

The INTER-TRIBAL COUNCIL of the FIVE CIVILIZED TRIBES

April 13, 2020



Chuck Hoskin Jr.
Principal Chief

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20240

RE: The Applicability of Title V, Coronavirus Relief Funding for Tribal Governments, to Alaska Native Corporations

Dear Secretary Mnuchin,

The Inter-Tribal Council of the Five Civilized Tribes, an organization comprised of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations, respectfully submits this letter as a supplement to our April 6 comments to urge Treasury to abide by the statutory mandate of the CARES Act to distribute funds from the \$8 billion tribal government set-aside to federally recognized tribes. This statutory mandate excludes Alaska Native Corporations (“ANCs”).

Importantly, the CARES Act requires beneficiaries of Title V funds to satisfy **two** definitions: (1) the definition of “Indian Tribe,” adopted from 25 U.S.C. § 5304(e); and (2) the definition of “Tribal government” in section 601(g) of the CARES Act. ANCs do not qualify.

While federally recognized Alaska Native Villages are eligible to receive aid out of this fund, the statutory language of the CARES Act clearly excludes ANCs.

This statutory language is buttressed by the legislative record, which indicates that Congress’s intent was to direct Title V funds to entities providing *governmental services*. Title V funds must go to states, local governments, and tribal governments—not for-profit, state-chartered, individually owned corporations. Other sections of the CARES Act are dedicated to providing funding for such corporations, and ANCs are eligible for such funding opportunities. In fact, their corporate status qualifies them as eligible for funding opportunities for which tribal governments are not eligible.

Further, including ANCs would result in improperly weighted distributions through double and triple counting. Specifically, villages and ANCs share citizens, shareholders, and land bases; improper inclusion of both villages and ANCs in the data collection would result in double and triple counting various factors in favor of Alaska. This defeats the purpose of Title V and further underscores the statutory directive and Congressional intent not to include ANCs.

In short, in both the language Congress chose and the debates surrounding passage of the



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CARES Act, Congress's intent was for the Coronavirus Relief Fund to channel needed aid governments and *not* to provide means for corporate bailouts.

I. The Statutory Language of the CARES Act Makes Clear that ANCs are not "Tribal Governments"

Title V, Section 601(g) of the CARES Act adopts the definition of "Indian Tribe" from the Indian Self-Determination and Education Assistance Act (the "ISDEAA"), i.e., "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 the Alaska Native Claims Settlement Act (85 Stat. 688), which is *recognized* as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e) (emphasis added). The same section of the CARES Act separately defines "Tribal Government" as "the *recognized* governing body of an Indian Tribe." Beneficiaries of Title V funds must satisfy **both** definitions.

Thus, the Act requires that the distribution go to "the *recognized* governing body of an Indian Tribe." CARES Act, Title V, Section 601(g). The phrase "recognized" is a key qualifier. *See Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610, 616 (9th Cir. 2019) ("On its face, this phrase ["recognized as eligible by the Secretary" in IGRA] means that the *Secretary* must recognize an Indian tribe as eligible for special programs and services. And, . . . the significance of Secretarial recognition . . . means that a tribe is federally recognized and that it appears on the Secretary's annual list.").

The Secretary has published his list of recognized tribal governments in Alaska for purposes of the ISDEAA in the "Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Contracts," stating that:

[f]or the purposes of contracting under Pub. L. 93-638 [the ISDEAA], the Alaska Area will **recognize as the village governing body** [alternatively referred to as the "**tribal governing body**" throughout the Guidelines] the following entities in order of precedence:

If there is an Indian Reorganization Act (IRA) Council, and it provides governmental functions for the village, it will be recognized.

If there is no IRA Council, or it does not provide governmental functions, then the traditional village council will be recognized.

If there is no IRA Council and no traditional village council, then the village profit corporation will be recognized.

If there is no IRA Council, no traditional village council, and no village profit corporation, then the regional profit corporation will be recognized for that particular village.

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46 Fed. Reg. 27,179 (May 18, 1981) (the “ISDEAA Governing Body List”). The federal government has long relied on this list. *See Ukpeagvik Inupiat Corp. v. U.S. Dep’t of Health & Human Servs.*, No. 3:13-CV-00073-TMB, 2013 WL 12119576 (D. Alaska May 20, 2013) (“pursuant to the ‘Alaska Area Guidelines for Tribal Clearances for Indian Self-Determination Contracts’ (the ‘Guidelines’), DHHS defers to resolutions of a village’s governing body, rather than resolutions of village corporations”); *Cook Inlet Native Ass’n v. Bowen*, 810 F.2d 1471, 1476–77 (9th Cir. 1987) (“The agencies have established priorities for determining the governing body of a tribe from the eligible, competing entities. These priorities have been followed since 1977, and are consistent with the administrative interpretation of the Self-Determination Act’s definition of “tribe.”) (citing Fed. Reg. 27179 (May 18, 1981)). The ISDEAA Governing Body List makes clear that it is the villages—not the ANCs—who are “tribal governing bodies.”¹

As the Arctic Slope Regional Corporation (the largest of Alaska’s twelve regional corporations) explained in its “Comments to Notice 2012-75: Proposed Revenue Procedure to Address the Application of the General Welfare Exclusion to Indian Tribal Government Programs Providing Benefits to Tribal Members,” although it would qualify as an “Indian Tribe” if defined as the CARES Act defines it,² it would **not** qualify as a “tribal government” if defined as “the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary [of the Treasury], after consultation with the Secretary of the Interior, to exercise governmental functions.” Specifically:

The tribal entities on the North Slope, not ASRC, are the entities recognized by the Department of Interior as having government functions. *See* 78 Fed. Reg. 26384-89 (May 6, 2013). In other words, a governing body of Alaska Natives would constitute an Indian tribal government, but an Alaska Native Corporation would not because it does not exercise governmental functions.

Notice 2012-75 DYSON, 2013 WL 3096205, at *2.

Courts too have held that ANCs are not “governing bodies.” *See, e.g., Seldovia Native Ass’n v. Lujan*, 904 F.2d 1335, 1350 (9th Cir.1990) (“Unlike the Native Alaskan Villages in *Native Village of Noatak v. Hoffman*, SNA [Seldovia Native Association] is not a governmental unit with a local governing board organized under the Indian Reorganization Act, 25 U.S.C. §§ 461–479 (1982). Because SNA is not a governing body, it does not meet one of the basic criteria of an Indian tribe.”); *Pearson v. Chugach Gov’t Servs. Inc.*, 669 F. Supp. 2d 467, 469 n.4 (D. Del.

¹ The United States itself has described Alaska Native Corporations as having “limited tribal status” under the ISDEAA. *Ukpeagvik Inupiat Corp. v. U.S. Dep’t of Health & Human Servs.*, No. 3:13-CV-00073-TMB (D. Alaska), United States Response in Opposition to Motion for Preliminary Injunction, Dkt. 22 at 19.

² Notice 2012-75 adopted this definition of “Indian tribe” from 26 U.S.C. § 45A: “[A]ny Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village, or regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”

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2009) (“ANCs are not federally recognized as a ‘tribe’ when they play no role in tribal governance.... [T]he Court can find no evidence to suggest, that they are governing bodies”).

This treatment aligns with how ANCs are treated elsewhere in federal law. For example, the FEMA regulations governing public assistance availability define “Indian Tribal government” as:

any federally recognized **governing body** of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Tribe List Act of 1994, 25 U.S.C. 479a. **This does not include Alaska Native corporations, the ownership of which is vested in private individuals.**

44 C.F.R. § 206.201; *see also* 44 C.F.R. § 206.222 (listing as eligible to apply for assistance under the State public assistance grant “Indian tribes or authorized tribal organizations and Alaska Native villages or organizations, but not Alaska Native Corporations, the ownership of which is vested in private individuals”).

While we acknowledge that some ANCs do perform some services to tribal governments through specific ANC-tribal agreements, these contractual services do not constitute governance. We respect any ANC-tribal agreements and the important resources, programs, and services that they address, however, using such agreements to satisfy the definition of “tribal government” is inconsistent with the both the letter and the spirit of the CARES Act's tribal stabilization provisions. Instead, allowing tribal governments to allocate and distribute CARES Act stabilization funding pursuant to these agreements would be both consistent with CARES Act requirements as well as the federal government’s trust obligations to tribal nations. Further, as we mention above, including ANCs would result in double and triple counting various factors, defeating the statutory directive of Title V and Congressional intent to equitably distribute funds to all tribal governments to stabilize their governmental services.

II. Congress Intended that Title V CARES Act Funds Go Only to Entities That Provide Governmental Functions

The Act directs that amounts paid to “Tribal governments” be “based on increased expenditures of each such **Tribal government (or a tribally-owned entity of such Tribal government)** relative to aggregate expenditures in fiscal year 2019 by the **Tribal government (or tribally-owned entity)**” and determined in such manner as to ensure that the entire \$8 billion appropriation is “distributed to **Tribal governments.**” CARES Act, Title V, Section 601(c)(7).

This language is not limited to 601(c)(7)—Section 601 repeatedly and plainly states the intended target of Tribal allocations from the Coronavirus Relief Fund:

- Sect. 601(a)(1): “Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for **making payments to ... Tribal governments**”
- Sect. 601(a)(2)(B): “\$8,000,000,000 ...for **making payments to Tribal governments.**”

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- Sect. 601(b)(1): “not later than 30 days after the date of enactment of this section, the Secretary **shall pay each ... Tribal government ... the amount determined for the ... Tribal government ... for fiscal year 2020 under subsection (c)**”
- Sect. 601(d): “A ...**Tribal government** ... shall use the funds provided under a payment made under this section to cover only those costs of the ... **Tribal government**”

Tellingly, the legislative history of the CARES Act is completely devoid of mention of ANCs. Instead, the Congressional record is replete with distinctions made between relief to corporations and relief to governments. Furthermore, all references to the intent of the \$8 billion set aside for tribes was to fund their governmental services—something ANCs do not do. The below excerpts from the Congressional record demonstrate that Congress’s intent was to direct the funds to tribal governing bodies that provide governmental services:

- In an April 1, 2020 letter from Senator Martha McSally of Arizona and Steve Daines of Montana to the Secretary of the Treasury Department and the Secretary of the Department of the Interior, they state: “Indian Country faces among the nation’s most dire of circumstances. Congress understands this and that is why Title V of the CARES Act amends the Social Security Act to create a Coronavirus Relief Fund and reserves \$8 billion within the Fund for payments to **Tribal governments** to use for expenditures incurred due to the COVID-19 public health emergency. For many tribes, revenue from tribally owned businesses provides the vast majority of operating revenue for **government services** such as healthcare, law enforcement, and public safety programs. The pandemic has forced many of these enterprises to close or drastically reduce operations, decimating the funding source tribes use to provide the very **government services** necessary to respond to the crisis. ... [W]e must ensure tribal-state parity- that tribal governments are eligible for all the same support and relief we give to state governments, on the same terms- and to tailor our implementation guidance to the unique posture of Indian Country. Emphatically, Congress’ intent in the CARES Act was to get relief dollars into the hands- and accountable discretion-of state, local and tribal governments best positioned to determine how to devote those dollars to meet the **needs of their citizens.**”
- From the floor Colloquy on the CARES Act in the House, Congressmen David Joyce (R-OH) and Tom Cole (R-OK) stated as follows:
 - “I became keenly aware of the need to mitigate the hardships that this pandemic has caused for Tribal governments who have to rely on business revenues – rather than taxes – to fund essential services for their Tribal Members.” – Congressman David Joyce (R-OH)
 - “A key part of the relief package was the tribal government stabilization fund. This fund would be used by tribal governments to offset the dramatic losses they are facing at this time.” – Congressman Tom Cole (R-OK)

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- In the March 25, 2020 legislative session on the CARES Act, Minority Leader Chuck Schumer separated his commentary when it came to governments and corporations in his enumerated description of the five “major components of the bill.” The fourth component was “resources for State, local, and Tribal governments that are carrying the weight of their overburdened health networks on their budgets. . . . [L]ocal governments are hurting. They are spending more money than they have ever spent and at the same time their tax revenues have declined. So we must help our local governments, and we will in this legislation. It will be distributed between both the local governments, county governments, and the State. In the end, State and local governments will now get \$150 billion, with \$8 billion set aside for Tribal governments.” The other four major components—as distinguished from the governmental component—were (1) “a Marshall Plan for the American medical system,” (2) a “workers first” approach to “unemployment insurance on steroids,” (3) “oversight, transparency, and accountability of all loans made to corporations,” and (4) “urgent help for small businesses.” 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2022-04, S2026-27.
- In the same legislative session, Senator Tom Udall of New Mexico—who is vice chair of the Senate Indian Affairs Committee—also made a corporate/ government distinction: “Relief is on the way: relief to American workers . . .; relief to our hospitals and frontline healthcare workers . . .; and relief to State and local governments . . . and Tribal governments to whom we owe trust and treaty obligations to provide healthcare, education, and community assistance, particularly in times of need.” 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2022-04, S2041.

Udall specifically described the intent of the CARES Act with respect to tribes: “Together, with my Democratic colleagues, I fought for and secured an \$8 billion set-aside for Tribal governments and their enterprises. This Tribal Relief Fund will provide the **574 federally recognized Indian Tribes** with flexible resources-resources they need during the COVID-19 response, and I am glad we found bipartisan agreement on this.” 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2022-04, S2041-42.

- In the same session, Senator Maria Cantwell of Washington State made the same distinctions, stating that “[i]t is so important that we give State and local governments and Tribes the resources they need to be on the frontlines in fighting this disease,” and then separately describing specific titles of the CARES Act geared to help corporate interests. 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2022-04, S2025.
- In the same session, Senator Cortez Masto of Nevada stated that “We made sure that we also included our local, State, and Tribal communities. We set aside \$150 billion for our **governments** that are bearing the brunt of the costs for their local healthcare systems.” 166 Cong. Rec. S2022-04, 166 Cong. Rec. S2022-04, S2045.
- In a March 27, 2020 speech in the House of Representatives, the Honorable Anna Eshoo of California explained that the \$150 billion relief fund was “to assist state, local, and tribal governments to maintain essential public services for their residents.” 166 Cong. Rec. E343-02, 166 Cong. Rec. E343-02, E343.

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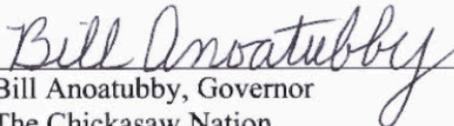
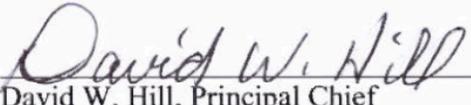
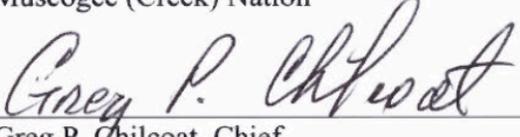
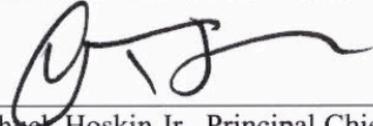
- A March 27, 2020 Congressional document “Memorializing the Intent of the Tribal Portion of the [CARES Act]” quotes Representative Tom Reed of New York: “I want to echo the remarks of my colleagues about the need for the Secretaries of the Treasury and Interior to incorporate into their analysis the unexpected costs of paying employees' wages and salaries along with the costs of maintaining facilities during closures of **tribal government** offices and enterprises.”

In sum, the CARES Act and Congress’s intent are clear: Title V funds must go to entities providing *governmental services*. We urge you to quickly implement a distribution formula that fulfills this statutory directive.

We also request that immediately upon disbursement of Title V funds, Interior and Treasury each publish a list of every recipient under the \$8 billion set aside and the amount disbursed to the recipient.

Thank you for the opportunity to provide additional comments. If we can provide further technical assistance to you or your staff, please contact Kim Teehee at: kim-teehee@cherokee.org or (202) 615-9505.

Sincerely,

 Bill Anoatubby, Governor The Chickasaw Nation	 David W. Hill, Principal Chief Muscogee (Creek) Nation
 Gary Batton, Chief Choctaw Nation of Oklahoma	 Greg P. Chilcoat, Chief Seminole Nation of Oklahoma
 Chuck Hoskin Jr., Principal Chief Cherokee Nation	