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The CARES Act: Implications for Tribes

Congress's third legislative response to the COVID-19 outbreak—the Coronavirus Aid, Relief, and Economic Security (CARES) Act—became P.L. 116-136 on March 27, 2020. Much of the CARES Act's aid and relief is available to, or will otherwise affect, federally recognized Indian tribes or tribal business entities. This In Focus discusses the provisions that most directly implicate tribes and tribal interests, though the agencies responsible for enacting these provisions will likely issue additional guidance and interpretation in the days ahead.

Financial Assistance to Tribes and Tribal Business Entities

Direct Assistance to Small Businesses. Section 1102 of the CARES Act sets up a Paycheck Protection Program within the Small Business Administration's (SBA's) existing 7(a) loan program. This authorizes \$349 billion in loans to all eligible small businesses, 501(c)(3) nonprofit organizations, veterans organizations, sole proprietors, and independent contractors, including "Tribal business concerns." Generally, tribal business concerns with 500 or fewer employees may be eligible for these loans, which do not require collateral, are available until June 30, 2020 (or until funding runs out), and can be for up to 2.5 times an applicant's average monthly payroll costs from the previous year, capped at \$10 million. In addition to the usual uses for small business loans, recipients can use these funds to cover payroll costs (including benefits) and most mortgage interest, rent, and utility costs. Section 1106 authorizes forgiveness for loan amounts used for such costs during the eight weeks after loan origination, meaning those amounts would not need to be repaid. Section 1110 includes tribal business concerns as eligible entities for Economic Injury Disaster Loans to be used for similar purposes, including sick leave for COVID-19-affected employees. The SBA may provide an advance payment of up to \$10,000 that does not have to be repaid.

Although the CARES Act itself does not exclude particular types of businesses from eligibility for these loans, it does not provide explicit relief from existing SBA regulations that prohibit funding certain categories of businesses. For example, 13 C.F.R. § 120.110 prohibits SBA loans to businesses that receive more than one-third of their gross income from legal gaming or that engage in any illegal activity. Thus, without additional legislation or rulemaking, tribally owned casinos and marijuana operations may be unable to access SBA-administered loans and grants.

Direct Assistance for Tribal Governments. Section 5001 of the CARES Act creates a Coronavirus Relief Fund (CRF) of \$150 billion for FY2020 and sets aside \$8 billion of that amount for tribal governments. The entire \$8 billion must be distributed, and distribution is based on the tribes' FY2019 expenditures. The Bureau of Indian Affairs (BIA)

has solicited tribal leaders' input on distribution methodology and guidance on what constitutes necessary expenditures. Tribes must certify that they will only use CRF funds to pay extrabudgetary "necessary expenditures" arising due to the COVID-19 outbreak between March 1 and December 30, 2020.

Additional Assistance for Tribes and Businesses. Section 4003 in Title IV of the CARES Act, the Coronavirus Economic Stabilization Act of 2020 (CESA), authorizes the Secretary of the Treasury to make loans, loan guarantees, and other investments and subsidies to provide liquidity for losses that states, municipalities, and eligible businesses incur as a result of the COVID-19 pandemic. Under Section 4002, eligible U.S. businesses are those that "have not otherwise received adequate economic relief in the form of loans or loan guarantees" from the CARES Act; the term "State" includes "any Indian Tribe." Thus, both tribal governments and tribal business entities ineligible for other relief may be eligible for assistance under this program. The Secretary will determine the forms, terms, and conditions (including a minimum interest rate) of the loans and loan guarantees. CESA's appropriations total \$500 billion.

Agency Funding with Set-Asides for Tribes or Tribal Services

BIA Funding. The CARES Act allocates \$453 million in addition to existing funding for BIA's "Operation of Indian Programs," of which at least \$400 million "shall be made available to meet the direct needs of tribes." These funds are available until September 30, 2021, for COVID-19-related responses, including (1) public safety and justice programs; (2) deep cleaning of facilities; (3) purchase of personal protective equipment; (4) improved teleworking capability; (5) welfare assistance and social services programs (including assistance to individuals); and (6) assistance to tribal governments.

Indian Health Services (IHS) Funding. The CARES Act designates \$1.032 billion in additional IHS funding for the COVID-19 response, available until September 30, 2021. Of that amount, up to \$65 million is available for electronic health record stabilization and support, including tribal consultation. Nearly half of the allocation—at least \$450 million—must be distributed (1) through IHS's directly operated programs, (2) to tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), and (3) through contracts or grants with urban Indian organizations via the Indian Health Care Improvement Act. Funds transferred under the ISDEAA throughout the CARES Act are explicitly one-time transfers with no appropriated contract support costs.

Department of Health and Human Services Funding. The Centers for Disease Control and Prevention received

additional funding through September 30, 2024, of which not less than \$125 million is set aside for “grants or cooperative agreements” with “tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes.” The money may be used for “surveillance, epidemiology, laboratory capacity, infection control, mitigation, communications,” and other COVID-19 preparedness and response activities.

The Substance Abuse and Mental Health Services Administration received an additional \$425 million in COVID-19 response funding, available through September 30, 2021. Of this amount, at least \$15 million “shall be allocated to tribes, tribal organizations, urban Indian health organizations, or health or behavioral health service providers to tribes.”

Of additional funds designated to the Public Health and Social Services Emergency Fund, \$180 million will be available for the Health Resources and Services Administration’s Office of Rural Health Policy “to carry out telehealth and rural health activities,” with at least \$15 million allocated to tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes.

The CARES Act also provides \$20 million of increased funding under the Older Americans Act to the existing Title VI nutrition program for tribal elders.

Bureau of Indian Education (BIE) Funding. The CARES Act allocates \$69 million to the BIE for COVID-19 response activities, including at least \$20 million for tribal colleges and universities. The remainder may fund salaries, transportation, and information technology. Separately, nearly \$154 million is reserved for BIE-operated and -funded programs out of appropriations for the Department of Education’s (ED’s) Education Stabilization Fund.

Department of Housing and Urban Development (HUD) Funding. The CARES Act appropriates \$300 million for HUD’s Native American Programs account, and reserves two-thirds of that amount for Native American Housing Block Grants under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). The remainder is available for grants to tribes through the Indian Community Development Block Grant (ICDBG) program under the Housing and Community Development Act of 1974. NAHASDA funds have already been allocated using the funding formula from FY2020. The Secretary of HUD must prioritize distribution of ICDBG funds—“without competition”—to “activities and projects designed to prevent, prepare for, and respond to” the COVID-19 outbreak.

Selected Other Provisions with Tribal Implications
Child Care and Development Block Grant (CCDBG). The CARES Act earmarked an additional \$3.5 billion for the CCDBG, specifying that the funds be used “to supplement, not supplant” existing child care assistance by states, territories, and tribes to low-income families. Recipients may use funds to help child care facilities stay open or reopen as appropriate, as well as to “provide child care assistance to health care sector employees, emergency

responders, sanitation workers,” and other workers essential to the COVID-19 response.

Children and Families Services Funding. The CARES Act allocates an additional \$1.874 billion for various Children and Families Services programs. There are no specific set-asides for tribes or tribal entities, but increased funding is available through existing programs like the Community Services Block Grant Act, the Head Start Act, the Family Violence Prevention and Services Act, or the Stephanie Tubbs Jones Child Welfare Services program.

Distance Learning, Telehealth, and Broadband Grants. The CARES Act provides \$125 million in additional funding to two of the Department of Agriculture’s Rural Development grant programs: Distance Learning and Telemedicine Grants can fund software and equipment for distance learning or telemedicine, and ReConnect Broadband grants can fund construction or improvement of broadband service facilities. Grants are awarded on a competitive basis, and tribes in rural areas (defined as populations of up to 20,000) are generally eligible to apply.

Rural Health Care and Elder Care Training. Section 3401 amends provisions supporting development of primary care training programs. The CARES Act provides that priority for grants and contracts *may* be given to qualified applicants that train residents in rural areas, including tribes and tribal organizations in such areas.

Similarly, in the context of grants for training health care professionals in geriatrics, Section 3403 specifies that priority *shall* be given “to applicants with programs or activities that are expected to substantially benefit rural or medically underserved populations of older adults, or serve older adults in Indian Tribes or Tribal organizations.”

Education Waivers. Section 3511 permits tribes, along with state and local education agencies—including BIE and BIE-funded schools—to request national emergency education waivers where the COVID-19 outbreak prevents or hinders compliance with certain requirements, including some related to assessment and reporting.

Museum and Library Assistance. The ED’s Institute of Museum and Library Services will receive \$50 million to aid responses to the COVID-19 outbreak, including “grants to States, territories and tribes to expand digital network access, purchase internet accessible devices, and provide technical support services.” The CARES Act waives matching fund requirements for these grants.

Fishery Relief. Section 12005 includes tribes among the entities and individuals who may be “fishery participants” eligible for assistance (including direct relief payments) for either substantial economic losses to fishery-related businesses or “negative impacts to subsistence, cultural, or ceremonial fisheries.” Congress appropriated \$300 million for this assistance.

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