

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Transforming the 2.5 GHz Band) WT Docket No. 18-120
)

To: The Commission

**EMERGENCY MOTION FOR STAY OF
2.5 GHZ RURAL TRIBAL PRIORITY WINDOW
OF
NATIONAL CONGRESS OF AMERICAN INDIANS,
AMERIND, SOUTHERN CALIFORNIA TRIBAL CHAIRMEN’S
ASSOCIATION, AND PUBLIC KNOWLEDGE**

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Date: July 20, 2020

INTEREST OF PARTIES

National Congress of American Indians (NCAI), founded in 1944, is the oldest, largest and most representative American Indian and Alaskan Native organization serving the broader interests of tribal governments and communities.

AMERIND Risk Management Corporation (AMERIND) is a tribal corporation formed under federal law by three federally recognized American Indian Tribes pursuant to Section 17 of the Indian Reorganization Act, 25 U.S.C. § 1524 (a Section 17 Tribal Corporation). AMERIND's charter, granted by the federal government, provides that it possesses tribal sovereign immunity. As a 100% tribally owned and operated company, AMERIND, through its Critical Infrastructure division, has been working on a pro-bono basis with tribes across the lower 48 states, Alaska Native Villages, and the Hawaiian Home Lands to bring awareness and to prepare for and complete the 2.5 GHz application process.

Southern California Tribal Chairmen's Association (SCTCA) is a multi-service non-profit corporation established in 1972 for a consortium of 20 federally recognized Indian tribes in Southern California. The primary mission of SCTCA is to serve the health, welfare, safety, education, cultural, economic and employment needs of its tribal members and descendants in the San Diego County urban areas.

Public Knowledge is a non-profit advocacy organization based in Washington, D.C. Public Knowledge promotes freedom of expression, an open internet, and access to affordable communications tools and creative works.

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Pursuant to Rules 1.41 and 1.43,¹ the National Congress of American Indians (NCAI), AMERIND Risk Management Corporation (AMERIND), The Southern California Tribal Chairmen's Association (SCTCA) and Public Knowledge (PK) (collectively NCAI, *et al.*), file this Emergency Motion for Stay of the 2.5 GHz Rural Tribal Priority Window (“Tribal Window”) currently scheduled to close on August 3, 2020. NCAI, *et al.* request that the Commission stay the close of the Tribal Window until February 1, 2021, an extension of 182 days.² The ravages of the COVID-19 pandemic, which began almost simultaneously with the opening of the Tribal Window on February 3,³ have impacted American Indians and Alaska

¹ 47 C.F.R. §§1.41, 1.43.

² January 30, 2021, the 180th day from August 3, is a Saturday. Monday February 1 is therefore the first business day following 180 days.

³ The Commission released the Public Notice with procedures for applying for the Window on January 6, 2020. *See* Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window, *Public Notice*, WT Docket no. 18-120 (rel. Jan 6, 2020) (“*Window Procedures PN*”).

Natives on tribal lands harder than any other community in America,⁴ a situation further aggravated by the lack of reliable broadband on tribal lands. Unless the Commission extends the Tribal Window, hundreds of eligible tribal nations will miss this unique opportunity to provide 5G service to their people.

The Commission has received multiple informal requests for a 180-day extension of the Window.⁵ NCAI, *et al.* now file this formal request so that the Commission may see in greater detail why grant of the extension is necessary to serve the vital purpose of promoting broadband deployment on rural tribal lands. NCAI, *et al.* note that on April 3, the Media Bureau extended implementation of Section 1004 of the Television Viewer Protection Act for six months, finding that the COVID-19 pandemic and the “disruptive effects of the national emergency on the daily activities” and the need of those subject to Section 1004 to “focus their resources on the national emergency” constituted “good cause” under the Administrative Procedure Act (APA) to grant the six-month extension without notice and comment.⁶ The same logic applies to this request. The COVID-19 pandemic created disparities that led to American Indians and Alaska Natives’ (AI/AN) vulnerability to COVID-19 and resulted in Native communities having the highest per-capita COVID-19 infection rate in the U.S.⁷ If the present emergency constitutes “good cause” to extend implementation of consumer protections for Fortune 100 companies such as Comcast and

⁴ See, e.g., Liz Mineo, *For Native Americans, Covid-19 is ‘the Worst of Both Worlds at the Same Time’*, The Harvard Gazette (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/>.

⁵ See, e.g., Jamie Lennon, WT Docket 18-120 (July 7, 2020) (comment requesting the F.C.C. extend the 2.5 GHz Rural Tribal Priority Window), <https://www.fcc.gov/ecfs/filing/10707176818149>; Lisa Padol, WT Docket 18-120 (July 9, 2020) (comment requesting the F.C.C. extend the 2.5 GHz Rural Tribal Priority Window), <https://www.fcc.gov/ecfs/filing/10710218724493>.

⁶ Public Notice, *In re Implementation of Section 1004 of the Television Viewer Protection Act* MB Docket No. 20-61 ¶4 (Media Br. rel. April 3, 2020) (“*TVPA Extension Order*”).

⁷ Coronavirus Resource Center, *COVID-19 United States Cases by County*, Johns Hopkins University of Medicine, <https://coronavirus.jhu.edu/us-map>

AT&T, it certainly constitutes “good cause” for rural American Indian and Alaska Native tribal nations.

I. SUMMARY

COVID-19 has forced tribal nations to close their governmental offices, shut down nearly all business on which they depend for revenue, and disrupted the ability of tribal governments to continue to provide even basic services to their residents. In many cases, critical tribal government leaders and personnel have become incapacitated or died due to infection.

These obstacles are made even more difficult to overcome by the widespread lack of reliable broadband on tribal lands, making it impossible to collect the necessary information, access resources such as the Commission shape files, or even file the Application and supporting documentation from the safety of their homes. Often, dedicated tribal government staff must put themselves at risk of infection by returning to their closed offices, or by driving hours to find an available source of broadband, so that they may consult with Commission staff or other federal agencies, take advantage of the resources created by tribal organizations to provide assistance, or coordinate with other tribal governments sharing the same tribal lands. COVID-19, combined with the widespread lack of reliable broadband the Commission designed the Tribal Window to address, has so disrupted the ability of tribal nations to dedicate resources to anything beyond basic services that hundreds of eligible tribal nations have only recently learned about the availability of the Tribal Window.

Clearly, neither the Commission nor the tribes could have foreseen anything remotely like this – let alone prepared for it. When the Commission opened the Tribal Window in January, there were virtually no known cases of COVID-19 in the United States. A mere two months later in March, tribal nations were under lockdown. The operations of government agencies assisting tribal nations – the Commission’s Wireless Bureau, the National Telecommunications

Information Administration (NTIA), and the Bureau of Indian Affairs (BIA) – were disrupted for several weeks as employees switched to working remotely and dealt with the immediate effects of the pandemic.⁸ Despite initial hopes that the pandemic was beginning to ebb and restrictions would significantly ease, the virus has continued to surge. This increased infection rate (and the increased risk of infection and disruption of daily life that comes with it) has centered in the states that are the homes of the largest numbers of eligible tribes. States experiencing record-breaking new cases are home to 318 of the 626 eligible tribal lands.⁹ The effects of this global emergency and its acute effects on Indian Country are consistent with the criteria under the Commission’s rules and precedent for grant of an extension of time.¹⁰

In Part I, the motion reviews a brief history of the Commission’s historic decision to open the Tribal Window and why it is so critically important to tribal nations to maximize their ability to participate. The Motion then explains why even before COVID-19 – and despite the Commission’s efforts to simplify the application process and provide staff resources – even the six months provided for the Tribal Window would be a tight schedule for outreach and filing complete applications. The very lack of reliable broadband the Tribal Window is designed to address is a constant hindrance to outreach, coordination and participation. This is especially true for a community where the vast majority of tribal nations have little experience with the FCC,

⁸ See F.C.C., *FCC Announces Updated Restrictions on Visitors to Its Facilities*, (March 12, 2020) (public notice), <https://docs.fcc.gov/public/attachments/DOC-363007A1.pdf>.

⁹ MuralNet, *Rural Tribal Windows* (last visited July 16, 2020), <http://muralnet.org/rtw/>. (The number of eligible tribal lands exceeds the number of eligible tribes because some tribes are associated with multiple eligible lands. The presence of Coronavirus spikes, however, makes it difficult for tribal members from outside these states to visit the 316 tribal lands impacted and collect necessary data, such as physical surveys where necessary.

¹⁰ See *Restoring Internet Freedom; Bridging the Digital Divide for Low Income Consumers; and Lifeline and Linkup Reform and Modernization*, Order Granting Request for Extension of Time (Rel. March 25, 2020) (finding disruption caused by COVID “good cause” to extend comment and reply comment deadlines).

and where appropriate due diligence as required by the Commission¹¹ and adherence to tribal law and procedures for undertaking such a project take significant investment of time and resources. The Motion then recounts the additional unexpected difficulties for tribal nations to complete applications, such as the fact that the maps provided by the FCC with the required shape files in many cases do not match the maps of tribal lands used by BIA. These and other issues require modification of the shape files, which requires access to the right equipment and technical expertise. Submitting a modified shape file requires applicants to file an application for waiver, with its own detailed requirements. A significant mistake on any one of these steps will result in the Application being disqualified, and the Commission has stressed it will not permit any major modifications to correct deficiencies or errors.

The Motion then recounts in greater detail the disruption caused by the COVID-19 pandemic and its particularly severe impact on tribal lands. It is difficult to grasp just how much more disruptive and severe the impacts of COVID-19 on tribal communities have been when compared to those impacts in places like Washington, D.C. The Motion describes the steps that intertribal organizations such as NCAI, and expert organizations such as AMERIND and MuralNet, have taken to overcome these obstacles. The fact that 71 applicants have filed during the Tribal Window despite the obstacles and risk of infection is a testament to the efforts and dedication of tribal stakeholders and federal agency staff that have supported them.¹² As the Commission should freely acknowledge, tribal nations and their allies have done everything in their power to meet the Commission's current August 3 deadline. It would be heartbreaking if, despite these heroic efforts, hundreds of tribal nations were unable to utilize this unique

¹¹ Public Notice, "Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window," WT Docket No. 18-120, 35 FCC Rcd 308 (rel. Jan. 6, 2020) ("*Tribal Window PN*").

¹² MuralNet, *supra* note 8.

opportunity to acquire 5G licenses and empower themselves to provide affordable and reliable broadband access on their tribal lands.

Part III addresses the Commission’s authority to grant the stay and how grant of the stay would permit hundreds of eligible tribal nations to participate. It would also provide the Commission with time to resolve NCAI’s pending Petition for Reconsideration, asking the Commission to extend eligibility to additional tribal lands than those authorized under the rules adopted for the Window.¹³ Numerous letters of support from Republican and Democratic members of Congress,¹⁴ as well as letters of support for an extension from industry stakeholders¹⁵ and public interest organizations,¹⁶ demonstrate the public interest in granting this

¹³ Petition for Reconsideration by The National Congress of American Indians, *In re Amendment of Parts 1, 21, 73 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access and Other Advanced Services in the 2150-2162 and 250-2690; Transforming the 2.5 GHz Band*, WT Docket No. 18-120 (filed Nov. 25, 2019) (“NCAI Recon Pet”).

¹⁴ See, e.g., Press Release, Senator Kamala D. Harris, *Harris, Colleagues Urge FCC To Ensure Rural Tribal Communities Have Equal Internet Access* (May 20, 2020), <https://www.harris.senate.gov/news/press-releases/harris-colleagues-urge-fcc-to-ensure-rural-tribal-communities-have-equal-internet-access>; Press Release, Martin Heinrich, Senator for New Mexico, *Heinrich Urges FCC To Ensure Rural Tribal Communities Have Equal Internet Access* (May 20, 2020), <https://www.heinrich.senate.gov/press-releases/heinrich-urges-fcc-to-ensure-rural-tribal-communities-have-equal-internet-access-sen-heinrich-leads-senate-democrats-in-calling-on-fcc-chairman-pai-to-extend-period-for-tribal-governments-to-complete-applications-for-spectrum-for-wireless-broadband-and-increased-mobile-coverage-in-indian-country-in-light-of-covid-19>; Letter of Rep. Deb Haaland (D-NM) and Rep. Tom Cole (R-OK), Co-Chairs, Congressional Native American Caucus, to Chairman Ajit Pai (April 9, 2020).

¹⁵ See Letter of Jeffery A. Campbell, Senior Vice President, Government Affairs and Public Policy, Cisco Systems, Inc. to Marlene Dortch, Secretary, Federal Communications Commission, Docket No. 18-120 (July 2, 2020), <https://ecfsapi.fcc.gov/file/10702322806006/Docket%2018-120%20Cisco%20Extension%20Request.pdf>; Letter of Gregory W. Guice, McGuire Woods, LLC., Counsel to Gila River Telecommunications, to Marlene Dortch, Secretary, Federal Communications Commission, Docket No. 18-120 (May 6, 2020).

¹⁶ E.g., Colorado Broadband Office, *Re: Rural Digital Opportunity Fund*, WC Docket No. 19-126

Transforming the 2.5 GHz Band - Rural Tribal Window WT Docket No. 18-120 (April 24, 2020) (letter to FCC),

Motion. Additionally, grant of the Motion would not in any way delay the following 2.5 GHz Auction. Not only is the Citizens Broadband Radio Service (CBRS) Auction about to begin, but the C-Band Auction is scheduled to start December 8. Based on past Commission auctions, it seems likely that the C-Band Auction will not end until the beginning of February at the earliest. Accordingly, the Commission may not expect to schedule the 2.5 GHz Auction any sooner than the spring of 2021. Extending the Tribal Window until February 3 would not affect this schedule.

Finally, granting the extension will not harm applicants that file by August 3. As an initial matter, an informal survey of the applications filed by June 30 with the Commission by MuralNet found that 20% of the applications contained errors that required correction before the Window closes August 3. The extension of time will allow time for these and other applicants rushing to meet the existing deadline to review their applications and correct any errors.

Additionally, the Commission can address any concerns that applicants currently “shovel ready” would suffer from the delay in two ways. First, the Commission can grant existing networks on tribal lands special temporary authority (STAs) to operate on the frequencies while their applications are pending. The Commission has already granted multiple requests for STAs for operation during COVID-19,¹⁷ so such relief has well-established precedent. The Commission could announce it is extending the Window but that it will process applications on a

[https://ecfsapi.fcc.gov/file/104240432630195/Ex%20Parte%20Tribal%20Window%20%26%20904%20Auction%20Extension%20Request%20\(1\).pdf](https://ecfsapi.fcc.gov/file/104240432630195/Ex%20Parte%20Tribal%20Window%20%26%20904%20Auction%20Extension%20Request%20(1).pdf); Native Public Media & MuralNet, *Re: WC Docket. No. 18-120, Transforming the 2.5 GHz Band -- Rural Tribal Priority Window* (March 24, 2020) (letter to FCC),

<https://ecfsapi.fcc.gov/file/1032556425140/Chairman%20Ajit%20Pai.%202.5%20.pdf>; Schools, Health & Libraries Broadband Coalition (March 17, 2020) (letter to FCC),

<https://ecfsapi.fcc.gov/file/1031709908887/SHLB%20Covid-19%20FCC%20Letter%20-%20Final.pdf>.

¹⁷ See discussion Part II, *infra*.

rolling basis after August 3. This will avoid any possibility of the extension creating a conflict between applicants that filed before August 3 and subsequent applicants.

In short, there is every reason to grant this Motion, and no reason to deny it. The Commission adopted the Tribal Priority Window to provide an opportunity for tribal governments to address some of the worst and most persistent broadband connectivity problems in America. The Commission should not allow the ravages of COVID-19 to undermine this opportunity.

II. ARGUMENT

As the Commission has long recognized, federal agencies, including the Commission, fall under the general “Trust Obligation” that characterizes the relationship between the federal government and federally recognized American Indian and Alaska Native tribes, as well as Native Hawaiian Homelands.¹⁸ As the Commission has also recognized, deployment of broadband on tribal lands falls well below that of the national average, with only 46.6% of housing units on rural tribal lands having access to broadband as defined by the Commission.¹⁹ The Tribal Window was created in response to this shockingly low state of broadband penetration.²⁰ But for the Tribal Window to serve its purpose, the Commission must facilitate the ability of tribal nations to take full advantage of the Window. COVID-19 has aggravated the

¹⁸ See *Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement*, 16 FCC Rcd 4078 (2000).

¹⁹ Federal Communications Commission, *Report on Broadband Deployment in Indian Country, Pursuant to the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018*, submitted to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce (May 2019), at 3. (“*FCC Indian Country Broadband Report*”).

²⁰ See *In re Transforming the 2.5 GHz Band*, Report and Order, WT Docket No. 18-120, 34 FCC Rcd 5446 (rel. July 11, 2019) (“*2.5 GHz Order*”); *In re Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, WT Docket No. 18-120, 33 FCC Rcd 4867 (rel. May 10, 2018) (“*2.5 GHz NPRM*”).

existing difficulties for tribal nations. Of the approximately 515 entities eligible for the Tribal Window,²¹ it is likely that fewer than 20% will be able to complete an application by the August 3 deadline.

A. THE IMPACT OF COVID-19 HAS MADE AN ALREADY DIFFICULT TASK IMPOSSIBLE FOR HUNDREDS OF ELIGIBLE TRIBES.

Generally, Commission filing windows are addressed to communities well versed in Commission practice. Here, however, the Tribal Window addresses a broad and disparate community where the vast majority of eligible parties have no direct experience with the FCC. They must therefore develop this expertise entirely from scratch. This is not, to be clear, for lack of tribal interest or effort. Historically, tribal nations have faced considerable barriers to entry in their efforts to access spectrum²² or to deploy networks on tribal lands (either by themselves or in partnership with others).

The Commission has made it clear that any error in an application requiring a major amendment -- such as insufficient documentation to support any element of the application -- will result in the dismissal of the application with no ability to cure the deficiency.²³ This makes the process of preparing applications a high-stakes venture that requires tribal nations to collect

²¹ *2.5 GHz Rural Tribal Maps*, FCC.gov (listing Tribes), <https://www.fcc.gov/25-ghz-rural-tribal-maps>.

²² Statement of Policy, FCC, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* 16 FCC Rcd 4078, 4078 (June 8, 2000) (“FCC Statement of Indian Policy”); GAO, *Tribal Internet Access: Increased Federal Coordination and Performance Measurement Needed*, GAO-16-504T, 4 (April 27, 2016), <https://www.gao.gov/assets/680/676830.pdf> (“2016 GAO Report”).

²³ Public Notice, FCC, *Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window*, ¶9 (Jan. 6, 2020), <https://ecfsapi.fcc.gov/file/01062185814033/DA-20-18A1.pdf> [hereinafter Application Procedures Notice].

as much documentation as possible and labor over the applications with painstaking care -- all of which takes time and resources.

1. Notifying All Eligible Tribal Nations in Time to Complete the Application Was Already Difficult Despite the 6-Month Window.

Tribal governments generally have the same or greater burdens as state and local governments for providing essential services to their communities -- but have fewer resources or sources of revenue upon which to draw.²⁴ As a consequence, even before COVID-19, few tribal governments could afford to dedicate resources exclusively to broadband, let alone FCC proceedings. Many tribal nations have therefore relied on intertribal organizations such as NCAI to represent them before the FCC. As a consequence, most eligible tribal nations required direct outreach from NCAI and other intertribal organizations, as well as from FCC staff, NTIA, and BIA staff, to even learn about the Tribal Window. Once tribal nations learned about the possibility, it required additional workshops and outreach to educate key tribal government staff on FCC requirements and for each tribal nation to consider internally whether they wish to utilize the Tribal Window, either by building and operating their own network or by working in partnership with others.

All of these activities take time, and the same organizations and agency staff involved with outreach are *also* the ones providing technical support for applicants. Outreach alone to hundreds of potential Tribal applicants -- even at the best of times -- takes time to develop. Multiple sessions by region for manageable numbers of tribal representatives take work to schedule and coordinate. Following each successful outreach effort, the same personnel must

²⁴ See U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003) (“USCRC 2003”).

assist tribal nations in assessing their ability to take advantage of the Window, and then many assist in the collection of necessary documentation to support their applications.

Again, *none* of the infrastructure to accomplish this mammoth effort existed prior to the Commission announcement that it would open the Tribal Window. The stakeholders needed to develop their own outreach and support programs from scratch, for a project that -- while welcome -- is unique in the tribal context and requires extensive outreach, education, and assistance. Even without the additional challenges imposed by COVID-19, the Commission's decision to have the Tribal Window open for six months recognized the tremendous effort that would be required to reach out to tribal nations and support their applications in the first place, making an extension a logical step due to the pandemic.

- a) Despite Widespread Interest in the Window, the Vast Majority of Tribal Nations Have Little Experience with the FCC or With Operating Networks.

As noted above, tribal nations have had little opportunity to access spectrum on their land, or to deploy their own networks (either in partnership with others or independently). As the Government Accountability Office (GAO) noted in its 2019 Report on broadband deployment, tribal nations face enormous barriers to entry in the form of lack of access to capital and because of the rural nature of most tribal lands.²⁵ As the Commission is well aware, sparsely populated terrain with significant natural features that make coverage more expensive contribute to the existing digital divide even for non-tribal rural communities. But as the GAO found, tribal nations suffer additional disadvantages in their efforts to compete for federal subsidies.²⁶

²⁵ GAO, Tribal Broadband: FCC Should Take Efforts to Promote Tribal Access to Spectrum, GAO-19-668T, 1 (Sept. 18, 2019), <https://www.gao.gov/assets/710/701483.pdf> ("2019 GAO Report"); See also 2016 GAO Report, *supra* note 20 at 4.

²⁶ 2016 GAO Report, *supra* note 20; 2019 GAO Report, *supra* note 22.

Although tribal nations are eligible for funding from general federal broadband programs, they have received less than 3% of available funds.²⁷ Problems have included a lack of federal carve outs for tribal nations, forcing tribal nations to compete against communities with traditional carriers;²⁸ a lack of data coordination between federal broadband subsidy programs; and overestimates of broadband accessibility in the annual broadband deployment report, foreclosing areas with no broadband access from applying to relevant programs.²⁹ Recently, Congress, the Commission and other federal agencies have made efforts to address these problems. But the result of this systemic bias in subsidy programs against applicants for subsidies to serve tribal lands has left tribal nations without necessary infrastructure or experience prior to the Tribal Window.

This is, of course, an important reason why the Commission created the Rural Tribal Priority Window -- to provide tribal nations with access to spectrum on tribal lands and facilitate the ability of tribal nations to deploy broadband networks. But it also means -- as the Wireless Bureau stressed in the *Tribal Window PN* and in the Small Entities Compliance Guide for the 2.5 GHz Window -- that tribal nations must seriously consider whether they have the resources and ability to take advantage of the Window.³⁰ This assessment process can only begin for tribal nations after learning of the Tribal Window and collecting sufficient information on the mechanics and cost of network deployment. Given the deadlines imposed by the Commission,

²⁷ See Congressional Research Service, *Tribal Broadband: Status of Deployment and Federal Broadband Funding Programs*, (January 9, 2019) (“CRS 2019”).

²⁸ See *id.*; GAO, *Tribal Broadband: Few Partnerships Exist, and the Rural Utility Service Needs to Identify and Address Any Funding Barriers Tribes Face*, (Sept. 2018) (“2018 GAO Report”).

²⁹ See CRS 2019; 2016 GAO Report.

³⁰ *Tribal Window PN* ¶¶4-5; FCC, *Small Entities Compliance Guide, Transforming the 2.5 GHz Band*, FCC 19-62, WT Docket No. 18-120 (rel. May 13, 2020) (“Small Entities Compliance Guide”).

this assessment must take place simultaneously with the process of preparing documentation for applications -- and of course must pull resources away from other immediate community needs.

Again, even before COVID-19 hit, the need for most tribal nations to undergo the self-assessment recommended by the Wireless Bureau as a prelude to applying would absorb considerable time and effort needed for other critical tasks, making completion of the application before August 3 difficult.

- b) Tribal Lands May Have Multiple Tribal Nations Eligible for a Given License, Requiring Coordination and Possibly Modification of the Shape File.

To assist tribal nations with their applications, and to assist the Commission in processing the applications, the Wireless Bureau prepared shape file maps of the eligible tribal lands and the coverage areas for the associated licenses. These licenses cover designated tribal lands, and an applicant must apply to serve the entire license area or submit a modified map and accompanying request for waiver.³¹ In addition to technical difficulties described below, many areas treated by the FCC as a single unit of tribal land are home to multiple tribal nations. Each of these tribal nations has its own recognized tribal government, and is separately eligible for each individual license assigned to the entire tribal land.

Therefore, tribal nations in these areas face a choice. They may coordinate together on a single application, or they can each file a competing application and rely on the Commission's procedures for resolving conflicting applications. Alternatively, as a compromise, multiple tribal nations sharing the same tribal land may file separate applications covering separate portions of

³¹ *Tribal Window PN ¶¶7-10, 14-15, 18-19.* The license coverage areas are unique to the Tribal Priority Window.

the tribal land -- a choice which requires the applicants to file modified shape files and separate waiver requests.

To negotiate any one of these options takes time -- especially as it is in the best interest of everyone to avoid conflicting applications. Tribal governments, like all governments, have necessary procedures for coordination with other governments. Additionally, all of the difficulties discussed above apply to all tribal nations in the coordination and negotiation process. The already difficult task of submitting an application is now doubled or tripled depending on the number of tribal nations that must receive notice, take necessary steps to coordinate with each other, and pursue the appropriate application process depending on the results of these negotiations.

2. Despite Efforts to Simplify the Application Process, Assembling the Necessary Supporting Documentation Takes Time.

In recognition of these difficulties, the Commission and the Wireless Bureau have taken steps to simplify the application process. But even with these steps, additional steps need to be taken. Again, in light of the Bureau's repeated warnings that an error on one matter may result in dismissal of the *entire application* with no opportunity to redress the error, the stakes on these problems are extremely high.

a) **Commission Shape Files Do Not Match the BIA Maps of Tribal Lands, Or Require Changes for Other Reasons, and the Filing of a Waiver Request.**

By far the most difficult problem involves alteration of the shape files, which has proven necessary for a large number of applicants. As an initial matter, applicants find that the Commission shape files do not match the official maps of designated tribal lands produced by BIA. This can cause tribal land to be left off the license area. But also, it can extend the proposed license area beyond land that the tribal applicant can prove is part of its tribal land, or beyond

where the applicant can provide proof of presence. Despite the fact that the maps were generated by the Wireless Bureau, applicants must still provide documentation to support the claim for the entire license area³² (unmodified map only *prima facie* evidence and must be accompanied by exhibits). So whether the Commission-provided map is over-inclusive or under-inclusive, it will require modification and a request for waiver supported by sufficient evidence.

Even where a map reflects the accurate boundaries of tribal lands, applicants may need to alter the maps and provide suitable documentation for a request for waiver. For example, if the tribal lands include an urban area at any point, the tribal applicant will need to modify the map to exclude any area that the applicant cannot prove is “rural” for purposes of the Window. As noted above, tribal lands for which the Commission provides a single map may contain multiple tribal nations. These tribal nations may need to form a consortium to meet the Commission’s requirements for showing a presence in the license area, or they may need to divide the land into new maps.

Modifying the shape file takes a particular set of tools and skills not routinely available to tribal governments. It also requires reliable broadband to access these files and successfully modify them. As noted above, the resources available to tribal nations for technical support are already heavily strained. This adds one more significant delay in the process, on one more piece of the application that the Commission requires be completed *flawlessly*.

- b) Assembling the Required Documentation Takes Considerable Time and Resources, and a Mistake May Cause the Application to be Dismissed.

In addition to requiring modifications of the shape files and supporting documentation for waiver requests, the Commission application requires documentation for four criteria: 1) status

³² *Id.* at ¶20.

as a qualified federally recognized Indian tribe or entity owned and controlled by a federally recognized Indian tribe; 2) that the land covered by the license request is tribal land; 3) that the land covered is rural -- as that term is defined by the Commission here; and, 4) that the tribal nation applying maintains a presence on the tribal lands described in the application.

Documenting each of these criteria can require considerable time and effort, coordination with non-tribal members, and access to records not under tribal control. Once again, the Commission has made it clear that an error or insufficient showing for any of the criteria will result in dismissal of the application.

Additionally, the Tribal Window procedures require applicants to conduct their own searches of the Commission's databases to determine the availability of licensed channels to request. The Commission's Universal Licensing Service (ULS) database is difficult to use and navigate, causing delays and uncertainties for tribal applicants. Indeed, Public Knowledge has frequently cited reorganizing ULS to make identifying spectrum holders, their associated licenses, and the area of coverage easier in response to Commission surveys on how to improve its transparency. The Educational Broadband Radio Service (EBRS) license holdings are particularly difficult to research in light of the multiple layers of rights, including overlay rights, and the difficulty in aligning the geographic area of tribal lands with the coverage areas of various EBRS licenses.

In short, even before COVID-19 struck, tribal nations confronted numerous difficulties and delays in completing their applications. Simply learning about the Tribal Window and understanding how to apply required outreach on an unprecedented scale to hundreds of tribal governments, each with its own procedures for approving a decision to apply -- and each with its own resources, expertise and limitations. Despite the assistance of FCC Staff, NTIA staff, BIA staff, and organizations such as NCAI and AMERIND, facilitating participation by the maximum

number of eligible tribal nations constituted a project of mammoth undertaking -- beyond any outreach and support project in communications technology ever engaged in by any of the stakeholders providing outreach or technical assistance.

Then COVID-19 struck, shutting down existing tribal infrastructure and disrupting the outreach and application process just as it was getting underway.

3. The Impacts of COVID-19 Make This Process Even More Difficult and Time Consuming.

The statistics on the human impact of COVID-19 on tribal nations are shocking and severe in the findings they reveal. As of July 20, 2020, the Indian Health Service (IHS) reported nearly 27,233 positive cases within the IHS, Tribal, and urban Indian health care system (I/T/U).³³ According to the Centers for Disease Control and Prevention (CDC), 831 American Indians and Alaska Natives have died from COVID-19, the majority of whom are over the age of 55.³⁴ Today, despite being only 0.3% of the weighted distribution of the U.S. population, American Indian and Alaska Native COVID-19 deaths represent 0.6% 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, American Indians and Alaska Natives are approximately 11% of the weighted population, yet represent at least 54.3% of the state's COVID-19 deaths. In Arizona, the weighted distribution of the American Indian and Alaska Native population is 2%; however, the distribution of COVID-19 deaths is at least 22%.³⁵

³³ Coronavirus Cases by IHS Area, Indian Health Services, (2020), <https://www.ihs.gov/coronavirus/>

³⁴ 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>

³⁵ Research Policy Update, COVID-19 Data – Situation Summary, NCAI Policy Research Center, (2020), http://www.ncai.org/policy-research-center/research-data/prc-publications/NCAI_COVID19_Data_Situation_Summary_FINAL_7_1_2020.pdf

These grim statistics documenting the disparate health impact of COVID-19 on tribal nations as compared to their surrounding populations do not begin to capture the disruptive impact of COVID-19 on every aspect of tribal life. Tribal nations have generally been under stay-at-home orders since late February or early March. As governments with citizenries under their jurisdiction, federally recognized Indian tribes within the United States routinely provide the whole range of governmental services to their citizens, including, but not limited to, health and wellness programming; police and public safety; courts; water and sewer infrastructure; fire protection; schools; sanitation and trash collection; road maintenance; the creation and enforcement of building codes; zoning and land-use planning; the regulation of air and water quality; and wildlife management. But even before the pandemic struck, tribal nations struggled to generate governmental revenues to provide these services³⁶ because states and localities already tax economic activity on tribal lands, all but ensuring an additional tribal tax would cause double taxation and “discourage economic growth.” *Bay Mills*, 572 U.S. at 811 (Sotomayor, J., concurring); *see id.* at 807 (“Tribes face a number of barriers to raising revenue in traditional ways”). Despite this, tribal governments are responsible for funding the same essential government services that non-tribal United States citizens enjoy from the federal government, their respective state government, and local governments.

³⁶ *See, e.g.*, Montana Budget & Policy Center, *Policy Basics: Taxes in Indian Country, Part 2*, at 4 (Nov. 2017); *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 78 (1994) (approving state authority to tax cigarettes sold on the Seneca reservation); *Okla. State Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 507 (1991) (authorizing state tax on sales of goods to nonmembers of Indian Tribes on land held in trust for the Tribe); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151-63 (1980) (approving state cigarette and sales taxes on certain on-reservation purchases made by nonmembers of Indian Tribes); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 477 (2d Cir. 2013) (authorizing town’s imposition of personal-property tax on gaming devices in tribal casino).

Additionally, as the 2003 report of the U.S. Commission on Civil Rights, *Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, documented, the federal government has historically failed “to carry out its promises and trust obligations. . . . These failures included longstanding and continuing disregard for Tribes’ infrastructure, self-governance, housing, education, health and economic development.”³⁷ Updating that report in December 2018, the Commission concluded:

Federal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide. Native American program budgets generally remain a barely perceptible and decreasing percentage of agency budgets. Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power.³⁸

For these reasons, all federally recognized Indian tribes rely heavily on the earnings of their tribal government-owned enterprises to fund the services to meet their citizens’ needs. Thus, as of 2019, *before the current crisis*, Indian tribes’ gaming enterprises alone provided more than \$12,590,000,000 to support tribal government programs.³⁹ However, “[n]early half of federally recognized Indian tribes in the United States do not operate gaming facilities at all,” *Bay Mills*, 572 U.S. at 809 (citing A. Meister, *Casino City's Indian Gaming Industry Report 28* (2009–2010 ed.) (noting that “only . . . 42%, of . . . federally recognized Native American tribes in the U.S. operate gaming”) and of that percentage, many are small and in remote areas.

³⁷ USCRC 2003 *supra* n.23.

³⁸ U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018 at 4, 6 (citing U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003).

³⁹ Dupris Consulting Group, “Economic Impact Summary: The Nationwide Impacts of Indian Gaming,” National Indian Gaming Association, 2019.

Thus, this annual \$12,590,000,000 figure to support tribal governmental programs only tells half the story, as it does not account for those governmental needs of federally recognized Indian tribes supported through revenues generated by non-gaming enterprises.

COVID-19 has shuttered virtually all tribal enterprises, gaming and non-gaming. As tribal governments scrambled to meet this catastrophic shortfall and provide basic services, many were unable to even begin the outreach and research necessary to successfully apply for a license. For example, the 21 federally recognized Indian tribes who are members of the Inter Tribal Association of Arizona with lands in Arizona, as well as California, New Mexico, Nevada and Utah, have exercised governmental authority to protect tribal citizens from the impacts of COVID-19 by promptly and voluntarily issuing emergency orders on their reservations. These orders have radically limited or shut down their tourism, gaming, and other business enterprises, the principal source of governmental revenues for these tribal nations. This loss of revenue cripples the ability of tribal nations to provide ongoing governmental services to their community members, including but not limited to: public safety and policing; health care; child care; elder assistance; food assistance; garbage and sanitation services; and many other services.⁴⁰ In addition, these 21 tribal nations have done their best to mitigate the economic hardships they and their residents are experiencing, by (wherever possible) providing paid leave and ongoing medical benefits to furloughed employees and overtime pay to essential employees and emergency workers for as long as possible.⁴¹

This is the situation for tribal nations across Indian Country, with many in even more dire conditions. American Indian and Alaska Native communities experience higher rates of poverty

⁴⁰ See Brief of *Amici Curiae NCAI, et al.* filed in *Confederated Tribes of Chehalis Reservation v. Mnuchin*, D.D.C. Docket No. 1:20-cv-01002 (filed April 23, 2020) at 11-13.

⁴¹ *id.*

than their non-tribal counterparts; more than 25% live in poverty with overcrowded housing conditions (16 times worse than the national average) and high rates of diabetes, cancer, heart disease and asthma.⁴² Daily life for a majority of American Indians on reservations means “living without adequate access to clean water, plumbing, electricity, internet, cellular service, roads, public transportation, housing, hospitals, and schools.” Due to the geography of some reservations, residents on tribal lands must travel great distances for work and basic necessities such as food and clothing. For example, a majority of American Indians who live on the Pine Ridge Reservation in South Dakota commute more than 50 miles to work or the nearest grocery store.⁴³ On the Navajo Reservation, which is home to 300,000 people, and where 1 in 5 residents has diabetes, the average resident has to drive three hours to buy food at the grocery store.⁴⁴

A survey conducted by NCAI, the largest, oldest, and most representative organization comprised of American Indian and Alaska Native tribal governments and their citizens, identified numerous health, education and welfare challenges due to the pandemic. *See* Declaration of Yvette Roubideaux, attached, at ¶¶ 10-39. As tribal economies continue to collapse and government services and enterprises shut down in response to COVID-19, the financial needs of the tribal nations increase and these critical health and safety challenges go unmet. *Id.* at ¶¶ 15-16, 28-29, 31.

⁴²U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018 at 156 – 157; Dana Hedgpeth, Darryl Fears and Gregory Scruggs, *Indian Country, where residents suffer disproportionately from disease, is bracing for coronavirus*, Washington Post (April 4, 2020) Available at <https://www.washingtonpost.com/climate-environment/2020/04/04/native-american-coronavirus/>

⁴³ *See, e.g.*, Priya King, *How Native Americans Are Fighting a Food Crisis*, New York Times (April 13, 2020).

⁴⁴ *See* Matilda Kreider, *13 grocery stores: The Navajo Nation is a food desert*, George Washington University (Dec. 10, 2019). Available at: <https://www.planetforward.org/idea/13-grocery-stores-the-navajo-nation-is-a-food-desert>.

It is not surprising that, in the face of such dire circumstances, many tribal nations have been unable to dedicate resources to the Tribal Window despite the value that tribal nations place on this opportunity. As the Roubideaux Declaration illustrates, many of these COVID-19 related crises are further aggravated by the lack of broadband access for residents of tribal lands. For example, many tribal government offices are closed, making it difficult to reach members of tribal governments to conduct outreach. Multiple tribal nations identified an inability to provide distance learning for children during school shutdowns. One Alaska Native tribe was reduced to preparing physical packets for parents and requiring parents to drive to school to physically collect the packets and return the completed packets to the school -- increasing the risk of infection for both teachers and parents. Tribal nations cited the poor telecommunications infrastructure as impeding the ability of tribal governments to conduct any business, including crisis response. Tribal nations observed that this was a consequence of infection among tribal leaders, the inability to communicate effectively with closed tribal offices, and no reliable source of broadband access. As one respondent explained, the tribal government is just trying to keep everything going while “working with a skeleton crew.” *Id.*

The havoc caused to tribal governments from the pandemic -- wholly unique and impossible to anticipate -- would be more than enough to justify an extension of the Tribal Window.⁴⁵ But impediments to meeting the August 3 deadline do not stop here. The plans and resources of the FCC and of others dedicated to reaching out to tribal nations and supporting their application were disrupted for weeks while employees switched to teleworking remotely, and addressed the more immediate short-term fallout from the pandemic. COVID-19 eliminated the ability to conduct face-to-face outreach. FCC direct outreach to tribal nations, a *sine qua non*

⁴⁵ See *TVPA Extension Order supra* n. 6 ¶¶4-5.

of notifying tribal nations and encouraging them to apply, was forced to become exclusively virtual. Given the widespread lack of available broadband to residents on tribal lands, especially with resources such as tribal offices and tribal libraries closed, this virtual outreach has been significantly less effective than the previously planned in-person workshops.

Again, to be clear, this is not the fault of Commission staff. This was absolutely the right decision. But it underscores how deep the disruption of the pandemic has been on tribal nations trying to file in the Window. *Every single activity related to filing* is made more difficult because of the impacts of COVID-19, in ways no one could possibly have imagined and prepared for. Would-be applicants could not possibly have prepared for, or in any way mitigated or controlled, the disruption in the ability of FCC, NTIA and BIA staff to conduct outreach and support applications.

In short, COVID-19 has fundamentally undermined the ability of tribal governments and tribal organizations to manage the basic responsibilities of government. Tribal nations already on the financial edge now face massive budget crises from the closing of their businesses, with nearly all resources and attention now going to basic questions of survival. Hampering all these activities is the disproportionate lack of broadband access -- the very problem the Tribal Window is meant to address. It would be a cruel irony for the Commission to refuse to extend the Window and deny hundreds of tribal nations this unique opportunity precisely because COVID-19 and lack of broadband have made it impossible for them to meet the August 3 deadline.

4. The 180 Days is Necessary to Provide Tribal Nations with a Reasonable Opportunity to Participate in the Window.

NCAI, *et al.* recognize that 180 days is an extraordinary request for relief. But the extraordinary and utterly unpredictable nature of these circumstances *warrants* such

extraordinary relief.⁴⁶ Tribal nations are still struggling with the impacts of the pandemic. Even those tribal nations that have managed to recover sufficiently to attempt to meet the August 3 deadline face the obstacles that already existed prior to COVID-19, layered on top of the new demands on tribal governments, and the difficulty of working without the resources in tribal offices that remain closed. Tribal nations have essentially lost the bulk of the Tribal Window due to the impacts of COVID-19 on would-be applicants and on the Commission and other providers of needed technical support. Those available to assist tribal nations in applying now face an enormous crush of applications that further burdens the ability of tribal nations to respond with a complete (and accurate) application by August 3.

While any extension is, of course, helpful, providing a full 180 days will allow tribal nations and their allies to compensate for the lost time *and* the continuing uphill struggle against the factors outlined above. Tribal nations still face the problems associated with residential lockdowns, the loss of their primary revenue generating businesses and the shutdowns of government services as they struggle to cope with the ongoing pandemic. While tribal nations have risen to the challenge, critical personnel are still required to spend the bulk of their time focused on the daily struggles of providing food, clean water and other basic services to their communities. Extending the deadline until February 3 will ensure that all tribal nations have a fair chance to participate successfully in this one-time opportunity to regain sovereignty over their own “public airwaves” and provide desperately needed broadband services through their own networks.

⁴⁶ *Id.* (finding that unique, disruptive impacts of COVID-19 and need to focus on addressing other aspects of the pandemic constitute good cause to extend implementation of TVPA full 180-days authorized by Congress.)

B. THERE IS AMPLE FCC PRECEDENT TO SUPPORT EXTENDING THE WINDOW DUE TO THE DISRUPTION CAUSED BY COVID-19.

The FCC has already acknowledged that the COVID-19 pandemic has imposed unprecedented hardships warranting extensions, special exceptions, and temporary authorizations within the purview of the FCC and its proceedings. The unprecedented hardship caused by this pandemic is just as much an issue now as it was at the start of the pandemic. It has had particular impact on the 2.5 GHz Rural Tribal Priority Window, warranting an application extension.

Throughout the pandemic, the FCC took measures to offset the impact of the crisis on many of its ongoing proceedings and the communication network in America, including: (1) on March 13, extending the E-rate filing window by an additional 35 days;⁴⁷ (2) on March 15, granting T-Mobile Special Temporary Authority (STA) to the 600 MHz band;⁴⁸ (3) on March 17, extending the post-auction channel adjustment process for television stations;⁴⁹ (4) on March 18, granting Verizon's request for STA to use additional spectrum to meet increased demand for broadband as COVID-19 stay-at-home orders swept the nation;⁵⁰ and (5) on April 3, extending implementation of the consumer protection requirements of the Television Consumer Protection Act by six months to December 3, 2020 due to the COVID-19 pandemic.⁵¹

⁴⁷ Public Notice, Wireline Competition Bureau Directs USAC to Extend E-Rate Application Filing Window for Year 2020 Due to Potential Coronavirus Disruptions,” CC Docket No. 02-6 (Rel. March 13, 2020). <https://docs.fcc.gov/public/attachments/DA-20-273A1.pdf>

⁴⁸ Press Release, “FCC Provides T-Mobile Temporary Access to Additional Spectrum to Help Keep Americans Connected During Coronavirus Pandemic,” (March 15, 2020). <https://docs.fcc.gov/public/attachments/DOC-363051A1.pdf>

⁴⁹ Public Notice, “Guidance to Stations in Phase 9 of the Post-Incentive Auction Transition as a Result of the Novel Coronavirus (COVID-19) Pandemic,” Docket Nos. MB 16-306; GN 12-268 (Rel. March 17, 2020). <https://docs.fcc.gov/public/attachments/DA-20-282A1.pdf>

⁵⁰ Press Release, FCC Grants Verizon Temporary Spectrum Access to Keep Americans Connected During COVID-19 Pandemic (March 18, 2020). <https://docs.fcc.gov/public/attachments/DOC-363145A1.pdf>

⁵¹ *TVPA Extension Order supra* n.6.

Additionally, the FCC has recognized the particular hardship faced by tribal nations due to the COVID-19 pandemic. This is demonstrated through the many STAs the Commission has granted, allowing tribal nations access to the 2.5 GHz band during the pandemic. To date, the FCC has granted STAs to the A:shiwi College and Career Readiness Center for the Zuni Tribe in New Mexico,⁵² the Navajo Nation for wireless service over its reservation,⁵³ and the Makah Tribe in Washington State.⁵⁴

The FCC should similarly exercise its authority here. As discussed below, granting the extension will enormously benefit tribal nations severely impacted by the pandemic -- the same people the Tribal Window was designed to help. It will not cause harm to anyone. The Commission has shown it can act with alacrity and compassion in the face of the pandemic. It has every reason to do so here, and no reason not to.

C. EXTENDING THE PRIORITY WINDOW WILL PROMOTE THE PUBLIC INTEREST BY ALLOWING GREATER PARTICIPATION.

Our communications network is only as strong as its weakest link. The FCC is entrusted with ensuring that our entire nation is connected through a robust communications network including rural, low-income, and high-cost areas. As part of its public mandate, the FCC has acknowledged that promoting tribal connectivity is important and necessary given the unique challenges faced by tribal nations.⁵⁵ In its effort to promote broadband access for tribal nations, the FCC created the 2.5 GHz Rural Tribal Priority Window. Despite significant interest amongst

⁵² FCC, *FCC Grants Temporary Spectrum Access to Support Connectivity on Tribal Reservation During Covid-19 Pandemic* (Mar. 30, 2020) (press release).

⁵³ FCC, *FCC Grants the Navajo Nation Temporary Spectrum Access to Meet Increased Wireless Broadband Needs During Covid-19 Pandemic* (Apr. 17, 2020) (press release).

⁵⁴ FCC, *FCC Grants Makah Tribe Temporary Spectrum Access to 2.5 GHz Band to Meet Increased Wireless Broadband Needs During Covid-19 Pandemic* (May 29, 2020) (press release), <https://docs.fcc.gov/public/attachments/DOC-364635A1.pdf>.

⁵⁵ *2.5 GHz Band R&O* at ¶47.

tribal nations to apply, the COVID-19 pandemic has made it difficult to complete applications and extending the Tribal Window would promote the public interest by giving those interested applicants the time they need to complete their applications.

1. For More Than Two Decades, the FCC Has Recognized That Tribal Nations Face Unique Challenges and That Promoting Tribal Connectivity Is in the Public Interest.

The FCC has consistently interpreted the 1996 Telecommunications Act (1996 Act) to include a responsibility to promote tribal connectivity. The 1996 Act mandates that “consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high[-] cost areas, should have access to telecommunications and information services”⁵⁶ Despite this mandate, underserved communities still abound within America -- particularly on tribal lands that often have no access to broadband.

Tribal nations face a unique set of challenges when it comes to broadband connectivity. As the FCC learned in its 1999 field hearings in New Mexico and Arizona, tribal nations face many issues that limit their ability to effectively access broadband, including already low-quality telephone service, high costs to deliver services to remote areas with low population density, and complex governments and sovereignty issues.⁵⁷ More than two-decades later, these challenges remain the same.

After the 1999 hearings, the FCC adopted a Statement of Policy recognizing the FCC's “general trust relationship with, and responsibility to, federally-recognized Indian Tribes.”⁵⁸ This

⁵⁶ 47 USC § 254(b)(3). The FCC has also found statutory grounds to provide telecommunication services to Indian reservations in Sections 214(e)(3) & (6) and Section 254(1) of the 1996 Act. 16 FCC Rcd 4078, n. 4.

⁵⁷ 16 FCC Rcd 4078, 4079.

⁵⁸ *Id.* at 4081.

Statement of Policy contains nine goals and principles, the first of these is “to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.”⁵⁹ Granting spectrum licenses to tribal nations is a critical part of ensuring that residents on tribal lands have access to communications services.

This is the very reason that the FCC created the 2.5 GHz Rural Tribal Priority Window. The window gives tribal nations “an opportunity to obtain unassigned EBS spectrum to address the communications needs of their communities and of residents on rural Tribal lands, including the deployment of advanced wireless services to unserved or underserved areas.”⁶⁰ The entire purpose of this Tribal Window is to promote the public interest by increasing broadband access for tribal nations. This falls squarely within the FCC's long-established public mission of ensuring a robust national communications network, a mission that also justifies extending the window now.

2. Extending the Tribal Window Will Likely Yield Greater Participation, Which Promotes the Public Interest by Expanding Access to Tribal Nations.

Since the FCC announced the 2.5 GHz Rural Tribal Priority Window, eligible tribal applicants have demonstrated significant interest in applying. MuralNet, a non-profit that provides resources to help tribal nations build their own communications networks, states that it has hosted 28 workshops to help tribal nations with their 2.5 GHz applications, reaching approximately 237 unique tribal lands. Additionally, NCAI states that it held two breakout sessions and multiple recurring Technology and Telecommunications Subcommittee and Task

⁵⁹ *Id.*

⁶⁰ *2.5 GHz Band R&O* at ¶47.

Force meetings on this opportunity. NCAI has also produced two videos providing education on the 2.5 GHz proceeding or promoting upcoming NCAI breakout sessions with information on the 2.5 GHz proceeding that have two-three times more views than their contemporary counterparts produced by the organization for the same events.⁶¹

Despite this outreach and ongoing interest, many tribal nations are only just now learning about the 2.5 GHz opportunity. As COVID-19 swept the nation, in-person workshops were cancelled or converted to virtual events. However, as the FCC has acknowledged, many tribal nations do not have adequate communication services, and some have no broadband access at all -- making it virtually impossible for them to attend online workshops. Although the FCC has identified 639 eligible areas,⁶² only 71 tribal lands have completed applications and MuralNet expects that just 111 more are expected.⁶³ This means that approximately 488 eligible tribal lands are unlikely to meet the current application deadline. Extending the Tribal Window would give interested tribal nations the necessary time they need to complete their applications.

This is particularly important, as the FCC created the 2.5 GHz Priority Window specifically to expand tribal broadband access.⁶⁴ Extending the deadline would do exactly that -- by providing tribal nations with adequate opportunity to complete applications. Moreover, choosing not to extend the deadline would essentially punish tribal nations for the exact hardship the Tribal Window is aimed at remedying -- a lack of broadband access. The COVID-19 pandemic has made outreach challenging due to the lack of virtual means available to

⁶¹ <https://www.youtube.com/watch?v=n5CNlBpZBmM>;
<https://www.facebook.com/ncai1944/videos/interested-in-learning-more-about-the-fccs-25-ghz-broadband-rural-tribal-window-/244707259852480/>

⁶² <https://www.fcc.gov/25-ghz-rural-tribal-maps>

⁶³ <https://www.fcc.gov/25-ghz-rural-tribal-window-submitted-applications>;
<http://muralnet.org/rtw/>

⁶⁴ *2.5 GHz Band R&O.*

communicate with tribal nations. In light of the Commission's numerous findings that the pandemic creates good cause for an extension of deadlines, it would be arbitrary for the Commission to refuse to extend the August 3 deadline in light of circumstances and the FCC's trust obligation. The effects of COVID-19 are demonstrating the essential nature of broadband access in America. Extending this Tribal Window would increase access to some of the most underserved communities in our nation by giving tribal nations the time they need to complete applications for spectrum in the 2.5 GHz band, a necessary step to securing broadband access for their communities.

D. GRANT OF THE MOTION WILL NOT DELAY THE 2.5 GHZ AUCTION OR HARM EXISTING APPLICANTS.

As part of any request for a stay, the Commission must consider the possible harms to other parties. Fortunately, an examination of the circumstances here shows that granting this Motion will harm no one. Granting the Motion will not delay the as-yet-unscheduled 2.5 GHz Commercial Auction, nor harm those tribal applicants that have managed to file by the deadline. Delay will benefit those applicants who have filed defective applications by giving them time to correct any deficiencies or errors. Furthermore, the vast majority of applicants do not have the capacity to begin deployment at this time while coping with the pandemic, so a delay in processing will not delay tribal deployment by those who have managed to overcome the obstacles described above to file by August 3. Nevertheless, to the extent the Commission is concerned that a delay in closing the Tribal Window may have adverse effects on those applicants who have managed to file and are ready to deploy, the Commission can grant these applicants STAs.

1. **The 2.5 GHz Auction Cannot Take Place before the end of Q2 2021 at the Earliest.**

The Commission has two major mid-band auctions scheduled for the remainder of this year. The CBRS Auction, Auction No. 105, is scheduled to begin July 23.⁶⁵ The C-Band Auction, Auction No. 107, is tentatively scheduled to begin on December 8, 2020.⁶⁶ This scheduling almost certainly precludes the possibility of scheduling the 2.5 GHz Auction before May or June of 2021 at the earliest.

Section 309(j)(3)(E)(ii) of the Communications Act, 47 U.S.C. § 309(j)(3)(E)(ii), requires the Commission to allow suitable time for parties to assess market conditions and other factors relevant to their participation in the auction and ability to secure capital. As a consequence, the Commission is careful not to schedule auctions for similar types of licenses too close to one another. Requiring parties to move too quickly from one auction to another raises concerns with regard to “capital depletion,” and that potential bidders will not have adequate time to assess the new, post-auction competitive landscape. The C-Band Auction is scheduled to begin December 8. Based on experience with prior, similar Commission auctions, Auction 107 is likely to take until mid-to-late February to end (especially in light of the down time around Christmas and New Year’s). In other words, it seems unlikely that the C-Band Auction will even end until after the requested date of extension for the Tribal Window on February 3. After Auction 107 closes, the Commission will most likely need to wait another several months before scheduling the 2.5 GHz Auction to allow potential participants to consider their spectrum needs and arrange lines of credit.

⁶⁵ See Public Notice, “Auction of Priority Access Licenses for the 3550-3650 MHz Band Rescheduled to July 23, 2020,” 35 FCC Rcd 2891 (rel. March 25, 2020). Of relevance here, the FCC delayed the auction “to protect the health and safety of Commission staff . . . and so that parties may have additional time to prepare to participate in the auction.” ¶1.

⁶⁶ See Press Release, FCC Announces Tentative Agenda for August Meeting,” (July 16, 2020) (listing Public Notice of C-Band Auction Procedures scheduling Auction).
<https://docs.fcc.gov/public/attachments/DOC-365576A1.pdf>

Since the 2.5 GHz Commercial Auction is unlikely to begin until months after February 3, granting the request will not delay the commercial auction. Accordingly, there is no concern that granting the Motion for Stay will delay deployment of 2.5 GHz spectrum elsewhere. To the contrary, granting the extension will facilitate 5G deployment to tribal lands without creating delays for others.

2. **Grant of the Motion Will Not Harm Existing Applicants, and Will Allow the FCC to Finish Consideration of NCAI’s Pending Petition for Reconsideration on Eligibility.**

NCAI has canvassed its members and found broad support for granting the Motion for Stay even among those tribal nations that have already filed applications. While NCAI cannot claim to have spoken with every applicant, NCAI is the oldest, largest and most representative American Indian and Alaska Native organization serving the broad interest of tribal governments and communities. NCAI, *et al.* also notes that no one has filed to oppose the informal requests for extension filed by multiple parties. Indeed, the record shows support for the extension request from a wide swath of tribal organizations, public interest groups, Members of Congress, and even industry support.⁶⁷

Additionally, granting the extension will allow the Commission to finish consideration of NCAI’s timely filed Petition for Reconsideration. In its Petition, NCAI asked the Commission to reconsider limiting the Tribal Window to rural federally recognized Indian tribes. As NCAI observed, tribal lands in urban and exurban areas not considered “rural” under the FCC’s definition also have a lower rate of broadband availability than similarly situated residents of non-tribal lands.

⁶⁷ See notes 13-15 *supra*.

Should the Commission grant the NCAI Petition (in whole or in part), it will enable a number of currently ineligible tribal nations to apply. Although the Tribal Window closes in two weeks, the Commission has not yet resolved the Petition. Granting the Motion for Stay will give the Commission time to resolve the Petition, allowing any newly eligible tribal nations to participate.

3. The Commission Can Issue STAs to Allow Tribal Nations Ready to Deploy, Or Process Applications on a Rolling Basis After August 3.

Although many applicants are not yet ready to utilize 2.5 GHz spectrum to deploy broadband, those tribal nations who are ready need not wait until the Rural Tribal Priority Window closes. In order to “ensure connectivity to Tribal consumers during this time of increased demand,” the FCC is currently allowing tribal nations to use unassigned spectrum in the 2.5 GHz band.⁶⁸ That will allow these tribal nations to connect their residents, irrespective of how long the Tribal Window stays open.

Tribal nations are already using Special Temporary Authority (STA) to deploy broadband. The Makah Tribe is using an STA to build its own private LTE network. The FCC press release on the grant of the STA to the Makah Tribe noted that three other tribal nations have applied for STA, and “all three have been quickly reviewed and granted.”⁶⁹ Thus, it is not necessary to close the Tribal Window on August 3 in order to prevent tribal nations who are ready to access the 2.5 GHz band from doing so. The tribal nations that wish to use this spectrum can already do so using STA.

⁶⁸ See notes 53 & 54 *supra* (STAs to Pueblo and Navajo to use 2.5 GHz spectrum to serve tribal land).

⁶⁹ FCC, FCC Grants Makah Tribe Temporary Spectrum Access to 2.5 GHz Band to Meet Increased Wireless Broadband Needs During COVID-19 Pandemic, Press Release (May 29, 2020). <https://docs.fcc.gov/public/attachments/DOC-364635A1.pdf>

To the extent the Commission is concerned that extending the Tribal Window will multiply the possibility of mutually exclusive applications, the Commission can resolve this problem by processing applications filed after August 3 on a rolling basis. All applications filed by August 3 would continue to be regarded as being filed simultaneously. However, subsequent applications would be resolved on a rolling basis to avoid conflicts. To be clear, nothing *requires* the Commission to do this. Further, there is broad support for granting the extension even among tribal nations that have filed applications. But the Commission has authority to do this should it wish to do so, and NCAI, *et al.* would not object to such an approach.

As the Commission recently found when it granted a blanket extension of six months to all multichannel video programming distributor (MVPDs) to implement the consumer protection requirements of the Television Viewer Protection Act, the Commission can act pursuant to the “good cause” provision of the Administrative Procedures Act (APA) without notice and comment.⁷⁰ As the Media Bureau explained: “In view of the evolving and unpredictable nature of the pandemic” and “the disruptive effect of the national emergency on the daily activities of entities subject to Section 642,” the decision to grant a six-month extension satisfied the provision allowing agencies to waive notice and comment “where it for good cause” finds it will serve the public interest to do so.⁷¹ Tribal nations deserve the same consideration from the Wireless Bureau as that shown by the Media Bureau to MVPDs and providers of fixed-broadband access service.

⁷⁰ See 5 U.S.C. §553(b)(3)(B).

⁷¹ *TVPA Extension Order* at ¶4.

III. CONCLUSION

The Rural Tribal Priority Window is the single most important initiative the Commission has ever taken to fulfill its trust obligations and enable American Indians to take control of their digital future, on equal terms with every other community in America. The unforeseen devastation from the COVID-19 pandemic threatens to deny this opportunity to hundreds of eligible tribal nations. Virtually no one could have foreseen the coming of the pandemic, or somehow planned for such a catastrophic contingency. COVID-19 has already inflicted a terrible toll on tribal nations across Indian Country. To allow COVID-19 to deny hundreds of tribal nations a genuine opportunity to access spectrum on their tribal lands and deploy their own 5G networks would be inequitable, unjust, and cruel.

The Commission has it within its power to extend the deadline so that tribal nations may overcome the damage done by COVID-19 and apply for 2.5 GHz licenses to serve their communities. The Commission has already exercised this power to assist the cable industry, granting an extension of six months for MVPDs to implement Section 1004 of the Television Viewer Protection Act. Tribal nations deserve the same treatment. The Commission's long-acknowledged obligations under the federal trust relationship with American Indian and Alaska Native tribes likewise requires the Commission to grant the extension. Doing so harms no one, and would benefit the hundreds of thousands of American Indians and Alaska Natives on rural tribal lands who lack broadband access.

WHEREFORE, for the above stated reasons, the Commission should grant this Motion and extend the deadline for filing applications in the Rural Tribal Priority Window until February 3, 2021.

Respectfully submitted,

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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Transforming the 2.5 GHz Band) WT Docket No. 18-120
)

DECLARATION OF YVETTE ROUBIDEAUX

I, Yvette Roubideaux, declare and state as follows:

1. I currently serve as the Vice President of Research for the National Congress of American Indians (“NCAI”) and the Director of the NCAI’s Policy Research Center (“PRC”) and have served in this role for 2 years.

2. The NCAI PRC is a renowned national tribal research center supported primarily through federal and foundation grants and contracts. The NCAI PRC’s mission is to provide tribal leaders with the best available knowledge to make strategic and proactive policy decisions that improve the future of American Indians and Alaska Natives.

**NCAI’s Online Survey to Capture Tribal Needs and Concerns with Respect to the
Coronavirus Pandemic**

3. On March 11, 2020, NCAI sent an Action Alert to all tribes requesting input on any concerns or needs related to current efforts to reduce the impact of coronavirus (“COVID-19”) in their community by completing a short input form via a Survey Monkey link (“NCAI Online Survey”). The purpose of this request was to use the input from tribal nations to formulate emergency action plans and to support advocacy efforts.

4. The questions included the following topics: biggest concerns; whether tribal governments were getting the information they needed from state, local, and federal authorities; type of information they needed to take action; and what types of resources, funding, or supplies their tribal governments needed. As of April 17, 2020, 26 responses were received from tribal governments to the NCAI Online Survey.

NCAI's Email and Phone Survey to Capture Tribal Needs and Concerns with Respect to the Coronavirus Pandemic

5. On March 30, 2020, the NCAI PRC began a related effort to solicit additional input from tribal governments on the impact of the COVID-19 pandemic and developed a script of questions to ask during phone calls to tribal nation contacts in NCAI's database ("NCAI Telephonic Survey").

6. The questions focused on identifying challenges and needs facing tribal nations during the COVID-19 pandemic, and what strategies tribal governments were implementing to take action to respond.

7. Two NCAI employees (BH, ID) conducted the calls with the same script of questions for each call. Since many tribal offices were closed, an email was also sent to the tribal nation contact if there was no answer to the call. When contact was made with the tribal nation, the NCAI employees wrote down answers to each question on the script form and sent them to two NCAI PRC employees (GEL, SW or "NCAI PRC employees") for coding and documentation into an excel spreadsheet.

8. The NCAI PRC employees coded the answers separately into major categories and subcategories under each of the three areas (challenges, needs, strategies). If it was unclear where an answer should be coded, the NCAI PRC employees met to gain consensus on the

coding of the information into the agreed upon category and subcategory. I received a summary of the results at the end of each day and forwarded them to NCAI's Chief Executive Officer, Kevin Allis ("KA"), and NCAI's Chief of Staff, Jamie Gomez ("JG"), without any edits or alterations. As of April 17, 2020, 52 responses were received and results were forwarded to KA and JG.

Summary of Survey Responses Received to Date

9. I set forth below a summary based on the responses received to date on the needs and challenges presented to tribal communities as a result of the COVID-19 pandemic, first specifically for Alaska Native Tribal Governments and second for Tribes located in the other 11 Bureau of Indian Affairs Regions who responded to the survey. Consistent with our statement in the call script that we would not mention their tribal names without asking for permission, the names of the responding tribal nations are absent from the following responses. These summaries are separately set forth in a spreadsheet attached hereto.

Alaska Specific Responses – Health and Disease Management Challenges & Needs

10. One Alaska Native village responded that they are challenged with assisting their citizens with developing and instituting proper sanitation methods in dwellings that lack running water.

11. Multiple Alaska Native villages identified challenges accessing supplies needed for self-quarantine and proper physical distancing, such as: cots, toiletries, cleaning and disinfectant supplies, and personal protective equipment ("PPE") (*e.g.*, masks, gloves, sanitizing agents).

12. One Alaska Native village identified access to food and supplies as an immediate challenge, stating that their village does not have grocery stores and must rely on groceries being flown in -- making day to day life more challenging.

13. Multiple Alaska Native villages identified the coordinating of medical care as a challenge, with some villages serving as health care hubs for other rural villages, but not having enough supplies and PPE to withstand an outbreak. In addition, some villages are 100 miles from the nearest health facility, and are in fly-in zones, which means if a tribal citizen is infected he/she would need to be flown to the nearest healthcare facility for treatment. Also, many tribal citizens have been unable to receive in-person medical care.

Alaska Specific Responses – Economic Challenges & Needs

14. Multiple Alaska Native villages identified an immediate need for funds to assist tribal citizens with water and sewer accounts, and other utility costs.

15. Multiple Alaska Native villages responded that they have had to lay off workers and shut down tribal government offices.

16. One Alaska Native village identified as an immediate challenge, that there is uncertainty for how to pay government employees a full check when the grants they are funded under do not account for the requirement to work from home.

Alaska Specific Responses – Education Challenges & Needs

17. One Alaska Native village identified distance learning challenges, stating that teachers are having to develop and provide learning packets, which parents must physically pick up, and then physically drop off when complete, which creates learning hardships for youth.

18. One Alaska Native village identified the challenge of ensuring daily nutrition for Native youth since schools are shut down and the school lunch programs were essential for

helping provide daily nutritious meals and also since the scarceness of food and supplies is more pronounced by limited deliveries to remote villages.

Alaska Specific Responses - Tribal Governance Challenges & Needs

19. Alaska Native villages identified as a challenge, the need to assert regulatory authority over seasonal fishermen, who will soon be coming into town, and ensuring that they adhere to proper physical distancing and self-quarantine guidelines as reflected in the Governor of Alaska's recent directive.

20. One Alaska Native village identified as a challenge that they realized that their government office is not equipped for telework, and, as a result, have required core staff to go into the office to keep operations afloat.

21. One tribal government identified the following challenges and needs: (1) The need for point-of-care testing for COVID-19 testing for tribal communities, particularly rural, remote villages that have high population density and multi-generation and often multifamily households, and that lack additional housing for social distancing much less quarantine; (2) The need for adequate food supplies for tribal communities that are accessed only by small plane or marine ferry, and which have no or limited access to food delivery services; (3) The absence of, or inadequate, broadband services for tribal communities when schools are closed and rely on online instruction; for employees that are asked to work from home; and for individuals asked to access services and benefits online; (4) The need for relief from high energy costs for shelter-in-place tribal communities; (5) The challenge of capped funding levels for tribal programs that are experiencing significant increases in need, such as TANF; (6) The challenges presented by the failure of the federal government to engage in tribal consultation and to listen to tribal needs and interests, such as the Center for Disease Control, and the omission of Indian Country in

Congress' legislation; and (7) The challenges presented by the 25% non-federal share required of tribes for Stafford Act emergency declarations, and lack of access to disaster declarations without significant administrative burdens on tribes.

Alaska Specific Responses – Communication Challenges & Needs

22. One Alaska Native village noted that the delivery flights into many rural villages have been cut down to 1 per week, limiting receipt of mail, groceries, and supplies.

23. One Alaska Native village identified the challenge that their hard lines were down recently, making it difficult to conduct conference calls and other business, and that the telecom infrastructure is very poor generally and does not allow for efficient telework, telemedicine, or distance learning.

Tribes Located in the Lower 48 Specific Responses – Education Challenges & Needs

24. One tribal government identified as a challenge that not all families have computers and internet services for the children to take their classes and families with multiple children may need multiple computers to keep up with classes. Another tribal government noted that by March the schools were closed and students were asked to stay home, and cited the challenges presented by this since many of their school-age children do not have access to internet, and have no iPads, laptops or desktop computers. Another tribal government responded that “there is no current k-12 classes being held by internet options such as zoom like our city counterparts.” One tribal government identified as a challenge that parents have been letting children use their iPhone as computers, if they have an iPhone available – which is not ideal for long-term distance learning during this pandemic.

25. One tribal government identified the need for funding assistance for internet costs, which would help parents pay for the internet while they get back on their feet financially.

26. One tribal government identified the need for education funding which would allow tribal governments to contribute revenues to schools and institutions to retain teachers and professors and allow for the continuation of quality education.

27. One tribal government identified school facility needs, specifically the lack of broadband. The tribal government respondent noted that the tribal center and the schools are shut down, which makes distant learning critical. However, the tribal government does not have any cell towers and does not want its children to be left behind.

**Tribes Located in the Lower 48 Specific Responses – Economic Development and
Employment Challenges & Needs**

28. One tribal government identified the single greatest challenge it faces as uncertainty, noting they are uncertain when this pandemic will end and when the tribal government will be able to resume normal operations. The tribal respondent stated, “[w]e are working in an environment with very few concrete variables. Our ability to remain an effective and agile [tribal government] has certainly been challenged throughout this pandemic. We have many stakeholders; our tribal community, our team members and our guests. We are faced with an environment that is changing by the hour and we have to react and adapt just as quickly.”

29. Multiple tribal governments identified as a challenges that they had to shut down businesses, and lay off tribal employees – causing a need for immediate financial relief. Multiple tribal governments specifically mentioned gaming facilities, while another specifically referenced fisheries that have been collapsing. One tribal government mentioned other tribally-owned businesses, specifically referencing an ambulance company which is losing money due to the requirement to deep clean vehicles after transport and the associated overtime costs, as well as financial losses due to the general downturn of the economy.

30. Multiple tribal governments identified the need for resources that ensure that their citizens can stay home when necessary, and not worry about it. With respect to tribal employees, one tribal government identified the need for resources that allowed its government employees to work from home, such as computer and electronic equipment.

31. One tribal government identified the challenges presented by their loss of revenue, which will require the tribal government to begin using its savings account – which “includes monies set aside for future capital replacement”, and then eventually its credit line if relief is not granted. This tribal government identified its specific immediate need as increased costs primarily related to “payroll and benefit related costs for employees across the entire Tribal Enterprise.”

Tribes Located in the Lower 48 Specific Responses – Health/Disease Management Challenges & Needs

32. One tribal government identified as a challenge, an increase in anxiety with healthcare patients.

33. One tribal government identified the need for resources to assist in “maintaining chronic health maintenance for clinic patients”, stating that they are working on this with telehealth approaches.

34. Multiple tribal governments noted the need for PPE and other supplies, such as N95 medical masks and COVID-19 testing kits, hand sanitizer, infrared non-contact thermometers, toilet paper, disinfecting wipes, anti-viral surgical masks, gloves, booties, caps, face shields, goggles, hospital grade disinfectants, antibacterial soaps, and pharmaceuticals.

35. One tribal government identified the need for a “larger stock of basic necessities for our local markets.” Another tribal government noted that their challenge is addressing a

shortage of food, stating that the food shortage is resulting in lack of adequate food for their elders.

36. One tribal government identified the need for employee payroll funding, specifically referencing the need for funding to “maintain essential services like law enforcement and social services.”

37. One tribal government responded that their greatest need is ensuring that their first responders, such as fire fighters, have the proper protective equipment and other resources needed during this pandemic.

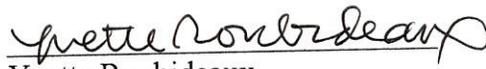
Tribes Located in the Lower 48 Specific Responses – Housing and Community Development Challenges & Needs

38. One tribal government identified the need to continue the construction of housing units, but everything has come to a standstill. The tribal respondent state that the tribal government is just trying to keep everything going, while “working with a skeleton crew.”

39. One tribal government identified the “need to identify and establish a quarantine center.”

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 7/21/2020


Yvette Roubideaux

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, et al.,
Plaintiffs,

v.

STEVEN MNUCHIN, in his official capacity As
Secretary of the Treasury,
Defendant.

Case No. 20-cv-01002 (APM)

CHEYENNE RIVER SIOUX TRIBE, et al.,
Plaintiffs,

v.

STEVEN MNUCHIN, in his official capacity As
Secretary of the Treasury,
Defendant.

Case No. 20-cv-01059 (APM)

UTE TRIBE OF THE UINTAH AND
OURAY RESERVATION,
Plaintiffs,

v.

STEVEN MNUCHIN, in his official capacity As
Secretary of the Treasury,
Defendant.

Case No. 20-cv-01070 (APM)

**BRIEF OF *AMICI CURIAE*, NATIONAL CONGRESS OF AMERICAN INDIANS;
AFFILIATED TRIBES OF NORTHWEST INDIANS; ALL PUEBLO COUNCIL OF
GOVERNORS; CALIFORNIA TRIBAL CHAIRPERSONS' ASSOCIATION; GREAT
PLAINS TRIBAL CHAIRMEN'S ASSOCIATION, INC.; INTER TRIBAL
ASSOCIATION OF ARIZONA, INC.; INTER-TRIBAL COUNCIL OF THE FIVE
CIVILIZED TRIBES; MIDWEST ALLIANCE OF SOVEREIGN TRIBES; UNITED
SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND; NATIONAL
INDIAN GAMING ASSOCIATION; ARIZONA INDIAN GAMING ASSOCIATION;
AND CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION
IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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INTERESTS OF *AMICI CURIAE*

Established in 1944, the National Congress of American Indians (“NCAI”) is the oldest and largest national organization comprised of tribal nations and their citizens. NCAI’s mission, as embodied in its Constitution, is to preserve the relationship between federally recognized Indian tribes and the United States, and to promote a better understanding of tribal nations and to improve the welfare of Indians. As such, NCAI is uniquely situated to provide critical context to the Court with respect to Tribal governments, specifically in Alaska, and the government-to-government relationship.

The other eleven *amici* likewise are national and regional organizations representing federally recognized Indian tribes and their interests across the United States. They each have an interest in this case because it involves important matters of tribal sovereignty: the allocation of desperately needed relief funds to assist Tribal governments in dealing with the COVID-19 pandemic. Leaders of these organizations have provided testimony regarding the dire consequences befalling their member Indian Tribes and challenges faced by their constituent Tribal governments in the face of this crisis. *See* ECF Nos. 20-1, 20-2, 20-3, 20-4, 20-5. We briefly describe each of these *amici*:

- Affiliated Tribes of Northwest Indians (“ATNI”) has been dedicated to tribal sovereignty and self-determination since its founding in 1953. ATNI is a nonprofit organization comprised of nearly 50 federally-recognized Indian tribes from the greater Northwest with the intent to represent and advocate for the interests of its member Tribes.
- All Pueblo Council of Governors (“APCG”) is comprised of the governors of the 19 Pueblo Nations of New Mexico and one in Texas. APCG was formally established in 1598 and has convened regularly ever since to advocate, foster, protect, and encourage the social,

cultural, and traditional well-being of the Pueblo Nations.

- California Tribal Chairpersons' Association ("CTCA") is a non-profit corporation, consisting of ninety (90) federally recognized tribes (represented by tribal chairpersons and vice-chairpersons) ("CTCA Member Tribes") from across the State of California.
- Great Plains Tribal Chairmen's Association, Inc. (GPTCA) is organized under Section 17 the Indian Reorganization Act, to support the 16 Indian nations and tribes of the Great Plains Region (North Dakota, South Dakota, and Nebraska) and their treaty rights, reserved rights to self-determination and self-government. As a Section 17 Corporation, GPTCA operates as an arm of its member Indian nations and tribes.
- Inter tribal Association of Arizona, Inc. ("ITAA") is comprised of 21 federally recognized Indian tribes with lands located primarily in Arizona, as well as in California, New Mexico and Nevada. Founded in 1952, ITAA is a united voice for tribal governments on common issues and concerns. The representatives of ITAA are the highest elected tribal officials from each Indian tribe, including tribal chairpersons, presidents and governors.
- Inter-Tribal Council of the Five Civilized Tribes ("ITC) is an organization that unites the Tribal Governments of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek) and Seminole Nations representing over 750,000 Indian people throughout the United States.
- Midwest Alliance of Sovereign Tribes ("MAST") was established in 1996 to protect, serve, and enhance the interests of its thirty-five members, which are federally-recognized Indian tribes from Minnesota, Wisconsin, Iowa, and Michigan. Its mission is to advance, protect, preserve, and enhance the mutual interests of its member tribes.
- United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), which represents 30 federally recognized Tribal Nations from the Northeastern Woodlands to the

Everglades and across the Gulf of Mexico. USET SPF was formed in 2014 as an affiliate of the United South and Eastern Tribes, Inc. to advocate on behalf of USET SPF's Tribal Nation members by upholding, protecting, and advancing their inherent sovereign authorities and rights.

- National Indian Gaming Association (“NIGA”) mission is to protect and preserve the general welfare of Tribes striving for self-sufficiency through gaming enterprises in Indian Country. To fulfill its mission, NIGA works with the Federal government and Congress to develop sound policies and practices and to provide technical assistance and advocacy on gaming-related issues. In addition, NIGA seeks to maintain and protect Indian sovereign governmental authority in Indian Country.
- Arizona Indian Gaming Association (“AIGA”) organization is comprised of eight federally-recognized Indian tribes in Arizona, AIGA is committed to protecting and promoting the welfare of Tribes striving for self-reliance by supporting tribal gaming enterprises on Arizona Indian lands.
- California Nations Indian Gaming Association (“CNIGA”), founded in 1988, is a non-profit organization. Its specific purposes are to promote, protect and preserve the general welfare and interests of federally-recognized Indian Tribes through the development of sound policies and practices with respect to the conduct of gaming activities in Indian country and the promotion of tribal sovereignty.

INTRODUCTION

Pursuant to Title V of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress amended the Social Security Act (42 U.S.C. 301 et seq.) to allocate \$150 billion in fiscal year 2020 to “States, Tribal governments, and

units of local government” to address unprecedented costs associated with the COVID-19 pandemic. 42 U.S.C. § 801(a)(1). Of that \$150 billion allocation, \$8 billion is “reserve[d] . . . for . . . Tribal governments.” *Id.* § 801(a)(2)(B). The term “Tribal government” means “the recognized governing body of an Indian Tribe,” *id.* § 801(g)(5), and the term “Indian Tribe” “has the meaning given that term in [section 5304(e) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5304(e)],” *id.* § 801(g)(1). The Indian Self-Determination and Education Assistance Act (“ISDEAA”) defines “Indian tribe” as

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 the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

25 U.S.C. § 5304(e). (We refer to the clause commencing with “which” as the “eligibility clause.”)

As this Court previously summarized: “taken together, Congress allocated \$8 billion in the CARES Act ‘for making payments to’ ‘the recognized governing body of’ ‘any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation . . . , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.’” Memorandum Opinion, ECF No. 36 (“Mem. Op.”) at 19-20 (citations omitted).

This case presents the question of whether for-profit, private corporations formed under the laws of the State of Alaska (the “ANCs”) may share in this \$8 billion targeted for “Tribal governments.” That is, whether the ANCs are the “*recognized* governing bod[ies]” of “any Alaska Native village or regional or village corporation . . . , which is *recognized* as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” We emphasize “recognized” because the construction of that term is a central focus of this brief.

By final agency action, the Defendant Secretary of the Treasury, Steven Mnuchin (the “Secretary”), determined that ANCs may share in the \$8 billion targeted for “Tribal governments” in the CARES Act, and on the Plaintiffs’ motions, this Court preliminarily enjoined the Secretary from distributing relief funds to the ANCs.

In so doing, the Court ruled, for the purposes of the preliminary injunction motion, *inter alia*, that “recognition” is a well-established Indian law “legal term of art” that Congress understood when it used that term to define “Tribal governments.” Mem. Op. at 21-22. Summary judgment should now be entered for the Plaintiffs for the central reason that the ANCs are not “recognized” by the United States as having the unique government-to-government relationship reserved for sovereign Indian tribes. That special status is held only by the 229 Alaska Native villages included on the list of federally recognized Indian tribes published in the Federal Register by the Secretary of the Interior in accord with the Federally Recognized Indian Tribe List Act, Law 103-454, Nov. 2, 1994, 108 Stat. 479, (“the List Act”), codified at 25 U.S.C.A. § 5131. *See* 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).

* * *

In this brief, the *amici curiae* describe the unique historical context for the federal recognition of the Alaska Native villages and why the ANCs do not share in that status.

First, neither Congress nor the Executive has ever recognized ANCs as Indian tribes. On the contrary, only the Alaska Native villages have held that unique governmental status, and the history of colonization in Alaska, while of relatively recent vintage, fully bears that out. The 1971 Alaska Native Claims Settlement Act, Pub. L. No. 92–203, § 2(b), 85 Stat. 688, (“ANSCA”), which spawned the ANCs, did not disturb that status. Nor did ANCSA bestow that status upon

the ANCs.

Second, ISDEAA did nothing more than identify ANCs as eligible pass through entities, or contractors, for the provision of services and programs to Alaska Natives. The ANCs' inclusion in the ISDEAA's "Indian tribe" definition alongside Alaska Native villages, *see* 25 U.S.C. § 5304(e), merely reflects uncertainty at the time about how federal services were to be provided to Alaska Natives in the aftermath of the complex and novel framework established by ANCSA. And that uncertainty mirrors similar confusion when, in 1988, the ANCs were included on the Secretary's list (one predating the List Act) of "entities" deemed "eligible" for funding from the federal government for programs designed for Native Americans. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 FR 54,364, 54,365 (Oct. 21, 1993). As the Secretary carefully explained in 1993 to avoid future misimpressions, the ANCs would be removed from the list because "these corporations are not governments." *See id.* at 54,365-66.

Third, as we set forth in our *amicus* brief in support of the Plaintiffs' motions for temporary restraining order and preliminary injunction (ECF No. 20) and as we revisit briefly below, the ANCs lack the sovereign powers of a Tribal government; those powers are retained and exercised only by Alaska Native villages.

ARGUMENT

I. INTRODUCTION

Corporations have no power *to govern*. Rather, they *are governed*. They are subject to the governmental authority of one of the three sovereigns in this country – the Federal, State, or Tribal governments, sometimes concurrently. *See generally*, The Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) ("[I]n the

United States, we have three types of sovereign entities--the Federal government, the States, and the Indian tribes.”).

The Defendants before the Court in this case have differing and inconsistent theories for why the corporations here, the ANCs, which seek to appropriate federal funds earmarked for “Tribal governments,” should be deemed to hold such a status. The Secretary apparently understands that the eligibility clause at issue employs a federal Indian law term of art – “recognized” – for the “political act” of establishing a government-to-government relationship between the United States and an Indian tribe. *See* Def.’s Mem. Of Law in Support of Def. Mot. For Summ. J., ECF No. 79-1 (“Sec. Br.”) at 7, 13. *See also* Mem Op. at 28 (quoting United States’ brief filed in *Wyandot Nation of Kan. v. United States*, 858 F.3d 1392 (Fed. Cir. 2017) (characterizing the eligibility clause as employing this “phrase of art”). But because the ANCs do not satisfy that term of art, the Secretary simply abandons the clause. *See* Sec. Bf. at 7, 13. In so doing, as this Court noted in its preliminary injunction ruling, the Secretary violates a cardinal principle of statutory construction: that the words of a statute cannot be rendered surplusage. *See* Mem. Op. at 24 (citing *Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005)).

In contrast to the Secretary’s complete abandonment of the clause, the ANCs wish to throw the well-established federal Indian law meaning of the eligibility clause out the window entirely. *See* Intervenor-Def.’s Mem of P. & A. in Support of Mot. For Summ. J., ECF No. 78-1 (“ANC Br.”) at 24, 33. In doing so, they contort the clause into something unrecognizable: they bootstrap out-of-context authority allowing non-tribal entities to participate in some federal programs (*with the approval or partnership of Tribal governments*) that further tribal interests. Beyond this, they claim to serve “essential governmental functions” for Alaska Natives (*including “‘at-large’ Alaska Native shareholders,” devoid of any tribal citizenship*) through voluntary, charitable donations and

other philanthropic activities (e.g., trails maintenance). *See* ANC Br. at 15-16 (emphasis added). These are the kinds of activities that private corporations undertake and then deduct on their tax forms, not governmental functions for a citizenry. In Alaska, like every place else in the country, governmental functions are performed only by one of three sovereigns: the Federal, State, or Tribal governments.

The bottom line is this: everyone knows what a “Tribal government,” or “recognized governing body of an Indian tribe,” is. It is a cognizable political entity, *one that governs*. As a matter of federal Indian law, it is, and always has been, a federally recognized Indian tribe. In Alaska, only the Alaska Native villages are “Tribal governments.” Only Alaska Native villages have “recognized governing bod[ies] . . . of Indian Tribe[s].”

II. IN ALASKA, THE FEDERAL GOVERNMENT HISTORICALLY HAS RECOGNIZED ONLY ALASKA NATIVE VILLAGES AS GOVERNMENTS.

Indian tribes are governments, “pre-existing the Constitution,” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), “that exercise inherent sovereign authority over their members and territories,” *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Federal recognition is “a formal political act confirming [a] tribe’s existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.” *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.)).¹ In the field of federal Indian law, such “recognition” is an established “term of art,” confirming an Indian tribe’s sovereign status in relation to the United States.

¹ Upon enacting the List Act, Congress found that “the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes.” Pub. L. 103-454, 108 Stat. 4791-4792 § 103(2).

Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127, 131 (D.D.C. 2015)), *aff'd*, 829 F.3d 754 (D.C. Cir. 2016). *Accord*, Mem Op. at 20-21.

Treaty agreements between the United States and Indian tribes were among the first means of federal recognition. *See Mackinac Tribe*, 829 F.3d at 755. Congress abolished treaty-making in 1871. 25 U.S.C. § 71. Thereafter, apart from the few instances where federal courts have determined Indian tribes to under a federal common law test, *see, e.g., Montoya v. United States*, 180 U.S. 261, 266 (1901); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 375 (1st Cir. 1975), the federal government recognizes Indian tribes by statute, *e.g.*, National Defense Authorization Act of 2020, Pub. L. 116-92, Sec. 2870 (Dec. 20, 2019) (recognizing the Little Shell Tribe of Chippewa Indians as an Indian tribe with a government-to-government relationship with the United States), or through a formal administrative process, *see Procedures for Federal Acknowledgement of Indian Tribes*, 25 C.F.R. §§ 83 *et seq.* As discussed in greater detail below, the 1936 Alaska Amendment to the Indian Reorganization Act, Pub. L. 74-538, 49 Stat. 1250 (1936) (codified at 25 U.S.C. § 5119), provided a congressionally-mandated framework for the federal recognition of tribes in Alaska. In 1994, with the enactment of the List Act, Congress established the means for unequivocally confirming the recognized status of any Indian tribe and its concomitant eligibility for special federal programs and services: the tribe's inclusion on the list of federally recognized Indian tribes.

* * *

In this case, the Defendants seek to change a fundamental reality: that in Alaska, the only recognized Tribal governments are the Alaska Native villages, which are now included on the list of federally recognized tribes. This would be a profound paradigm shift for federal-tribal relations in Alaska. This can best be understood by placing the United States' relationship with the

Indigenous peoples of Alaska in historical context. For the history shows that the ANCs have never been “recognized” as Tribal governments as that term has been long understood in the field of federal Indian law.

A. Background: The Context for the United States’ Colonization of Alaska

Our Nation’s colonization of the Tribal nations indigenous to our 50 states has been a brutal process. *See generally*, TOCQUEVILLE, DEMOCRACY IN AMERICA (1848) (Doubleday Edition 1969) at 339 (observing that the United States accomplished the subjugation of Native Americans with its laws as or more effectively than the Spaniards did with brutal force). In dealing with “the Indian problem,” “Federal Indian policy [has been] schizophrenic.” *United States v. Lara*, 541 U.S. 193, 219 (2004). It has shifted from actions to “remove” tribes from their homelands to distant lands, presumed to be of no interest to white settlers; to attempts to end Tribal governments and cultures through “assimilation” and “termination”; to the current “modern era,” from the 1970s to the present, when the federal government has committed to promote tribal sovereignty and self-government. *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW at 8-108 (2012) (Nell Jessup Newton ed.) (“COHEN”). The Tribal nations of Alaska, while uniquely situated, have not been spared from the dispiriting consequences of this colonizing process.

In a comprehensive analysis of the sovereign status of Alaska Native villages and their relationship to the United States undertaken in 1993, the Solicitor of the Department of the Interior (the “Solicitor”) observed that although “Alaska was the last territorial acquisition of the United States on the North American continent,” “[d]ealings with Native groups in Alaska have . . . reflected elements of then-current national policies.” Op. Sol. Interior M-36975 at 2 (Jan. 11,

1993) (*Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, 1993 WL 13801710) (hereinafter “Op. Sol. Interior M-36975”).²

B. A Brief History of Alaska Natives.

1. First Contact and the 1867 Treaty of Cession with Russia

Russians in first contact with the Indigenous peoples of Alaska in the 1700s encountered numerous “distinct cultural groups” of Alaska Natives, including the Inupiat, the Yupik, the Aleuts, the Athabascans, the Haida, and the Tlingit. *See* Op. Sol. Interior M-36975 at 29. These were highly organized communities, which, like any sovereign, set rules for trade and subsistence activities; recognized land boundaries; conducted war; and managed domestic and diplomatic affairs. *Id.* at 9 (citations omitted).

In 1867, the United States assumed possession of present-day Alaska by means of the Treaty of Cession with Russia. *See* 15 Stat. 539 (1867). The Treaty “maintained and protected” the Alaska Native tribes’ “free enjoyment of their liberty, property, and religion” and provided that the “tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of [the United States].” *Id.* art. III-IV. The United States never negotiated treaties with the numerous Alaska Native tribes for the relinquishment of their retained aboriginal title to their homelands. *See* Op. Sol. Interior M-36975 at 10. As the Solicitor noted, “[t]he remote location, large size and harsh climate of Alaska further delayed the need to confront questions concerning the relationship between the Native peoples of Alaska and the United States.” *Id.* at 4.

² Page citations to Op. Sol. Interior M-36975 herein track the pagination (e.g. “*1”) of the version found on Westlaw, 1993 WL 13801710.

2. Before Statehood

In 1871, Congress declared an end to treaty-making with Tribes in response to rapid westward expansion of the U.S. population. *See* 25 U.S.C. § 71. Congress then embraced a policy of forced assimilation under the General Allotment Act of 1887 (the “Dawes Act”). *See* General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 – 358 (2019)). The Dawes Act and a series of other federal statutes sought to assimilate and dissolve Tribal nations and their citizens, open their lands, and eradicate their separate political identity. *See id.*; Alaska Native Allotment Act of 1906, Pub. L. No. 59-171, 34 Stat 197 (repealed by ANCSA in 1971). As a result of allotment, Indian landholdings decreased from 138 million acres in 1881 to 48 million acres in 1934. COHEN at 73.

In 1928, a comprehensive report commissioned by the Secretary of Interior found that the allotment/assimilation efforts had proved to be a colossal failure. *See* INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 3 (L. Meriam ed., 1928) (the “MERRIAM REPORT”). In 1934, John Collier, the Commissioner of Indian Affairs, urging repudiation, reported to Congress, “[i]t is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul.” Hearings on H.R. 7902 (Readjustment of Indian Affairs (Index)) before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 17 (Comm.Print 1934) at 18. Congress ended the allotment policy that year by passing the Indian Reorganization Act of 1934 (“IRA”). *See* 48 Pub. L. No. 73-3863, 48 Stat. 984 – 88 (1934) (codified as amended at 25 U.S.C. §§ 461 – 479 (2019)). The IRA shifted federal Indian policy to focus on rebuilding the Tribes’ land bases by taking land into trust on behalf of Tribal nations. *See* 25 U.S.C. § 465. In addition, the Act promoted a policy of

enhancing Tribal self-governance and encouraged Tribes to adopt constitutions and form federally chartered corporations as arms of the Tribes to further economic development. *Id.* §§ 476-477.

Many Alaskan tribes took advantage of opportunities afforded by IRA amendments, specifically targeting Alaska, to organize their governments.³ The Alaska Amendment to the IRA was carefully crafted to be specific to Alaska Natives and their political structure, allowing Alaska Natives to organize as Indian tribes under the IRA, *see* 25 U.S.C. § 5123, to establish Section 17 Corporations on par with other federally recognized Indian tribes, *see* 25 U.S.C. § 5124, and to receive loans set aside for Indian chartered corporations, *see* 25 U.S.C. § 5113 and to acquire land in trust status, *see* 25 U.S.C. § 5108, among other benefits. 25 U.S.C. § 5119.

With respect to organizing as an Indian tribe, Congress took careful consideration to ensure Alaska Natives could organize in a manner that made sense in Alaska, stating:

[G]roups of Indians in Alaska not *recognized* prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws, and to receive charters of incorporation and Federal loans under sections 5113, 5123, and 5124 of [the IRA].

³ Approximately one-third of today's 229 federally recognized Indian tribes in Alaska formally organized their governments through the Alaska amendments to the IRA and thereby govern through IRA Councils. Op. Sol. Interior M-36975 at 1-2. The rest retain Traditional Councils organized under tribal law and custom. Op. Sol. Interior M-36975 at 52-53, 79. Organizing as an IRA council requires a tribe to adopt a constitution and bylaws, obtain Secretarial approval of the constitution, and then to have the constitution ratified by a majority vote of the adult members of the tribe in an election conducted by the BIA. *See* 25 U.S.C. § 5123. The inherent governmental powers of Traditional Councils are the same as the powers of IRA councils: both possess the inherent sovereign authority of Indian tribes. *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999). These powers include the power to adopt and operate a government of the tribe's own choosing, define conditions of membership, prescribe rules of inheritance, and control conduct of its members. COHEN, at § 4.01(1). Both Traditional Councils and IRA Councils possess sovereign immunity from suit unless waived. *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337 (Alaska 2011).

Id. Because of the unique history of Alaska Natives, many groups that would organize as Indian tribes were groups bonded by their “occupation,” such as fishing communities. *See* AUTHORITY OF THE SECRETARY OF INTERIOR TO RESERVE WATERS IN CONNECTION WITH, AND INDEPENDENTLY OF, LAND RESERVATIONS FOR ALASKAN [SIC] NATIVES UNDER THE ACT OF MAY 1, 1936, 56 Interior Dec. 110, 13 (D.O.I.), 1937 WL 3346 (stating: “One of the most usual bond of occupation is that of fishing and it is certain that many of the communities organized under the Reorganization Act will be fishing communities.”). Others organized based on their shared residency within an Alaska Native community. The common bond standard also allowed for the reorganizing of Alaska Natives from different origins. *See* Memorandum from Harold Ickes, Secretary, Department of the Interior, *Instructions for Organization in Alaska under the Reorganization Act of June 18, 1934 (48 Stat. 987), and the Alaska Act of May 1, 1936 (49 Stat. 1250), and the Amendments Thereto*, at 1-2 (Dec. 22, 1937). In other words, in determining how best to recognize governing bodies in Alaska, Congress did not rubber stamp the process in the IRA of 1934 – which was intended to organize Indians on a reservation – but instead carefully crafted criteria specific to how Alaska Natives had organized themselves in Alaska up until that point. This all occurred 35 years prior to Congress’ passage of ANCSA.

“Pursuant to the IRA, sixty-nine Alaska Native villages and regional groups adopted constitutions [approved by the Secretary of Interior].” Op. Sol. Interior M-36975 at 19. Thus, “[b]y the time of enactment of the IRA, the preponderant opinion was that Alaska Natives were subject to the same legal principles as Indians in the contiguous 48 states, and had the same powers and attributes as other Indian tribes, except to the extent limited or preempted by Congress.” Op. Sol. Interior M-36975 at 26.

The 1940s ushered in another reversal of federal Indian policy, back towards assimilation, the era known as “Termination,” when Congress and the Bureau of Indian Affairs pursued formal policies to terminate the existence of Indian tribes. *See* COHEN at 84-93. This policy resulted in the legislative and administrative termination of the federal government’s relationship with countless Indian tribes and the unwanted extension of state jurisdiction over many tribes. *See id.* at 92. The termination policies, like those of allotment/assimilation, only led to the further impoverishment of Indian people. *Id.* It would not be until the 1970s that the federal government would again change course and commit to the “modern era” to a federal Indian policy of tribal self-determination. *See id.* at 93-108.⁴

This, then, was the stage for Alaska’s statehood in 1958 and ANCSA in 1971.

3. ANCSA

Like so many stories involving the displacement of Indigenous peoples, the one in Alaska involves the discovery of, and desire to exploit, a lucrative natural resource. In the early 1960’s, just years after statehood, “Atlantic Richfield Company discovered a huge oilfield on Alaska’s ‘north slope’ of the Brooks Range and native groups blanketed the proposed right-of-way for a trans-Alaska oil pipeline with claims of aboriginal title.” *Native Vill. of Venetie I.R.A. Council v. State of Ak.*, 1994 WL 730893, at *1 (D. Alaska Dec. 23, 1994). The state had selected large areas of federal land and made application for patents for the land. *People of Vill. of Gambell v. Clark*, 746 F.2d 572, 574 (9th Cir. 1984).

These conflicting claims hindered both development and protection of Native and national interests in Alaska. In 1966, Secretary of Interior Stewart Udall froze all public land transactions in Alaska pending resolution of the conflicting claims. In 1971 Congress passed the [ANCSA] in an effort to accommodate in a rational manner the interests of the

⁴ In the 1994 List Act, Congress recounted that it “has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated.” P.L. 103-454 (H.R. 4180) § 103(5).

state, Native groups, conservationists, and potential developers, including the oil companies.

Id. See also COHEN at 329 (describing the conflict). ANCSA “extinguished” the Alaska Tribal nations’ claims of aboriginal title to their homelands in exchange for \$962,500,000 and 40,000,000 acres of land. *Cape Fox Corp. v. United States*, 646 F.2d 399, 400 (9th Cir. 1981). But instead of employing the “usual model of vesting existing tribal governments with the assets reserved after the extinguishment of the aboriginal claims, Congress adopted an experimental model initially calculated to speed assimilation of Alaska Natives into corporate America.” COHEN at 330. In order to receive benefits under the Act, Native residents of Native villages were required to form profit or nonprofit corporations. See 43 U.S.C. § 1607.⁵

Most Alaska Natives were enrolled in the villages where they resided. Op. Sol. Interior M-36975 at 22. Those alive on December 31, 1971, were permitted to be issued stock in one of 13 regional corporations, incorporated as for-profit corporations, and in one of the over 200 for-profit village corporations. See 43 U.S.C. §§ 1606-1607. (The thirteenth regional corporation, comprised of Natives residing outside of Alaska, received only money. *Id.* §§ 1606(c), 1611(c).) With respect to land allocations, 38 million acres were to be selected and conveyed to Native village corporations and to 12 of the 13 regional corporations. 43 U.S.C. § 1611. As for the distribution of settlement proceeds, ANCSA allocated the entire \$962,500,000 to the ANCs. *Id.* § 1605(c). See also Mem. Op. at 4 (discussing same).

The corporate allocations of ANCSA “parallel termination statutes in significant respects.” Op. Sol. Interior M-36975 at 61. Nevertheless, while this “formidable framework” “threw into question the future *role* of the tribes,” ANCSA recognized “their continued existence” as sovereign

⁵ Every village corporation opted for the for-profit form. See Op. Sol. Interior M-36975 at 50 n.225.

governments. COHEN at 353 (emphasis in original). Unlike the Alaska Native villages, the ANCs are chartered under state law to “perform proprietary, not governmental functions,” *id.*, and, as the Solicitor found, “are clearly not tribes,” Op. Sol. Interior M-36975 at 35 n.152. They are not “recognized” as Tribal governments. *See* 58 Fed. Reg. at 54,365-66 (Oct. 21, 1993).

Consistent with this and notwithstanding the “formidable” corporate overlay imposed upon Alaska Natives by ANCSA, “[n]othing in ANCSA . . . required the dissolution of tribal governments.” COHEN at 353. Indeed, ANCSA did not revoke or disrupt in any way the governmental authorities confirmed by the IRA. *See* Op. Sol. Interior M-36975 at 23 (stating “ANCSA did not revoke the village IRA constitutions or the IRA corporate charters for those villages that also had charters.”). Nor did ANCSA repeal the authority in section 1 of the Alaska Amendment of the IRA, affording Alaska Native villages continuing authority to reorganize and adopt constitutions. *Id.* At its core, therefore, “Congress intended ANCSA to free Alaska Natives from the dictates of ‘lengthy wardship or trusteeship,’ *not to handicap tribes by divesting them of their sovereign powers.*” *John v. Baker*, 982 P.2d at 753 (quoting H.R. Rep. 92-523, 1971 U.S.C.C.A.N. 2192 at 2220)) (emphasis added). “[T]he tribes continue to exist” and “*Tribal governments, as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government.*” COHEN at 353 (emphasis added).

In 1975, closely on the heels of ANCSA, Congress established the American Indian Policy Review Commission to undertake “the most comprehensive review of federal Indian policy” since the Merriam Report. Op. Sol. Interior M-36975 at 3. In a chapter dedicated to the status of Alaska Tribal nations, the Commission reported:

When, after the beginning of the 20th century, the United States began to take notice of the Alaska Natives. . . it regarded the Alaska Native tribes as dependent domestic sovereigns, possessed of the same attributes and powers as the Native tribes of the lower 48. And, just as in the case of other Native tribes, [the United States] *acknowledged* that a special

relationship existed between it and the Alaska Native tribes and their members, as an incident of which it undertook to provide them with special services.

* * *

The Alaska Native tribes (*referring, of course, to the historic and traditional tribal entities, not to the Native corporations organized under the Settlement Act*), just as the tribes of the lower 48, are domestic sovereigns. They possess all of the attributes and powers normally appertaining to such status, except those that have been specifically denied or taken from them by Congress.

AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 95th Cong., 1st Sess. 489-91

(Comm. Print 1977) (footnotes omitted) (emphasis added).

In sum, ANCSA did not require the dissolution of tribal governments; rather, tribes in Alaska still exist and are the only Native entities that possess inherent powers of self-government.

4. Post-ANCSA: Executive Action to Definitively Recognize Alaska Native Villages and To Disclaim Recognition of the ANCs

The above-referenced 1993 analysis of the sovereign status of Alaska Native villages undertaken by the Solicitor stopped short of identifying all recognized governing bodies of Indian tribes in Alaska. *See* Op. Sol. Interior M-36975 at 27-28, 35. “The question of federal recognition of Alaska tribes was definitively settled [later] in 1993, when the Department of the Interior published a revised list of federally recognized tribes.” COHEN at 354. The Interior Department’s “definitive” recognition of the Alaska Native villages was set forth in the preamble to Department’s 1993 Federal Register Notice of “Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs.” *See* 58 Fed. Reg. at 54,365.

The Notice states:

The purpose of the current publication is to . . . unequivocally acknowledg[e] that . . . the villages and regional tribes listed below . . . have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

Id. at 54,365-66 (emphasis added). Equally definitive was the Department’s clarification that ANCs have no such recognition as Tribal governments. The Interior Department explained:

Rather than being limited to . . . Native *governments* . . . as were the prior lists, the 1988 list was expanded to include . . . [the ANCs] . . . [in] respon[se] to a “demand by the Bureau and other Federal agencies . . . for a list of organizations *which are eligible for their funding and services based on their inclusion in categories frequently mentioned in statutes concerning Federal programs for Indians.*” 53 FR at 52,832.

The inclusion of *non-tribal entities* on the 1988 Alaska entities list . . . created a discontinuity from the list of tribal entities in the contiguous 48 states As in Alaska, Indian entities in the contiguous 48 states *other than recognized tribes* are frequently eligible to participate in Federal programs under specific statutes. For example, “tribal organizations” associated with recognized tribes, but not themselves tribes, are eligible for contracts and grants under the ISD[EE]A. 25 U.S.C. 450b(c), 450f, 450g. Unlike the Alaska entities list, the 1988 entities list for the contiguous 48 states was not expanded to include such entities.

* * *

[T]he inclusion of ANCSA corporations, *which lack tribal status in a political sense*, called into question the status of all the listed entities.

Id. (emphasis added). Thus, the Interior Department refused to include the ANCs on the 1993 list because they were “non-tribal entities” and not “recognized” as Tribal governments. *Id.* From that year forward, to this day, the Alaska Native villages are on the list and, therefore, “recognized” by the federal government, but the ANCs are not.⁶

⁶ See *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 60 Fed. Reg. 9,250 (Feb. 16, 1995); 61 Fed. Reg. 58,211 (Nov. 11, 1996); 62 Fed. Reg. 55,270 (Oct. 23, 1997); 63 Fed. Reg. 71,941 (Dec. 30, 1998); 65 Fed. Reg. 13,298 (Mar. 13, 2000); 67 Fed. Reg. 46,327 (Jul. 12, 2002); 68 Fed. Reg. 68,179 (Dec. 5, 2003); 70 Fed. Reg. 71,193 (Nov. 25, 2005); 72 Fed. Reg. 13,648 (Mar. 22, 2007); 73 Fed. Reg. 18,553 (Apr. 4, 2008); 74 Fed. Reg. 40,218 (Aug. 11, 2009); 75 Fed. Reg. 60,810 (Oct. 1, 2010); 75 Fed. Reg. 66,124 (Oct. 27, 2010); 77 Fed. Reg. 47,868 (Aug. 10, 2012); 78 Fed. Reg. 26,384 (May 6, 2013); 79 Fed. Reg. 4,748 (Jan. 29, 2014); 80 Fed. Reg. 1,942 (Jan. 14, 2015); 81 Fed. Reg. 5,019 (Jan. 29, 2016); 81 Fed. Reg. 26,826 (May 4, 2016); 82 Fed. Reg. 4,915 (Jan. 17, 2017); 83 Fed. Reg. 4,235 (Jan. 30, 2018); 83 Fed. Reg. 34,863 (Jul. 23, 2018); 84 Fed. Reg. 1,200 (Feb. 1, 2019); 85 Fed. Reg. 5,462 (Jan. 30, 2020).

III. THE ANCSA'S INCLUSION IN THE ISDEAA DEFINITION OF "INDIAN TRIBE" REFLECTS UNCERTAINTIES SURROUNDING THE NOVEL "EXPERIMENT" TAKING PLACE IN ALASKA, NOT THE BESTOWAL OF GOVERNMENTAL AUTHORITIES UPON ANCSAs.

As set forth above, in the 1970s, the United States began to implement a new policy of Indian self-determination, which included giving more authority over programs and services to tribal citizens. The ISDEAA, 25 U.S.C. §§ 5301 *et seq.*, enacted in 1975, just four years after ANCSA, is a centerpiece of this federal policy. ISDEAA authorizes Indian tribes to step into the shoes of the federal government through contracts and compacts in order to provide programs and services to trust beneficiaries – American Indians and Alaska Natives. Consistent with federal contracting policies, ISDEAA only allows for the contracting of administrative or ministerial functions and does not delegate inherent federal functions.⁷ As such, ISDEAA does not bestow upon eligible contractors, including ANCSAs listed next to Alaska Native villages in the definition of "Indian tribe," any governmental powers or governing authority. It only allows for, through federal contracting, the streamlined delivery of administrative functions tied to programs and services benefiting American Indians and Alaska Natives.

The history set forth above is directly relevant to the inclusion of the ANCSAs in ISDEAA's definition of "Indian tribe." ANCSA was a complex "experimental model." For one, it allocated settlement funds for the "extinguishment" of Tribal nations' aboriginal titles to private corporations, instead of the Tribal nations themselves. *See* COHEN at 330-31 (citing 43 U.S.C. §

⁷ *See, e.g.*, 25 U.S.C. § 5321 ("The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services . . . that support the delivery of services to Indians."); 25 U.S.C. at § 5387(C)(1)(A)(ii) (Including the fact that "the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe" as an appropriate reason for the Secretary to reject a Self-Governance compact proposal.").

1605(c)).⁸ *See also* Mem. Op. at 4-5 (describing the allocation of settlement funds and transfer of reservation lands to ANCs) (quoting *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998)). For another, it vested land allocations out of the settlement with the same corporations, not with the Tribal nations themselves. *See id.* (describing the land allocations under ANCSA).

At the same time, while ANCSA did not divest the Alaska tribes of their pre-existing sovereign status, there was uncertainty as to which of those tribes or affiliated entities could be considered “recognized.” There was no formal federal recognition process in place in 1971 at the time of ANCSA’s enactment or in 1975 at the time of the ISEAA’s enactment. The Interior Department thereafter began publishing its list of federally recognized tribes, and in 1978 promulgated its acknowledgment procedures. 43 Fed. Reg. 39,361 (Sept 5, 1978); 25 C.F.R. §§ 83.1–83.11 (1978). When Congress enacted ISDEAA (1975), and continuing for nearly 20 years thereafter, neither the federal courts nor the Interior Department could definitively confirm which Alaska Native villages were recognized Indian tribes with the unique government-to-government relationship with the United States. *See Native Vill. of Venetie I.R.A.*, 1994 WL 730893, at *12; Op. Sol. Interior M-36975 at 27-28, 35. Given this uncertainty and the complexity of the ANCSA “experiment” with its “formidable” corporate overlay, it is no wonder that Congress included not only the Alaska Native villages but also the ANCs, each with the potential option to fulfill the requirements of the “Indian tribe” definition’s eligibility clause.

⁸ Until extinguished by the United States, Indian tribes, *not individuals or corporations*, retain aboriginal title to the lands that they exclusively occupy and govern. *See Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823) (discussing the nature of aboriginal title retained by Indian tribes); *Pueblo of Jemez v. U.S.*, 790 F.3d 1143, 1154 (10th Cir. 2015) (same).

Of course, as set forth above, the Interior Department “definitively” resolved that issue for the Alaska Native villages with its preamble to the 1993 list of federally recognized Indian tribes published in the Federal Register. As for the ANCs, they found themselves on the 1988 list of entities eligible for funding and services. But in 1993, in the same Federal Register notice that it unequivocally announced the federally recognized status of Alaska Native villages, the Interior Department definitively established that the ANCs are *not* Tribal governments; they are not “recognized” as Indian tribes with a government-to-government relationship with the United States.

In 1994, on the heels of the Interior Department’s 1993 list and definitive clarifications with respect to the “recognized” status of the Alaska Native villages, and lack thereof for the ANCs, Congress chose to enact the List Act. Congress thereby made perfectly clear that federal recognition is demonstrated by inclusion on the list of Indian entities recognized as “eligible for the special programs and services provided by the United States to Indians because of their status of Indians.” 25 U.S.C. § 5131(a). The Defendants cannot bootstrap ANCs into “Tribal government” status for Title V CARES Act funds through their placement within the ISDEEA definition of “Indian tribe,” either by writing out the eligibility clause entirely (as the Secretary would do), or by construing it as something it is not (as the ANCs would do).

The Plaintiffs in the Confederated Tribes of the Chehalis Reservation case have aptly explained the contexts in which the ANCs may enter into 638 contracts as tribal organizations authorized to do so by federally recognized Alaska Native villages. *See* Confederated Tribes of the Chehalis Pls.’ Mot. For Summ. J. and Mem. On P. & A., ECF No. 77 at 35-39. The ANCs have that ability not because they are “recognized” in accord with the formal act of establishing a government-to-government relationship with the United States as required by the eligibility clause

within the ISDEAA definition of Indian tribe, but because they partner with, or attain authority from, a formally “recognized” Alaska Native village. Again, such recognition is reserved for only Tribal governments.⁹

IV. ALASKA NATIVE VILLAGES POSSESS GOVERNMENTAL POWERS LIKE STATES AND LOCAL GOVERNMENTS ENTITLED TO THE CARES ACT RELIEF FUNDS, BUT THE ANCS DO NOT.

As the Court observed in its preliminary injunction decision, “Congress placed monies for ‘Tribal governments’ in the same title of the CARES Act as funding for other types of “governments,” specifically, “for making payments to States, Tribal governments, and units of local government.” Mem. Op. at 22-23. In accord with time-honored rules of statutory construction, “[t]he term ‘Tribal government’ must be read in this context.” Mem. Op. at 23.

As set forth above and discussed in detail in our *amicus* brief in support of the Plaintiffs’ motion for preliminary injunction, federally recognized Indian tribes are governments. Indeed, federal recognition confirms their very status as governments and their government-to-government relationship with the United States. ANCs have no such status – they are private corporations – and their attempt to stand shoulder to shoulder with the recognized governing bodies of Alaska Native villages “denigrates” the sovereign dignity of Indian tribes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-146 (1982) (quotations omitted) (citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); accord *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 388 (1976). As the Supreme Court in *Mazurie* said, Tribal governments represent “‘a separate people’ possessing ‘the power of regulating their internal and social relations . . . ,’ *United States v. Kagama*, 118 U.S. 375,

⁹ Further, as the Court pointed out in its preliminary injunction decision, “the possibility that ANCs might not qualify under the eligibility clause is hardly fatal to carrying out Congress’s purpose under ISDEAA.” Mem Op. at 24. The statutory language uses “or” to separate “Alaska Native village[s] or regional or native village corporation[s].” 25 U.S.C. § 5304(e). “Alaska Native villages are therefore able to fulfill ISDEAA’s purposes.” Mem Op. at 24.

381-2 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973) . . . and are “a good deal more than ‘private, voluntary organizations.’” *Mazurie*, 419 U.S. at 556-57.

The ANCs, unlike the 229 federally recognized Alaska Native villages, exercise no governmental functions whatsoever. While, as the ANCs point out, ANCSA “*permit[s]*” them to provide their shareholders with benefits to their health, education, and welfare, *see* ANC Br. at 58 n.9 (citing 43 U.S.C. § 1606(r)) (emphasis added), they have no *duty* to do so. Tribal governments on the other hand, have inherent duties to provide for their citizens. Indeed, Alaska Native villages, as governments, set legal criteria for their enrolled citizens, whom they govern with duly enacted laws, enforceable within their judicial forums. *See, e.g., State v. Native Vill. of Tanana*, 249 P.3d 734, 750 (Alaska 2011); *In re C.R.H.*, 29 P.3d 849, 854 (Alaska 2001); *Baker*, 982 P.2d at 751-59. The ANCs, private, state-chartered corporations do no such thing; they are owned by corporate shareholders, who do not even have to be enrolled citizens of an Alaska Native village. *See* COHEN at 353 (“[M]any Natives are not shareholders in Native corporations, because stock was initially limited to Natives alive on December 18, 1971). And they are overseen by executives enjoying salaries in the seven figures, not public servants responsible to a constituency.¹⁰ As the COHEN treatise points out, “Tribal governments, as opposed to regional and village corporations, are the only Native entities that possess inherent powers of self-government and that can develop autonomous membership rules.” *Id.*

Particularly telling in this regard is the ANCs’ misleading suggestion that they engage in “essential governmental functions” because they “provide benefits” to 1,330 shareholders who are

¹⁰ For example, in 2018, the top five executives for Arctic Slope Regional Corporation (“ASRC”), each earned annual salaries of between \$1.87 million and \$5.1 million. Arctic Slope Reg’l Corp., 2019 Proxy Statement to Shareholders, at 26 (Apr. 26, 2019) available at <https://alaskalandmine.com/wp-content/uploads/2019/12/2019-ASRC-Proxy-Statement-5-9-19.pdf> (last visited June 3, 2020).

not enrolled citizens of any federally recognized Indian tribe. *See* ANC Br. at 27. Again, Tribal governments – like States and units of local government, the other governmental entities included in Title V of the CARES Act – function to serve *their citizens*. Corporations serving or giving dividends to *individual shareholders*, or engaged in charitable activities, are not functioning as governments.

Finally, as discussed in our *amicus* brief in support of the Plaintiffs’ motion for preliminary injunction, part-and-parcel to the government-to-government relationship between the United States and federally recognized Indian tribes, the federal government owes a unique trust obligation to tribes. *See* ECF 20 at 5-6. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The ANCs enjoy no such relationship. *See Cape Fox Corp. v. United States*, 456 F. Supp. 784, 799 & n.51 (D. Alaska 1978) (federal trust duty does not extend to land acquisitions of village corporation), *rev’d in part on other grnds*, 646 F.2d 399 (9th Cir. 1981). The Alaska Native villages do. *See People of Togiak v. United States*, 470 F.Supp. 423, 428 (D.D.C. 1979).

CONCLUSION

For all of the above reasons, the Court should grant summary judgment in favor of the Plaintiffs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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