

# National Indian Health Board



April 30, 2020

President Donald J. Trump  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

Via email to: [Tyler.A.Fish@who.eop.gov](mailto:Tyler.A.Fish@who.eop.gov)

**Re: Request to Waive Cost-Share Requirements for Tribal Public Assistance Recipients**

Dear President Trump,

On behalf of the National Indian Health Board,<sup>1</sup> and the 574 federally recognized Tribes we serve, I urge you to use the authority vested in you under section 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) to waive the cost-share requirements under the Federal Emergency Management Agency's (FEMA) Public Assistance program for all Tribal Nations who request assistance to respond to COVID-19. There is perhaps no greater urgency to exercise the trust responsibility than during a global pandemic.

Generally, the Stafford Act, as amended (42 U.S.C. § 5121 et seq.), authorizes the President to provide federal assistance up to 75 percent of the total cost in Public Assistance when the severity of an incident exceeds the affected Tribal, state or local government's capability to respond or recover. However, as we detail below, it is not unprecedented for the non-federal cost-share of the remaining 25 percent to be waived for state and local governments in times of great need. This is a time of extraordinary need for Tribal Nations. To adequately address COVID-19, *it is critical that the federal government leverage all resources at its disposal* to help Tribal governments combat this crisis; this includes granting a waiver of the non-federal cost-share for Tribes.

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<sup>1</sup> Established in 1972, the National Indian Health Board (NIHB) is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board or regional Tribal organization elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board or regional Tribal organization, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or rely on IHS for delivery of some, or most, of their health care, the NIHB is their advocate



Chronic underfunding of health services has made Tribal peoples especially vulnerable to COVID-19. For example, in New Mexico, American Indian and Alaska Natives account for 38.18 percent<sup>2</sup> of all COVID-19 cases in the state but are only about 11 percent of the population.<sup>3</sup> Even before the crisis, Tribal Nations operated in a severely underfunded environment. Now, we are dangerously past the breaking point.

Although some Tribes have received funding to respond to the COVID-19 crisis through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the only federal agency to allow coverage of cost sharing under the CARES Act distribution is the Department of Housing and Urban Development (HUD). Additionally, some Tribes have more flexibility than others under their Indian Self-Determination and Education Assistance Act (ISDEAA) contracts to repurpose funding in response to emergencies like COVID-19. Despite these opportunities available to some, Tribes have yet to find another source to help cover emergency expenses due to COVID-19.

### **Legal Background**

The Stafford Act provides that eligible emergency protective measures (“Category B” costs) performed by an eligible applicant to respond to COVID-19 may receive reimbursement from the FEMA Public Assistance fund.<sup>4</sup> Costs must be directly tied to the performance of eligible work, documented, and reasonable in nature and amount.<sup>5</sup> As indicated in the President’s national emergency declaration,<sup>6</sup> FEMA Public Assistance for the COVID-19 nationwide emergency will be provided at a 75 percent federal/25 percent non-federal cost-share. Some states offer to share the 25 percent cost-share with their subrecipients to reduce the financial burden on local and Tribal governments. However, this will not work for Tribes seeking funding assistance directly from the FEMA Public Assistance fund, and even when there is the ability of a state to absorb some of those costs, many Tribes will be unable to raise the remaining funds to meet the cost share.

For a Tribal government to be directly eligible as a recipient for FEMA Public Assistance, the President must issue a Tribe-specific declaration of emergency as provided under the Stafford Act. The Chief Executive of the affected Tribal government (or Governor of the state on behalf of the Tribal government) must submit this request directly to FEMA.<sup>7</sup> During the declaration request process, Tribal governments are required to certify that they will comply with the 25 percent cost-share requirements for which states and territories are also responsible.<sup>8</sup>

Currently, all 50 states, five territories and over 25 Tribes are working directly with FEMA under emergency declarations specific to each recipient.<sup>9</sup> Some Tribal recipients are seeking a waiver of the 25 percent cost-share. Recently, a FEMA official confirmed the agency received the Tribes’

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<sup>2</sup> See <https://cvprovider.nmhealth.org/public-dashboard.html>

<sup>3</sup> See <https://www.census.gov/quickfacts/fact/table/NM/RHI325218#RHI325218>

<sup>4</sup> FEMA Public Assistance Program and Policy Guide, April 2018.

<sup>5</sup> FEMA COVID-19 Eligible Emergency Protective Measures Fact Sheet (Mar. 19, 2020); see also <https://www.aha.org/advisory/2020-03-25-coronavirus-update-fema-public-assistance-application-information>

<sup>6</sup> Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

<sup>7</sup> See FEMA Tribal Declarations Pilot Guidance.

<sup>8</sup> GAO analysis of FEMA guidance and interview, GAO-18-443 <https://www.gao.gov/assets/700/691962.pdf>

<sup>9</sup> Indian Health Service weekly phone call (April 16, 2020).

waiver requests, and is working through each request. A blanket cost-share waiver for federally recognized Tribes, for COVID-19 related responses, would reduce this administrative burden on FEMA officials, expedite the process, and make the emergency funding more accessible to Tribal Nations at a time when it is needed most.

There is an exception outlined in the Stafford Act that may work to accommodate some, but not all, Tribal nations seeking FEMA assistance. Using a per capita formula, FEMA may recommend a federal cost-share up to 90 percent for small, impoverished communities.<sup>10</sup> Nonetheless, the federal government has a unique trust responsibility to *all* Tribal governments as sovereign nations, and this warrants waiving all of the cost-share for all Tribes to handle the expenses of emergency response. As we will explain further, the trust responsibility places a moral and legal duty on the federal government to respond to Tribal concerns and to do everything in its power to ensure adequate emergency health expenses, which were prepaid with Tribal lands and resources, memorialized through treaties, and affirmed many times over in Supreme Court case law, legislation, and Executive Order.

### **The Federal Government Has a Trust Responsibility to Tribal Nations**

As solidified in the Sandy Recovery Improvement Act, FEMA officially recognizes Tribes as sovereign nations, and acknowledges the government-to-government relationship that exists between the United States and Tribal governments.<sup>11</sup> The Act promotes self-determination by allowing Tribes to decide for themselves how to seek Stafford Act assistance – whether directly or as a subrecipient of the state.

There are 574 federally recognized Tribal governments that maintain a government-to-government relationship with the United States. The federal government has a trust responsibility that establishes a clear relationship between the Tribes and the federal government that does not exist between Tribes and the states. The responsibility of the federal government to protect Native peoples has long been codified through treaties and statutes and reaffirmed multiple times by the United States Supreme Court. The duty to provide for the health care for AI/ANs was specifically mentioned in numerous treaties. Because of this special obligation, we urge the Administration to support Tribal governments in this time of need.

### **The COVID-19 Impact on Indian Country**

Historical inequities impacting Tribes' health and access to health care demonstrates the need for significantly more resources to protect Tribal citizens as we work to address the impact of the COVID-19 crisis. As of April 26, the Indian Health Service (IHS) reported 27,188 COVID-19 administered tests across IHS, Tribal, and urban Indian sites. There have been 2,973 confirmed

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<sup>10</sup> 42 U.S.C. § 5133 (“the President may contribute up to 90 percent of the total cost of a mitigation activity carried out in a small impoverished community”); 44 CFR § 201.2, “Definition of Small and impoverished communities”: must be a community of 3,000 or fewer individuals, the community needs to be economically disadvantaged and have high unemployment rates. The way of distinguishing economically disadvantaged is that that per capita annual income cannot exceed 80 percent of the national per capita income and then the local rate must exceed by 1 percentage point the average yearly national unemployment rate ([https://www.fema.gov/media-library-data/1572539997242-74081a9193ee60a23042c4bc2495c054/NOFO\\_Tribal\\_WebTranscript\\_508.pdf](https://www.fema.gov/media-library-data/1572539997242-74081a9193ee60a23042c4bc2495c054/NOFO_Tribal_WebTranscript_508.pdf)).

<sup>11</sup> See [https://www.fema.gov/media-library-data/1523033284358-20b86875d12843441a521a6141c15099/Pilot\\_Guidance.pdf](https://www.fema.gov/media-library-data/1523033284358-20b86875d12843441a521a6141c15099/Pilot_Guidance.pdf)

positive results. The number of confirmed cases in Indian Country is likely underreported given a significant shortage of available testing kits. NIHB has also received word from IHS/Tribal/urban Indian sites experiencing a critical shortage of medical supplies like respiratory swabs used to collect the COVID-19 specimen.

In addition to resource disparities, American Indian and Alaska Natives (AI/ANs) are disproportionately impacted by the health conditions the Centers for Disease Control and Prevention (CDC) categorize as extremely high risk for serious COVID-19 illness. This includes respiratory illnesses, diabetes, heart disease, and other chronic health conditions. In light of this, and federal trust and treaty obligations to Tribal Nations, we urge you to consider waiving the 25 percent cost-share for Tribal nations seeking FEMA assistance related to COVID-19.

### **Request to Waive the Non-Federal Cost-Share is Not Unprecedented**

FEMA has previously waived the non-federal cost-share for Tribes<sup>12</sup> and other governments. With respect to states, following the damage inflicted on New Jersey and surrounding states by Hurricane Sandy in 2012, and after major flooding hit Louisiana in 2016, the federal government, in many cases, covered 100 percent of the cost to repair damaged public buildings and infrastructure through FEMA Public Assistance.<sup>13</sup> The very purpose of the grant program is to support eligible communities' recovery from major disasters by providing them with grant assistance for life-saving emergency protective measures. In the wake of COVID-19, a bipartisan group of 23 senators, led by New Jersey and Louisiana members, appealed directly to you and your Administration to waive cost sharing for FEMA emergency grants in New Jersey and Louisiana in response to COVID-19.<sup>14</sup> The senators argued that the strain on the American people and on local and state governments during this public health emergency is no different from dealing with the impact and aftermath of a natural disaster. Further, FEMA is authorized to increase its federal cost-share to 100 percent of response and recovery costs "if warranted by the needs of the disaster" (44 CFR§ 206.47(d)). We agree with the bipartisan senators that "if ever there was a time when a 100 percent cost-share was warranted, *now* is that time." The senators' logic was that boosting the federal cost-share would allow local governments to concentrate on controlling and mitigating the outbreak of this insidious disease without being limited by growing costs and strained budgets.

Like local governments, Tribal governments are in precarious positions, having to prioritize resources accordingly to control and mitigate the spread of COVID-19 and save the lives of their people. Even for Tribes earning revenue, any revenue from Tribally-owned businesses that would normally support governmental activities have evaporated overnight because many Tribal governments have closed their businesses to help fight the virus and protect their communities and surrounding communities. According to a federal district court filing submitted on April 16,

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<sup>12</sup> Havasupai Tribe, Record cost-share adjustment <https://fas.org/sgp/crs/homesec/R41101.pdf>

<sup>13</sup> Duckworth, Durbin Join Bipartisan Call For FEMA To Waive State And Local Match On COVID-19 Assistance (Mar. 23, 2020), <https://www.duckworth.senate.gov/news/press-releases/duckworth-durbin-join-bipartisan-call-for-fema-to-waive-state-and-local-match-on-covid-19-assistance>

<sup>14</sup> Menendez, Cassidy Lead Bipartisan Call for FEMA to Help Individuals, States Handle COVID-19 Outbreak (Mar. 20, 2020), <https://www.menendez.senate.gov/news-and-events/press/menendez-cassidy-lead-bipartisan-call-for-fema-to-help-individuals-states-handle-covid-19-outbreak>

2020,<sup>15</sup> several Tribes are struggling under the weight of this responsibility. Here are two examples:

“The Chehalis Tribe in Washington is providing a broad array of unbudgeted emergency services, including, for example, daily operation of its Incident Operation Center, COVID-19 clinical work, delivering meals to elders and children no longer able to attend school as a result of the State of Washington’s school closure, increased cleaning and sanitation supplies, accounting services associated with tracking expenditures above normal budgeted activity, and planning for reopening of Tribal government. Chehalis has been forced to maintain all essential services for its citizens despite a reservation-wide shelter-in-place State of Emergency order and the closure of its Tribal government and virtually all of its Tribal enterprises.”

“The Tulalip Tribes likewise face daunting governmental challenges as a result of the COVID-19 pandemic. Tulalip has appointed a new Tulalip Health Officer, passed a Communicable Disease Ordinance and instituted isolation protocol, increased its COVID-19 testing capabilities so that tribal members can be tested at the Tulalip Health Clinic, transformed the Clinic into an acute health care clinic, directed the Clinic to obtain additional PPE, and purchased an additional ambulance for the Tulalip Fire District to meet emergency health needs. Tulalip has also borne increased costs for food distribution programs for children, elders and general welfare payments to assist tribal members in preparing to shelter-in-place by purchasing.”

The increased and necessary expenditures by these and other Tribal governments resulting from the devastating impacts of COVID-19 are *warranted by the needs of the [COVID-19] public health disaster*. FEMA is authorized to increase the federal cost-share to 100 percent for emergency work, including Direct Federal Assistance “if warranted by the needs of a disaster” (44 CFR§ 206.47(d)). The unprecedented size, scale and duration of the COVID-19 impacts far exceed the response capabilities of Tribes and warrant the full force and support of the federal government. Waiving the cost-share requirements will ensure that Tribes are able to adequately and rapidly respond to and support their peoples.

### **In Conclusion**

FEMA’s reimbursement process for disaster recovery is meant to help governments recover from a disaster or event causing widespread physical damage. In this case, Tribal governments are in the midst of responding to an evolving public health crisis. The extent of physical damage or disaster of the COVID-19 pandemic will not be known, for any community, for some time.

As you continue to work through appeals for federal assistance, we urge you to take into consideration the unique needs of the Indian health system, the unique vulnerabilities of Tribal populations, as well as the solemn trust obligations federal agencies owe to Tribal nations as you determine whether to waive the non-federal cost share for public assistance recipients to respond

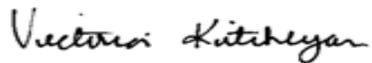
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<sup>15</sup> *Confederated Tribes of Chehalis v. Mnuchin*, United States District Court for the District of Columbia (Apr. 16, 2020).

to the COVID-19 pandemic. We remind you that AI/ANs have long experienced lower health status, have lower life expectancy, and a disproportionate disease burden compared to the general population. These factors make Tribal populations at risk and extremely vulnerable to COVID-19. Exercising your authority to waive the non-federal public assistance cost-share will save lives. Not doing so will impact Indian Country in a way that will be felt for generations to come.

We thank you in advance for consideration of our comments and recommendations. Should you have any questions, please contact Carolyn Hornbuckle, Chief Operations Officer, at the National Indian Health Board, at [chornbuckle@nihb.org](mailto:chornbuckle@nihb.org).

Sincerely,



Victoria Kitcheyan  
Chair  
National Indian Health Board

cc: The Honorable Peter Gaynor  
Administrator  
Federal Emergency Management Agency

Carolyn Angus Hornbuckle  
Chief Operations Officer  
National Indian Health Board

Margeau Valteau  
National Joint Information Center Tribal Liaison Officer  
Federal Emergency Management Agency

Rear Admiral Michael D. Weahkee  
Director  
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