, the largest direct funding is in Title V – Coronavirus Relief Fund where \$8 billion of the total amount of \$150 billion available to governments for general relief was reserved for tribal use. States and secondarily, local governments share \$139 billion and the District of Columbia and the Territories share \$3 billion.

Including tribal governments in discretionary funding for governmental aid is a significant advancement for Indian tribes. However, this new inclusion and treatment of tribal governments as set forth in the law means consultation and guidance takes on a different focus. One that turns away from overly defining the discretion included in the law and turns toward broad guidance.

The purpose of this paper is to create a timely and necessary debate around the considerations for distribution of the \$8 billion in relief aid available to tribal governments in the CARES Act. Consultations with the Department of Treasury and the Department of the Interior should be centered on making quick decisions that are fair in the way funds are distributed and utilized while maintaining tribal government autonomy as intended in the law. Before raising necessary considerations for consultation, a review of the stipulations in the law related to tribal governments and the considerations for tribal consultation may be helpful in framing and expediting the agency and tribal consultation process.

Payment Method & Mandatory Distribution Date

Provision of Law: The Secretary of Treasury will need to pay each unit of government listed under the Act no later than 30 days after enactment - before April 27, 2020.

Analysis and Considerations: The law only states that Treasury will distribute funds to each unit of government by April 27, 2020. There are no further considerations on how distributions are made. There is also no stipulation that the Department of the Interior would have a role in distribution other than a consultative role. Tribes have raised the idea of working through self-

governance contracts or through a way that accommodates direct service tribes through Interior. However, for the purposes of this law, the Department of Treasury would be the responsible party making payments. This raises questions for leadership. Do tribes want to involve the Department of the Interior in the distribution of funds in any particular manner? Will funding through the Department of Treasury delay the allocations? Does Department of Treasury have a mechanism in place to distribute the funds?

Method & Full Distribution of Tribal Allocations

Provision of Law: The Secretary of Treasury in consultation with the Secretary of Interior and Indian tribes will make a determination on the distribution of funds to each tribal government “based on increased expenditures of each tribal government (or a tribally-owned entity of such tribal government) relative to aggregate expenditures in fiscal year 2019...” The section also includes some flexibility of the Secretary of Treasury to use discretion to ensure all \$8 billion is distributed to tribal governments within the thirty-day period.

Analysis and Considerations: State governments are allocated funds according to a reserved floor amount plus an increased allocation based on population. Each state receives a one-fiftieth share or \$1.25 billion with the remaining based on their share of the total population of the states. This methodology is meant to ensure each state receives a share and those states with higher populations that may have greater expenditures to care for the larger population receive relief in proportion to their populations.

Tribal governments do not have a population criterion, nor do they have a stated minimum distribution requirement among each tribe as required by states. The law does, however, include a baseline for tribal governments based on “increased expenditures” from 2019 to 2020 related to the Coronavirus crisis with discretion given to the Secretary of Treasury to move beyond that single requirement to ensure distribution occurs within a month.

It is important to note another key difference for tribal governments not included in the state stipulations. “Increased expenditures” include tribal governments (or a tribally-owned entity of such tribal government) relative to aggregate expenditures. This is an important distinction and recognizes the role that tribally-owned entities play in funding government operations and the difficulty of some tribes to be able to meet government responsibilities without enterprise revenue.

Considerations for implementing this provision of the law are perhaps the most difficult. Tribal governments will need to consider; a fair way to include all tribal government entities that express the need for the relief funds, a possible accommodation for the potential impacts of tribes with higher populations as states have done, and carefully consider the best use of funds to mitigate the impact of the Coronavirus that includes the largest number of tribal requests.

Expenditures have two components, the revenues assumed to support expenditures and the anticipated expenditures that tribal governments will bear in working through this crisis. Tribal

governments that rely on enterprises to fund operations have seen government revenue plummet while tribes that rely mostly on federal funding will have unmet expenditure obligations that will need to be addressed.

Perhaps a fair consideration of allocating funds should include a combination of the different considerations. First, an allocation available to all tribes of a lower amount as mandated in the state specific provision, an allocation beyond the minimum based on population, and an increase beyond either the minimum population based on expenditure impacts beyond both. For example, the first consideration may be to establish a minimum of \$500,000 for each tribal government to request, keeping in mind that funds need to be requested and utilized for the specific purpose of the Title. This would mean reserving \$287 million and leave approximately \$7.71 billion remaining of the total fund.

Secondary considerations may consider population as states have, however; tribes are so disparate in structure, needs, and funding that it may not be as good an indicator as the state allocations. Perhaps utilizing the amount remaining beyond the minimum allocation simply should go to the broad relief of tribal governments with expenditure needs for government operations impacted and needed for the crisis. The maintenance of tribal government entities should also be considered keeping in mind that aid is for relief and not to make tribal enterprises whole.

The final consideration that may be included is ensuring tribal governments are utilizing other aspects of the CARES Act and its predecessors before seeking relief from Title VI amendments. For example, should funds specifically for health and housing already included in the Act and previous Acts for the same purposes be required to be considered first?

Use of Funds

Provision of Law: The funds are required to be used only for; necessary expenditures incurred due to the public health emergency with respect to the Coronavirus, costs that were not accounted for in the tribal budget most recently approved as of April 27, 2020, and costs that were incurred beginning March 1, 2020 through December 30, 2020.

Analysis and Consideration: Tribal governments will need to review existing impacts on government expenditures utilizing last year's expenditures and develop formal requests for deficiencies and projected impacts of their respective communities that relate to the Coronavirus. Planning for the potential impacts and increased expenditures is difficult since the crisis is governed by uncertainty. However, examples can be gleaned from the cities, states, and nations that have experienced the worst of the crisis. It is also important to consider the unique aspects of each community when estimating the impacts. For example, will transportation or temporary facility costs be a significant factor?

Oversight & Enforcement

Provision of Law: The Inspector General of the Department of Treasury has oversight and monitors the disbursement, receipt, and use of funds. If tribal governments fail to comply with the required use of funds, the Department of Treasury shall book the amounts received as debt payable to Treasury.

Analysis and Consideration: An important consideration for tribal requests for funding are the terms of the aid. Tribal governments should assume the funds will be distributed by April 27, 2020 with estimated funding shortfalls of government expenditures considering the time period from March 1, 2020 through to December 30, 2020. Again, uncertainty should be considered in the request along with the reminder that tribes will be out of compliance if they request funding that goes unused or is used for the wrong purposes.

Should we assume at a minimum and in the absence of forthcoming guidance, that funds used for government programs and services along with increases in those programs and services as a result of the Coronavirus crisis should be primary considerations. Maintaining tribal entities should also be considered an acceptable use. In addition, any service supplemented by other governments should be acceptable such as unemployment. Examples of increased services may include law enforcement, unemployment or payroll relief, debt service, and maintenance and security for existing enterprises.

Concluding comments: Everyday matters. The consultations should be brief with plans being developed now on how to distribute and implement funding requests. The Departments of Treasury and Interior should keep the intent of the law; providing broad relief for governmental impacts from the Coronavirus as a center of guidance.

We are hopeful that the stipulations considered in this paper are helpful. The suggestions are based on tribal leader interactions and offered as a way to structure input and hopefully find a way forward for quick implementation and fair consideration of tribal governments.