AIGA
ARIZONA INDIAN GAMING ASSOCIATION
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April 17, 2020

VIA E-MAIL ONLY
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The Honorable Steven Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable David L. Bernhardt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: CARES Act; Coronavirus Relief Fund Distribution; Objection to ANCs Participation

Dear Secretary Mnuchin and Secretary Bernhardt:

The Arizona Indian Gaming Association ("AIGA") writes to urge that the U.S. Department of the Treasury ("Treasury") exercise its authority under Title V, Section 5001 ("Title V") of the recently passed Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), to ensure that the Coronavirus Relief Fund ("CRF") is disbursed to bona fide Tribal governments and not Alaska regional or village corporations ("ANCs").

Congressional intent of the CARES Act is clear that it was intended to be limited to federally recognized Indian tribes – not ANCs. Title V, Section 5001 of the CARES Act amended the Social Security Act to add a new Title VI, Section 601, establishing the CRF. Congress' establishment of the CRF 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."

The AIGA is concerned about the Administration's interpretation of what is a "recognized governing body," as it pertains to Tribal governments under the CARES Act. AIGA 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)]," and that "Indian Tribe" also appears in the more narrow definition of "Tribal Government" in Title V. However, AIGA disagrees that the two terms are interchangeable for the following reasons.

"Where 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 the disparate inclusion or exclusion."[1] 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, Congress 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. Finally, with respect to statutory interpretation, a fundamental canon of construction is that "Congress said what it meant."[2]

As noted above, "Tribal government" is defined in Title V 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."

Congress cannot have intended this definition to also mean that a corporate board of a state-chartered corporation also qualifies as a "recognized governing body" of an "Indian Tribe" for two reasons. First, and as stated above – there would be no need for an alternative definition if the two terms, "Indian Tribe" and "Tribal government", effectively meant the same thing. Second, and more importantly, each reference to "Tribal government" throughout Title V appears beside and in the same context as other political governing entities that exercise varying degrees of inherent sovereignty: "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."[4]

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. Constitution[5] -- *i.e.*, "Indian tribes" under the Constitution, or "Tribal governments." AIGA 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,[6] for an easily accessible list of qualifying "Tribal governments" (List of Federally Recognized Indian Tribes).

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[1] 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)).
[2] United States v. LaBonte, 520 U.S. 751, 757, 117 S. Ct. 1673, 1677, 137 L. Ed. 2d 1001 (1997).
[3] Section 601(g)(5).
[4] *See*, CARES Act, Section 601(a) generally.
[5] U.S. CONSTIT. Art. I, Sec. 8, Cl. 3.
[6] 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).

Notably, ANCs do not have recognized governing bodies, since they are corporate entities incorporated under Alaska state law, and are therefore, absent from the List of Federally Recognized Indian Tribes.

Further, in examining legislation, "AIGA must presume that the legislation intends that its pronouncements will operate fairly, reasonably and equitably."[7] 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. Any other interpretation would be unreasonable and would operate unfairly and inequitably.

AIGA 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. Alaska Native villages are tribal governments; and state-chartered ANCs are not.[8] The State of Alaska acknowledges that Alaska Native villages are the bona fide tribal governing entities within their jurisdiction, and that the Alaska Native Claims Settlement Act ("ANCSA") did not divest them of their sovereign authority as Tribal governments.[9] Finally, the Federal Government clarified this exact understanding in the Federally Recognized Tribe List Act of 1994 (1994 List Act),[10] which does not include ANCs but does include Alaska Native villages.[11]

Also, ANCs do not have tribal citizens, but instead have shareholders – most of which are tribal citizens of their own Tribal governments where they are enrolled. If Treasury interprets ANCs as eligible for CRF disbursements intended for Tribal governments, many Alaska Native tribal citizens will be counted for CRF disbursement purposes as shareholders of their respective Alaska regional or village corporation ***and*** as tribal citizens of their tribal governments.

There are 13 Regional ANCs and over 200 Village ANCs. Alaska Natives 49 years old or older typically have shares in both a regional corporation and a village corporation. Many younger Alaska Natives have shares by bequest or transfer. While AIGA takes no issue with any American Indian or Alaska Native individual receiving the utmost benefits from the federal government, where there is a limited CRF resource, such benefits should be disbursed in as fair a manner as possible and the system for determining disbursements should not be prone to counting individuals

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[7] Crawford, Earl. "Statutory Construction: Interpretation of Laws," Thomas Law Book Co. 455 (1940).
[8] *See*, *e.g.*, Letter from Chief Michael Williams, Sr., Akiak Native Community, to David Bernhardt, Secretary of the Interior, and Steven Mnuchin, Secretary of the Treasury Department, (Apr. 15, 2020).
[9] *See* John v. Baker, 982 P.2d 738 (Alaska 1999); See also, e.g., McCrary v. Ivanof Bay Vill., 265 P.3d 337, 342 (Alaska 2011) (Alaska Native village was federally recognized Indian tribe); Healy Lake Vill. v. Mt. McKinley Bank, 322 P.3d 866, 867 (Alaska 2014); State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska, 371 P.3d 255, 259 (Alaska 2016); Simmonds v. Parks, 329 P.3d 995, 999 (Alaska 2014).
[10] Federally Recognized Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791, 4792) (1994).
[11] *See*, *e.g.*, 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).

multiple times. For these reasons, AIGA strongly urges Treasury to follow the law, as enacted, and disburse the CRF to only Tribal governments, as recognized under the U.S. Constitution.

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."[12] This bedrock principle of federal Indian law is rooted in the federal government's trust responsibility to sovereign tribal governments, and extends to statutes, treaties, agreements, and executive orders.[13]

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.[14]

ANCs established pursuant to ANCSA do not possess such a government-to-government relationship with the United States. For these reasons, AIGA urges Treasury to listen to tribal leaders and draw a distinction between the terms "Indian Tribe" and "Tribal government" as described above and as intended by Congress.

Based on the foregoing, AIGA urges Treasury to exclude ANCs from any distribution under the CRF.

Sincerely,

Gwendena Lee-Gatewood, Chairperson
Arizona Indian Gaming Association

[12] Montana v. Blackfeet Tribe, 471 U.S. 759, 766-67 (1985).
[13] Newton, Nell Jessup, et al. Cohen's Handbook of Federal Indian Law, § 2.02[1] – § 2.02[2], pp. 126-127 (2012 ed.).
[14] Id.