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COVID-19 RESPONSE AND RECOVERY POLICY BRIEFS

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Federal COVID-19 Response Funding for Tribal Governments: Lessons from the CARES Act

by

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I. The CARES Act

The federal response to the COVID-19 pandemic has played out in varied ways over the past several months. For Native nations, the CARES Act (i.e., the *Coronavirus Aid, Relief, and Economic Security Act*) has been the most prominent component of this response to date. Title V of the Act earmarked $8 billion for tribes and was allocated in two rounds, with many disbursements taking place in May and June of this year.

This federal response has been critical for many tribes because of the lower socio-economic starting points for their community members as compared to non-Indians. Even before the pandemic, the average income of a reservation-resident Native American household was barely half that of the average U.S. household. Low average incomes, chronically high unemployment rates, and dilapidated or non-existent infrastructure are persistent challenges for tribal communities and tribal leaders. Layering extremely high coronavirus incidence rates (and the effective closure of many tribal nations' entire economies[2]) on top of these already challenging circumstances presented tribal governments with a host of new concerns. In other words, at the same time tribal governments' primary resources were decimated (i.e., the earnings of tribal governmental gaming and non-gaming enterprises dried up), the demands on tribes increased. They needed these resources to fight the pandemic and to continue to meet the needs of tribal citizens.

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[2] See Akee, Randall K.Q., Eric C. Henson, Miriam R. Jorgensen and Joseph P. Kalt, *Policy Brief No. 1: The Need for a Significant Allocation of COVID-19 Response Funds to American Indian Nations*, Harvard Project on American Indian Economic Development and Native Nations Institute, May 18, 2020.

As in the rest of the U.S., emergency and interim support from the CARES Act (and to a lesser extent, related COVID-19 stimulus funding) has helped to dampen the social and economic harm of the COVID-19 crisis in Indian Country. This is in spite of the fact that the assistance was delivered to the 574 federally recognized Indian tribes only after considerable litigation-driven delay, with counterproductive strings attached, and in a context characterized by long-standing federal government under-funding and neglect.[3]

II. Lessons from the CARES Act

In the course of our ongoing work in Indian Country, we have been fortunate to hear from a number of tribes about the allocation and distribution of CARES Act funds. Tribal leaders have been quick to commend the federal government for carving out funds specifically to assist Native nations and are appreciative that funding was largely directed to tribal governments. For a number of tribes, the disbursement also represented a substantial amount of money.[4] Even so, these funds were insufficient to overcome the combined blow to tribal governments' budgets from economic stoppages and from the additional expenditures necessary to combat COVID-19. Furthermore, problems with the federal government's CARES Act funding disbursement processes and a lack of clarity as to how the funds may be used have substantially diminished the overall efficacy of the legislation.

Congress now is considering legislation that will bring another round of pandemic-related funding to tribes. This possibility focuses attention on the lessons learned from the CARES Act – lessons that might enhance the upcoming legislation, maximize positive outcomes in Indian Country, and save the federal government the expense, delay, and frustration of litigation. In our view, three key lessons serve as guidelines for the next round of legislation:

1. Replace the tribal on-reservation population measure employed in the original CARES Act allocation formula with a measure of the total number of tribal citizens;
2. Permit greater leeway in the timeframe over which relief funds are to be spent; and,
3. Allow tribal governments extensive flexibility in their use of COVID-19 relief funds.

We discuss these recommendations in turn below.

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[3] U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018.

[4] This was not the case in every instance, as discussed in more detail below, particularly in the round of CARES Act funding tied to tribal population measures.

A. Replace the Population Measure Employed for Allocating Funds

In early May 2020, the Treasury Department indicated that it would disburse CARES Act funding for Indian Country in two rounds, and that in the first round it would use a measure of tribal populations to allocate 60% of the funds intended for tribal governments.[5] As discussed in our *COVID-19 Response and Recovery Policy Brief No. 3*, the use of population is a reasonable and sensible way in which to allocate a substantial portion of relief funds that are targeted to overcoming the hardships that accompany the pandemic.[6]

To conduct its allocation of the first $4.8 billion of the CARES Act funds, the U.S. Treasury Department chose to employ a data series acquired from the Indian Housing Block Grant (IHBG) program administered by the Department of Housing and Urban Development. Of note, the data series was designed to support the allocation of federal housing expenditures aimed at improving housing for low-income American Indians and Alaska Natives living on reservation. These data focus on the racial make-up of the residents of reservations and related tribal areas, yielding a "population count" consisting of those residents who self-identify to the U.S. Census Bureau as either solely American Indian/Alaska Native (AIAN) or as AIAN in combination with one or more additional racial categories.

As underscored in our *COVID-19 Response and Recovery Policy Brief No. 2*, however, the IHBG population data are not appropriate for allocating federal funding that is explicitly aimed at combatting the coronavirus by supporting the economic stability and operations of tribal governments.[7] The U.S. Department of the Treasury's use of IHBG population data in allocation of CARES Act funding disregarded the fact that tribes are sovereign governments with populations of, and responsibilities to, both resident and non-resident citizens. This resulted in a demonstrably and grossly arbitrary allocation of CARES Act funds to some tribes.[8] Upcoming federal legislation intended to support tribal governments' responses to the pandemic should employ verified counts of tribes' *citizens.*

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[5] See, e.g., Law360 at https://www.law360.com/articles/1270490/treasury-to-send-tribes-4-8b-chunk-of-covid-19-funding, accessed July 23, 2020.

[6] Akee, Randall K.Q., Eric C. Henson, Miriam R. Jorgensen & Joseph P. Kalt, *Policy Brief No. 3, Proposal for a Fair and Feasible Formula for the Allocation of CARES Act COVID-19 Relief Funds to American Indian and Alaska Native Tribal Governments*, Harvard Project on American Indian Economic Development and Native Nations Institute, May 22, 2020.

[7] Akee, Randall K.Q., Eric C. Henson, Miriam R. Jorgensen & Joseph P. Kalt, *Policy Brief No. 2, Dissecting the US Treasury Department's Round 1 Allocations of CARES Act COVID-19 Relief Funding for Tribal Governments*, Harvard Project on American Indian Economic Development and Native Nations Institute, May 18, 2020.

[8] In fact, tribes such as the Shawnee Tribe and the Prairie Band Potawatomi Band Nation sued Treasury because they were either counted as having zero population (Shawnee) or demonstrably undercounted (Prairie Band) in the IHBG data series.

B. Permit Greater Leeway in the Timeframe over which Relief Funds Are to Be Spent

The spread of the coronavirus across Indian Country and the U.S. is unpredictable, both in terms of geography and timeline. Without warning, new hot spots emerge daily and media outlets share grim predictions of the continued spread well into fall 2020 and winter 2021. Compounding COVID-19 fears and relief efforts are forecasts of a grueling flu season.

Given the immense need in Indian Country and the unpredictability of the virus, it is wholly unrealistic and counterproductive to expect tribes to spend the CARES Act funds by December 31, 2020. Tribal nations need leeway in the timeframe to responsibly craft and execute plans and to spend the funds in ways that will create the most benefit and relief for their citizens, communtities, and regions.[9] While some investments can be made rapidly and immediately, others cannot.

For example, tribes are faced with redesigning many of their tribal enterprise facilities, such as casinos, to make them safer for patrons and employees. Not only do casino floors need to be redesigned for social distancing, but their ubiquitous buffets need to be transformed into table service restaurants. Activity on this scale requires time for planning, engineering, procurement, and construction management. The same principle holds for investments in water systems, health facilities, housing, roads, and broadband networks. If relief monies are to be spent responsibly and effectively, tribes should be allowed adequate time to do so.

Additionally, many tribes operate seasonal enterprises and may need to match COVID-19 related spending to the off-season decline of enterprise revenue. As the winter season approaches and temperatures dip, heating and energy expenses will climb. This will place still greater strain on tribal governments' budgets, especially if tribes find it necessary to heat more or larger spaces to sustain social distancing in schools, offices, and other workplaces.

Given these circumstances, to truly assist tribes as they respond to the coronavirus, a time-limited requirement for *budgeted obligation of funds,* as opposed to full expenditure, is appropriate for any additional funds deployed to Indian Country. Moreover, a legislative fix of the CARES Act that pushes the original December 31, 2020 deadline *and* adopts the language of "budgeted obligation" would best assist tribal governments in responding to the current pandemic and to develop resilience against future crises.

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[9] Legislation is being considered to extend the deadline by two years, to the end of 2022 (see The Hill, *Lawmakers seek extension for tribes to spend stimulus money*, at https://thehill.com/policy/energy-environment/overnights/508409-overnight-energy-20-states-sue-over-trump-rule-limiting, accessed July 23, 2020).

C. Allow Flexibility in the Use of Funds

COVID-19 has revealed the impact of decades of underinvestment in Indian Country by the federal government. The needs are monumental and urgent. To realize the intended impact of federal stimulus spending in Indian Country, the federal government must afford tribal nations broad flexibility in the use of the funds. Decades of experience and research demonstrate that federal policies of tribal self-determination through tribal self-government work. Overall, Native nations do better when they are in the decision-making driver's seat. The implication is that COVID-19 response and recovery funds will be most productively used if tribes have the flexibility to make spending decisions in accord with their own priorities and capacities.[10] In fact, not only will greater flexibility benefit tribes themselves, but because tribal governments and enterprises serve as regional economic engines, other jurisdictions will benefit as well.[11] New legislation should extend the scope of permissible tribal government spending of federal coronavirus relief dollars to at least three broad areas.

Replacing Lost Governmental Revenues. Current CARES Act requirements are, at best, ambiguous when it comes to determing what qualifies as a pandemic-created cost for tribes. As a result, tribes are left to struggle with how to address lost tribal government revenue from the shuttering of tribal enterprises, many of which have yet to reopen. As noted in our *COVID-19 Response and Recovery Policy Brief No. 1*, in this era of tribal self-government, tribes have responsibilities for providing the full array of basic governmental services that we normally expect of state and local governments.[12] Yet, because tribal nations do not have the same opportunities to generate tax revenues that state and local governments do, tribes must rely on revenues from their business enterprises to fund their services and operations. Without revenues from their enterprises, tribal nations are either forced to dip into their reserves or are simply unable to provide basic services to their citizens.

In addition, tribal nations should be able to offer hazard pay to essential workers, including health care workers, educators, grocery clerks, gas station attendants, and the like. Beyond essential workers, it is critical that tribes also have the ability to keep employees on their payrolls, even if those employees do not work directly in health-related fields. By keeping workers paid, employees maintain their healthcare insurance coverage and incomes, and salary dollars

[10] For a summary, see Henson, Eric, Megan M. Hill, Miriam R. Jorgensen and Joseph P. Kalt, *Policy Brief No. 4, Emerging Stronger than Before: Guidelines for the Federal Role in American Indian and Alaska Native Tribes' Recovery from the COVID-19 Pandemic*, Harvard Project on American Indian Economic Development and Native Nations Institute, July 24, 2020.

[11] See Akee, et al., Policy Brief No. 1…, op. cit.

[12] Ibid.

continue to circulate in local economies, contributing to the economic survival of the regions in which tribes are embedded.

Physical Infrastructure. Tribal citizens' health and wellbeing, and tribal nations' economic recoveries, are directly tied to physical infrastructure. Decades of underinvestment in water and sewer systems, housing, broadband, electricity service, etc., have created a situation in which some of the highest rates of COVID-19 infection across the U.S. are found on tribal lands.[13] Without ready access to quality water systems, tribal citizens cannot ensure the sanitation standards necessary to protect against infection. Without adequate Internet access, private and public sector employees living in Indian Country cannot engage in telework, and telemedicine is difficult, if not impossible. Without appropriate housing options, quarantine and isolation of infected individuals are not viable public health strategies. Without multipurpose tribal community buildings, local employers and local schools cannot provide socially distanced options for a safe return from lockdown. And without a clear option to build permanent structures for emergency, ambulatory, and inpatient healthcare, Native nations are hampered in their efforts to respond appropriately and quickly to ongoing COVID-19-related healthcare needs. Consequently, the spending rules in any further coronavirus relief or stimulus legislation should be broad enough and flexible enough to support needed infrastructural replacement, expansion, and upgrades.

Governmental Infrastructure. As with spending on physical infrastructure, wide scope should be provided for tribes to invest COVID-19 relief funds in their basic governmental infrastructure. Tribes vary in their positions along the path of building and rebuilding their governmental institutions in the current era of federal policies of tribal self-determination through self-government.[14] Nevertheless, we can see in various cases the highly positive payoffs that arise when a tribal government has the resources needed to build basic administrative, regulatory, and policymaking capacities.

Consider, for example, the "COVID-19 Respond, Recover and Rebuild" plan quickly set into motion by the Cherokee Nation (which shares a geography with the state of Oklahoma). This strategy includes health, economic, education, and workforce investments, as well as direct grants to community organizations and non-tribal emergency-response partners who are working to help Cherokee Nation citizens through the crisis. As Cherokee Principal Chief Chuck Hoskins, Jr. has explained:

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[13] Akee, Randall K.Q., Nicolás E. Barceló, Stephanie Russo Carroll, and Desi Rodriguez-Lonebear, "American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic," *Journal of Public Health Management and Practice*, July/August 2020.

[14] See Henson, et al., Policy Brief No. 4, op. cit.

> "All of these new federal dollars come on top of tribally funded initiatives the Deputy Chief, the Council, and I were working on before the pandemic hit… Prudent budgeting and the right priorities mean that these funds are still available to repair elders' homes and improve Cherokee community buildings [despite the stresses caused by COVID-19]."[15]

Similarly, the Turtle Mountain Band of Chippewa (which shares a geography with the state of North Dakota) announced a clear allocation of CARES Act resources; the Band plans for 35% of CARES Act monies to be spent on reservation infrastructure, 19% on future COVID-19 preparedness, 13% on public health, 13% on food security, 12% on public safety, 5% on tribal member wellness, and 2% on economic development recovery.[16] Even in the midst of a crisis, such intentionality and transparency help ensure that funds are used strategically rather than reactively. This can only increase the likelihood that the funds will be deployed productively.

In our estimation, the critical factor underlying both these tribes' responses is administrative capacity. Leaders of the Northern Arapaho Tribe (which shares a geography with the state of Wyoming) appear to agree. Their plan allocates $5.275 million in CARES Act aid to housing, utility costs, and food assistance for tribal citizens; $1M to elder assistance, including infrastructure and safety improvements to elder facilities; $1M to assistance to meet students' remote learning technology needs; $1.5 million to startup expenditures for a new USDA-certified meat processing plant that will employ tribal members and support food sovereignty; $4.5M to public health improvements including water, sewer, and HVAC updates to reduce the spread of COVID-19; $1M to the Wind River Family, Community, and Healthcare Center, especially facilities to isolate and treat COVID-19 or other patients with high communicable diseases; and $3.2M to a contingency fund to support unanticipated expenses. But the Northern Arapaho Tribe does not expect to be able to manage these ambitious, wide-ranging, and sorely needed projects using its pre-existing administrative infrastructure: it has also allocated $1.5M to the creation of a COVID-19 management team tasked with overseeing expenditures and project completion.[17]

Both the Confederated Salish and Kootenai Tribes of the Flathead Reservation (which share a geography with the state of Montana) and the Tohono O'odham Nation (which shares a geography with the state of Arizona) have taken related approaches. The former organized a "Unified Command Center" with Lake County, Montana, a non-tribal government with which the tribe has substantial overlapping jurisdiction. The two governments' strategic approach has been to use their cross-jurisdictional partnership to find comparative advantages, leverage resources,

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[15] Facebook at https://www.facebook.com/TheCherokeeNation/videos/1174906546217154/, accessed July 22, 2020.

[16] Facebook at https://www.facebook.com/ChairmanAzure/posts/3023109021075686, accessed July 22, 2020.

[17] Wyoming Public Media at https://www.wyomingpublicmedia.org/post/northern-arapaho-tribe-announces-spending-plans-federal-covid-19-aid#stream/0, accessed July 24, 2020.

share administrative burdens, and provide services. In the case of the Tohono O'odham Nation, the Tribe established a "Unified Command" across its Department of Public Safety, Department of Health and Human Services, and health services arm (Tohono O'odham Health Care, which manages several ambulatory care clinics and a hospital). This Unified Command is tasked with devising and managing the Nation's responses to the coronavirus, and with keeping both the tribal public and tribal leadership informed of their efforts and progress.[18]

While these are all excellent examples of smart tribal governance that other tribes might follow, decades of federal under-investment, as well as state and local governments' privileged access to traditional tax revenue streams, mean that many tribal governments' administrative capacities are stretched thin. In such a setting, having the flexibility to allocate federal funds to core administrative capacity needs are critical to tribes' abilities to address the pandemic and lay the foundations for addressing future challenges.

[18] Tohono O'odham Nation at http://www.tonhc.org/wp-content/uploads/2020/07/Leadership-Update22_7-7-20.pdf, accessed July 23, 2020.