



# Miccosukee Tribe of Indians of Florida

## Business Council Members

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April 21, 2020

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

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

**Re: *The Coronavirus Relief Fund MUST be Disbursed to Tribal Governments and NOT ANCs***

Dear Secretary Mnuchin and Secretary Bernhardt:

On behalf of the Miccosukee Tribe of Indians of Florida, I write to urge the U.S. Department of the Treasury (Treasury) to exercise its authority under Title V, Section 5001 (Title V) of the recently passed Coronavirus Aid, Relief, and Economic Security (CARES) Act, to ensure that the Coronavirus Relief Fund (CRF) is disbursed directly and exclusively to Tribal governments, as understood and reflected within the DOI Federally-Recognized Tribes List, and not Alaska regional or village for-profit corporations.

***I. Ensure Disbursements from the CRF go to Federally Recognized Tribal Governments, as Congress Intended***

As noted in numerous letters from Tribal governments, and inter-tribal regional organizations, and national organizations, this issue is paramount to realizing the intent of Congress in passing the CARES Act, and is consistent with the Constitution and federal law and policy. 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.”

Miccosukee Tribe of Indians, has great concerns as to the Administration’s purported interpretation of the breadth and scope of what is a “recognized governing body,” as it pertains to Tribal governments under the CARES Act. Although “Alaska Native regional or village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act [(ANCSA)]” are mentioned in the definition of “Indian Tribe” in the Indian Self-Determination and Education Assistance Act (“ISDEAA”) (25 U.S.C. § 5304(e)), they are not “Indian tribes,” within the meaning of that definition, because they are not “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” Congress requires the Secretary of the Interior annually to “publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians” (List of Federally Recognized Indian Tribes).<sup>1</sup> Alaska Native corporations are not on the List of Federally Recognized Indian Tribes.<sup>2</sup> The term “Indian Tribe” also appears in the more narrow definition of “Tribal Government” in Title V. The Miccosukee disagree that the two terms are interchangeable for the following reasons.

a. Congress’ Use of “Indian Tribe” and “Tribal Government”

In finding Congress’ intent, it is important to note that “[w]here 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.”<sup>3</sup> 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.”<sup>4</sup>

As noted above, “Tribal government” is defined in Title V as “the recognized governing body of an Indian Tribe.”<sup>5</sup> 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

<sup>1</sup> Federally Recognized Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791, 4792) (1994).

<sup>2</sup> See Dept. of Interior, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5,462 (Jan. 30, 2020).

<sup>3</sup> *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)).

<sup>4</sup> *United States v. LaBonte*, 520 U.S. 751, 757, 117 S. Ct. 1673, 1677, 137 L. Ed. 2d 1001 (1997).

<sup>5</sup> Section 601(g)(5).

Tribe.” Congress cannot have intended this definition to also mean that a corporate board of a state-chartered, for-profit 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.”<sup>6</sup>

As such, Treasury must 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<sup>7</sup>—*i.e.*, “Indian tribes” under the Constitution, or “Tribal governments.” The Tribe suggests referring to the most recent publication of the List of Federally Recognized Indian Tribes.<sup>8</sup> Notably, Alaska regional and village corporations are absent from the List of Federally Recognized Indian Tribes as discussed above. They are not sovereign Tribal governments, they are not controlled by sovereign Tribal governments, and they do not provide essential Tribal government services. Rather, they are for-profit corporate entities incorporated under Alaska state law, governed by corporate boards of directors and managed by company executives.

Further, in examining legislation, “we must presume that the legislation intends that its pronouncements will operate fairly, reasonably and equitably.”<sup>9</sup> 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). Any other interpretation would be unreasonable and would operate unfairly and inequitably. Please note 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; state-chartered Alaska Native corporations (ANCs) are not.<sup>10</sup> The Alaska Supreme Court acknowledges that Alaska Native villages are the tribal governing entities within their jurisdiction, and that the ANCSA did not divest them of their sovereign authority as Tribal governments.<sup>11</sup> Finally, the Federal Government clarified this exact understanding in the

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<sup>6</sup> See, CARES Act, § 601(a) generally.

<sup>7</sup> U.S. CONST. Art. I, §. 8, Cl. 3.

<sup>8</sup> See Dept. of Interior, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5,462 (Jan. 30, 2020).

<sup>9</sup> EARL CRAWFORD, STATUTORY CONSTRUCTION: INTERPRETATION OF LAWS 455 (Thomas Law Book Co. 1940).

<sup>10</sup> 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).

<sup>11</sup> 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); *Simmonds v. Parks*, 329 P.3d 995, 999 (Alaska 2014); *State v. Cent. Council of*

Federally Recognized Tribe List Act of 1994 (1994 List Act),<sup>12</sup> which does not include ANCs but does include Alaska Native villages.<sup>13</sup>

Also, Alaska regional and village corporations 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 Alaska regional and village corporations 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 12 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. Some, but not all, ANCs allow for these shares to pass to younger Alaska Natives by bequest or transfer. 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 multiple times. For these reasons, the Miccosukee strongly urge 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.”<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

Alaska’s regional and village corporations established pursuant to ANCSA do not possess such a government-to-government relationship with the United States. For these reasons, the Tribe 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.

## **II. Treasury’s Trust Responsibility**

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*Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 259 (Alaska 2016).

<sup>12</sup> Federally Recognized Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791, 4792) (1994).

<sup>13</sup> 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).

<sup>14</sup> *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766-67 (1985).

<sup>15</sup> NEWTON, NELL JESSUP, ET AL. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, §§ 2.02[1]–2.02[2], at 126-27 (2012 ed.).

<sup>16</sup> *Id.*

The Miccosukee Tribe feels obligated to communicate to Secretary Mnuchin the gravity of this decision. This is not a one-off decision that Treasury can make with minimal unintended consequences. Any indication that Congress has recognized Alaska Native Corporations' "boards of directors" as akin to Tribal political governing bodies completely misrepresents the breadth and meaning of Tribal governance. This is categorically incorrect and diminishes the stature of federally recognized Tribal governments and our sacred government-to-government, nation-to-nation, sovereign-to-sovereign relationship. If this legally unsupported assertion is taken as true by Treasury or any other body of the federal government, it potentially results in a course-changing decision that could have dangerous implications for federal Indian law, as it could irreparably affect how the United States treats and views sovereign Tribal governments. The interpretation that state-chartered corporations are akin to or on par with inherent sovereign Tribal governments risks diluting—severely—what it means to be an Indian Tribe under federal law. Right now, the statutory authority for this monumental decision lies in Treasury's jurisdiction. If this interpretation stands, then Interior will have failed to protect Tribal interests and will fail to properly communicate the legal nuances and issues to Treasury. It is regrettable that Treasury is in this tenuous situation, but the Miccosukee implores both Interior and Treasury to make the right decision, and not make a decision that could alter or undermine the relationship the United States has with Tribal governments—a relationship that spans several centuries.

### ***III. Conclusion***

In conclusion, the Miccosukee Tribe of Indians of Florida is committed to preventing a grave injustice and stand prepared to ensure that the CRF is distributed in manner consistent with the intent of Congress as an expression of their understanding and respect for Tribal sovereignty. Our ancestors that came before us would not have it any other way. If the Administration chooses to recognize ANC's as government entities, this will set a dangerous precedent that will have greater negative implications beyond the CARES Act; including, but not limited to, the delivery and fulfillment of trust and treaty obligations across the federal government. Such an action by this Administration would be an affront to our Tribal sovereignty. In sum, we must stand strong to protect and preserve what it means to be an Indian Tribe under the Constitution, and therefore, a "Tribal government" under Title V of the CARES Act.

Sincerely,



Billy Cypress,  
Chairman

cc: Business Council