

# What The CARES Act Means For Tribes

By **Michael Connor, Ken Salazar, Tom Strickland, Raya Treiser, Daniel Volchok and Chris Babbitt** (April 17, 2020)

On March 27, the Coronavirus Aid, Relief, and Economic Security, or CARES, Act was signed into law, setting in motion the distribution of funds and other relief mechanisms to counteract the economic fallout from the coronavirus pandemic.

The legislation contains several provisions to address the unique and disproportionate impacts of the pandemic in Indian Country. These involve a number of measures that include American Indian tribes within the range of entities eligible for relief (e.g., the \$454 billion of authorized spending by the U.S. Department of the Treasury for loans, loan guarantees, and other investments to benefit distressed businesses, states, municipalities and tribal nations).

More specifically, however, are provisions that set aside a specific amount of funding to support tribal governments as they respond to and manage the significant costs and related impacts associated with COVID-19.

The following discussion identifies the current status of implementation efforts related to these measures and important considerations to keep in mind due to oversight requirements in the CARES Act.

## Coronavirus Relief Funds for Tribal Governments

Title V of the CARES Act provides for \$150 billion in aid to states, tribal governments and units of local government. Of that amount, \$8 billion in aid is expressly dedicated for payments to tribal governments, with such funds to be disbursed not later than 30 days after the date of enactment.[1]

There are 573 federally recognized Native American tribes in the United States and the amount available for each tribe is still to be determined. On this point, the act states that the amounts paid will be determined by the secretary of the treasury in consultation with the secretary of the U.S. Department of the Interior and Indian tribes. Treasury and Interior initiated consultation sessions with tribes and took input through April 13 on the methodology to be used in allocating the \$8 billion.[2] In accordance with the act, the funding is to be distributed by April 26.

The act specifies that the use of Title V funding is for necessary expenditures that were (1) incurred to address the COVID-19 public health emergency; (2) not accounted for in the budget; and (3) incurred between March 1 and Dec. 30, 2020.

In making its determination on allocating available funds, key issues include (1) the formula that is the basis for the allocation; (2) the means for allocating the funds so that tribes can receive and use them as soon as possible; and (3) whether any guidance is provided on qualifying expenditures under the act. On this last point, as sovereign governments addressing the pandemic on many levels, tribes should have broad discretion to define necessary expenditures under the act.

In particular, tribes have been asserting that qualifying expenditures should include those costs necessary to maintain basic services and programs for tribal communities which are otherwise at risk due to lost revenues associated with the closure of tribal enterprises. This is a key issue since tribal governments lack a tax base and therefore rely on tribal-owned business entities to generate resources necessary to fund government operations. There is bipartisan support for this interpretation in the legislative history of the CARES Act, including specific statements from members of Congress supporting the use of relief funds for tribal employees and for tribal-owned entities, and to replace revenue lost as a consequence of the COVID-19 pandemic response.[3]

An expansive reading of qualifying expenditures under Title V of the act is critically important to tribes,



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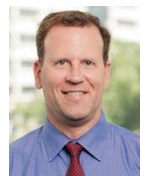
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particularly given the Small Business Administration's restrictive interpretation of the provisions authorizing \$349 billion for the Paycheck Protection Program. The SBA issued an interim final rule on April 2 that applied an existing regulation to the PPP that excludes tribal-owned casinos from program eligibility.[4] This interpretation eliminates a significant source of funding available to help alleviate the impact of COVID-19 on a primary tribal business and its employees, many of whom are tribal members.

Under any scenario, it will be important for tribal governments to take notice of the CARES Act's strong oversight authorities. Specifically, Title V of the act includes a section authorizing recoupment of distributed funds if the Treasury Department's inspector general determines that they were not used consistent with the act's definition of qualifying expenditures. Tribal governments will therefore need to be cognizant of any guidance provided by the Treasury Department in distributing the funds, and address that guidance and the act itself in developing and documenting their expenditure plans.

### **Emergency Appropriations for the Bureau of Indian Affairs**

The CARES Act also provides supplemental emergency appropriations to federal agencies to effectively respond to COVID-19. This includes an appropriation of \$453 million to the Bureau of Indian Affairs for operating Indian programs, which represents a 30% increase in the amounts available to BIA in the 2020 omnibus appropriations bill.

The funding is available through the end of fiscal year 2021 for the purpose of addressing direct tribal needs related to preparing for and responding to the coronavirus. Interior has not publicly disclosed how it intends to distribute these funds, but the act specifically authorizes distribution through tribal priority allocations in the budget and references the use of existing self-determination contracts and compacts under the Indian Self-Determination and Education Assistance Act. Unlike the coronavirus relief funds, there are no specific oversight and recoupment provisions related to the emergency appropriations. Nonetheless, the general oversight provisions apply.

### **Emergency Appropriations for the Indian Health Service**

In addition to the BIA, the CARES Act provides supplemental appropriations to the Indian Health Service, or IHS, in the amount of \$1.032 billion. This money is available through the end of fiscal year 2021 for preparing for and responding to the coronavirus outbreak. This funding is in addition to approximately \$214 million made available to the IHS and the U.S. Centers for Disease Control and Prevention in the prior COVID-19 relief bills[5] to support tribes and tribal organizations as they respond to coronavirus in American Indian and Alaska Native communities.

According to an April 3 letter from the principal deputy director of the IHS to tribal leaders, distribution decisions have already been made for \$600 million of the CARES Act supplemental appropriations, as follows: (1) \$30 million for urban Indian organizations pursuant to existing Indian Health Care Improvement Act contracts; and (2) \$570 million to IHS federal health programs (i.e., IHS-operated service units) and tribal health programs through existing agreements under the Indian Self-Determination and Education Assistance Act.

Of the remaining \$432 million, the IHS will use \$65 million for electronic health-record stabilization and support as contemplated in the act and will allocate the remaining \$367 million by late April following consideration of comments provided by tribal leaders and urban Indian organizations.

With respect to oversight, the IHS has made clear that the funds provided to tribal health programs must be used consistent with the purposes for which they were appropriated, and that those tribal health programs should immediately notify the IHS if they are unable to comply.

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[1] CARES Act, Pub. L. No. 116-136, Section 5001.

[2] Letter from Assistant Secretary - Indian Affairs to Tribal Leaders (March 31, 2020); Comments were to be submitted to [consultation@bia.gov](mailto:consultation@bia.gov) or [tribal.consult@treasury.gov](mailto:tribal.consult@treasury.gov)

[3] 166 Cong. Rec. E342-E347 (daily ed. March 31, 2020) (Statements of Reps. Kildee; Cole; Gallego).

[4] Congressional Research Service, The Cares Act, Implications for Tribes (April 9, 2020).

[5] Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123 (March 6, 2020); Families First Coronavirus Response Act, Pub. L. No. 116-127 (March 18, 2020).