



# NATIONAL CONGRESS OF AMERICAN INDIANS

## U.S. Commission on Civil Rights Hearing on COVID-19 in Indian Country: The Impact of Federal Broken Promises on Native Americans Written Testimony of President Fawn Sharp National Congress of American Indians July 17, 2020

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On behalf of the National Congress of American Indians (NCAI), thank you for holding this hearing to address updates to the U.S. Commission on Civil Rights' (Commission) report entitled, "Broken Promises: Continuing Federal Funding Shortfall for Native Americans" (*Broken Promises*). I am Fawn Sharp, President of the Quinalt Indian Nation and President of NCAI.

Founded in 1944, NCAI is the oldest and largest representative organization serving the broad interests of tribal nations and communities. Tribal leaders created NCAI in response to federal policies that threatened the existence of tribal nations. Since then, NCAI has fought to preserve the treaty and sovereign rights of tribal nations, advance the government-to-government relationship, and remove structural impediments to tribal self-determination.

Today, Indian Country is in a national emergency that—while intensified by the coronavirus-19 (COVID-19) pandemic—has its roots in the federal government's neglect of its fiduciary obligations to tribal nations and citizens resulting in the *Broken Promises*' key finding that:

Federal programs designed to support the social and economic well-being of Native Americans remain chronically underfunded and sometimes inefficiently structured, which leaves many basic needs in the Native American community unmet and contributes to the inequities observed in Native American communities.<sup>1</sup>

This existing crisis created disparities that led to American Indians and Alaska Natives' (AI/AN) vulnerability to the COVID-19 pandemic and resulted in our communities having the highest per-capita COVID-19 infection rate in the U.S.<sup>2</sup> On June 4, 2020, I testified before the U.S. House Committee on Oversight and Reform, Select Subcommittee on the Coronavirus Crisis (Oversight Testimony), and requested the Committee support an update to *Broken Promises* in light of the pandemic. We are grateful this update is occurring and look forward to working with the Commission to address Indian Country's pandemic response and recovery needs and the conditions that impair the lives and livelihoods of AI/ANs. In support of that goal, on behalf of NCAI, I submit the following responses to the Commission's questions.

<sup>1</sup> Broken Promises: Continued Federal Funding Shortfall for Native Americans (Broken Promises), U.S. Commission on Civil Rights, (December 20, 2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>

<sup>2</sup> Coronavirus Resource Center, COVID-19 United States Cases by County, Johns Hopkins University of Medicine, <https://coronavirus.jhu.edu/us-map>

**A. What do data trends suggest about the health impact of COVID-19 on Native American communities? To what extent has existing data identified health disparities in the severity of impact of COVID-19 on Native Americans as compared to other racial or ethnic groups?**

Presently, the rate of infection and deaths from COVID-19 continues to grow in AI/AN communities. As of July 5, 2020, the Indian Health Service (IHS) reported nearly 21,531 positive cases within the IHS, tribal, and urban Indian health care system (I/T/U).<sup>3</sup> According to the Centers for Disease Control and Prevention (CDC), 831 AI/ANs have died from COVID-19, the majority of whom are over the age of 55.<sup>4</sup> Today, despite being only 0.3 percent of the weighted distribution of the U.S. population, non-Hispanic AI/AN COVID-19 deaths represent 0.6 percent of all U.S. deaths related to the COVID-19 virus. This disparity is even greater in some parts of Indian Country. For example, in New Mexico, AI/ANs are approximately 11 percent of the weighted population, yet represent at least 54.3 percent of the state's COVID-19 deaths. In Arizona, the weighted distribution of the AI/AN population is 2 percent; however, the distribution of COVID-19 deaths is at least 22 percent.<sup>5</sup>

As explained in our Oversight Testimony, while stark, these statistics undercount the extent of COVID-19 within AI/AN communities due to three critical issues with data collection.<sup>6</sup> First, the complexities of the health service delivery system for AI/ANs make it difficult to provide comprehensive hospitalization and mortality data for our population.<sup>7</sup> Within the I/T/U system, only those facilities that are directly operated by IHS are required to report their data, representing about 19 percent of the facilities in the I/T/U system.<sup>8</sup> Additionally, gathering national IHS data is hindered by an outdated electronic record system that has yet to be replaced.<sup>9</sup> For conditions such as COVID-19, there are very few IHS and tribal hospitals that have the equipment to manage those suffering from severe illness, such as ventilators, and many patients are referred out to local or regional hospitals and the I/T/U clinic or hospital often does not receive data or records on referred patients.

Second, as explained in our Oversight Testimony, tribal governments have had difficulty acquiring testing.<sup>10</sup> Additionally, the Abbott COVID-19 tests sent to IHS have been found to have high false negative rates and several adverse events, making the testing kits not only short in supply but potentially inaccurate.<sup>11</sup>

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<sup>3</sup> Coronavirus Cases by IHS Area, Indian Health Services, (2020), <https://www.ihs.gov/coronavirus/>

<sup>4</sup> Deaths involving coronavirus disease 2019 (COVID-19) by race and Hispanic origin group and age, by state. CDC-National Center for Health Statistics, (July 1, 2020), <https://data.cdc.gov/NCHS/Deaths-involving-coronavirus-disease-2019-COVID-19/ks3g-spdg>

<sup>5</sup> Research Policy Update, COVID-19 Data – Situation Summary, NCAI Policy Research Center, (2020), [http://www.ncai.org/policy-research-center/research-data/pre-publications/NCAI\\_COVID19\\_Data\\_Situation\\_Summary\\_FINAL\\_7\\_1\\_2020.pdf](http://www.ncai.org/policy-research-center/research-data/pre-publications/NCAI_COVID19_Data_Situation_Summary_FINAL_7_1_2020.pdf)

<sup>6</sup> U.S. House Committee on Oversight and Reform, Hearing on An Unequal Burden: Addressing Racial Health Disparities in the Coronavirus Pandemic (Oversight Testimony), National Congress of American Indians Testimony, (June 4, 2020), pp. 2-3, [http://www.ncai.org/attachments/Testimonial\\_ZlqBTHcGkxFNyoVbiTFftNBNoDGfXomdikCKhNpnIteIBreaSh\\_Fawn%20Sharp%2006.04.2020.pdf](http://www.ncai.org/attachments/Testimonial_ZlqBTHcGkxFNyoVbiTFftNBNoDGfXomdikCKhNpnIteIBreaSh_Fawn%20Sharp%2006.04.2020.pdf)

<sup>7</sup>Disaggregating American Indian & Alaska Native data: A review of literature, NCAI Policy Research Center, (2016), [http://www.ncai.org/DataDisaggregationAIAN-report\\_5\\_2018.pdf](http://www.ncai.org/DataDisaggregationAIAN-report_5_2018.pdf)

<sup>8</sup> Oversight Testimony, at p. 2

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup>As Problems Grow With Abbott's Fast COVID Test, FDA Standards Are Under Fire, Kaiser Health News, (June 22, 2020), <https://khn.org/news/abbott-rapid-test-problems-grow-fda-standards-on-covid-tests-under-fire/>

Third, data collection practices by many state and local entities often omit or misclassify AN/AN populations.<sup>12</sup> As mentioned in our Oversight Testimony, one solution to this issue is state recognition of Tribal Epidemiology Centers as public health authorities which would support state sharing of data on AI/ANs treated outside of the I/T/U system. This data sharing would illustrate the extent of COVID-19's impact on the health of AI/ANs within and outside of the I/T/U health system.

**B. Broken Promises found that Native Americans experience distinct health disparities as compared to other Americans which is compounded by Native American healthcare programs being chronically underfunded. How has the outbreak of COVID19 impacted these health disparities?**

*Broken Promises* identified significant health disparities between AI/ANs and other populations including shorter life expectancies, higher infant mortality rates, and higher rates of diabetes as compared to the national population. Additionally, *Broken Promises* highlighted the underfunding of certain infrastructure systems such as water sanitation programs within tribal communities, citing the estimated need of \$2.8 billion to provide safe drinking water and adequate sewerage systems for all Native homes.<sup>13</sup> As explained in our Oversight Testimony, these findings—two years prior to the COVID-19 pandemic—demonstrate that structural inequities arising from the underfunding of the federal tribal trust and treaty created the destructive conditions that led to COVID-19's rapid and continuing advancement in tribal communities.<sup>14</sup>

In addition to the infection and death rates, the COVID-19 pandemic upended the funding of the I/T/U system due to the substantial reduction in third party billing revenue generated from Medicare, Medicaid, the Veterans Health Administration, and private insurance. As explained in our inter-organizational April 15, 2020 letter,<sup>15</sup> this funding is a critical supplement for the I/T/U system. As reported in the fiscal year (FY) 2021 IHS Congressional Justification, in FY 2019 alone, IHS collected \$1.14 billion in third-party reimbursements from these payers, equaling nearly 20 percent of the entire IHS discretionary budget for that year. Tribal health programs are typically more successful in securing third-party reimbursement dollars, with up to 50 to 60 percent of their healthcare budgets derived from such payers. Shelter in place and social distancing has limited in-person health visits and inadequate access to telecommunications has hindered use of tele-health services within the I/T/U system. As a result, the I/T/U system is losing critical third-party funding which will impact the delivery of health services for an already chronically underfunded system.

**C. Broken Promises found that there is a severe lack of affordable housing and adequate physical infrastructure in Indian Country. Due to a lack of federal investment in affordable housing and infrastructure such as roads, water, sewer, and other basic utilities, Native Americans often find themselves living in overcrowded housing with inadequate conditions, cut off from basic utilities and infrastructure. What have been the consequences of these disparities in housing conditions and access to infrastructure during the outbreak of COVID-19?**

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<sup>12</sup> Mays, Vickie M et al. "Classification of race and ethnicity: implications for public health." Annual review of public health vol. 24 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3681827>

<sup>13</sup> *Broken Promises*, at p. 86.

<sup>14</sup> Oversight Testimony, at p. 5.

<sup>15</sup> Inter-tribal Letter to Congress on C-4 Health, Education, and Nutrition Priorities, (April 15, 2020), [http://www.ncai.org/Covid-19/legislative-updates/FINAL\\_Tribal\\_Orgs\\_Letter\\_re\\_HENHS\\_Priorities\\_fo\\_COVID-19\\_Package\\_4.pdf](http://www.ncai.org/Covid-19/legislative-updates/FINAL_Tribal_Orgs_Letter_re_HENHS_Priorities_fo_COVID-19_Package_4.pdf)

### ***I. Water***

According to the World Health Organization and the CDC, the provision of safe water, sanitation, and hygienic conditions are essential to protecting human health in response to COVID-19.<sup>16</sup> As set forth in *Broken Promises*, however, tribal communities disproportionately lack access to clean and safe drinking water and sanitation facilities.<sup>17</sup> As a result, it is difficult to impossible for many AI/AN communities to abide by CDC’s sanitation and hygiene standards. A recent study found that limited access to water and sanitation infrastructure contributed to AI/ANs being five times as likely to be hospitalized due to COVID-19 as Caucasians.<sup>18</sup>

### ***I. Utilities***

*Broken Promises* found that there are major disparities in the availability and quality of basic utilities in Indian Country as compared with the U.S. at large.<sup>19</sup> COVID-19 has exacerbated these challenges because many tribal utilities have lost revenue by providing forbearance and/or waiver of payments for customers to alleviate the economic effects of the pandemic. Uncertain revenue for future infrastructure maintenance and improvement directly impacts a tribal servicer’s ability to meet loan obligations, access future capital, and develop and update aging utility infrastructure.

### ***II. Housing***

*Broken Promises* demonstrated that the lack of affordable and safe housing and overcrowding in Indian Country is severe and widespread, and far exceeds the housing funding available to tribal nations.<sup>20</sup> These inequities have been exacerbated during the pandemic and threaten tribal health and lives as families have difficulty social distancing or quarantining in overcrowded housing. These housing conditions had led to the spread of COVID-19 and increased its duration and severity in tribal communities. Overcrowding also affects the ability of tribal governments to deliver social services and other assistance needed as a result of COVID-19 to their citizens. Many federal assistance programs are limited to one payment per household within a given period, which directly impacts multi-family and multi-generational homes during emergencies. Further, overcrowding may increase domestic violence as victims are forced to shelter in place with their abusers in locations with limited telecommunications access.

### ***III. Roads***

Transportation facilities are essential community infrastructure that directly impact tribal nations’ ability to provide services to their citizens during COVID-19. Poor road conditions in Indian Country make it difficult for vital community service personnel such as police and first responders to reach tribal communities. The lack of surface transportation infrastructure also slows down other infrastructure development—such as temporary testing or quarantine sites—because roads are non-existent or unable to accommodate increased traffic. Further, road conditions also affect tribal economic opportunities. As a result of the pandemic, there has been increased demand for the manufacturing of personal protective equipment. Many tribal nations face barriers in accessing this market because of an inability to get products quickly to buyers due to inadequate road conditions.

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<sup>16</sup> Technical Brief, Water, Sanitation, Hygiene and water management for the COVID-19 virus, World Health Organization, (April 23, 2020), <https://www.who.int/publications-detail/water-sanitation-hygiene-and-waste-management-for-covid-19>

<sup>17</sup> *Broken Promises*, at pp.180-84.

<sup>18</sup> Desi Rodriguez-Lonebear et. al, “American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic,” 26 *Journal of Pub. Health Mgt. and Practice*, pp. 371-377 (July/Aug. 2020)

[https://journals.lww.com/jphmp/Fulltext/2020/07000/American\\_Indian\\_Reservations\\_and\\_COVID\\_19\\_.14.aspx](https://journals.lww.com/jphmp/Fulltext/2020/07000/American_Indian_Reservations_and_COVID_19_.14.aspx)

<sup>19</sup> *Broken Promises*, at pp. 165; 171-176.

<sup>20</sup> *Id.*, at pp 7-8.

#### ***IV. Airports, Seaports, Freshwater ports, Waterways, and Ferries***

COVID-19 has also affected tribal nations that rely on transportation by air and by water. In Alaska, many villages are the fly-in hub for healthcare, public safety and justice, and trade for surrounding villages that are not connected by road. The same is true for island and coastal communities that rely on both air and water for travel. Remote tribal nations in the contiguous 48 states also rely on airfields and waterways for transportation. Unfortunately, federal funding for tribal transportation is provided primarily through the U.S. Department of Transportation's Federal Highways Administration<sup>21</sup> and currently limited to activities generally associated with roads.<sup>22</sup>

The lack of federal funding for the diverse transportation needs of Indian Country has resulted in many Native communities stranded without supplies, access to healthcare, or proper personal protective equipment during COVID-19. Further, as seasonal workforces arrive in these tribal communities they risk spreading the disease to areas that have limited to no health facilities. Due to inadequate transportation, affected individuals will have difficulty accessing testing and treatment and risk exposing others to the disease.

#### **D. Broken Promises found that telecommunications infrastructure, especially wireless and broadband internet services, is often inaccessible to many Native Americans in more remote areas in Indian Country. These services are necessary to keep the community connected to telehealth services, remote education, and public safety. What have been the consequences of this lack of connectivity for Native Americans during the outbreak of COVID-19?**

COVID-19 has driven more activities online putting tribal communities at a distinct health, educational, and economic disadvantage. Unlike their counterparts, many tribal patients are unable to access telehealth and Native students are unable to access distance learning opportunities due to the digital divide. Another consequence of COVID-19 has been the disruption in tribal governments' ability to engage in broadband connectivity opportunities at the Federal Communications Commission (FCC), some of which are specifically designed for tribal communities. One such proceeding is the Tribal Priority Window (TPW) in the 2.5 GHz Band. Tribal nations, organizations, and members of Congress have asked the FCC to extend the 2.5 GHz Band TPW due to the effects of COVID-19. To date, the FCC has not indicated any intent to extend the deadline.<sup>23</sup>

Additionally, as a result of the pandemic, in-person FCC outreach has stopped. This outreach is often the best way to inform those tribal nations that need the information most. Tribal nations have also encountered difficulty engaging in FCC proceedings that require extensive research for filing and cost additional time and resources.

#### **E. Has the Congressional response to the pandemic, including the CARES Act and any similar stimulus packages, been sufficient to meet the needs of the Native American community in responding to and coping with the challenges posed by COVID-19? If not, what more would be necessary to meet those needs?**

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<sup>21</sup> Fiscal Year 2021 Indian Country Budget Request, NCAI, (2020), [http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI\\_FY\\_2021\\_FULL\\_BUDGET.pdf](http://www.ncai.org/resources/ncai-publications/indian-country-budget-request/NCAI_FY_2021_FULL_BUDGET.pdf).

<sup>22</sup> 23 U.S.C § 202(b)(1).

<sup>23</sup> Inter-tribal Letter to Congress on FCC Deadlines, (July 7, 2020), <https://www.publicknowledge.org/documents/group-letter-to-congress-on-extending-2-5-ghz-priority-window-for-indian-tribes/>

## ***I. Health, Education, Nutrition***

The first COVID-19 response package, the Coronavirus Preparedness and Response Supplemental Appropriations Act, H.R. 6074, included at least \$40 million in funding for the I/T/U health system, to be distributed by the CDC. Shortly after, the second response package, the Families First Coronavirus Response Act, H.R. 6201, provided \$64 million into the IHS account within the Department of Health and Human Services (HHS). H.R. 6201 also provided \$10 million for grants for Indian Programs within the Older Americans Act (OAA) for nutrition and direct support services.

When the COVID-19 pandemic began to intensify in March 2020, tribal nations and organizations, put forward a comprehensive list of urgent priorities for a COVID spending package and requested a total of at least the following: \$2.624 billion for the I/T/U system; \$107 million for Bureau of Indian Education (BIE) funded schools and tribal colleges and universities, and \$100 million for tribal nutrition programs.<sup>24</sup>

While these educational and nutrition requests were nearly met under H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), tribal health programs were only appropriated \$1.2265 billion. In addition to a shortfall in funding, several vital policy priorities were either not included or were not fully actualized. For example, the Special Diabetes Program for Indians (SDPI) which is critical to treating the co-morbidities that increase the pandemic's lethality, was only reauthorized for eight months rather than being permanently reauthorized. Critical technical fixes to Medicaid and Medicare were also not included in addition to tribally controlled grant schools still being unable to access Federal Employee Health Benefits for their employees.

On April 23, 2020, H.R. 266, the Paycheck Protection Program and Health Care Enhancement Act, a supplement to the CARES Act, was passed and provided \$750 million to the I/T/U system to develop, purchase, administer, process, and analyze COVID-19 tests.

The funding provided in these stimulus packages have been appreciated; however, Indian Country continues to face challenges meeting tribal health, educational, and nutrition needs. On April 15, 2020, and May 11, 2020, NCAI and our tribal partners sent letters to Congressional leadership requesting increased emergency appropriations and technical fixes for tribal health, education, nutrition, and public health infrastructure.<sup>25</sup> As set forth in those letters, Indian Country requested at least: \$8.411 billion for the I/T/U system; \$1.155 billion for Bureau of Indian Affairs (BIA) programs; \$175 million for K-12 BIE needs; and \$95 million for Indian child welfare services. Some of these requests were included in H.R. 6800, the Health and Economic Recovery Omnibus Emergency Solutions Act (HEREOS Act), which passed the House. To date, they have not been included in a Senate package and Indian Country continues to urgently request this emergency relief.

## ***II. Economic and Employment***

The pandemic has had a catastrophic effect on tribal economies. As a result of a limited tax base, due in part to dual taxation, tribal nations rely on their tribal businesses to generate revenue to fund

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<sup>24</sup> Inter-tribal Letter to Congress on C-3 Health, Education, and Nutrition Priorities (March 20, 2020),

[http://www.ncai.org/Tribal\\_Priorities\\_for\\_Health\\_Education\\_and\\_Nutrition\\_for\\_COVID-19\\_Stimulus\\_Package\\_FINAL.pdf](http://www.ncai.org/Tribal_Priorities_for_Health_Education_and_Nutrition_for_COVID-19_Stimulus_Package_FINAL.pdf)

<sup>25</sup> Inter-tribal Letter to Congress on C-4 Health, Education, and Nutrition Priorities (April 15, 2020), [http://www.ncai.org/Covid-19/legislative-updates/FINAL\\_Tribal\\_Orgs\\_Letter\\_re\\_HENHS\\_Priorities\\_fo\\_COVID-19\\_Package\\_4.pdf](http://www.ncai.org/Covid-19/legislative-updates/FINAL_Tribal_Orgs_Letter_re_HENHS_Priorities_fo_COVID-19_Package_4.pdf); Inter-tribal Letter to Congress on C-4 Infrastructure Priorities, (May 11, 2020), [http://www.ncai.org/Covid-19/legislative-updates/C4\\_Tribal\\_Infrastructure\\_Priorities\\_House-pdf](http://www.ncai.org/Covid-19/legislative-updates/C4_Tribal_Infrastructure_Priorities_House-pdf)

essential government services. In early March 2020, these operations closed to prevent transmission of COVID-19 and to protect the safety of guests and employees. The shutdown of the \$39.1 billion tribal gaming industry effectively constituted closing the 12th largest employer in the U.S. This loss occurred as tribal nations encountered an increased demand for government services—from health care, to education, to housing—as a result of the public health emergency and secondary economic crisis it generated.

To address these needs, NCAI and our tribal partners on March 20, 2020, sent a letter requesting that the third stimulus package contain: (1) at least \$20 billion in direct relief to tribal governments; (2) \$2 billion in a forbearance, loan, and guarantee fund; (3) small business assistance; (4) aid to tribal fisheries; and (5) unemployment insurance reimbursement assistance.<sup>26</sup>

The CARES Act met nearly half of these requests by including tribal governments and/or businesses in the following: (1) \$8 billion tribal set aside in the Coronavirus Relief Fund; (2) inclusion in the \$500 billion Exchange Stabilization Fund; (3) inclusion in the Paycheck Protection Program; (4) inclusion of tribal fisheries in COVID-19 fisheries relief; and (5) 50 percent reimbursement of state unemployment costs for reimbursement-option employers. Despite this aid, as explained below, there has been numerous administrative barriers that have impaired tribal access and as the pandemic continues tribal economic needs have grown. As a result, on April 30, 2020, NCAI and our tribal partners sent a letter detailing economic and employment relief asks for the next COVID package.<sup>27</sup>

### ***III. Housing and Tribal Governance***

The Congressional response to COVID-19 included tribal housing and governance programs, but funding fell short of amounts requested by tribal governments by about half.<sup>28</sup> On April 17, 2020, NCAI and our tribal partners recommended to Congress \$950 million in BIA funding for tribal governments and \$600 million in funding for the Indian (or Native American) Housing Block Grant (IHBG) to respond to the COVID-19 pandemic.<sup>29</sup> The CARES Act provided \$453 million for BIA Operation of Indian Programs, which includes funding for tribal governments and U.S. Department of the Interior (Interior) personnel and facilities, and \$300 million for tribal housing authorities through the IHBG and the Indian Community Development Block Grant. Additional investments in housing and tribal governance are needed from Congress to address COVID-19 and its disproportionate impact on tribal communities. Congress must recognize and dedicate itself to sustained long-term investment in housing and governance to address systemic disparities in tribal communities.

### ***IV. Infrastructure***

Presently, outside of the above mentioned housing funds in the CARES Act, Congress has not passed a stimulus package addressing tribal infrastructure needs during COVID. On May 11, 2020, NCAI sent an inter-tribal infrastructure priorities letter to Congress covering governance; health; housing;

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<sup>26</sup> Inter-tribal Letter to Congress on C-3 Economic & Employment Priorities (March 20, 2020) [http://www.ncai.org/Tribal\\_Priorities\\_for\\_Economic\\_Development\\_and\\_Employment\\_for\\_COVID-19\\_Stimulus\\_Package\\_FINAL\\_w\\_Leg\\_Language.pdf](http://www.ncai.org/Tribal_Priorities_for_Economic_Development_and_Employment_for_COVID-19_Stimulus_Package_FINAL_w_Leg_Language.pdf)

<sup>27</sup> Inter-tribal Letter to Congress on C-4 Economic & Employment Priorities (April 30, 2020) [http://www.ncai.org/Covid-19/legislative-updates/Tribal\\_Economic\\_Dev\\_-\\_Employment\\_Priorities\\_-\\_House.pdf](http://www.ncai.org/Covid-19/legislative-updates/Tribal_Economic_Dev_-_Employment_Priorities_-_House.pdf)

<sup>28</sup> Inter-tribal Letter to Congress on C-3 Governance and Housing Priorities (March 20, 2020) [http://www.ncai.org/Tribal\\_Priorities\\_for\\_Tribal\\_Governance\\_and\\_Housing\\_for\\_COVID-19\\_Stimulus\\_Package\\_FINAL.pdf](http://www.ncai.org/Tribal_Priorities_for_Tribal_Governance_and_Housing_for_COVID-19_Stimulus_Package_FINAL.pdf)

<sup>29</sup> Inter-tribal Letter to Congress on C-4 Governance and Housing Priorities (April 17, 2020) [http://www.ncai.org/Covid-19/legislative-updates/HOUSE\\_FINAL\\_Tribal\\_Priorities\\_for\\_Tribal\\_Governance\\_and\\_Housing\\_for\\_CV4.pdf](http://www.ncai.org/Covid-19/legislative-updates/HOUSE_FINAL_Tribal_Priorities_for_Tribal_Governance_and_Housing_for_CV4.pdf)

water, sanitation, and utilities; energy; telecommunications; transportation; and education.<sup>30</sup> As explained in that letter, not all infrastructure projects require years of planning and construction. Some projects as simple as funding for gravel and labor can transform an impassable earthen path into a gravel road in a very short amount of time. Infrastructure projects such as these can save lives and improve conditions by increasing accessibility. Funding for shovel-ready infrastructure projects can also employ local workforces on improvement projects, lessening the economic effects of COVID-19 on tribal communities while improving basic community infrastructure.

#### ***V. Tribal Emergency Services***

While the CARES Act provided billions in disaster funds to the Federal Emergency Management Agency (FEMA), only a fraction of tribal nations have been able to access them. FEMA's most recent report shows that only 44 out of 574 tribal nations are working directly with FEMA to respond to the pandemic.<sup>31</sup> Many tribal nations have encountered roadblocks and disparate treatment in their attempts to access disaster funds due to FEMA's inconsistent and discretionary policies, implemented at both Headquarters and Regional Offices.

To address this, Congress should eliminate four FEMA roadblocks:<sup>32</sup> 1) waving the 25 percent non-federal cost share for all tribal nations under Public Assistance Funds (PAF); 2) streamlining and standardizing the tribal application across all FEMA Regions; 3) setting timelines for FEMA to respond and distribute disaster funds to tribal nations; and 4) permitting PAF to be provided directly to tribal nations rather than on a reimbursement basis.<sup>33</sup>

Additionally, Congress must guarantee that tribal nations are no longer an afterthought in the Department of Homeland Security (DHS) and FEMA by establishing an Assistant Secretary of Indian Affairs and a Tribal National Advisory Council (Tribal NAC) in DHS.<sup>34</sup> The FEMA funding roadblocks that tribal nations encounter today can be avoided if tribal nations have a senior official and a federal advisory committee dedicated solely to their needs and strategic advantages.

Additionally, Congress must direct funds to build tribal nations' emergency service capacity to respond and recover from COVID-19. Tribal nations have been left behind in meeting the core homeland security and emergency services capabilities and capacities due to a lack of funding. In contrast, for over 50 years federal funding has aided state and local governments in developing core capabilities and capacities. Without the same investment, tribal nations have been left with little if any staff that can navigate the FEMA processes. The fourteen FEMA regional tribal liaisons are not sufficient to meet the technical assistance needs of 574 tribal nations.<sup>35</sup> Tribal nations and organizations have asked Congress address this in the next COVID-19 package by establishing a Tribal Resiliency Continuity Program with consistent baseline funding for tribal nations and increase current tribal homeland security grant funding.<sup>36</sup> In 2019, the FEMA National Advisory Council

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<sup>30</sup> Inter-tribal Letter to Congress on C-4 Infrastructure Priorities (May 11, 2020) [http://www.ncai.org/Covid-19/legislative-updates/C4\\_Tribal\\_Infrastructure\\_Priorities\\_-House-.pdf](http://www.ncai.org/Covid-19/legislative-updates/C4_Tribal_Infrastructure_Priorities_-House-.pdf)

<sup>31</sup> Weekly Update: Coronavirus Pandemic Whole-of-America Response, Federal Emergency Management Agency, (July 6, 2020), at p.2, <https://www.dhs.gov/news/2020/07/06/weekly-update-dhs-response-covid-19>

<sup>32</sup> Inter-tribal Letter to Congress on C-4 DHS and Emergency Services Priorities, (May 26, 2020) p. 3-5, [http://www.ncai.org/Covid-19/legislative-updates/Tribal\\_Homeland\\_Security\\_and\\_Emergency\\_Services\\_Needs\\_and\\_Priorities\\_for\\_COVID-19\\_Phase\\_4\\_-\\_Senate\\_Letter.pdf](http://www.ncai.org/Covid-19/legislative-updates/Tribal_Homeland_Security_and_Emergency_Services_Needs_and_Priorities_for_COVID-19_Phase_4_-_Senate_Letter.pdf)

<sup>33</sup> Id.

<sup>34</sup> Id., at p. 5, 7-8.

<sup>35</sup> FEMA Regional Tribal Liaisons, FEMA, (2020), p. 1, [https://training.fema.gov/tribal/assets/rtl\\_map.pdf?v=2019-7-15](https://training.fema.gov/tribal/assets/rtl_map.pdf?v=2019-7-15)

<sup>36</sup> Id., at pp. 5-7.



(FEMA NAC) also recommended that tribal nations receive annual capacity building funds.<sup>37</sup> Congress should take the recommendations of tribal nations, tribal organizations, and the FEMA NAC and invest in Indian Country to combat COVID-19.

**F. Have the Executive Branch's responses to the pandemic, including its statutory interpretation and administrative implementation of laws passed by Congress, been adequate to help Native Americans cope with the challenges posed by COVID-19? If not, in what ways has the response been inadequate?**

***I. Health, Education, Nutrition***

As each relief bill was signed into law, tribal advocates urged the federal government to release funding quickly and equitably across all of Indian Country.<sup>38</sup> Directly following the passage of the CARES Act, tribal organizations wrote to the Department of Education and Interior urging them to ensure that funding under the CARES Act was released quickly across their departments.

Unfortunately, tribal nations have experienced delays in accessing this funding.<sup>39</sup> For example, despite repeated requests by NCAI and our tribal partners,<sup>40</sup> the Department of Education and BIE funding was not completely distributed until July 2, 2020<sup>41</sup> – 97 days after the CARES Act was signed into law.

Further, within the Department of Agriculture, tribal nations were provided with \$50 million for costs relating to additional food purchases under the CARES Act. Unfortunately, the Office of Food & Nutrition Service did not allow for funds to be leveraged to allow tribal government and Indian Tribal Organizations to purchase food from local and regional tribal producers, as requested by tribal nations, organizations,<sup>42</sup> and members of Congress.<sup>43</sup> To date, this funding has not been disbursed.

Finally, many agencies that engaged in tribal consultation did not act in accordance with the input provided by tribal leaders as requested by NCAI and others in our April 3, 2020 letter to HHS.<sup>44</sup> For example, the CARES Act provided the Substance Abuse and Mental Health Services Administration (SAMHSA) with \$15 million to address tribal needs related to COVID-19. SAMHSA held tribal consultation with the SAMHSA Tribal Technical Advisory Committee (TTAC) on how to distribute these funds on March 25. The TTAC specifically recommended funding be non-competitive and

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<sup>37</sup> National Advisory Council Report to the FEMA Administrator, FEMA National Advisory Council, (Nov. 2019), p. 23-25, [https://www.fema.gov/media-library-data/1576076713587-c1ae1017f2adb4b836ad3db0c26d3578/November\\_2019\\_NAC\\_Report\\_final.pdf](https://www.fema.gov/media-library-data/1576076713587-c1ae1017f2adb4b836ad3db0c26d3578/November_2019_NAC_Report_final.pdf)

<sup>38</sup> Inter-tribal Letter to ED, HHS, and DOI, (March 31, 2020), [http://www.ncai.org/Covid-19/administrative/FINAL\\_COVID-19\\_Tribal\\_Education\\_Letter.pdf](http://www.ncai.org/Covid-19/administrative/FINAL_COVID-19_Tribal_Education_Letter.pdf); see also National Indian Health Board Letter to HHS, (March 7, 2020), [https://www.nihb.org/docs/03092020/FINAL\\_NIHB%20Letter\\_Secretary%20Azar\\_COVID-19.pdf](https://www.nihb.org/docs/03092020/FINAL_NIHB%20Letter_Secretary%20Azar_COVID-19.pdf)

<sup>39</sup> Inter-tribal Letters to the Administration on Implementation Issues, <http://www.ncai.org/Covid-19/administrative/letters-sent-to-administration>

<sup>40</sup> Inter-tribal Letter to BIE, (May 20, 2020), [http://www.ncai.org/Covid-19/administrative/ED\\_Interior\\_Letter\\_CARES\\_Funding.pdf](http://www.ncai.org/Covid-19/administrative/ED_Interior_Letter_CARES_Funding.pdf); and Inter-tribal Letter to BIE, (June 12, 2020), [http://www.ncai.org/Covid-19/administrative/ED\\_Interior\\_Letter\\_CARES\\_Funding\\_6.12.pdf](http://www.ncai.org/Covid-19/administrative/ED_Interior_Letter_CARES_Funding_6.12.pdf)

<sup>41</sup> BIE Listening Session PPT, U.S. Department Of the Interior (July 2, 2020), [https://www.bia.gov/sites/bia.gov/files/assets/asia/opa/BIE\\_CARES\\_Act\\_Slides%20-%20July%202nd%20Update.pdf](https://www.bia.gov/sites/bia.gov/files/assets/asia/opa/BIE_CARES_Act_Slides%20-%20July%202nd%20Update.pdf)

<sup>42</sup> Inter-tribal Letter to USDA, (May 4, 2020), <http://www.ncai.org/Covid-19/administrative/2020-05-04-NAFDPIR-IAC-NFBC-Ltr-USDA-CFAP-for-IndianCountry-Final.pdf>

<sup>43</sup> Congressional Letter to USDA, (June 1, 2020), <https://www.testersenate.gov/files/Letters/2020-06-01%20FDPIR%20Ltr%20to%20USDA.pdf>

<sup>44</sup> Inter-tribal Letter to HHS, (April 3, 2020), [http://www.ncai.org/Covid-19/administrative/FINAL\\_COVID-19\\_Tribal\\_Health\\_Letter.pdf](http://www.ncai.org/Covid-19/administrative/FINAL_COVID-19_Tribal_Health_Letter.pdf)

available to tribal nations previously not funded by SAMHSA. SAMHSA disregarded this request and on May 1, 2020 it announced that the \$15 million would be allocated to the 154 current Tribal Behavioral Health grant recipients – leaving 420 tribal nations without the ability to access funds.

## ***II. Economic and Employment***

The distribution of CARES Act economic funds has been beset with problems and delays from the Department of Commerce,<sup>45</sup> to the Department of Labor,<sup>46</sup> to the Department of Treasury (Treasury). Below are three examples of economic relief delays which significantly impaired the ability of tribal nations to fund government services and retain employees.

### **1. Coronavirus Relief Fund**

Early on, NCAI requested that Treasury and Interior immediately commence tribal consultation to facilitate the urgent disbursement of the CRF. Despite this request, Treasury decided to distribute funds based on a formula and then solicited feedback on formula metrics in two consultations organized with Interior. Right after the consultations had concluded, Treasury released a data solicitation form for collection of tribal land, population, and expenditures, which showed that Alaska Native regional and village corporations (ANCs) were “tribal governments” eligible for funding. ANC eligibility had never been mentioned in either consultation. Some tribal nations commenced litigation to enjoin the disbursement of these tribal government funds to ANCs which initially resulted in the grant of a preliminary injunction enjoining ANC disbursement.<sup>47</sup> Despite this decision, Treasury disregarded the April 26, 2020 statutory deadline. Concurrently, tribal data submitted to Treasury and shared with Interior was released to the public by unknown federal employees resulting in the general public being able to access particularly confidential data on tribal expenditures.<sup>48</sup>

On May 5, 2020, Treasury began disbursement of only 60 percent of the CRF and announced that it was using IHBG population data instead of the tribal enrollment numbers that had been submitted.<sup>49</sup> The IHBG contained significant inaccuracies including, but not limited to, significant undercounts and over 15 tribal nations listed as having no population. This formula resulted in another lawsuit.<sup>50</sup>

Additionally, prior to distributing the remaining 40 percent of funds, Treasury forced tribal nations to respond to a second data solicitation. Tribal nations had to wait until late June for Treasury to

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<sup>45</sup> Inter-tribal Letter to Commerce (April 3, 2020) (requesting tribal consultation on fisheries funds), [http://www.ncai.org/Covid-19/administrative/FINAL\\_COVID-19\\_Assistance\\_to\\_Tribal\\_Fishery\\_Participants\\_Letter.pdf](http://www.ncai.org/Covid-19/administrative/FINAL_COVID-19_Assistance_to_Tribal_Fishery_Participants_Letter.pdf); and NCAI Letter to Commerce, (June 16, 2020), (highlighting lack of consultation and formula transparency), [http://www.ncai.org/Covid-19/administrative/NCAI\\_Sec\\_12005\\_Distribution\\_Follow-Up\\_-\\_enclosure-.pdf](http://www.ncai.org/Covid-19/administrative/NCAI_Sec_12005_Distribution_Follow-Up_-_enclosure-.pdf)

<sup>46</sup> Unemployment Insurance Program Letter, DOL (April 27, 2020) (providing that government employers, including tribes, must first may their unemployment insurance bills in full prior to reimbursement), [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=5893](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5893); see also Inter-tribal Letter to Congress on C-3 Economic & Employment Priorities (March 20, 2020) (explaining significant UI costs incurred by tribal employers), [http://www.ncai.org/Tribal\\_Priorities\\_for\\_Economic\\_Development\\_and\\_Employment\\_for\\_COVID-19\\_Stimulus\\_Package\\_FINAL\\_w\\_Leg\\_Language.pdf](http://www.ncai.org/Tribal_Priorities_for_Economic_Development_and_Employment_for_COVID-19_Stimulus_Package_FINAL_w_Leg_Language.pdf)

<sup>47</sup> *Confederated Tribes of Chehalis Reservation v. Mnuchin*, (D.D.C. Apr. 27, 2020), <https://turtletalk.files.wordpress.com/2020/04/36-dct-order.pdf>

<sup>48</sup> Congressional Letter to Treasury Inspector General, (April 28, 2020), <https://www.tomudall.senate.gov/imo/media/doc/2020-0428%20TU%20LETTER%20DOI%20OIG%20Data%20Breach.pdf>

<sup>49</sup> Allocations to Tribal Governments, Treasury, (May 5, 2020), <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf>

<sup>50</sup> *Prairie Band Potawatomi Nation v. Mnuchin*, (D.D.C. June 11, 2020), <https://turtletalk.files.wordpress.com/2020/06/22-dct-order.pdf>

announce its method for distributing the second tranche of funding.<sup>51</sup> Further, despite prevailing on an injunction in the IHBG litigation, Treasury announced it was withholding \$679 million for that litigation in addition to the amounts it was withholding for ANCs.<sup>52</sup> Presently, the full tribal set aside has not been disbursed and two appeals are pending.

## **2. Exchange Stabilization Fund**

The CARES Act Exchange Stabilization Fund sought to support the credit needs and protect liquidity of both corporate and government entities through the creation of facilities operated by the Federal Reserve and Treasury. Section 4002(10)(E) expressly defines the term “State” to include “any Indian Tribe.” Early on NCAI and our tribal partners requested the creation of a tribal lending facility due to the unique characteristics of tribal lending.<sup>53</sup> Despite this request, instead of establishing a unique lending facility to meet the financing needs of tribal nations within the government lending facility (entitled the Municipal Liquidity Facility), the Treasury Department included tribal businesses in the Main Street Lending Program (MSLP). The terms of the MSLP prohibit the borrowing business from making distributions, effectively making the Main Street program unusable by tribal nations. Presently, despite statutory eligibility, there remains no direct ability for tribal nations to borrow for its governmental purposes. On June 9, 2020, NCAI and our tribal partners requested congressional assistance to enable tribal nations to access this fund.<sup>54</sup>

## **3. Paychex Protection Program**

The CARES Act made tribal business concerns (TBCs) eligible for Section 7(a) Small Business Administration (SBA) loans including the forgivable loans in the Paychex Protection Program (PPP). On April 2, 2020, NCAI and our tribal partners sent a letter to the SBA and Treasury with recommendations for the implementation of the PPP and requested tribal consultation. Despite this request, the SBA placed restrictions on the eligibility of gaming facilities which disproportionately impacted TBCs and led to tribal layoffs. Tribal nations, organizations, and members of Congress pushed back against these restrictions by seeking both legislative and administrative fixes from the imposition of non-statutory restrictions.<sup>55</sup> On April 24, 2020, the SBA finally lifted its gaming restrictions after the PPP’s \$349 billion had been depleted and Congress passed H.R. 266, the Paycheck Protection Program and Health Care Enhancement Act, which replenished the PPP.<sup>56</sup>

### ***III. Housing***

Funds included in the CARES Act for the IHBG were disbursed using IHBG FY 2020 formulas.<sup>57</sup> No tribal consultation occurred. To receive funds, the Department of Housing and Urban

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<sup>51</sup> Allocations to Tribal Governments, Treasury, (June 17, 2020), <https://home.treasury.gov/system/files/136/Tribal-Allocation-Methodology-for-Second-Distribution.pdf>

<sup>52</sup> *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, (D.D.C. June 15, 2020), <https://www.indianz.com/covid19/wp-content/uploads/2020/06/ac061620.pdf>

<sup>53</sup> Inter-tribal Letter to Treasury and Federal Reserve, (April 10, 2020), <http://www.ncai.org/Covid-19/administrative/letters-sent-to-administration>

<sup>54</sup> Inter-tribal Letter to Treasury and Federal Reserve, (June 9, 2020), <http://www.ncai.org/Covid-19/administrative/letters-sent-to-administration>

<sup>55</sup> Congressional Letter to Treasury and SBA, (April 8, 2020), [https://www.tomudall.senate.gov/imo/media/doc/2020-04-07%20\(Final\)%20Letter%20SBA%20Treasury%20PPP\[1\]\[1\]\[3\].pdf](https://www.tomudall.senate.gov/imo/media/doc/2020-04-07%20(Final)%20Letter%20SBA%20Treasury%20PPP[1][1][3].pdf); see also Inter-tribal letter to Congress on C-4 Economic & Employment Priorities, (April 30, 2020), [http://www.ncai.org/Covid-19/legislative-updates/Tribal\\_Economic\\_Dev\\_-\\_Employment\\_Priorities\\_-\\_House-.pdf](http://www.ncai.org/Covid-19/legislative-updates/Tribal_Economic_Dev_-_Employment_Priorities_-_House-.pdf)

<sup>56</sup> PPP Interim Final Rule, SBA, (April 24, 2020), at p.-7 <https://www.sba.gov/document/policy-guidance--ppp-interim-final-rule-promissory-notes-authorizations-affiliation-eligibility>

<sup>57</sup> Dear Tribal Leader Letter, HUD, (April 3, 2020), <https://www.hud.gov/sites/dfiles/PIH/images/DTL%20IHGB-CARES%204-3-20.pdf>

Development (HUD) required the submission of an abbreviated housing plan before funds could be disbursed. NCAI and our tribal partners recommended that the release of funding should not be conditioned upon tribal programs first updating their Indian Housing Plans, but rather that those plans can be amended at any time after distribution of the funds through existing processes.<sup>58</sup> Requiring applications and other paperwork to be completed and filed prior to disbursement of CARES Act funds resulted in delays in relief funding and an increased administrative burden on tribal governments and housing authorities operating with limited staff during a national emergency.

#### ***IV. Tribal Governance***

On April 2, 2020, NCAI and our tribal partners sent a letter to Interior recommending the use of existing funding mechanisms and program lines without the need for new agreements or amendments to existing agreements for BIA CARES Act funding.<sup>59</sup> Interior adopted many of these recommendations and disbursed BIA funds using existing funding mechanisms and program accounts. However, the Office of the Assistant Secretary for Indian Affairs selected which program accounts would receive the funds and how much would be withheld for BIA staff and facilities without tribal consultation.<sup>60</sup> Instead of consultation, only an informational conference call was scheduled for April 15, 2020,<sup>61</sup> in which tribal leaders were in listen-only mode and unable to speak.<sup>62</sup> The lack of consultation between Interior and tribal nations at the outset led to uncertainty on the use of funds, resulting in additional time and resources invested by tribal governments<sup>63</sup> and Interior seeking and providing clarifications on the use of funds as late as July 6, 2020.<sup>64</sup>

#### ***V. Infrastructure***

The Executive Branch has taken limited action to address COVID-19 infrastructure conditions in Indian Country, especially telecommunications. With respect to broadband, the FCC has the authority and resources from auction and industry fees to provide greater assistance to tribal governments and their citizens during COVID-19. The FCC could create a Tribal Broadband Fund and provide funding and resources for deployment, adoption, affordability, and access to spectrum. Creation of a Tribal Broadband Fund would immediately and directly address the connectivity problems exacerbated by COVID-19. Additionally, special temporary authority to access unassigned spectrum over tribal lands could be granted to all tribal nations, instead of requiring limited tribal staff to file waivers for limited channel use while other channels remain unassigned and unused during a global emergency.<sup>65</sup> The FCC could open proceeding to all tribal lands rather than limiting eligibility to only “rural” tribal lands because this restrictive definition hinders efforts to deploy

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<sup>58</sup> Intertribal letter to HUD, (April 1, 2020), [http://www.ncai.org/Covid-19/administrative/FINAL\\_COVID-19\\_Tribal\\_Housing\\_Letter.pdf](http://www.ncai.org/Covid-19/administrative/FINAL_COVID-19_Tribal_Housing_Letter.pdf)

<sup>59</sup> Intertribal letter to DOI, (April 2, 2020) [http://www.ncai.org/Covid-19/administrative/FINAL\\_COVID-19\\_Tribal\\_Governance\\_Letter.pdf](http://www.ncai.org/Covid-19/administrative/FINAL_COVID-19_Tribal_Governance_Letter.pdf)

<sup>60</sup> Dear Tribal Leader Letter, Interior, (April 13, 2020), [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/opa/pdf/IA%209185%20DTLL%20CARES%20Distributions\\_508.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/opa/pdf/IA%209185%20DTLL%20CARES%20Distributions_508.pdf).

<sup>61</sup> Id.

<sup>62</sup> Self-Governance Communication and Education Tribal Consortium Letter to Interior, (May 29, 2020), [http://www.ncai.org/Covid-19/administrative/SGAC\\_-\\_Ltr\\_to\\_Bernhardt\\_re\\_Contrary\\_DOI\\_Administrative\\_Restrictions\\_Applied\\_to\\_CARES\\_Act\\_Funds\\_for\\_SG\\_Tribes.pdf](http://www.ncai.org/Covid-19/administrative/SGAC_-_Ltr_to_Bernhardt_re_Contrary_DOI_Administrative_Restrictions_Applied_to_CARES_Act_Funds_for_SG_Tribes.pdf)

<sup>63</sup> Id.

<sup>64</sup> FAQ for Indian Affairs Regarding Funding for Division B, Title VII of the CARES Act, Interior (July 6, 2020), [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/opa/pdf/FINAL%20-%20FAQs%20for%20Indian%20Affairs%20Div.%20B%20Title%20VII%20of%20the%20CARES%20Act%20Funds%20-%202007.02.20\\_508.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/opa/pdf/FINAL%20-%20FAQs%20for%20Indian%20Affairs%20Div.%20B%20Title%20VII%20of%20the%20CARES%20Act%20Funds%20-%202007.02.20_508.pdf)

<sup>65</sup> Congressional Letter to FCC, (April 27, 2020) [https://haaland.house.gov/sites/haaland.house.gov/files/wysiwyg\\_uploaded/Letter\\_FCC-EmergencyTribalBroadband\\_04272020.pdf](https://haaland.house.gov/sites/haaland.house.gov/files/wysiwyg_uploaded/Letter_FCC-EmergencyTribalBroadband_04272020.pdf).

services to population dense areas of a tribal nation's lands which can negatively impact their deployment planning and make broadband investment economically infeasible.<sup>66</sup> FCC's decision to limit tribal lands also contradicts industry practice which factors in population density for economic efficiency in deployment of wireless services.<sup>67</sup>

In recognition of the special government-to-government relationship between tribal nations and the U.S., the FCC could also elevate the Office of Native Affairs and Policy to directly advise the Commissioners on tribal policy at the FCC. The FCC could also provide additional staff and resources to the FCC's Office of Native Affairs and Policy to conduct outreach and technical assistance across all federal broadband and telecommunications opportunities. The FCC is a unique federal agency with the immediate ability to save lives in tribal communities threatened by COVID-19.

## **VI. Emergency Services**

The Executive Branch has largely failed to ensure that disaster relief funds reach tribal nations. FEMA in its July 7, 2020, report noted that only 44 tribal nations were working directly with the agency to respond to COVID-19. This means that only 7 percent of tribal nations currently have the option to directly access disaster resources from FEMA. On April 20, 2020, NCAI and our tribal partners wrote to the President requesting that he use his power to remove roadblocks preventing tribal nations from accessing the disaster relief funds.<sup>68</sup> To date, we have received no response.

Two of the roadblocks that have prevented tribal nations from accessing the disaster funds are 1) the 25 percent cost share; and 2) the lengthy application process to access the funds.<sup>69</sup> Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act the President has the authority to waive the 25 percent cost share for tribal nations. To date, the President has not exercised this authority despite numerous tribal requests. Additionally, DHS has the authority to waive certain regulatory requirements in the Public Assistance application process under Executive Order 13175.<sup>70</sup> However, DHS has failed to use the order to streamline the application process for tribal nations. Until these barriers are removed, the majority of tribal nations will be unable to access billions in disaster response funds meant to help them respond to and recover from COVID-19.

### **G. What can the Commission add or change to the findings and recommendations reached in Broken Promises, as a result of the COVID-19 outbreak? What tailored recommendations are appropriate for Congress and the federal government to ensure that the Native American community can address the coronavirus pandemic?**

#### **I. Revised Recommendations**

As evidenced above, the pandemic has demonstrated that Indian Country needs multifaceted assistance to address the financial and administrative barriers that impede tribal nations' response to COVID-19. Based on the needs identified above, we recommend the following revisions to the *Broken Promises* recommendations:

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<sup>66</sup> Petition for Reconsideration, NCAI, (November 25, 2019)

<https://ecfsapi.fcc.gov/file/1125753726939/NCAI%20PTR%20re%202.5%20GHz%20Tribal%20Priority%20Window.pdf>

<sup>67</sup> Id. at 6-7.

<sup>68</sup> Inter-tribal Letter to the White House, (April 20, 2020) [http://www.ncai.org/Covid-19/administrative/4-20-2020\\_-\\_Tribal\\_Letter\\_to\\_the\\_White\\_House\\_re\\_100\\_waiver\\_of\\_FEMA\\_cost\\_and\\_reimbursement\\_adjustment\\_-\\_FINAL.pdf](http://www.ncai.org/Covid-19/administrative/4-20-2020_-_Tribal_Letter_to_the_White_House_re_100_waiver_of_FEMA_cost_and_reimbursement_adjustment_-_FINAL.pdf)

<sup>69</sup> Inter-tribal Letter to Congress on C-4 DHS and Emergency Services Priorities, (May 26, 2020) p. 3-5, [http://www.ncai.org/Covid-19/legislative-updates/Tribal\\_Homeland\\_Security\\_and\\_Emergency\\_Services\\_Needs\\_and\\_Priorities\\_for\\_COVID-19\\_Phase\\_4\\_-\\_Senate\\_Letter.pdf](http://www.ncai.org/Covid-19/legislative-updates/Tribal_Homeland_Security_and_Emergency_Services_Needs_and_Priorities_for_COVID-19_Phase_4_-_Senate_Letter.pdf)

<sup>70</sup> Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000).

- **Funding:** Provide increased emergency and annual appropriations for IHS and tribal governments to address response and pandemic mitigation needs; provide advanced appropriations for all IHS and BIA programs; increase funding and permanently reauthorize programs like SDPI that are critical to treating comorbidities such as diabetes; increase emergency and annual appropriations for infrastructure (particularly housing, water, sanitation, and transportation) and move all tribal 105(l) lease agreements to mandatory appropriations.
- **Telecommunications:** Establish a FCC Tribal Broadband Fund, ensure inclusion of all tribal nations and tribal lands as eligible in FCC proceedings of tribal interest, extend FCC proceedings with tribal implications by no less than 180 days as a result of the pandemic, and grant all unassigned spectrum over tribal lands to their respective tribal governments.
- **Technical Fixes:** Enact technical fixes to Medicaid and Medicare to improve tribal access; enact technical fixes to allow tribal access to the Strategic National Stockpile, the Public Health Emergency Fund, and Federal Employee Health Benefits for Tribal Controlled grant schools; remove non-statutory program restrictions and matching requirements for tribal programs such as in the Department of Energy’s tribal programs which hinder tribal access during the economic crisis.

## *II. New Recommendations*

### **1. Consultation Enforcement and Oversight**

As shown above, distribution of tribal relief funds by the Executive Branch has been beset with delays that have resulted from: sluggish inter-departmental cooperation; limited communications with tribal applicants; creation of non-statutory barriers to accessing funds; and a lack of transparency in the creation of methodologies for distribution of funds to tribal recipients. These issues are underpinned by a failure to engage in and delays in commencing tribal consultation and inter-department coordination issues. To address this, we recommend that future legislation statutorily mandate consultation with tribal governments, provide consultation enforcement mechanisms, facilitate inter-department transfer of funds (e.g. CDC to IHS); and ensure Congressional oversight of a department’s implementation of its delegated responsibilities for COVID and non-COVID legislation.

### **2. Public Health and Economic Recovery Plan**

In our Oversight Testimony we noted that Indian Country is in a growing health and socio-economic crisis that requires a public health and economic “Marshall Plan” for our recovery. While increased appropriations are critical to address this pandemic and meeting existing needs, they do not address the structural barriers that created the health and economic conditions for COVID to devastate tribal communities.

For example, for decades, Indian Country has sought assistance for dual taxation by state and local governments which causes the loss of tribal government revenue. This lost revenue occurs at the expense of tribal government services, such as health care, and prevents tribal nations from creating government rainy day funds to prepare for emergencies. Similarly, tribal nations are routinely left out of funding provided to state and local governments. This lack of parity impoverishes tribal nations and impedes their ability to address issues ranging from mental health to clean water access. As a result of these structural issues, addressing the effects of COVID-19 requires a national Congressional and Executive Branch plan that focus on the conditions that have created and exacerbated the pandemic. Accordingly, we recommend Congress create a special select committee that is tasked

with developing a tribal Marshall Plan for Indian Country's socio-economic development out of the third-world conditions that existed pre-pandemic.

### **3. Federal Branch Infrastructure**

In conjunction with the above recommendations, it is imperative that the federal-tribal infrastructure in the Executive Branch be developed. During the prior administration, the White House Council on Native American Affairs (Council) was established and tasked with improving coordination of federal programs and the use of resources available to tribal communities. In April 2020, the Council was re-established but has yet to have a principal-level meeting with federal departments and tribal leaders.<sup>71</sup> To serve its purpose, the Council should be within the White House, have the authority to ensure coordination across departments, and have direct and ongoing engagement with tribal nations.

In addition to bolstering the Council, each federal department should have an office expressly dedicated to fulfilling the department's government-to-government engagement and trust responsibility to Indian Country. Due to the numerous issues involving Treasury's implementation of the CARES Act, an Office of Tribal Affairs is critically needed within Treasury to address tribal economic development, tax, and capital needs; integrate tribal nations within Treasury policy making; and facilitate tribal consultations. Additionally, departments that have tribal-serving offices should be strengthened with increased funding and enhanced authority.<sup>72</sup>

### **4. Emergency Services**

Tribal nations are the first and often the only responders during disasters in their jurisdictions for both their citizens and surrounding communities. As described above, however, unlike states, tribal nations are experiencing insurmountable challenges in accessing the billions of dollars set aside to support COVID-19 response efforts. These challenges are directly linked to the lack of tribal homeland security and emergency service infrastructure and staff in Indian Country today. To address this, we recommend investment into tribal homeland security and emergency services infrastructure in Indian Country and establishment of an Assistant Secretary of Indian Affairs and National Tribal Advisory Council to ensure that tribal needs are regularly addressed by DHS.

## **H. Conclusion**

I thank you for the opportunity to testify on these critical issues and I look forward to working with the Commission to address these disparities to ensure the U.S. upholds its trust and treaty responsibilities to tribal nations and citizens.

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<sup>71</sup> White House Re-Establishes Council on Native American Affairs to Support Continued Inter-Agency Coordination with Indian Country, Interior, (April 28, 2020), <https://www.doi.gov/pressreleases/white-house-re-establishes-council-native-american-affairs-support-continued-inter>

<sup>72</sup> Inter-tribal letter to Congress on C-4 Economic & Employment Priorities (April 30, 2020), at p.7, [http://www.ncai.org/Covid-19/legislative-updates/Tribal\\_Economic\\_Dev\\_-\\_Employment\\_Priorities\\_-\\_House-.pdf](http://www.ncai.org/Covid-19/legislative-updates/Tribal_Economic_Dev_-_Employment_Priorities_-_House-.pdf); see also Inter-tribal letter to Congress on C-4 Infrastructure Priorities (May 11, 2020), at p. 14, [http://www.ncai.org/Covid-19/legislative-updates/C4\\_Tribal\\_Infrastructure\\_Priorities\\_-\\_House-.pdf](http://www.ncai.org/Covid-19/legislative-updates/C4_Tribal_Infrastructure_Priorities_-_House-.pdf)