



Strengthening Indigenous Governance

Harvard Project on American Indian Economic Development  
Native Nations Institute

## COVID-19 RESPONSE AND RECOVERY POLICY BRIEFS

Policy Brief No. 6

April 9, 2021

### EXECUTIVE SUMMARY

#### Recommendations for the Allocation and Administration of *American Rescue Plan Act* Funding for American Indian Tribal Governments

by

Eric C. Henson, Megan M. Hill, Miriam R. Jorgensen, & Joseph P. Kalt

The *American Rescue Plan Act* (ARPA) provides the largest infusion of federal funding for Indian Country in the history of the United States. More than \$32 billion dollars is directed toward assisting American Indian nations and communities as they work to end and recover from the devastating COVID-19 pandemic – which was made worse in Indian Country precisely because such funding is long overdue.

Below, we set out recommendations which we hope will promote the wise and productive allocation of ARPA funds to the nation's 574 federally recognized American Indian tribes. We see ARPA as a potential "Marshall Plan" for the revitalization of Indian nations. The Act holds the promise of materially remedying at least some of the gross, documented, and long-standing underfunding of federal obligations and responsibilities in Indian Country. Yet, fulfilling that promise requires that the federal government expeditiously and wisely allocate ARPA funds to tribes, and that tribes efficiently and effectively deploy those funds to maximize their positive impacts on tribal communities. Toward these ends:

- To enable tribes to recover and emerge stronger from the pandemic, we recommend wide scope be provided for tribes to invest COVID-19 relief funds in their basic physical, governmental, and educational infrastructures.
- To facilitate consultation and promote sound policy development under ARPA, we recommend the establishment of a *Treasury/Tribal ARPA Advisory Panel* consisting of knowledgeable experts.
- To provide guidance and reduce uncertainty regarding permissible ARPA spending and processes, we recommend the creation of a formal system of *Tribal/ARPA Determination, Opinion, and Advisory Letters*.
- To provide much-needed technical assistance to tribes, we recommend the creation of a "hub and web" network of *Treasury/Tribal ARPA Tech Centers*, with the Treasury Department as the central hub, providing funding and serving as the central node responsible for coordinating and communicating with a set of discipline-spanning Centers.
- To ensure maximum community benefit is derived from ARPA funding, we recommend that tribal governments adopt best-practice systems for prioritizing, planning, budgeting, contracting, implementing, and sustaining ARPA-funded projects and programs.
- To allocate the ARPA funds dedicated to tribal governments, we recommend a three-part formula that uses data-ready drivers of apportionment and puts 40% weight on each tribe's **population** of enrolled citizens, 30% weight on each tribe's total of tribal government and tribal enterprise **employees**, and 30% weight on each tribe's share of Indian Country's coronavirus **infections**.

# Recommendations for the Allocation and Administration of *American Rescue Plan Act* Funding for American Indian Tribal Governments

by

Eric C. Henson, Megan M. Hill, Miriam R. Jorgensen, and Joseph P. Kalt<sup>1</sup>

## I. The *American Rescue Plan Act*

Signed into law on March 11, 2021, the *American Rescue Plan Act* (ARPA) provides the largest infusion of federal funding for Indian Country in the history of the United States. More than \$32 billion dollars is directed toward assisting American Indian nations and communities as they work to end and recover from the devastating COVID-19 pandemic – from which they suffered disproportionate precisely because funding at the level provided by ARPA is demonstrably long overdue.

It goes without saying that the ARPA support is welcome and critically needed. Multiple bipartisan studies over the last two decades have documented the chronic, nationally embarrassing underfunding of promised programs and services for Indigenous citizens of the U.S. and for the original sovereigns in the territory now known as the United States. For centuries, the federal government has ignored and violated treaties, repeatedly excluded tribal communities from infrastructure and educational programs that are the foundations of community and economic development in mainstream America, and exercised heavy-handed federal control on Indian reservations. The results are the social and economic living conditions that, over the course of the last year, have put tribes at a significant disadvantage in fighting the COVID-19 pandemic.

The ARPA funding holds promise of substantially remedying some of this history of gross underfunding. Doing so, however, requires that the federal government expeditiously and wisely allocate ARPA funds to tribes, and that tribes efficiently and effectively deploy those funds to maximize their positive impacts on tribal communities. Below, we set out recommendations and guidelines which we hope will promote these ends. Our primary focus is the \$20 billion ARPA specifically dedicated to the recovery and support of tribal governments (Title IX, Subtitle M, Sec.

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9901). Nevertheless, we believe that much of our analysis and counsel applies with force to the other sections of the Act that deal with tribal needs.

## II. Context: Tribal Sovereignty and the Dishonorable Backlog of Unmet Federal Spending

There is a common misconception in the mainstream media and public that the 574 federally recognized American Indian nations are essentially dependents of the federal government, receiving outsized federal support upon which it would hardly seem possible to act as independent sovereigns. This misses essentials of U.S. federalism. It is *state and local governments* that receive outsized support from the federal government. As of 2019, the Congressional Research Service (CRS) reported that:

The federal government is expected to provide state and local governments about \$750 billion in federal grants in FY2019, funding a wide range of public policies, such as health care, transportation, income security, education, job training, social services, community development, and environmental protection. Federal grants account for about one-third of total state government funding, and more than half of state government funding for health care and public assistance.<sup>2</sup>

Meanwhile, the federal government’s Commission on Civil Rights’ 2003 report, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, “documented the federal government’s historic failure 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”.<sup>3</sup> Overall federal spending per person on Native American U.S. citizens was only two-thirds of the spending on the average U.S. citizen. In health, the comparable figure was 50%, and in education, tribal funding was only 50%-60% of the federal total spent on mainstream education. In the criminal justice arena, federal expenditures on law enforcement in Indian Country were only 80% of the level devoted to demographically comparable non-Indian communities.

There has not been substantial improvement since 2003. In its 2018 update report, 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

<sup>2</sup> Congressional Research Service, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, May 22, 2019, accessed April 8, 2021 at <https://fas.org/sgp/crs/misc/R40638.pdf>.

<sup>3</sup> U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018, at 6 (citing U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003), accessed April 8, 2021 at <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>.



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.”<sup>4</sup>

By comparison, CRS calculates that, since 1970, federal grants to state and local governments have increased 373% in real, inflation-adjusted spending power dollars. Since 2000 alone, real-dollar federal direct outlays to state and local governments have increased 77%.<sup>5</sup>

These extreme funding shortfalls are a modern and historical phenomenon: they began with the very first federal assertions of jurisdiction over tribes and extend in an unbroken line through to the present day. In practice, these shortfalls have meant impoverishment. Compared to state and local governments, tribes have been far less able to build and maintain the fire and police stations, administrative offices, courthouses, roads, communications networks, health clinics, school facilities, water and sanitation systems, public utilities, recreational amenities, and myriad other programs and installations that undergird First World economic development in the rest of the country.

Even before the pandemic, the average income of a reservation-resident Native American household was barely half that of the average U.S. household. Low average incomes, chronically high unemployment rates, and dilapidated or non-existent infrastructure are persistent challenges for tribal communities and tribal leaders. To be sure, some economic progress has been made in recent decades. Based on decennial U.S. Census data, the rate of increase in per capita income among Native reservation residents over the last 25-30 years has been consistently higher than that of the average American. Moreover, it is not a coincidence that this “glass half-full and filling” pattern took hold after the federal government adopted formal policies of *tribal* self-determination in the 1970s – policies that shifted to more complete *tribal* self-government beginning in the late 1980s.

Importantly, tribes’ economic progress in the era of tribal self-determination is not all about casinos: Only about 5% of tribal citizens are from tribes that operate so-called mega-casinos (located through historical accident in or near major metropolitan areas), which are frequently represented in the media. Meanwhile, the vast majority of tribes are in rural locales with small potential customer bases.<sup>6</sup> In fact, beyond gaming, many tribes have exercised their self-

<sup>4</sup> U.S. Civil Rights Commission, *Broken Promises...*, *op. cit.*, at 6 (citing U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003) at 4.

<sup>5</sup> Congressional Research Service, *Federal Grants to State and Local Governments...*, *op. cit.*, at Table 2; Table 2 nominal dollars adjusted for inflation according to <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator>, accessed July 15, 2020.

<sup>6</sup> “List of Casinos State-by-State,” *500Nations.com*, [https://www.500nations.com/Indian\\_Casinos\\_List.asp](https://www.500nations.com/Indian_Casinos_List.asp), accessed April 19, 2020, reports 245 tribes as having gaming operations as of mid-2018. Many of the tribes without casinos are located in Alaska.



governing powers to establish enterprises and build successful economies in the manufacturing, tourism, and service sectors.

Research repeatedly finds that the economic progress across Indian Country in recent years, however unevenly spread, is founded on the noted federal policy of self-determination through tribal self-government.<sup>7</sup> Respect and support for tribal sovereignty has put tribal government in the hands of *tribal* citizens. In the process, the reins of accountability for tribal officials have been shortened and no longer reach so directly back to Washington, DC. In this era of self-government, some tribes perform better than other tribes, just as some states perform better than other states. But the evidence is clear that, on average, tribal governments make better decisions that are better matched to the needs and values of their citizens, than non-tribal governments which, for so long in the eras before tribal self-determination, sought to control tribes.

In short, tribes have been bootstrapping themselves up economically despite, not because of, the type and level of federal support that state and local governments enjoy. It also should be made clear that, while policies of local self-government by tribes have brought economic improvement across most of Indian Country, the gap between average tribal household living conditions and overall average American citizen living conditions remains large. At current rates of progress, it will take many decades to close this gap. Indeed, unless addressed by federal policies, the legacy of underfunded physical and tribal administrative infrastructure on many reservations is a virtual guarantee that many tribal communities will have no reasonable chance of ever closing the poverty gap. First World economic and social conditions cannot be built on dilapidated Third World foundations.

### III. Spending ARPA Dollars: Eligibility Criteria

The *American Rescue Plan Act* sets out the categories of spending that tribal governments can lawfully pursue with their allocations of Title IX Sec. 9901 monies:

- [A] State, territory, or Tribal government shall only use the funds... to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024 —
- (A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
  - (B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by

<sup>7</sup> Cornell, Stephen and Joseph P. Kalt, “Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t” in M. Jorgensen, ed., *Rebuilding Native Nations: Strategies for Governance and Development*, (Tucson: University of Arizona Press, 2007), Chapter 1.



providing grants to eligible employers that have eligible workers who perform essential work;

- (C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or
- (D) to make necessary investments in water, sewer, or broadband infrastructure.

Certain infrastructure needs of Indian Country – water, sewer, and broadband – are explicitly addressed in (D) above, others are clearly implicated implicitly. First, infrastructure needs complementary infrastructure. Broadband connectivity requires electric power, transmission, and distribution infrastructure. Nor can broadband connectivity come close to realizing its potential contributions to economic progress if school buildings are crumbling or the police and fire stations have had to go decades without “bricks and mortar” upkeep and upgrades. A modern water and sewer system does not do much good if peoples’ homes suffer from substandard or non-existent plumbing. Further, new water and sewer installations may be “nice and shiny”, but they will breakdown and go underutilized if the local government has not earmarked and set aside long-term training, maintenance, and replacement funding. New broadband, water, and sewer projects will flounder if the tribal government has not built the administrative infrastructure necessary for fully functioning utility authorities or lacks the judicial capacity to address complaints from users and contractors. The direct public health contributions that improved water and sewer systems might otherwise make in dealing with diabetes, obesity, and other lifestyle maladies will be truncated if there are no playgrounds, ballfields, or other recreational facilities to connect to the water system for necessary irrigation. Broadband systems will similarly be of limited use if schools lack computers and other telecommunications systems, or don’t have the teachers and technicians needed to train users and maintain functionality. Failure to think through, plan, and sustainably fund the integrated nature of community physical, administrative, and educational infrastructure is a key reason why reservation after reservation is riddled with one-off, federal white elephant projects that are eyesores and embarrassments in tribal communities.<sup>8</sup> ARPA provides the framework and funding to finally, and potentially, get past these problems.

Second, the case for an inclusive interpretation of infrastructure under ARPA is made even more forcefully by the foundational linkages between (1) a community’s infrastructure and its ability to develop economically, and (2) economic underdevelopment and the prevalence and severity of ill-health in general and of COVID-19 specifically. The first of these linkages is “bread and butter” to professional economists. From the Marshall Plan to rebuild Europe and Japan

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<sup>8</sup> Cornell and Kalt, “Two Approaches...,” *op. cit.*

after WWII to today's World Bank programs,<sup>9</sup> modern infrastructure is the backbone of a modern economy. As the Brookings Institution put it in *Why Infrastructure Matters: Rotten Roads, Bum Economy*:

“Concrete, steel and fiber-optic cable are the essential building blocks of the economy. Infrastructure enables trade, powers businesses, connects workers to their jobs, creates opportunities for struggling communities and protects the nation from an increasingly unpredictable natural environment. From private investment in telecommunication systems, broadband networks, freight railroads, energy projects and pipelines, to publicly spending on transportation, water, buildings and parks, infrastructure is the backbone of a healthy economy.

It also supports workers, providing millions of jobs each year in building and maintenance... Important national goals also depend on it. The economy needs reliable infrastructure to connect supply chains and efficiently move goods and services across borders. Infrastructure connects households across metropolitan areas to higher quality opportunities for employment, healthcare and education. Clean energy and public transit can reduce greenhouse gases. This same economic logic applies to broadband networks, water systems and energy production and distribution.”<sup>10</sup>

The second linkage – i.e., between economic underdevelopment and the prevalence and severity of ill-health in general and of COVID-19 specifically – is equally critical, and it runs in both directions. The linkage from the COVID-19 pandemic back to infrastructure has been called out by the World Bank with respect to infrastructure support in the developing nations:

“[C]onstruction is affected; and future planning while sands are still shifting is extremely challenging... We should anticipate a lasting downward trend in revenues, adverse impacts on access to financing for projects yet to reach financial close, and potentially continued disruption of construction schedules of projects already underway as the virus' trajectory changes... What are the implications of the hit infrastructure is taking on crisis recovery, once we get there? On the one hand, a downturn in infrastructure balance sheets, creation, and maintenance does not bode well—given the sector's role in getting people to jobs, goods to market, electricity to hospitals, and digital access to students.”<sup>11</sup>

This holds in spades for tribes. They are overwhelmingly dependent on the revenues of tribally-owned businesses to fund the panoply of local services that are provided by tribal governments. But tribal business revenues have been – and continue to be – negatively impacted

<sup>9</sup> World Bank, *Understanding Poverty: Infrastructure*, accessed April 6, 2021 at <https://www.worldbank.org/en/topic/infrastructure>.

<sup>10</sup> Brookings Institution (Robert Puentes), *Why Infrastructure Matters: Rotten Roads, Bum Economy*, accessed April 6, 2021 at <https://www.brookings.edu/opinions/why-infrastructure-matters-rotten-roads-bum-economy/>.

<sup>11</sup> World Bank (Makhtar Diop), “What can AI tell us about COVID-19's impact on infrastructure?”, November 24, 2020, accessed April 6, 2021 at <https://blogs.worldbank.org/ppps/what-can-ai-tell-us-about-covid-19s-impact-infrastructure>.

by the pandemic.<sup>12</sup> Absent CARES Act and ARPA funding, not only would tribal physical infrastructure investment be put on hold across Indian Country, but so would the overall administrative infrastructure of tribal governments.

The linkage extending from (i) poor physical, administrative, and educational infrastructure to (ii) economic underdevelopment and hardship, and then through to (iii) public health and, specifically, COVID-19 is no less pronounced in Indian Country as the reverse linkage. Native Americans have suffered the highest rates of COVID-19 of any group in the U.S., and scientific research finds that this is directly related to the prevalence of economic underdevelopment in Indian Country.<sup>13</sup> ARPA funding to address the underinvestment in infrastructure in Indian Country not only directly confronts the economic hardship attributable to the pandemic, but also addresses the contributions of long-standing infrastructure underinvestment and concomitant economic hardship to the disastrous public health effects of the pandemic, not to mention the effects that will undoubtedly arise from future pandemics.

Finally, we stress that infrastructure in Indian Country must be thought of not only in terms of “bricks and mortar” and “concrete, steel, and fiber-optic cable”. Any community’s infrastructure also has administrative and educational components. Accordingly, wide scope should be provided for tribes to invest COVID-19 relief funds in their basic governmental and educational infrastructures to support and enhance investments in physical infrastructure. Doing so is how our conceptualization of ARPA-as-Marshall-Plan can avoid adding to the long federal record of funding white elephants.

With respect to governmental infrastructure, tribes vary tremendously in their positions along the path of building and rebuilding their governmental institutions in the current era of federal policies of tribal self-determination through self-government.<sup>14</sup> Nevertheless, case after award-winning case demonstrates the highly positive payoffs in terms of economic well-being, public health, and social and cultural strengthening that arise when a tribal government has the

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<sup>12</sup> See Akee, Randall K.Q., Eric C. Henson, Miriam R. Jorgensen and Joseph P. Kalt, *Policy Brief No. 1: The Need for a Significant Allocation of COVID-19 Response Funds to American Indian Nations*, Harvard Project on American Indian Economic Development and Native Nations Institute, May 18, 2020.

<sup>13</sup> Akee, Randall K.Q., Nicolás E. Barceló, Stephanie Russo Carroll, and Desi Rodriguez-Lonebear, “American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic,” *Journal of Public Health Management and Practice*, July/August 2020, at 374. See, also, Akee, Randall K.Q. and Sarah Reber, “American Indians and Alaska Natives (AIAN) are dying of COVID-19 at shocking rates,” Brookings Institution, February 18, 2021, accessed April 6, 2021 at <https://www.brookings.edu/research/american-indians-and-alaska-natives-are-dying-of-covid-19-at-shocking-rates/>.

<sup>14</sup> See Henson, Eric, Megan M. Hill, Miriam R. Jorgensen, and Joseph P. Kalt, *Policy Brief No. 4, Emerging Stronger than Before: Guidelines for the Federal Role in American Indian and Alaska Native Tribes’ Recovery from the COVID-19 Pandemic*, Harvard Project on American Indian Economic Development and Native Nations Institute, July 24, 2020.





resources needed to build its basic administrative, service delivery, regulatory, judicial, and policymaking capacities.<sup>15</sup> Moreover, in terms of ARPA Title IX's delineation of permissible uses of Sec. 9901 monies, the work of the employees in everything from the tribal school to the tribal housing department, from the tribal environmental protection programs to the juvenile justice facility, from the tribal health clinic to the tribal roads department are *essential* to community well-being in the face of the pandemic.

Because of the heavy dependency of tribal governments on tribal business revenues, which have suffered tremendously as a result of the pandemic,<sup>16</sup> it is precisely core tribal governmental capacities and their essential workers that the pandemic has harmed in tribe after tribe. These negative economic impacts have come regardless of the state of tribes' respective governmental infrastructure and concomitant economic development going into the pandemic. It is consistent with ARPA Title IX that tribal governments be able to use such funding to restore and rebuild their core governmental functions and capacities so that they can emerge stronger than before the COVID-19 pandemic.

Tribal educational needs also must be addressed with ARPA Title IX funding. Education builds the human infrastructure of communities. The era of tribal self-determination through self-governance has seen tribes take over management and substantial portions of the funding of formerly federal schools and programs, as well as create new institutions that can meet the needs of their youth and communities. Tribes are further improving educational outcomes by devoting growing tribal government resources and attention to lifelong and mid-career education of Native professionals. These efforts are important because tribes are engaged in *nation building*. This is rapidly increasing the demand for citizens who are educated in such fields as business, public administration, law, finance, technology, engineering, and accounting. Capacity in such fields is critical *infrastructure* for tribal communities.<sup>17</sup>

The provisions for educational support by various federal government agencies in ARPA Titles I, II, and XI (for tribal colleges and universities, Alaska Native and Native-serving non-tribal higher educational institutions) and Titles II and XI (for Bureau of Indian Education tribal schools and other childhood educational programs) is wholly appropriate. Such funding, however, should not obscure the need for tribes to directly employ Title IX, Sec. 9901 funding to make up for shortfalls in direct tribal funding that the economic hardship of the pandemic has visited on tribal governments and on their abilities to build out educational programs and facilities.

<sup>15</sup> See Harvard Project on American Indian Economic Development, *Honoring Nations*, at <https://hpaied.org/honoring-nations>.

<sup>16</sup> See discussion above, as well as our *Policy Briefs* Nos. 1, 4, and 5, accessible at <https://hpaied.org/>.

<sup>17</sup> See Henson, *et al.*, *Policy Brief* No. 4..., *op. cit.*



## IV. Allocating ARPA Dollars: Guidelines for Efficient Processes

### IV.A. The Starting Points

Funds allocated under Title IX of ARPA are for the explicit purpose of the “fiscal recovery”<sup>18</sup> of state, territory, and tribal governments. Under the Act, this means “mitigat[ing] the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19)”<sup>19</sup> by paying “to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024”.<sup>20</sup> Payments to tribal governments are to be made by allocating \$1 billion in equal amounts across the 574 federally recognized tribal governments and allocating \$19 billion across the tribal governments “in a manner determined by the Secretary [of the Treasury]”.<sup>21</sup>

Unlike states and territories (which are required to “provide the Secretary with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in [Sec. 9901] before the Secretary can make any payments to the state or territory”<sup>22</sup>), “the Secretary shall make the payment required for the Tribal government not later than 60 days after the date of enactment of [ARPA].”<sup>23</sup> After receipt of Sec. 9901 payments, states, territories and tribal governments are required to provide “a detailed accounting of... the[ir] uses of funds,”<sup>24</sup> While a pre-certification requirement is not imposed on tribal governments, a tribal government that is found to have failed to comply with the Act by spending Title IX Sec. 9901 monies on other than the four enumerated purposes noted above shall be subject to recoupment of any mis-spent funds.<sup>25</sup>

In short, in important ways (as the U.S. Senate Committee on Indian Affairs has noted): “The *American Rescue Plan Act* respects Tribal sovereignty and self-determination.”<sup>26</sup> While tribal governments must live within the law that is ARPA, they can be subjected to what would surely turn out to be onerous recoupment by the federal government. If they do not, the Act (as the

<sup>18</sup> ARPA Title IX, Sec. 9901 is titled: “Coronavirus State and Local Fiscal Recovery Funds” and explicitly treats tribal governments as equivalent to state and territory governments for certain enumerated purposes and requirements under Sec. 9901).

<sup>19</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(a)(1)).

<sup>20</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(c)(1)).

<sup>21</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(b)(2)(B)(i) and (ii)).

<sup>22</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(b)(6)(A)(i) referring to Sec. 602(d)(1)).

<sup>23</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(b)(6)(B)).

<sup>24</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(d)(2)(A)).

<sup>25</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(e)).

<sup>26</sup> United States Senate Committee on Indian Affairs, *American Rescue Plan Act: Budget Reconciliation Support for Tribes and Native Communities*, Resource Guide, March 15, 2021, accessed March 16, 2021 at [https://www.indian.senate.gov/sites/default/files/2021-03-15\\_Sec-by-Sec\\_ARPA\\_Tribal\\_Funding\\_%28SCIA%29.pdf](https://www.indian.senate.gov/sites/default/files/2021-03-15_Sec-by-Sec_ARPA_Tribal_Funding_%28SCIA%29.pdf)



Senate Committee notes) “[p]rovides Tribes and Native communities with greater flexibility on deciding how to deploy funds and meet their peoples’ needs” than heretofore has been the case with most federal spending programs in Indian Country.<sup>27</sup> Indeed, with interpretations of the four categories of permissible uses of Title IX funds which, as we have argued above, properly recognize that (1) tribal governmental functions and programs are essential infrastructure for tribal communities, and they are carried out by essential workers, and that (2) tribal governmental revenues needed to carry out those governments’ essential activities and services have been severely and negatively impacted by the pandemic, ARPA holds promise as a grossly overdue Marshall Plan for Indian Country.

For the promise of ARPA to be realized, there will be devils in the details of federal administration of the Act. We believe that the worst outcome at this moment in the history of federal-tribal relations would be for Title IX of the *American Rescue Plan Act* to devolve into “just another” federal grants program. The threat is that mountains of pre-approval and mid-cycle red tape will waste time and resources, drag progress down to a snail’s pace, and contradict the research evidence which so clearly shows that local self-government by tribes ultimately “works” better than having non-tribal decisionmakers determine the priorities and allocate funds.

After the fact standards of “waste, fraud, and abuse,” coupled with the Act’s threats of recoupment of mis-spent funds, provide appropriate incentives to both federal and tribal decisionmakers. While we recognize that federal officials must operate within the law, the paternalism of old-style before-the-fact approvals and mid-stream meddling have no place in this era of tribal self-government. Tribal officials, too, will need to operate within the law that is ARPA; and, with the monetary stakes being so large, they and their advisors undoubtedly will have many, many questions as they craft and implement their plans for ARPA funds. In addition, the scope and magnitude of recovery measures envisioned by the Act are historic and beyond the experience of many tribes. Technical support surely will be needed across a wide range of activities as tribes set about using their ARPA funds.

#### **IV.B. Responding to Real-Time Questions and Concerns**

The experience with the CARES Act suggests that the deployment of ARPA funding in Indian Country will generate numerous questions and concerns, and many of these will be general policy questions with broad applicability across the tribes. For example: “What will constitute adequate record-keeping for ultimate reporting?” “What mechanisms and standards will Treasury use to investigate and undertake eventual “recoupment” proceedings?” “If our infrastructure project requires a construction period that extends beyond December 2024, but we have already contracted and obligated payment for construction services extending beyond

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<sup>27</sup> United States Senate Committee on Indian Affairs, “*American Rescue Plan Act:...*”, *op. cit.*



December 2024, can we use our ARPA funds to pay our post-December 2024 construction bills?” “We’re going to need to do some serious governmental restructuring, strategic planning, needs assessment, and feasibility analyses to ensure that we spend our ARPA monies on our most pressing priorities – can we use ARPA money for those activities?” And so on.

In addition, individual tribes are likely to have more specific legal and regulatory questions pertinent to their respective situations and concerns: “Our tribe really needs to upgrade its XYZ system. It’s expensive and we don’t want to screw up and have Treasury try to recoup what we spend later. Can we spend ARPA monies on the upgrade?” “ARPA provides for premium pay for essential workers. Are the employees in our ABC department considered essential?” And so on. Answers to these kinds of questions are critical to avoiding intentional or unintentional waste, fraud, and abuse. In addition, clarity and communication by the federal authorities concerning the laws and regulations that must be followed under ARPA can provide tribal citizens and their leaders with the kind of useful information that allows tribal political deliberations to “stay within the lines.”

#### **IV.B.1. Consultation**

The forthcoming ARPA processes of allocating, disbursing, and spending billions of dollars warrants the establishment of federal mechanisms for dealing with both the general policy concerns that will inevitably arise and the specific legal/regulatory guidance that will be needed. With respect to the former, we recommend a two-pronged approach. First, the Department of the Treasury should build upon, adapt, and continue its mechanisms for tribal consultation developed in connection with the CARES Act and related COVID-19 relief funding programs. As ARPA allocations and distributions get underway, these consultations should be streamlined for efficiency through means such as: (1) regular and routine scheduling; (2) pre-submission of questions and comments; (3) prior consideration by Treasury of submitted questions; (4) and prompt, written, catalogued, and accessible follow-up policy discussions (as needed) by the Department. Treasury has been rapidly enhancing its understanding of Indian Country as it has worked to administer the CARES Act and related COVID-19 relief funding. This progress should not be lost and should be embedded in a standing Departmental “*Treasury ARPA Task Force for Tribal Issues*” charged with managing the consultation process and its outcomes.

Second, we believe the consultation process can be materially improved and lead to more substantive and usable information for federal and tribal decisionmakers through engagement by the Department of the Treasury of a *Treasury/Tribal ARPA Advisory Panel*<sup>28</sup> consisting of knowledgeable and respected experts. Wide-open, public-meeting-style consultations can be

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<sup>28</sup> Although legislation may be required to change its mandate and enhance its expert capacities, this panel role might well be fulfilled by Treasury’s extant Treasury Tribal Advisory Committee.

useful in taking stakeholders’ temperatures and ensuring myriad voices are heard. They should be used for such purposes. At the same time, however, a fully productive consultation process also needs to be able focus in on priorities, gather relevant data on pressing matters, and deliberate calmly on matters that are often quite contentious. Under the *Federal Advisory Committee Act* (FACA), federal departments and agencies have experience with more than 1000 advisory panels. These commonly consist of: Regular (federal) Government Employees with pertinent experience; knowledgeable Special (federal) Government Employees temporarily engaged for panel work; stakeholder Representative Members who are not federal employees; expert Peer Review Consultant members selected for their topic area knowledge; and Ex Officio Members.<sup>29</sup>

In the case at hand, a *Treasury/Tribal ARPA Advisory Panel* can provide valuable contributions by being able to synthesize, organize, and deliberate regarding the kinds of questions Indian Country already is asking. By doing so, such a panel can raise the satisfaction of all parties by enabling deeper substantive issue engagement. In the process, a *Treasury/Tribal ARPA Advisory Panel* that draws on the expertise of knowledgeable members from within and from outside the federal government will support and accelerate Treasury’s capacity to support tribal self-determination efforts under ARPA and beyond. Of course, in addition to members of the highest quality, a *Treasury/Tribal ARPA Advisory Panel* would properly be supported by and produce a full array of written, digital, and broadcast resources.

#### **IV.B.2. Determinations, Opinions, and Advice**

A fully fleshed-out tribal consultation process can greatly facilitate the development and dissemination of overall ARPA policies and processes. However, addressing the second kinds of questions and issues that will surely arise – i.e., the detailed legal and regulatory questions that specific tribes will have in relation to their specific contexts and concerns – benefits from a more technical administrative process. In this regard, the Treasury Department has extensive experience in the form of the Department’s Internal Revenue Service (IRS) system of *Determination, Opinion, and Advisory Letters*.<sup>30</sup> This system serves the extremely valuable public policy function of addressing specific concerns of specific parties through a mechanism that mitigates uncertainty and generates actionable knowledge both for specific requesting parties and for broader sets of actors with similar concerns. Information is generated across the spectrum, ranging from quite strict “determinations”, to agency “opinions”, to less strict agency

<sup>29</sup> Government Services Administration, *Federal Advisory Committee Act (FACA) Database*, accessed April 7, 2021 at <https://www.facadatabase.gov/FACA/FACAPublicPage> (see “Frequently Asked Questions” – “What types of members serve on Federal advisory committees?” at <https://d2d.gsa.gov/report/ogp-federal-advisory-committee-act-faca-data>).

<sup>30</sup> See, for example, Internal Revenue Service, *Determination, Opinion and Advisory Letters*, accessed April 7, 2021 at <https://www.irs.gov/retirement-plans/determination-opinion-and-advisory-letters>.



“advice.” The whole system is supported by rich resource materials, instructions to users/requesters, catalogues of accumulated *Letters*, and the like.

Although it is difficult to predict the volume and topics of questions that tribes, their advisors and attorneys, and even federal officials will have regarding rules and regulations that will be forthcoming under ARPA, we can be assured they will be many and diverse. We recommend the creation of a formal system of *Tribal/ARPA Determination, Opinion, and Advisory Letters*. In light of the newness and unprecedented magnitude of Treasury’s engagement with Indian Country under ARPA, it will be valuable for such a system to have access to the deliberations of, even if not formal input from, the recommended Tribal ARPA Advisory Panel. As with the IRS’ *Letters* system, a similarly modeled Tribal/ARPA system should be supported by a full panoply of resource materials, instructions to users/requesters, catalogues of accumulated *Letters*, internet-based FAQ mechanisms, and other helpful functions.

#### **IV.B.3. Technical Assistance**

As noted above, the *American Rescue Plan Act* has the opportunity to be the long-needed Marshall Plan for Indian Country. But with this plan, federal policies of self-determination through self-government and tribes’ inherent rights of sovereignty demand that the tribes be in the drivers’ seats as spending priorities are set, projects are selected, designs are drawn, contractors and employees are brought on board, and operations are managed.

Fortunately, for an increasing number of tribes, investments over the last several decades in governing capacities and administrative systems have readied them for the challenges of onboarding ARPA funding and projects. In fact, our research finds that they are better positioned as planners and managers than many state and local governments.<sup>31</sup> At the same time, just as with the thousands of state and local governments in the U.S., there is unequal governing and managerial capacity. Many tribes now are confronted with having to rapidly ramp up their abilities to efficiently and effectively handle such tasks as identifying priorities, scoping projects, budgeting for design, construction, operations, and long-term maintenance, and contracting with service providers and employees. Moreover, these tasks will have to be carried out, in many cases, in quite technical areas, such as telecommunications and contemporary construction and/or operational processes. These conditions of having to respond to ARPA’s funding and mandates rapidly and at a scale often outside prior experience create the need, even among the highest capacity tribes, for access to significant technical assistance. At the same time, they create opportunities for unscrupulous consultants and vendors to try to take advantage.

There is recent experience that can help avoid the implied disaster of wasting hundreds of millions, and even billions, of dollars on hastily decided, shoddily delivered rip-offs. Specifically,

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<sup>31</sup> See Henson, *et al.*, *Policy Brief No. 4...*, *op. cit.*

the U.S. already has demonstrated during the course of the pandemic, and in responding to rapid deployment of COVID-19 relief funds, that it is feasible to utilize networks of “tech centers” as systems of technical assistance to local governments. These tech centers are frequently public-private partnerships, involving federal or state agencies and colleges, universities or non-profit organizations. Outstanding examples entailing federal participation include the COVID-related training programs of the Mental Health Technology Transfer Center (MHTTC) Network, which is funded by the Substance Abuse and Mental Health Services Administration (SAMHSA). In fact, SAMHSA’s *Technology Transfer Centers (TTC) Program* is comprised of three networks: the Addiction Technology Transfer Centers (ATTC), the Mental Health Technology Transfer Centers (MHTTC), and the Prevention Technology Transfer Centers (PTTC); and each network is comprised of one National Coordinator Center, ten Regional Centers, one American Indian and Alaska Native focused Center, and one Hispanic and Latino focused Center.<sup>32</sup>

As another example, the U.S. Department of Commerce’s National Institute of Standards and Technology Partnerships Office manages the *Federal Technology Transfer Resources for Coronavirus Response*.<sup>33</sup> In other cases, non-profit organizations operate tech centers, such as the National Rural Health Association’s COVID-19 Technical Assistance Center.<sup>34</sup> Many universities, too, have joined their centers and programs to efforts such as CGIAR’s COVID-19 agricultural “hub and spoke” research network.<sup>35</sup>

We recommend the creation of a “hub and web” network of *Treasury/Tribal ARPA Tech Centers*, with the Treasury Department as the central hub, providing funding and serving as the central node responsible for coordinating and communicating with a set of discipline-spanning Centers. By “discipline-spanning” we mean to capture the reality that tribes will require technical assistance across multiple *functional* (e.g., accounting, budgeting strategic planning, contracting, human resources) and *substantive* (e.g., housing, public health, water and sewer, telecommunications, roads, recreational facilities, public safety) areas.

Service-providing centers constituting the network should consist of governmental and not-for-profit organizations with appropriate subject matter expertise, as well and organizational missions that commit them to serve Indian Country and track records of success in that mission.

<sup>32</sup> Substance Abuse and Mental Health Services Administration, *Technology Transfer Centers (TTC) Program* accessed April 7, 2021 at <https://www.samhsa.gov/technology-transfer-centers-ttc-program>.

<sup>33</sup> National Institute of Standards and Technology, *Technology Partnerships Office*, accessed April 7, 2021 at <https://www.nist.gov/tpo/federal-technology-transfer-resources-coronavirus-response>.

<sup>34</sup> National Rural Health Association, *Rural Health Voices*, accessed April 7, 2021 at <https://www.ruralhealthweb.org/blogs/ruralhealthvoices/june-2020/nrha-launches-rural-covid-19-technical-assistance>.

<sup>35</sup> See, for example, CGIAR, “World’s largest public agricultural research network launches COVID-19 Hub to support global scientific response,” accessed April 7, 2021 at <https://www.cgiar.org/news-events/news/worlds-largest-public-agricultural-research-network->



Since ARPA projects can be expected to draw on the technical expertise of multiple centers (e.g., a water and sewer project would likely need services of civil engineers, budget planners, environmental protection experts, and hydrologists), individual centers would triage with each other and with the central node – hence, the “hub and web” nature of the network.

We are mindful that a network of *Treasury/Tribal ARPA Tech Centers* will require substantial resources, careful management, and capable partners. Yet, the stakes and the potential for wasting resources as a result of insufficient technical assistance for tribes are both extremely high. Best practices examples are at hand and should guide federal efforts if we are to avoid squandering the promise that ARPA holds for Indian Country.

#### **IV.B.4. The Tasks of Tribal Government**

Of course, tribes have responsibilities with regard to the appropriate use of their ARPA funds, too. At a minimum, they need to participate in consultation activities, seek formal advice and make requests for rulings when they are uncertain about how monies might be spent, and stay abreast of rulings, determinations, and guidance from Treasury, Tech Centers, and other helpful sources. Together, these kinds of efforts can help them stay within the confines of the law and, even better, allow them to take greater advantage of ARPA funding.

Staying informed, however, is only a small first step. The larger challenge is to proactively take charge of this once-in-many-generations opportunity, and truly build and rebuild the foundations of their nations according to their own priorities and with maximum contribution to their communities. As noted above, many tribes’ accumulated experience has prepared them well to take on this challenge. They have the personnel, governing systems, and organizational structures necessary to prioritize, plan, implement, and operate the programs and projects they need to recover from the setbacks dealt by COVID-19 and to emerge from the pandemic even stronger than before.

In other cases, however, tribes continue to suffer the consequences of economic and infrastructure underdevelopment, long-unmet federal treaty and trust obligations, and ongoing interference from other governments. As a result, their opportunities to have built up the experienced workforces and governmental and managerial capacities that ARPA’s opportunities inherently demand have been limited. The danger in such settings is that the uses of tribal ARPA monies will be determined by the rush of raw politics, rather than through wise and strategic deliberation. To avoid the former and move toward the latter, tribes will need to establish and use – quite quickly, in some cases – the tools of effective strategic planning, organizational development and restructuring, project selection, and project management.

Key steps in project selection include setting priorities, assessing project feasibility, appraising feasibility and costs against priorities, and then determining which project(s) to pursue. For





infrastructure projects in particular, key steps in project management include establishing budgets and engineering-informed project timetables, hiring contractors and consultants (architects, construction firms, specialized legal assistance, etc.), monitoring progress, adjusting plans and budgets as needed, conducting mid-stream and final inspections of completed projects against established standards, and planning for and funding long-term maintenance and upkeep.

In addition, as many tribes have learned, the components of sound spending and management systems (whether for infrastructure or service programs) often can require tribes to take major organizational steps such as shifting the management of responsibilities over education, human resources, natural resource management, economic development, etc., out of tribal council subcommittees and into full-blown departments. Such reorganizations of tribal government may even require changes at the level of a tribe's constitution.

Fortunately, tribes do not have to “reinvent the wheel” again and again as they work to improve their governance, planning, budgeting, and operations. Through major service organizations and national professional associations, as well as regional colleges and universities and other bodies, tribes have the opportunity to learn from each other, draw on best practices, and tap into experts. The Tech Centers proposed above can assist in structuring such efforts and directing tribes to resources that best meet their needs.

Importantly, wise use of ARPA funding also will mean taking a stand concerning per capita distribution payments. On the one hand, the federal response to the pandemic has shown the usefulness of “smaller” (\$600-\$1,400 under the CARES Act and ARPA) means-tested cash distributions. These payments, which have been made to all qualified U.S. citizens (including American Indians and Alaska Natives), are proving to be an important form of support for individuals and households struggling to put food on the table and keep a roof overhead. Tribal governments and their leaders, however, are ducking their responsibilities if they fail to consider carefully whether another round of per capita payments to tribal citizens is the right approach.

If careful deliberation (as opposed to mere “politics”) supports the payment of additional per capita distributions (as can well be the case depending on individual tribes' particular circumstances), tribes would be wise to focus on how to best deploy another round of payments. A first consideration is the fact that blanket per capita, “no strings” payments that cannot be linked directly to the burdens of the pandemic may not be lawful under ARPA. Even absent that constraint, the evidence from across Indian Country points away from undifferentiated and large per capita distributions when community development and nation rebuilding are priorities for a tribe. While understandably politically attractive, Indian Country can point to case after case in which financial settlements or payouts have been distributed, dissipated, and thus lost to the larger goals of community revitalization. The Cobell settlement is perhaps the most recent of



these examples: many Native nations received substantial payouts, but today have little to show in terms of community well-being from their settlement funds.

Because of the historic nature of the ARPA dollars, truly making them work for Indian Country is an opportunity that should not be lost. A true “Marshall Plan for Indian Country” is possible only if the majority of funds are used to pay for infrastructure and other necessary components of community strengthening. Thus, if tribal governments *do* opt for per capita payments as one of their ARPA “projects,” it is sensible for them to consider establishing, following, and making transparent a set of rules that govern and constrain payments. The positive experiences of various tribes suggest that such rules might include: setting a reasonable cap on individual payments; means testing distributions (i.e., targeting per capita assistance to those citizens most in need); restricting total distributions to a fraction of total ARPA funds received; and/or conditioning receipt of payments on tribally-determined criteria such as educational attainment.

In sum, we are not denying that individual tribal citizens, families, and households may continue to have needs that tribal investments in infrastructure and the tribal economy overall may not meet. Yet, given the opportunity for truly transformative community-level change, it is appropriate for tribes and their leaders to approach the question of “per capping” ARPA funds from the perspective of the long-term needs of their communities. ARPA-level funding for tribal governments in the future seems highly unlikely.

## V. Allocating ARPA Dollars Across the Tribal Governments: A Proposal for a Fair Formula

A large part of the ARPA funding available is to be allocated across the 574 tribal governments “in a manner determined by the Secretary [of the Treasury]”.<sup>36</sup> Realistically, apportioning \$19 billion across 574 entities in a relatively short period of time will require a formulaic mechanism.<sup>37</sup> The Act’s emphasis on the rapid release of funds, the magnitude of the funds to be distributed, and the transformative impact that such funding can potentially represent to tribal communities mean that it is imperative that a fair and feasible formula be devised and implemented without imposing undue delay and costs on either the federal government or the tribes.

To meet these objectives, we propose an allocation formula that uses data-ready drivers of apportionment. Specifically, we propose a three-part formula that puts 40% weight on each tribe’s **population** of enrolled citizens, 30% weight on each tribe’s total of tribal government and tribal enterprise **employees**, and 30% weight on each tribe’s share of Indian Country’s coronavirus **infections**.

<sup>36</sup> ARPA Title IX, Sec. 9901(a) (amending Social Security Act Title IV, Sec. 602(b)(2)(B)(i) and (ii)).

<sup>37</sup> We are well aware that final distribution of some of the \$8 billion of CARES Act funding during 2020 is still being disputed in legal proceedings.



## V.A. Principles

In an effort to draw upon the lessons learned from the allocation of CARES Act funding in 2020, we previously advised Treasury to apply a method of allocation for ARPA funding that is straightforward and relies on easily ascertainable data. In our May 22, 2020 *Policy Brief*,<sup>38</sup> we argued that a proper allocation formula should entail (i) *outcome goals* of fair and equal recognition of the pain suffered and the costs borne by tribal citizens; and (ii) *process goals* of administrative feasibility and rapid distribution of COVID relief funding.

We found it reasonable in May 2020 that an allocation formula give weight to tribes' populations of citizens and the number of workers employed by tribes, and we see no defensible rationale for ignoring those important characteristics in distribution of the Title IX ARPA funding. These two factors – reflecting the sheer number of citizens that need to be served during the pandemic and the magnitude of the economic activity impacted by the pandemic – are primary drivers of the costs and negative economic impacts tribes have incurred, and are still bearing, as they respond to and recover from the COVID-19 crisis. The third factor in our proposed formula (i.e., each tribe's share of Indian Country's coronavirus infections) captures the proportionate severity of the actual incidence of the disease across tribes, and the actual incidence of coronavirus is obviously the key driver of direct and specific costs of caring for infected citizens.

The emphasis here on the *drivers* of costs and burdens is important. *No* mechanism exists by which any system could dissect and measure the specific, “down-to-the penny,” direct and indirect pandemic-caused costs and burdens at the tribal level. If nothing else, many of these costs and burdens are still evolving and will continue to do so for long into the future. Yet, ARPA relief is needed, and mandated by the Act, *now*. Moreover, by employing data-ready measures of the drivers of COVID costs and burdens, the prospects of expensive and time-consuming debate and/or litigation can be held down, and the reporting and paperwork burdens on tribes and Treasury can be minimized.

## V.B. Factors

**Population:** First among our three categories is citizen population. The 574 federally recognized tribes are *governments*, and as governing entities, they are populated by *citizens* – people to which tribal governments owe duties of service and over whom they have jurisdiction. Tribes do in fact differ in the degree to which their citizens reside within their tribal borders, but in our modern era of federal-tribal relations, tribe after tribe is reaching beyond its geographic

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<sup>38</sup> Akee, Randall K.Q., Eric C. Henson, Miriam R. Jorgensen & Joseph P. Kalt, *Policy Brief No. 3, Proposal for a Fair and Feasible Formula for the Allocation of CARES Act COVID-19 Relief Funds to American Indian and Alaska Native Tribal Governments*, Harvard Project on American Indian Economic Development and Native Nations Institute, May 22, 2020.

borders to serve their off-reservation citizens.<sup>39</sup> In addition, it is a dominant characteristic of the non-resident population that its members routinely “come home” to their reservations for services, community events, and in-person political engagement *because they are citizens* of the tribal nation.

For these reasons, the appropriate measure of population in a sound allocation formula is the number of a tribe’s enrolled citizens as of January 1, 2021, provided and certified to Treasury by the tribes. Other measures that might be considered (such as the measure Treasury used in its initial CARES Act allocation, which was based on disparately collected population data utilized in a Department of Housing and Urban Development housing program) have been rather notoriously discredited. Then, too, U.S. Census and American Community Survey figures are outdated and/or depend on on-reservation residency rather than citizenship status to geo-locate Native populations.

Tribally provided and certified citizenship population measures were originally proposed by Treasury for use in the CARES Act allocations in 2020. Albeit abandoned by Treasury in its disbursement of the first \$4.8 billion of the CARES Act monies, the Department has nevertheless established the needed recording and reporting system. While assembling and/or updating each tribe’s citizen population data as of January 1, 2021 will require some effort on the part of the tribes and Treasury, it is surely not overly burdensome. Knowing who its citizens are is a basic responsibility of any government, tribal or non-tribal; and interfacing with the tribes to record these data is indisputably within the means of a major department of the U.S. federal government.

**Employment:** Second among our three categories is employment. As we pointed out in May 2020, the case for including employment in the allocation formula stems from the reality that the negative economic impacts of the pandemic on a tribal government, its citizens, and the tribal economy depends on the size of the tribal economy – and the relative size of a tribe’s economy is reasonably approximated by the workforce employed by each. The human and budgetary costs of a tribe having to furlough (or otherwise bear costs to support) a workforce of 5,000 are higher than for a tribe having to furlough (or otherwise bear costs to support) a workforce of 500.

We still find it reasonable to use tribes’ aggregate employment figures across the tribal government and tribally owned enterprises as a basis for capturing the proportionate distribution of negative economic impacts of the pandemic costs across tribes. For the allocation of CARES funds tied to employment in 2020, Treasury looked to IRS Form 941 to ascertain employment counts. Importantly, Treasury requested this information from 2019, so as to have a measure of tribal employment prior to the pandemic and its negative impacts on tribal business activities.

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<sup>39</sup> See, e.g., <https://www.cnn.com/2021/03/16/us/oklahoma-tribes-offers-vaccine-to-all-trnd/index.html>.

We believe it is reasonable for Treasury to continue to rely on this payroll information from 2019 as its measure of tribal employment.

**Coronavirus Infections:** Last among our three formula components is the share of Indian Country’s coronavirus infections suffered by each tribe’s population. Our understanding is that individual tribal-level infection rates are not currently being collected, or at least are not being reported publicly, for all tribes. Due to this constraint on the (at least publicly) available data, our proposal is for Treasury to turn to the number of COVID-19 positive case counts reported by each Indian Health Service (“IHS”) Area.<sup>40</sup> IHS reports the cumulative positivity rate for 12 IHS Areas, reflecting the share of administered COVID-19 tests that have returned “positive” for infection over the course of the pandemic. These rates by IHS Area as of 11:59pm on April 6, 2021 are shown in Figure 1 (see below).

If data on positive infection test rates are not available at the level of each tribe within IHS’ system, or if such data cannot be utilized for reasons of confidentiality, we recommend that Treasury employ the figures of Figure 1 (updated as available at the time of formula specification) to estimate the total number of coronavirus infections for each tribe. While not every member of every tribe has or will be tested for the coronavirus, this can be done by multiplying each tribe’s population of enrolled citizens by the “cumulative percent positive” figure in the relevant IHS Area. In other words, the rate of infection for any given tribe would be assumed to equal the rate of positive cases found in the share of its population that has been tested. This also treats the rate of infection as being the same across the tribes in a given Area, while allowing across-Area variation in that rate.

While imperfect, the data in Figure 1 indicate reasonably expected across-Area differences of the severity of the disease. Thus, for example, locales where public information and reporting have been revealing particularly high rates of the coronavirus (such as Navajo and the other Arizona tribes), we find the IHS Area rates of positivity being well above average. In Areas (e.g., Alaska) where various forces have been reported to have held down infections, we find the confirming opposite result.

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<sup>40</sup> See Indian Health Service at <https://www.ihs.gov/coronavirus/>.



**Figure 1**  
**Rates of Positive Tests for Coronavirus Infection by Indian Health Service Area**  
 As of 11:59pm April 6, 2021

IHS Area	Tested	Positive	Negative	Cumulative percent positive *
Alaska	569,411	11,625	484,117	2.3%
Albuquerque	91,923	8,096	63,001	11.4%
Bemidji	154,040	10,748	139,957	7.1%
Billings	96,985	7,368	86,217	7.9%
California	76,691	7,803	65,757	10.6%
Great Plains	138,161	14,096	123,535	10.2%
Nashville	74,333	5,993	67,431	8.2%
Navajo	239,337	31,414	163,678	16.1%
Oklahoma City	475,091	60,224	409,819	12.8%
Phoenix	172,824	23,569	148,418	13.7%
Portland	111,579	7,546	103,691	6.8%
Tucson	25,704	2,747	22,804	10.8%
<b>TOTAL</b>	<b>2,226,079</b>	<b>191,229</b>	<b>1,878,425</b>	<b>9.2%</b>

Source: Indian Health Service, *Coronavirus (COVID-19)*, accessed April 8, 2021 at <https://www.ihs.gov/coronavirus/>.

If data on infections at the level of individual tribes are available and useable in an ARPA formula, the foregoing approach can readily be modified to incorporate such information, leaving the estimation method set out here to be applied only to those tribes for which requisite data are either unavailable and/or unusable.<sup>41</sup> With measures of each tribe's total infections in hand

<sup>41</sup> To the extent that IHS can provide Treasury with data specific to each tribe, Treasury should use the cumulative positivity rate for each individual tribe, removing the populations of those individual tribes from the calculation of positive infections for each Area and applying the Area-wide positivity rates in Figure 1 as described above to only those tribes for which tribe-specific data remain unavailable and/or unusable.

via the calculations set out above, each tribe's share of Indian Country's total number of coronavirus infections can readily be calculated as the ratio of the individual tribes calculated number of infections divided by the sum of infections across all tribes. This share can now be input into the allocation formula and applied to the portion (30%) of ARPA Title IX funds to be allocated based on the severity of the disease across tribes.

### **V.C. Weighting the Population, Employment and Infection Factors**

With measures of citizen population, tribal employment, and incidence of the coronavirus in hand, there remains the question of how much weight to give each of these drivers of the negative impacts and costs of the pandemic. This is a difficult problem. In dividing up any fixed sum among the 574 tribes, giving more weight to a given factor will tend to allocate more funds to tribes with above average levels of that factor, and less to tribes with below average amounts of that factor. *This is an unavoidable aspect of dividing up any sum of money.* Addressing the issue responsibly requires goodwill and publicly-interested standards of what is fair and reasonable.

Bearing this in mind, we propose the following weighting of the population, employment, and infections factors:

Population = 40%

Employment = 30%

Infections = 30%

A range of legitimate arguments can be made to justify weighting one factor more than another. We believe it is fair and reasonable to give citizen population substantial and the most weight in a Title IX allocation formula.<sup>42</sup> After all, as a *novel* virus, COVID-19 is a disease that has the potential to affect anyone without immunity. The correlation between resources to fight the disease, and recover from it, with a tribe's population counts makes basic sense and is not inherently unfair to any interested parties. Even if two tribes have the same numbers of employees and have seen the same number of cases of the coronavirus, it is reasonable to expect that the tribe with the larger population will end up incurring more costs and burdens in the efforts to protect its larger population.

With respect to the weighting of employment and expenditures, if 40% of the "pie" is allocated based on population, 60% remains to be split between (1) tribal government and

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<sup>42</sup> To the extent it is allowable under the legislative language of ARPA, we advise Treasury to consider using this population-weighted 40% of the funds to review the population-based allocation of CARES Act funds. Treasury can then equalize the per-capita allocations made to every tribe across those amounts already disbursed under the CARES Act and those amounts to be soon disbursed under the ARPA. This allocation mechanism will drive toward the guiding desire for fairness in the current allocation, while also addressing some of the inequities suffered by certain tribes in the population-based allocation of \$4.8 billion of CARES Act monies.

enterprise employment and (2) the calculated number of cases of the disease. We propose to make this split equal, giving employment a weight of 30% and giving infections a weight of 30%. Each factor is important, and we see no basis for choosing to weight one more heavily than the other. Moreover, each is trying to get at essentially the same thing (i.e., the burdens of the pandemic on tribes). To a first order approximation, we would expect likely expenditures (both direct and those associated with supporting workforces and jobs adversely affected by COVID-19) and total tribal government and enterprise employment to move together. A tribe with a reasonably strong economy may be relatively well-off, but its relatively large economy has undoubtedly meant particularly large “hits” to that economy. On the other hand, in light of the evidence noted above that poverty and the incidence of the coronavirus tend to go together, a tribe with a relatively weak economy and attendant employed workforce and perhaps a large and rural land base that has not supported vibrant economic development can reasonably be expected to bear particularly significant direct costs of dealing with disease (and/or its prevention) among its members.

#### V.D. Summary Formula

Title IX of ARPA specifies that the Secretary shall allocate \$1 billion of the \$20 billion designated for payment to tribal governments in equal amounts to each tribal government. For allocation of the remaining \$19 billion, we propose that each tribal government (z) receive a share,  $S_z$ , of the \$19 billion, where:

$S_z = .4 \times \text{Population Share}_z + .3 \times \text{Employee Share}_z + .3 \times \text{Infections Share}_z$ ; with

- **Population Share** of each tribe z based on its certified enrolled citizenship as of January 1, 2021.
- **Employee Share** of each tribe z based on the average of its total of tribal government and tribal enterprise employees over the four quarters of 2019.<sup>43</sup>
- **Infections Share** of each tribe z based on its share of total cumulative Indian Country infections as of the date of the most recently available IHS data on infections.

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<sup>43</sup> Average quarterly employment over the full year avoids problems of seasonal fluctuations in employment.

