April 16, 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: To Ensure that the Coronavirus Relief Fund is Disbursed to Tribal Governments and Demanding the Recusal of Assistant Secretary for Indian Affairs Tara Sweeney

Dear Secretary Mnuchin and Secretary Bernhardt:

The undersigned national and regional tribal organizations, broadly representing Indian Country, 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."

The undersigned organizations have expressed great concern 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. We acknowledge that "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)), but 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).[1] Alaska Native corporations are not on the List of Federally Recognized Indian Tribes.[2] The term "Indian Tribe" also appears in the more narrow definition of "Tribal Government" in Title V. However, we 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."[3] 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."[4]

As noted above, "Tribal government" is defined in Title V as "the recognized governing body of an Indian Tribe."[5] 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

[1] Federally Recognized Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791, 4792) (1994).
[2] *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).
[3] *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)).
[4] *United States v. LaBonte*, 520 U.S. 751, 757, 117 S. Ct. 1673, 1677, 137 L. Ed. 2d 1001 (1997).
[5] Section 601(g)(5).

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, 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."[6]

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[7]—*i.e.*, "Indian tribes" under the Constitution, or "Tribal governments." We suggest referring to the most recent publication of the List of Federally Recognized Indian Tribes.[8] 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."[9] 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. We 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.[10] 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.[11] Finally, the Federal Government clarified this exact understanding in the Federally Recognized Tribe List Act of 1994 (1994 List Act),[12] which does not include ANCs but does include Alaska Native villages.[13]

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[6] *See*, CARES Act, § 601(a) generally.
[7] U.S. CONST. Art. I, §. 8, Cl. 3.
[8] *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).
[9] EARL CRAWFORD, STATUTORY CONSTRUCTION: INTERPRETATION OF LAWS 455 (Thomas Law Book Co. 1940).
[10] *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).
[11] *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 Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 259 (Alaska 2016).
[12] Federally Recognized Tribe List Act of 1994, Pub. L. 103-454 (108 Stat. 4791, 4792) (1994).
[13] *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).

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. While we take 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 multiple times. For these reasons, we 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."[14] 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.[15]

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.[16]

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, we urge 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

The undersigned organizations feel 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

[14] *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766-67 (1985).
[15] NEWTON, NELL JESSUP, ET AL. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §§ 2.02[1]–2.02[2], at 126-27 (2012 ed.).
[16] *Id.*

under federal law. Right now, the statutory authority for this monumental decision lies in Treasury's jurisdiction. Interior has failed to protect tribal interests and has failed to properly communicate the legal nuances and issues to Treasury. It is regrettable that Treasury is in this tenuous situation, but we must implore you 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. Demand that Assistant Secretary for Indian Affairs Tara Sweeney Recuse Herself from All Actions and Decision-Making Related to Alaska Native Corporations

Further, the undersigned organizations hereby demand Assistant Secretary Tara Sweeney recuse herself from all actions and decision-making related to ANCs, including the decision regarding the distribution of Coronavirus Relief Funds. During her Senate confirmation process, Sweeney testified, "[f]or those who may fear that I am too Alaska- centric or I don't have lower 48 experience, I want to dispel that myth. . . . I am committed to working very hard for Indian Country . . . and for Native self-determination, regardless of geography."[17] The undersigned organizations feel the Assistant Secretary has not lived up to this commitment with her recent actions. Sweeney is charged with upholding the treaty and trust obligations to American Indian and Alaska Native tribal governments, as a prominent representative of the Department of the Interior. The Department and her office are responsible for decision-making and other actions that could put federal obligations to tribal governments at odds with the interests of state-chartered, for-profit corporations owned by Alaska Native shareholders, including her former employer. Consistent with her oath to protect and preserve the public trust and uphold the United States' treaty and trust obligations to tribal governments, as well as a promise made during her confirmation hearing, we demand that Assistant Secretary Sweeney recuse herself from any decision-making process regarding the CRF or related to ANCs.

IV. Conclusion

In conclusion, each of the undersigned organizations are 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. We thank you for your time and consideration of this critical issue for Indian Country, and please feel free to reach out to us with any further questions or thoughts.

Sincerely,

Affiliated Tribes of Northwest Indians	USET Sovereignty Protection Fund
All Pueblo Council of Governors	Association on American Indian Affairs

[17] Nomination of Tara Mac Lean Sweeney of Alaska to serve as the Assistant Secretary for Indian Affairs at the Department of the Interior: Hearing before the Senate Committee on Indian Affairs, 115 Cong. (2018) (Statement of Tara Sweeney).

Great Plains Tribal Chairmen's Association

Inter Tribal Association of Arizona

Midwest Alliance of Sovereign Tribes

Rocky Mountain Tribal Leaders Council

Native American Rights Fund

National Congress of American Indians

National Indian Education Association

National Indian Gaming Association

Native American Finance Officers Association