



NATIONAL CONGRESS OF AMERICAN INDIANS

April 13, 2020

The Honorable Steven T. Mnuchin
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

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Re: CARES Act and Tribal Governments

Dear Secretary Mnuchin:

On behalf of the National Congress of American Indians (NCAI), the oldest, largest and most representative organization comprised of American Indian and Alaska Native Tribal governments and their citizens, I write to provide additional, and important, comments on the appropriations to Tribal governments under Title V, Section 5001 (Title V) of the recently passed Coronavirus Aid, Relief, and Economic Security (CARES) Act.

I. Tribal Government Appropriation

As noted in previous comments, Title V, Section 5001 of the CARES Act amended the Social Security Act to add a new Title VI, Section 601, establishing the Coronavirus Relief Fund (CRF). Section 601(a)(B)(2) of the Social Security Act appropriates "\$8,000,000,000 . . . for making payments to Tribal governments." "Tribal government" is defined at Section 601(g) as "the recognized governing body of an Indian Tribe," and consistently appears in the Act alongside references to "States," and other "units of local government", including "the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa."

NCAI, and its member tribes, have expressed great concern as to the Administration's purported interpretation of the breadth and scope of what is a "recognized governing body," as it pertains to Tribal Governments under the CARES Act. Openly, NCAI acknowledges that the definition of "Indian Tribe" in the Indian Self-Determination and Education Assistance Act ("ISDEAA") (25 U.S.C. § 5304(e)) includes "Alaska Native regional or village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act [(ANCSA)]." "Indian Tribe" also appears in the more narrow definition of "Tribal Government" in Title V.

a. Congress' Use of "Indian Tribe" and "Tribal Government"

In finding Congress' intent, it is important to note that "[w]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in

1 See, CARES Act, Section 601(a) generally.

the disparate inclusion or exclusion.”² In other words, if the more expansive definition of “Indian Tribe” were intended to require that Treasury disburse Title V allocations to all entities included in the definition of “Indian tribe” within ISDEAA, it would have referenced that defined term throughout Title V. Instead Congress referenced “Indian Tribe” once, and only with respect to participatory status in the required consultation to determine the amounts to allocate to “Tribal governments.” Moreover, there would be no need for the additional definition of “Tribal government” if that were the case.

As noted above, “Tribal government” is defined as “the recognized governing body of an Indian Tribe.”³ Since the definition of “Indian Tribe”, as defined in ISDEAA, “means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA]”, a plain reading of “Tribal government” would apply only to the “recognized governing bod[ies]” of such entities within the definition of “Indian Tribe.” As such, Treasury should limit its application only to those entities with recognized governing bodies, made up of elected or appointed tribal leaders, which are commensurate with other units of local government, and on par with States and Foreign Nations under the U.S. Constitution⁴ -- *i.e.*, “Indian tribes” under the Constitution, or “Tribal governments.” NCAI suggests referring to the Federally Recognized Indian Tribe List Act, Pub. L. 103-454 (108 Stat. 4791, 4792), and its most recent publication of such tribal governing entities,⁵ for an easily accessible list of qualifying “Tribal governments” (List of Federally Recognized Indian Tribes). Notably, Alaska regional and village corporations do not have recognized governing bodies, since they maintain a corporate structure and – as noted in our previous letter – are incorporated under Alaska state law, and are also therefore absent from the List of Federally Recognized Indian Tribes.

Further, NCAI notes that the inclusion of corporations in the ISDEAA definition of “Indian Tribes” has never conferred upon such corporate entities a government status, but only confers on them limited contracting authority to carry out certain programs and services on behalf of Native people. Indeed, Alaska Native villages, as included in the List of Federally Recognized Indian Tribes, are the appropriate “Tribal governments” for purposes of disbursing amounts under the CRF. Title V of the CARES Act on its face clearly pertains to sovereign political bodies (States, local governments, and Tribal governments) and not corporate entities established under state law. However, if Treasury does find any degree of ambiguity – no matter how slight – the federal Indian law canons of construction dictate that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”⁶ This bedrock principle of federal Indian law is rooted in the federal government’s trust responsibility to sovereign Indian tribes, and extends to statutes, treaties, agreements, and executive orders.⁷

² *CBS Inc. v. Primetime 24 J.V.*, 245 F.3d 1217, 1225 (11th Cir. 2001) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)).

³ Section 601(g)(5).

⁴ U.S. CONSTIT. Art. I, Sec. 8, Cl. 3.

⁵ Bureau of Indian Affairs, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5462, 5467 (Jan. 30, 2020).

⁶ *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766-67 (1985).

⁷ Newton, Nell Jessup, et al. *Cohen’s Handbook of Federal Indian Law*, § 2.02[1] – § 2.02[2], pp. 126-127 (2012 ed.).

As noted in Felix Cohen's Handbook of Federal Indian Law:

The Trust relationship is rooted in Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*, in which the Court declared the tribe to be a "domestic dependent nation," a term demonstrating that tribes are not simply minority ethnic groups, but are sovereigns possessing a government-to-government relationship with the United States.⁸

Alaska regional and village corporations established pursuant to ANCSA do not possess such a government-to-government relationship with the United States. For these reasons, we urge that when analyzing the definitions used within the CARES Act, and the words within such definitions if necessary, you take full appreciation of the difference between the roles and responsibilities of Tribal governments, the similarity of such roles and responsibilities to those same responsibilities of the other listed governments in Title V, and compare these attributes, and the categorical differences, to the purposes and beneficiaries of corporate entities.

II. Flexible Tribal Government Use of Relief Funds

NCAI consistently over its 76 years has advocated for flexibility when it comes to the use of federal funding by Tribal governments for important tribal programs. As sovereigns, Tribal governments should be afforded the respect to expend funds in a responsive manner that is determined to be in the best interests of the tribal community served. Consistent with this premise, NCAI strongly advocates for Tribal governments to be allowed the same deference when it comes to the funds disbursed under Title V of the CARES Act.

With respect to Alaska Native Tribal governments, co-existing in Alaska with state chartered ANCSA regional and village corporations, it is no secret that some of these corporations have very good and close relationships with Alaska federally recognized Tribal governments, and some simply do not have such great relationships. Given this scenario, if a corporation is well connected with an Alaska Native Tribal government, it would not seem fair, or reasonable, for such Tribal government to receive the benefits of duplicative funding for the same community – one allotted to the corporation(s), and the other directly to the Tribal government. This is at odds with the fact that smaller Tribal governments in the Lower 48 would not have such a similar benefit. This concern is further exacerbated given that these same corporations have access to other funding in the CARES Act, such as the Paycheck Protection Program funding, where Tribal governments are ineligible for such capital sources. In theory, if corporations were eligible to receive funding under Title V, such entities would have funding sources in the Act that vastly exceed those eligible for tribal governments. Furthermore, if a corporation does not possess a close relationship with a federally recognized Tribal government in Alaska, the resources received by the corporation under Title V of the Act risk not meeting the goals intended by Congress to provide relief to Tribal governments through this pandemic. Instead, the benefit would be conferred upon shareholders that, like the corporations, can be availed of the generous relief in the Act through other pools of funding. Both of these situations could not have been the intent of Congress.

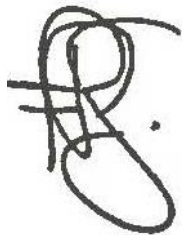
As such, we respectfully request that Treasury and Interior consider the notion of flexibility when it comes to the use of government relief funds by all federally recognized Tribal governments, including

⁸ Id.

those in Alaska, and allow them, if they so choose, to allocate the amounts determined to be necessary to address the impact on their communities as a result of this pandemic. In this instance, consistent with the spirit of “government stabilization” in Title V of the CARES Act, the only impact to consider should be that of the tribal community. Alaska Native Tribal governments should be free to use their allocated resources in a way that works for them, and that should allow a partnership between a Tribal government and any of the corporations it considers to be valuable in achieving the purpose for which the relief funding is disbursed. This approach will allow all funding to flow through only “Tribal governments” or entities authorized by the Tribe to act in their behalf, which is the intent of Title V of the Act. This approach will also allow participation by the corporations in situations deemed necessary by Tribal governments. In addition, these corporations will have access to other funding sources in the Act to aid in the overall response.

In closing, NCAI appreciates Treasury and Interior’s swift action to implement their consultation duties under the CARES Act, and looks forward to the completion of a well-reasoned distribution formula for Tribal governments. If you have any further questions or comments, please feel free to contact myself or NCAI CEO Kevin J. Allis at kallis@ncai.org. Thanks for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to be 'Fawn Sharp', with a stylized, cursive script.

Fawn Sharp
President
National Congress of American Indians