



NATIONAL CONGRESS OF AMERICAN INDIANS

June 16, 2020

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The Honorable Wilbur Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Independence Ave. NW
Washington, D.C. 20230

The Honorable Dr. Neil Jacobs
Assistant Secretary of Commerce for
Environmental Observation and
Prediction
National Oceanic and Atmospheric
Administration
1401 Constitution Ave. NW
Washington, D.C. 202030

Re: NCAI Comment Regarding Allocation of Funding Under §12005 of the CARES Act

Dear Secretary Ross and Assistant Secretary Jacobs:

On behalf of the National Congress of American Indians (NCAI), the oldest, largest, and most representative national organization comprised of tribal nations and their citizens, I write to supplement an April 3, 2020 letter by NCAI and the Native American Contractors Association (NACA) regarding disbursement of §12005 funding under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Pursuant to §12005 of the CARES Act, Congress authorized the Secretary of Commerce (Secretary) to disburse \$300 million to “Tribal, subsistence, commercial, and charter fishery participants.”¹ On April 3, 2020, NCAI and NACA submitted recommendations to assist the Department of Commerce (Commerce) with implementation and distribution of these funds to tribal nations and tribal fisheries. That letter presented several recommendations, including that Commerce: (1) prioritize funding to tribal nations and fisheries; (2) refrain from a unilateral determination of the allocation formula; (3) and provide tribal nations with discretion to determine the best method, amount, and use of funds.

On May 7, 2020, the Secretary announced allocation of §12005 funds to states, tribal nations, and territories. On May 8, 2020 and May 11, 2020, Commerce and the National Oceanic and Atmospheric Administration (NOAA) hosted telephonic conferences with tribal leaders and representatives.

1 CARES Act, § 12005(a). The CARES Act defines “Fishery Participants” to, “include Tribes, persons, fishing communities, aquaculture businesses not otherwise eligible for assistance under part 1416 of title 7 of the Code of Federal Regulations for losses businesses, who have incurred, as a direct or indirect result of the coronavirus pandemic – (1) economic revenue losses greater than 35% as compared to the prior 5-year average revenue; or (2) any negative impacts to subsistence, cultural, or ceremonial fisheries.

During these calls tribal participants raised several issues. First, that the teleconference calls did not meet the standards of meaningful government-to-government consultation. Tribal participants pointed out that Commerce and NOAA were engaging tribal nations *after* a distribution formula had been developed. As a result, Commerce and NOAA were conducting unilateral federal decision-making that robust tribal consultation policies are designed to prevent. Second, that it was unclear what metrics NOAA used to develop the distribution formula and allocate funding to states and tribal nations. Third, this lack of clarity raised related concerns about how the “negative effects”² on subsistence and cultural fisheries would be calculated. Representatives requested this information be shared, in writing.³

Fourth, that NOAA failed East Coast tribal nations when it claimed it lacked data for these fisheries and that they must therefore obtain funding from their respective states. One tribal representative pointed out that East Coast tribal nations, such as those in New York, had been trying to address this issue with NOAA for years, but with no success. Fifth, exclusion of fresh-water fisheries from §12005 funding created disparate treatment in funding among tribal nations and left many without essential resources. Lastly, it was inappropriate and incorrect of NOAA to suggest that fresh-water fishers could obtain funding elsewhere in the CARES Act.⁴

Commerce and NOAA have a trust responsibility to tribal nations and their citizens. NOAA readily acknowledged this during the May 8 and May 11 telephonic meetings. However, acknowledgement is not enactment. Merely informing tribal leaders of unilateral departmental decisions is not meaningful consultation.⁵ Although NOAA updated its §12005 Frequently Asked Questions with more information on how it calculated the distribution of funds, several questions remain. For example, why funding for West Coast tribal nations was limited to approximately \$5 million; how, why, and what factors were used to establish minimum and maximum funding levels of \$1 million and \$5 million; what is the funding and allocation process for tribal nations that are required to engage with their respective states; and, how distribution of §12005 funding through regional fish commissions benefits tribal nations.

For all of the reasons above, NCAI strongly urges Commerce and NOAA to re-engage tribal nations in meaningful government-to-government consultation to address these unanswered questions. If you have questions, please contact Fatima Abbas, NCAI Director of Policy and Legislative Counsel, at fabbas@ncai.org, or Darren Modzelewski, NCAI Policy Counsel, at dmodzelewski@ncai.org.

² § 12005(b)(2).

³ After the calls with tribal leaders, NOAA provided updated information regarding the basis for their funding decisions in its Frequently Asked Questions. (www.fisheries.noaa.gov/feature-story/commerce-secretary-announces-allocation-300-million-cares-act-funding) (last visited June 9, 2020).

⁴ NOAA representatives suggested that in light of the exclusion of fresh-water fisheries from Section 12005 funding, tribal nations and fisheries should look to U.S. Department of Agriculture CARES Act funding as well as the Relief Fund administered by the Bureau of Indian Affairs.

⁵ Consultation and Coordination Policy of the U.S. Department of Commerce, § 4.01, “Consultation,” as defined in Sec. 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.” See also, *Lower Brule Sioux Tribe v. Ada Deer*, 911 F. Supp. 395 (D.S.D 1995) (stating, “meaningful consultation means tribal consultation *in advance* with the decision maker”) (emphasis added); see also, *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Ag.*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979).

Sincerely,

A handwritten signature in black ink, appearing to be 'K. Allis', written on a light blue background.

Kevin J. Allis
Chief Executive Officer
National Congress of American Indians



April 3, 2020

The Honorable Wilbur Ross
Secretary of Commerce
United States Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: **Guidance and Recommendations for the Rapid Disbursement of COVID-19 Relief Funding for Tribal Fishery Participants under Section 12005**

Dear Secretary Ross:

On behalf of the undersigned American Indian and Alaska Native organizations, we write to provide recommendations on the implementation of Section 12005 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Further, we thank you for your efforts during the COVID-19 pandemic to ensure that fishery participants are provided some relief including the disaster relief assistance provided to tribal nations pursuant to Section 312(a) of the Magnuson-Stevens Fishery Conservation and Management Act.

As part of the CARES Act, Congress has provided an additional \$300 million for “fishery participants,” which includes tribal nations and tribal fishers. Tribal fisheries are not only a vital component of the tribal economy, but also of local and regional economies, and are the primary source of income for many families. The COVID-19 pandemic is having grave impacts on tribal fisheries due to fisheries being cancelled or forced to close, and lack of an available market. Tribal fisheries contribute significantly to annual fisher income and provide a ceremonial and subsistence food source for use by the community throughout the year. It is imperative that funds provided for in the CARES Act Section 12005 are distributed in a manner that provides immediate and meaningful relief to our tribal communities.

Towards that goal, we respectfully provide the following recommendations to assist you and the Department of Commerce (Commerce) with the implementation and distribution of relief funds available to tribal nations and tribal fishers who are facing grave economic hardships as a direct and indirect result of COVID-19.

Recommendations

- **Prioritization of funding.** Assistance to tribal nations and tribal fishers should be a top priority for the Secretary of Commerce because their status is different than many fishery participants. Tribal nations that possess fishing rights secured by treaties,

Executive Orders, or other federal law possess a federally reserved-right, akin to a property right in the resource. These tribal communities and tribal fishers have a disproportionate dependence on fishery resources and revenue when compared to other fishery participants because of tribal culture and a long history of inequity.

- **Timelines for review and distribution of funding.** Commerce should be accountable for rapid distribution of fishery assistance. Tribal nations have experienced severe delays in the distribution of National Oceanic and Atmospheric Administration (NOAA) Fishery Disaster Assistance funding, which is something tribal communities cannot afford during this time of crisis. Commerce should set timelines to: a) review requests for assistance; b) respond in writing to requests; c) make determinations of eligibility and assistance, and d) process and distribute checks. We also ask Commerce to provide guidance to tribal nations seeking financial assistance on the information needed to evaluate eligibility and the information needed to determine assistance levels.
- **Determination of economic impact to tribal nations and corresponding amount of assistance.** Each tribal nation, as a sovereign government, must determine the economic value of their COVID-19 related impacts to fisheries. It is important that Commerce not unilaterally determine an allocation formula, particularly since H.R. 748 § 12005 includes impacts to subsistence, cultural, and ceremonial fisheries. Since the COVID-19 fishery assistance speaks to the unique culture and legal rights of tribal nations, only these nations are able to calculate the appropriate level of assistance. Tribal nations may present a variety of numeric and narrative information to be used for determining scope of economic impacts, including but not limited to, reduced average market price per pound, reduced monthly harvest rates (all species), closed fisheries, reduced work force, increased operating costs associated with COVID-19 related difficulties, or other such information that is pertinent to a tribal nation's particular situation.
- **Evaluating “any negative impacts to subsistence, cultural or ceremonial fisheries” provision.** The subsistence, cultural, and ceremonial provision of § 12005(b)(2) is unique to tribal nations. Section 12005(b)(2) should be interpreted so that “subsistence, cultural and ceremonial fisheries” applies only to tribal nations or those with explicit rights to harvest secured by treaties, Executive Orders, or other federal law. Not every potential subsistence user should have parity with tribal nations that hold these explicit legal rights to that harvest.
- **Agency resources for quick relief.** We strongly encourage Commerce to reprogram resources, as appropriate, to ensure that the agency tasked with distribution has adequate staff, resources, and infrastructure to perform the tasks involved in implementing and distributing the funds.

- **Tribal nation requests.** We strongly encourage Commerce to allow tribal nations to request funds on behalf of their impacted tribal fishers and communities, and have the tribal nations distribute funds to their impacted fishers and communities.
- **Use of assistance.** Section 12005 specifies that direct relief payments are an eligible use of assistance funding, but is otherwise silent on the use of financial assistance. Tribal nations, as sovereign governments, must be given the discretion to determine the best method, amount, and use of the assistance. Also, relief funds should be made available to provide relief for market losses caused by the coronavirus pandemic, either directly or indirectly.

Stabilizing tribal fisheries and fishers during this pandemic is critical to tribal economies and the preservation of tribal lifeways and customs. Accordingly, we submit this letter to assist your implementation of Section 12005 of the CARES Act, and we support consultation with tribal governments to ensure this relief is expediently delivered.

Sincerely,



Kevin J. Allis
Chief Executive Officer
National Congress of American Indians



Joseph Valandra
Executive Director
Native American Contractors Association