



Self-Governance Communication & Education Tribal Consortium

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July 24, 2020

Chairwoman Catherine E. Lhamon
U.S. Commission on Civil Rights
1331 Pennsylvania Ave, NW Suite 1150
Washington, D.C. 20425

Re: SGCETC Comments - Assessing COVID-19 and the Broken Promises to Native Americans

Chairwoman Lhamon and Commissioners:

On behalf of the Self-Governance Communication and Education Tribal Consortium (SGCETC), thank you for convening a virtual public briefing on July 17, 2020. This forum provided the opportunity for Tribal Nations and Tribal Organizations to share their unique and life altering experiences during the coronavirus and their struggles to begin the recovery in a time of uncertainty.

The SGCETC is a non-profit, inter-Tribal organization that assists and advances the right of all Tribal Nations to pursue their inherent right to self-govern. In the absence of the Federal government honoring its trust and treaty obligations to American Indian and Alaska Native peoples, Tribes participating in Self-Governance have demonstrated that they are better at managing and forging their local agendas to better address and fulfil the needs of their Nations.

Tribal Nations have experienced the highest per-capita COVID-19 infection rate in the United States.¹ The vulnerability of American Indian and Alaska Native people to COVID-19 is a direct result of:

(1) The chronic underfunding of Indian programs and services by the Federal government and its disregard to honor the trust and treaty responsibilities to Tribal Nations are directly attributable to inadequate and overcrowded housing, a crisis in health equity including hospitals and healthcare clinics without sufficient staff or

¹Coronavirus Resource Center, COVID-19 United States Cases by County, Johns Hopkins University of Medicine, <https://coronavirus.jhu.edu/us-map>

supplies, lack of adequate drinking water and wastewater infrastructure in many Tribal communities, and limited to no access to reliable broadband; and,

(2) Federal management weaknesses in the administration of resources and programs intended for Tribal Nations and their citizens.

SGCETC supports the testimony provided during the briefing by Tribal Leaders and Tribal organizations. Chief Lynn Malerba, the National Congress of American Indians' President Fawn Sharp, Navajo Nation President Jonathan Nez, and the National Indian Health Board Chairman William Smith provided the USCCR with valuable insight into health disparities, infrastructure challenges that Tribal governments are facing, impacts resulting from Tribal Nations shutting down Tribal enterprises, and legislative priorities for Tribal governments. Geoffrey Blackwell provided USCCR with valuable insight into the lack of adequate broadband in so many Tribal communities.

SGCETC submits the following responses—focused primarily on USCCR's questions related to the Administration's response to the pandemic and recommendations for Congress—for your consideration.

USCCR Question: Has the Executive Branch's responses to the pandemic – including its statutory interpretation and administrative implementation of laws passed by Congress – done enough to help Native peoples cope with the challenges passed by Congress?

Federal promotion and support of Tribal sovereignty, self-determination and self-governance have been the basis of Federal Indian Policy for more than 50 years.² President Donald J. Trump proclaimed on October 31, 2018 that the Administration is “committed to the sovereignty of Indian nations—including the rights of self-determination and self-governance.”³ Yet, in its response to the COVID-19 pandemic, the Administration took some actions that:

(1) are contrary to fundamental principles of Self-Determination and Self-Governance—preventing Tribal Nations from using limited Federal resources to respond to the pandemic quickly, and,

²In 1970, President Nixon called for self-determination of Indian people without the threat of termination of the trust relationship over Indian lands. The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), as amended, has represented the cornerstone of the Federal Indian Policy. ISDEAA authorizes federally recognized Tribal nations to assume the administration of a variety of federal programs—or portions thereof—that were previously managed by the Department of the Interior (DOI) and the Indian Health Service (IHS). The U.S. Government Accountability Office reported in 2019 that Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decision, and administrative practice. See *Indian Programs: Interior Should Address Factors Hindering Tribal Administration of Federal Programs*, GAO-19-87.

³<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-national-native-american-heritage-month-2018/>

(2) undermine the sovereignty of Tribal Nations and hinder the inherent right of Tribal Nations to protect their citizens.

The Administration took actions that are contrary to fundamental principles of Self-Determination and Self-Governance—preventing Tribal Nations from using limited Federal resources to respond to the pandemic quickly in a manner that is responsive to local needs.

Some Federal actions prevented the Tribal governments from using funds quickly by imposing additional administrative restrictions that go beyond authorizing legislation and are contrary to Self-Governance principles. For instance, on April 13, 2020, DOI issued a “Dear Tribal Leader Letter” (DTLL) to announce that it decided, without Tribal consultation, how it would disburse funds authorized under the CARES Act to Tribal governments through its Aid to Tribal Government Program (\$380 million) and its Welfare Assistance Program (\$20 million). The DTLL stated that funds must be used “within the allowable confines of the program, function, service, or activity (PFSA) in which they are received.” However, the CARES Act, which authorized the resources, does not require that funds must only be used within the confines of these two programs that were administratively selected.⁴

Title IV of the ISDEAA significantly expanded the right of Tribal governments who choose to administer programs under a Self-Governance Compact to determine how program funds should be used to address the health and welfare of their communities, as long as the Congressional requirements of such funds are met. Tribal leaders requested that DOI reconsider its position that the “requirement” outlined in the April 13, 2020, DTLL does hinder the rights of Tribal governments that administer these programs through a Self-Governance agreement to reallocate the funds to any programs and activities authorized by the applicable provisions of the CARES Act.

On July 6, 2020, DOI released guidance stating it reversed its decision outlined in the DTLL (nearly three months after issuing its initial DTLL). We commend DOI for making this correction, but it is unfortunate that a Federal agency’s actions to incorporate limitations not found in the CARES Act potentially hindered Tribal governments from swiftly using crucial funds needed to address the ongoing pandemic in a manner consistent with local needs. For future relief funds, Federal agencies should not incorporate administrative limitations that are not found in COVID-19 relief funds legislation.

Despite overwhelming requests from Tribal leaders to disburse critical funds to Tribal governments through existing government-to-government agreements that almost all

⁴In the CARES Act, Congress appropriated \$453,000,000 to the DOI, Indian Affairs, Bureau of Indian Affairs to prevent, prepare for, and respond to coronavirus in Tribal communities. Congress designated that these funds can be used for public safety and justice programs, executive direction to carry out deep cleaning of facilities, purchase of personal protective equipment, purchase of information technology to improve teleworking capability, welfare assistance and social services programs (including assistance to individuals), and assistance to Tribal governments.

Tribal Nations have with the Federal government, some Federal agencies elected to administer resources through competitive grant mechanisms. For example, the Coronavirus Preparedness and Response Supplemental Appropriations Act directed CDC to distribute at least \$40 million in CDC funding to Tribal Nations and organizations. Tribal leaders urged the CDC to enter into an inter-agency agreement with the Indian Health Service (IHS) that would allow the CDC to transfer its funds to IHS along with direction on the amount of funding to distribute to a Tribal Nation through an existing Self-Determination and Self-Governance agreement established between the Federal government and a Tribal government. Based on decades of experience, Tribal leaders know that the IHS can expeditiously transfer funds to Tribal governments and, during an unprecedented crisis, wanted to use a proven and effective distribution method. Unfortunately, CDC claimed that it was legally unable to initiate the inter-agency transfer.

Instead, CDC acted unilaterally to route a portion of the funds through existing cooperative agreements with several Tribal organizations, with the remainder available directly to Tribal Nations via a grant mechanism. This action caused major delays in the distribution of critically needed funding, both because of the deliberations around this decision and the grant application process. Approximately four months later, Tribal Nations are now receiving notices of award for these funds.

Tribal governments appreciate all funding delivered to Indian country but disbursing funds through grant mechanisms rather than direct funding marginalizes and impedes the exercise of Self-Government because Tribal Nations have little flexibility to align resources with local needs. Rather than aligning limited resources with local needs, grants require Tribal governments to be subject to Federal agencies' priorities and preferences.

The Administration took actions that undermine the sovereignty of Tribal Nations and hinder the inherent right of Tribal Nations to protect their citizens.

Some actions by the Administration have sought to hinder the inherent right of Tribal Nations to protect their citizens. For example, on April 2, 2020, in direct response to the COVID-19 pandemic, the Cheyenne River Sioux Tribe established Health Safety Checkpoints on a highway that traverses through its lands to monitor the entry of individuals onto the Tribe's Reservation. The checkpoints are intended to track individuals that have returned to the Reservation from hotspots throughout both the state of South Dakota and other off-Reservation locations.

According to a complaint filed in the United States District Court for the District of Columbia, the Tribe's Health Safety Checkpoints became a political flashpoint in the state of South Dakota, resulting in the South Dakota Governor issuing an ultimatum to the Tribe to either remove the checkpoints or to be sued by the State. When the Tribe did not stop checking vehicles entering its lands, the State sought Federal government assistance through the White House and the Bureau of Indian Affairs (BIA) to force the Tribe to shut down the Tribe's Health Safety Checkpoints.

The Administration complied with the request from the State of South Dakota, and the BIA ignored its mission to support Tribal Self-Determination, Self-Governance, and sovereignty by threatening to withdraw the Tribe's law enforcement funding agreed upon in a Self-Determination agreement if it did not comply with the Governor's request. Nowhere in BIA's mission does it speak to protecting the interests of state governments and it is unfathomable that the BIA elected to threaten a Tribe's right to Self-Determination.

Actions by the Administration threaten the sovereignty of Tribal Nations by allowing for-profit corporations to be treated as Tribal governments. Through the CARES Act, Congress allocated \$8 billion of the Coronavirus Relief Fund (CRF) to help tribal governments—defined as “the recognized governing body of an Indian Tribe”—fight the COVID-19 pandemic. The U.S. Department of the Treasury (Treasury) has responsibility for administering these funds and it determined for-profit Alaska Native Corporations (ANCs) were eligible to be direct recipients of funds from the CRF. While ANCs do provide services to Alaska Native Tribal Nations and people, ANCs do not satisfy the definition of “Tribal government” in the CARES Act. In addition to not meeting the definition of tribal government in the CARES Act, the Federal Register Notice published on January 30, 2020 by the Bureau of Indian Affairs identifies “the current list of 574 Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.”⁵ The list of federally acknowledged Tribal Nations in the contiguous 48 states and Alaska does not include ANCs. Treasury's decision to allow for-profit corporations to be treated as the recognizing governing body of a nation not only diverts critical funds that Tribal governments need to protect their citizens and communities but also threatens the sovereignty of Tribal Nations and the Government to Government Trust relationship between Federal and Tribal governments.

USCCR question: What recommendations should the Commission make to Congress and the federal government to ensure that Native American communities can address the coronavirus pandemic?

Tribal Nations continue to face significant challenges posed by the COVID-19 pandemic and we recommend that the next Congressional COVID response package **retain** the Tribal provisions in the HEROS Act.

We also provide the following recommendations to Congress:

⁵This notice, 85 FR 5462, is published pursuant to Section 104 of the Act of November 2, 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792), and in exercise of authority delegated to the Assistant Secretary- Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

- Allow maximum flexibility in the spending and timeframe for the use of new and existing funds
- Direct Federal agencies to consult with Tribal nations on the distribution of resources
- Mandate Federal agencies to be transparent in distribution formulas
- Distribute funds to Tribal Nations through an existing Self-Determination or Self-Governance agreement, even when it requires an interagency transfer of funds
- Eliminate duplicative and hefty reporting and application requirements during the pandemic
- Include Tribal governments whenever state and local governments are named in COVID-19 legislation
- Require Federal agencies switch from a grant-based funding model to direct funding that allows Tribal Nations to exercise their inherent sovereignty and right to self-govern.

As noted in Chief Lynn Malerba's testimony delivered on July 17, 2020, we must move beyond piecemeal approaches directed at specific functions or programs and start ensuring Tribal Nations have real decision-making authority over the resources that serve their citizens and communities.

We hope this information can assist the USCCR in its efforts to help the Federal government structure relief aid and response actions in a more effective and efficient manner that aligns with the Federal governments' trust and treaty responsibilities to Tribal Nations and their citizens.