

[Feds Back Virus Funds For Alaska Native Cos. At High Court](#)

By [Andrew Westney](#)

Law360 (October 26, 2020, 10:23 PM EDT) -- Treasury Secretary Steven Mnuchin has asked the U.S. Supreme Court to reverse an appeals court ruling that Alaska Native corporations can't claim part of \$8 billion for tribal governments to fight the COVID-19 pandemic, saying the lower court misread language meant to include ANCs in the funding.

In a petition Friday, Mnuchin asked the high court to consider a D.C. Circuit panel's September decision that reversed a federal judge's ruling that ANCs were eligible for the funding under the Coronavirus Aid, Relief and Economic Security Act, following another petition [filed earlier last week](#) by several of the companies and two associations.

The secretary argued that the appeals court misinterpreted language Congress borrowed for the CARES Act from the Indian Self-Determination and Education Assistance Act, flying in the face of federal agencies' decadeslong understanding that the definition in the 1975 law, known as the ISDA or ISDEAA, included the companies.

"Nothing in the CARES Act suggests that Congress departed from that understanding," Mnuchin said. "To the contrary, Congress incorporated the ISDA definition to ensure that urgent coronavirus relief funds are available to ANCs for the benefit of their Alaska Native shareholders and the communities ANCs serve."

Six tribes filed the original complaint in D.C. federal court in April, arguing that the 12 for-profit Alaska Native regional corporations and 177 Alaska Native village corporations were not intended to receive any of the \$8 billion "tribal stabilization fund" included in the \$2 trillion CARES Act.

U.S. District Judge Amit P. Mehta in June [lifted an injunction](#) on ANCs receiving CARES Act funding that he had put in place when he thought the federally recognized tribes were likely to win their suit.

In its [Sept. 25 opinion](#), a unanimous D.C. Circuit panel reversed Judge Mehta's holding that an "eligibility clause" taken from the ISDEAA — which targets tribes "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" — was not intended to apply to ANCs, and that they otherwise met the CARES Act's requirements to qualify for funding.

The D.C. Circuit said that the ISDEAA language borrowed for the CARES Act referred only to sovereign tribes that have been formally recognized by the federal government, and not to ANCs, which are state-chartered companies led by boards of directors.

The appellate panel agreed with the [Confederated Tribes of the Chehalis Reservation](#) and other federally recognized tribes that brought the litigation that "recognition" is a term of art in Native American law indicating a formal, government-to-government relationship with a tribe.

The panel said that the unclear status of ANCs when the ISDEAA was passed in 1975 resolved a conflict between competing interpretations of the key clause. It was "highly unsettled" when the ISDEAA became law "whether Native villages or Native corporations would ultimately be recognized," and the clause mentioned ANCs to keep the door open for them to qualify under the law, even though ultimately they weren't formally recognized as tribes, according to the opinion.

In a petition Wednesday, the Alaska Native Village Corporation Association Inc., the Association of ANCSA Regional Corporations Presidents/CEOs and several individual ANCs said the panel's decision "upends the long-settled legal landscape and shatters the basic infrastructure of Native life in Alaska."

Mnuchin said in his petition Friday that Congress "deliberately added ANCs to the ISDA definition during

the legislative process" for that law, and that the [U.S. Department of the Interior](#) "has understood the ISDA definition that way essentially since ISDA was enacted."

The D.C. Circuit decision created a split with the Ninth Circuit's 1987 decision in [Cook Inlet Native Association v. Bowen](#), in which that court "likewise determined that ANCs qualify as Indian tribes under the ISDA definition, thus settling the issue for the last thirty years for the circuit that encompasses all ANCs."

And the D.C. Circuit decision to exclude ANCs "calls into question the status of ANCs under other federal statutes" that incorporate the ISDEAA definition, Mnuchin said.

The appeals court wrongly found that the ANCs' status was "highly unsettled" when the law was passed because "the evidence of purported uncertainty on which the court of appeals relied pertained to the status of Alaska Native villages," Mnuchin said. The villages were eventually given formal recognition as tribes, but the ANCs were understood at the time to be "newly formed business corporations that are plainly not sovereign entities," yet were still meant to be covered by the ISDEAA, the petition said.

Representatives for the parties were not immediately available for comment Monday.

The federal government is represented by Acting Solicitor General Jeffrey B. Wall, Deputy Solicitor General Edwin S. Kneedler, Senior Counsel to the Assistant Attorney General Sopan Joshi, Assistant to the Solicitor General Matthew Guarnieri, and attorneys Michael S. Raab, Daniel Tenny and Adam C. Jed of the [U.S. Department of Justice](#).

The ANCs are represented by Paul D. Clement, Erin E. Murphy, Ragan Naresh and Matthew D. Rowen of [Kirkland & Ellis LLP](#).

The Confederated Tribes of the Chehalis Reservation and other tribes in the lead case are represented by Riyaz Kanji and Cory J. Albright of [Kanji & Katzen PLLC](#), Harold Chesnin of the Confederated Tribes of the Chehalis Reservation and Lisa Koop Gunn of the [Tulalip Tribes](#).

The [Quinault Indian Nation](#) is represented by Lori Brunner of the Quinault Office of the Attorney General. The [San Carlos Apache Tribe](#) is represented by Alexander B. Ritchie. The [Elk Valley Rancheria](#), California, is represented by Bradley G. Bledsoe Downes. The Pueblo of Picuris is represented by Eric Dahlstrom, April E. Olson, Richard W. Hughes, Donna M. Connolly and Reed C. Bienvenu of [Rothstein Donatelli LLP](#).

The [Cheyenne River Sioux Tribe](#) is represented by Nicole E. Ducheneaux of [Big Fire Law & Policy Group LLP](#). The [Rosebud Sioux Tribe](#) is represented by Natalie A. Landreth, Wesley James Furlong, Erin Dougherty Lynch, Matthew N. Newman and Megan R. Condon of the [Native American Rights Fund](#). The [Ute Indian Tribe](#) of the Uintah and Ouray Reservation is represented by Rollie Wilson, Jeffrey S. Rasmussen, Frances C. Bassett and Jeremy J. Patterson of [Patterson Earnhart Real Bird & Wilson LLP](#).

The cases are Steven T. Mnuchin v. Confederated Tribes of the Chehalis Reservation et al., case number [20-543](#), and Alaska Native Village Corporation Association Inc. et al. v. Confederated Tribes of the Chehalis Reservation et al., case number [20-544](#), in the [Supreme Court of the United States](#).

--Additional reporting by Adrian Cruz. Editing by Breda Lund.

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