



**CHEROKEE NATION
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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Tralynna Sherrill Scott, Cherokee Nation Treasurer

Opinion Number: 2020-CNAG-02 Availability of Per Capita Distribution of CARES Act Distribution from Congress

Date decided: May 28, 2019

You have effectively asked the Office of the Attorney General for an official opinion regarding:

- I. **Does the CARES Act permit the Cherokee Nation to distribute its share of the tribal Coronavirus Relief Fund on a per capita basis among its citizens?**

ANSWER AND ANALYSIS

Short Answer:

No, the CARES Act does not permit the Cherokee Nation to make per capita distribution of the Coronavirus Relief Fund dollars to Cherokee citizens.

Analysis:

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act; P.L. 116-136), signed into law on March 27, 2020, created the Coronavirus Relief Fund (“Fund”). Congress created the Fund to provide assistance to states, tribal governments and other domestic

governments in the United States. The Fund provided an eight billion dollar (\$8,000,000,000) set-aside for tribal governments. On May 6, 2020, the United States Treasury distributed sixty percent (60%) of the eight billion dollars (\$8,000,000,000) to tribal governments, and the Cherokee Nation received a three hundred thirty two million dollar (\$332,000,000) distribution from the Fund. At least one additional distribution is expected, although the final amount the Nation may receive is not known.

Like many federal funds created by Congress, this Fund definitely comes with “strings” attached. The Nation is not free to spend the money in whatever way its elected leaders should desire; instead, there are specific requirements that are imposed on expenditure of the funds. And as is typically the case, there are penalties associated with failing to spend the funds in accordance with the law.

There are three major “strings” attached to this funding.

(d) USE OF FUNDS.—A State, Tribal government, and unit of local government shall use the funds . . . to cover only those costs of the State, Tribal government, or unit of local government that—

- (1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
- (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and
- (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

Section 601(d) of the Social Security Act, as added by section 5001 of the CARES Act.

The U.S. Treasury has released two documents to assist states and tribes that are Fund recipients. The Guidance for State, Territorial, Local and Tribal Governments, released April 22,

2020, further clarified the permissible uses of the Fund. As additional questions came into Treasury, it also released a “Frequently Asked Questions” document that has been most recently updated on May 4, 2020. These two documents represent the only official guidance from Treasury at this time, although additional guidance may –and likely will - be issued moving forward. (Both documents are available at: <https://home.treasury.gov/policy-issues/cares/state-and-local-governments>).

There is no present legislation or proposal from any elected leader to proceed with a per capita distribution of Nation’s share of the Fund, and so this Opinion can only address the requirements of federal law that the Nation has certified it will follow. For the purpose of considering all potential options, the Treasurer has asked whether the Nation’s share of the Fund could be distributed per capita to individual tribal citizens.

A tribal per capita payment is a distribution of tribal property or money to an individual tribal member on a per person basis.¹ For instance, during allotment most of the Nation’s communal property was split up among the tribal citizens. It was a way to remove the communal wealth of the Cherokee people and pass it along to individuals. The question presented today is whether the Nation, as a matter of law, may take money set aside for it by Congress under the CARES Act and distribute it directly to individual citizens on a per capita basis.

Looking at the statute, the first issue that must be addressed is whether a per capita distribution is a necessary expenditure incurred due to the COVID-19 pandemic. An expenditure is considered “due to” the pandemic if that expenditure is used to take action to respond to the

¹ Typically, per capita disbursements are understood to be made “equally” to citizens without regard to need or other factors.

public health emergency. It includes expenditures that directly respond to the emergency, such as purchase of medical supplies, as well as expenditures incurred to respond to secondary effects of the pandemic, such as providing economic support to those suffering from unemployment or business interruptions due to COVID-19 related business closures.

The Treasury FAQ states that emergency financial assistance to individuals and families is allowed under certain circumstances. Like all expenditures of the Fund, such assistance must be structured in a manner to ensure that the assistance is necessary and due to the COVID-19 pandemic. Eligible financial assistance programs could include emergency housing assistance, unforeseen financial costs for funerals, or other emergency needs identified by the relevant government.²

A per capita distribution of funding is a blunt instrument. It does not differentiate between individuals in need of financial assistance due to the pandemic, individuals in need of financial assistance for non-pandemic related reasons, and individuals with no need whatsoever. The wealthiest Cherokee citizens and the most in-need citizens receive equal shares in a per capita distribution. For this reason, no per capita distribution could be considered “necessary” under the law, nor could any per capita expenditure be justified as “due to” the COVID-19 pandemic.

To receive a distribution from the Fund, the Cherokee Nation certified that its uses of the fund would be consistent with the requirements that all funds would be 1) necessary expenditures incurred due to COVID-19; 2) not previously budgeted; and 3) occurred between March and

² Cherokee Nation could, for example, establish a program that provided utility payment assistance to someone who could show that they were unable to make utility payments due to a COVID-19 related job loss. However, Cherokee Nation could not simply fund its current utility payment assistance program with these funds without any further program requirements.

December of 2020. Section 601(e) of the Social Security Act, as added by section 5001 of the CARES Act. Further, the CARES Act empowered the Inspector General of the Department of the Treasury to conduct monitoring and oversight over the Fund, and authorized the Inspector General to recoup from the Nation any amount of funds used in violation of the law. Section 601(f) of the Social Security Act, as added by section 5001 of the CARES Act. Aside from violating the law, the additional consequence of disregarding the “strings” attached to the Fund would be the creation of a \$332 million debt owed to the United States by the Cherokee Nation³.

Conclusion:

It is the Official opinion of the Office of the Attorney General that it is illegal to use Coronavirus Relief Funds as a source of funding for a per capita payment. This Opinion shall have the force and effect of law “until a differing opinion or order is entered by a Cherokee Nation Court.” 51 C.N.C.A. § 105(B)(4).

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³ Other tribes have publically announced their plans for a “per capita” payment of CARES funds, however that does not factor into this legal analysis.