UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE SHAWNEE TRIBE, Plaintiff, v. STEVEN T. MNUCHIN, in his official capacity as Secretary of the United Stated Department of the Treasury; et al., Defendants.	)	Case No. 4:20-cv-290-JED-FHM

REPLY IN SUPPORT OF EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER

The Shawnee Tribe, by and through undersigned counsel, provides this Reply in support of its Ex Parte Motion for Temporary Restraining Order (the "Motion") and responds to Defendants' Opposition to the same.[1] On June 18, 2020, Defendants filed their "Notice by Defendants of Intent to Oppose" (ECF No. 6). Instead of merely providing notice of their intent to oppose a temporary restraining order ("TRO"), however, Defendants offered arguments for why they believe the TRO should be denied, attempting to meet the substance of the Motion.

Defendants' arguments are largely hyper-technical, focusing on notice and timeliness, in an effort to cut off Plaintiff's right to desperately needed funds under Title V of the CARES Act – a right to which it is undisputedly entitled. None of these arguments have any merit, particularly given that Defendants have actual notice of this Motion, to which they have substantively responded (albeit ineffectively), and they caused the delay about which they now complain.

Defendants' other arguments are equally meritless. Defendants disparagingly allege that The Shawnee Tribe filed this lawsuit merely to get a "second bite at the apple" following lawsuits

[1] While the Motion was originally filed as an ex parte, it is no longer such. Defendants have been served with and are aware of the Motion and have responded to it.

in the District Court for District of Columbia ("D.C."). The Shawnee Tribe is based in Oklahoma and its members reside primarily there. It is not a party to the lawsuits by others in D.C. and is not seeking "a second bite" at anything. The Shawnee Tribe does not need to go to Washington to tell Defendants that their formula for distributing CARES Act funds was facially and materially flawed nor does it need a Washington court to order Defendants to preserve the funds needed to provide redress where this Court has every ability to order that relief.

Further, Defendants' allegation that Plaintiff's Motion is solely based on "challenging the methodology," which is allegedly unreviewable, is a misreading of the Motion and a mischaracterization of the facts. To the contrary, the crux of the Motion is that Defendants used, and failed to correct, ***objectively false*** (not merely inaccurate) data in that methodology when calculating Title V awards. Had Defendants used accurate data in their methodology, all tribes would have been treated equally, regardless of the methodology. Instead, some tribes received a windfall of Title V funds solely based on their participation in the Indian Housing Block Grant program ("IHBG") and ***not increased costs associated with COVID-19 as required by Title V***, whereas others were disadvantaged by the lack of participation in that program. Finally, Defendants' contention that all Title V funds have been exhausted making this Motion moot is contradicted by their own admissions that other funds do exist. Regardless, if all funds have been exhausted, Defendants should have no objection to the entry of a TRO.

I. Defendants' notice argument is moot.

Defendants have appeared in this matter and filed a substantive Opposition, irrespective of how they captioned it; thus, Defendants clearly had notice of the TRO and have been afforded the opportunity to be "heard." *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 842 (7th Cir. 2012) (entry of TRO prior to formal service of process or the appearance of defense counsel is proper where defendants had actual notice of the TRO). Indeed, comments to

Rule 65(b) permit "telephonic notice to the attorney for the adverse party," which Defendants received, as acknowledged in Defendants' Opposition. Dkt 6, p. 1 n. 1. Defendants' case law does not hold otherwise and their feigned lack of notice – which is counter to the facts – does not preclude entry of the TRO here. Actual notice is evidenced by Defendants' Opposition filed on June 19, 2020, and the Tribe has certified that service and mailings have been accomplished.

II. Defendants' effort to describe Plaintiff's action as "delay" does not hold water.

Defendants assert that The Shawnee Tribe has unjustifiably delayed in bringing this action. That argument is materially flawed. On June 12, 2020, after at least one month of meaningful discussions among The Shawnee Tribe, Congressional Representatives, and Treasury officials described in the Tribe's Motion for Temporary Restraining Order (ECF No. 3) trying to resolve this issue, The Shawnee Tribe was informed it would have a mechanism to remedy the flawed distribution formula adopted by Treasury. On that date, Treasury published a document entitled "Coronavirus Relief Fund, Allocation to Tribal Governments, June 12, 2020" (Exhibit D to the Motion). There, Treasury represented to The Shawnee Tribe and others as follows:

> Treasury has determined to reserve $679 million from amounts that would be paid to Tribal governments, which represents an estimate of the difference in total payment amounts to Tribal governments if Treasury had made population-based payments based on tribal enrollment data provided by the Bureau of Indian Affairs . . . . These reserved funds would be available to resolve any potentially adverse decision in litigation on this issue . . . .

Stated differently, Treasury advised The Shawnee Tribe that (1) recourse would exist because a fund of $679 million was being reserved to satisfy claims for the appropriate allocation of CARES Act funds; and (2) the reservation of such funds was necessary to address claims for additional payment because "the Judgment Fund is unavailable to compensate plaintiffs seeking additional CARES Act payments." Plaintiff relied on this statement of policy and fully expected to be able to seek its appropriate allocation of funds from the amount Treasury withheld.

On June 15, 2020, however, Treasury was ordered by the D.C. District Court to dispense such funds notwithstanding its acknowledgment that they would be needed to resolve anticipated claims for an appropriate allocation. (See Exhibit E to the Motion). Prior to that date, Treasury was promising to withhold sufficient funds to resolve anticipated claims for an appropriate allocation of CARES Act funds to tribes such as The Shawnee Tribe. Upon notice of this unfortunate shift, The Shawnee Tribe prepared and filed this action almost immediately.

Defendants' position on delay is further refuted by their own assertions. They write that "Plaintiff has known since the conversation between counsel on Wednesday morning, June 17, 2020" that Treasury was taking a position that would require urgent relief. The Shawnee Tribe literally filed this action the very next day -- June 18, 2020. In fact, the Shawnee Tribe attempted to file the action on the same day, June 17, 2020, but a case number could not be assigned by the District Court in time. Defendants' assertion that June 17 was a pivotal date alerting the Shawnee Tribe of the need to take legal action is an argument in favor of the Tribe, which took immediate action. It does not point to any delay. It points to the opposite – a very rapid response.

How Defendants can characterize the Tribe's action as an "unexplained delay in bringing suit" is beyond rational understanding. Their reliance on *Southern Ute Indian Tribe v. Department of Interior*, 2015 WL 3862534 (D. Colo. 2015), misses the mark. In that case, the tribal plaintiff had delayed *84 days* before bringing suit on the eve of the known effective date of a rule. 2015 WL 3862534 at *1. In the present case, The Shawnee Tribe filed suit literally within a day or two of learning of the need, and within 6 days of Treasury's June 12 statement.

Defendants try to make use of a May 5, 2020 document to suggest that The Shawnee Tribe unjustifiably delayed. On that date, Treasury revealed its flawed formula for the distribution of CARES Act funds, one that all but eliminated distributions to The Shawnee Tribe

and others with a population zero under the IHBG program. But Defendants omit to mention the ensuing discussions for almost a month among the parties, including the involvement of Congressional Representatives, culminating in the June 12, 2020 policy document wherein Treasury asserted it would withhold funds from distribution so that affected parties could be purse compensation. Only when that promise was undermined just three days later did the need for immediate action become apparent. Indeed, according to Defendants' own rendering of events, it was a conversation on June 17, 2020 that alerted The Shawnee Tribe of the need for immediate action, and the Tribe acted accordingly. The merits of this action must be addressed.

III. Defendants cannot circumvent Plaintiff's right to recourse merely because other tribes have sued Defendants for mishandling of Title V funds.

Defendants attempt to mischaracterize The Shawnee Tribe's lawsuit as "a transparent effort to get a second bite at the apple." Dkt. 6, p. 2. This is factually and legally incorrect. The Shawnee Tribe is headquartered, and most of its members currently reside, in Oklahoma. The Shawnee Tribe has every right to bring this lawsuit in this Court where venue is proper. It does not need to go to Washington to hold these Defendants accountable for their obvious wrongdoing. This Court has clear jurisdiction to issue orders providing appropriate relief, and is not beholden to a judge or court that Defendants prefer. Defendants assert, in conclusory fashion, that this case should be transferred to a district court in D.C. *See* Dkt. 6, p. 2. Defendants provide no basis to divest this Court of its authority to hear this matter; thus, it should be denied.

Moreover, there can be no "second bite at the apple" where the Tribe has never had a first. To the extent Defendants suggest that this action is a collateral attack, they have to show that the issue previously decided is identical to the one presented before this Court; that it was adjudicated on the merits; that Plaintiff was a party to, or in privity with another party in, the prior lawsuit; and that it had a full opportunity to litigate the matter in the prior lawsuit. *Moss v.*

Kopp, 559 F.3d 1155, 1161 (10th Cir. 2009). Defendants cannot make this showing. The Shawnee Tribe is not a party to any of the lawsuits Defendants list in their Opposition and which they claim now bars it from seeking redress in this Court. Likewise, The Shawnee Tribe has not had any opportunity to litigate the issues raised in this lawsuit. Defendants concede that the lawsuits listed in their Opposition "*are currently being litigated*" (Dkt. 6, p. 2 (emphasis added); thus, none of the issues raised in those lawsuits have been fully adjudicated on the merits.

Finally, Defendants have failed to demonstrate that the issues raised here are identical to those raised in any prior lawsuit. For example, in *Prairie Band of Potawatomi Nation v. Mnuchin*, Case No. 20-cv-1491-APM (D. D.C.), Plaintiff sought to preclude the release of all remaining Title V funds and not those that applied to the tribe at issue. The Shawnee Tribe has made clear that it seeks a TRO to preclude the distribution of only those funds to which it would have been entitled had Defendants used correct data. Further, the *Prairie Band* Plaintiff challenged the decision to use the IHBG formula, while The Shawnee Tribe challenges the use of, and failure to fix, objectively false information in that formula. The Tribe's claims are sufficiently legally distinct and, thus, are not barred from raising its claims before this Court.

IV. Fourth, Defendants' Clear Error Is Reviewable.

Defendants' lone basis for arguing Plaintiff cannot be successful on the merits is because "it is challenging the methodology," which a District Court in D.C. has held is "unreviewable." *See* Dkt. 6, p. 3. Defendants' reading of the Motion is simply inaccurate and misses the mark.

As a threshold matter, Defendants do not dispute that, absent entry of a TRO, The Shawnee Tribe will (1) suffer irreparable harm, (2) the threatened injury outweighs the harm caused by injunctive relief and (3) the injunction will not adversely affect the public interest. *See generally* Dkt. 6 (failing to dispute these elements as set forth in *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) and *Winter v. Nat. Res. Def. Council*,

Inc., 555 U.S. 7, 20 (2008) (citations omitted)). Nor do Defendants dispute that they used ***objectively false*** data when calculating Title V awards under what they argue is a correct methodology because they cannot genuinely do so. Further, Defendants do not dispute the on-going efforts to resolve this issue, and Defendants' failure to correct this objectively false data. Thus, Defendants have conceded these points. *See* LCvR7.2(e).

The notion advanced by Defendants that their decisions for how to distribute funds under the CARES Act are "unreviewable" under the abuse of discretion standard of the Administrative Procedures Act is not supported within the Tenth Circuit. The APA embodies a "'strong presumption favoring judicial review of administrative action.'" *Mach Mining LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1651 (2015) (quoting *Bowen v. Mich. Aca. Of Family Physicians*, 476 U.S. 667, 670 (1986). The agency – not Plaintiff – carries the "heavy burden" to show that Congress "prohibited all judicial review of the agency's compliance with a legislative mandate." *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (internal quotations omitted). This exception will apply only "in those rare circumstances" where the statute leaves the court with no meaningful standard against which to judge the agency's discretion and the express language of the statute demonstrates "that Congress wanted an agency to police its own conduct." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Mach Mining LLC*, 135 S.Ct. at 1651.

Addressing the CARES Act specifically, the District Court of New Mexico ruled that the Small Business Administration had violated the APA by abusing its discretion in distributing CARES Act funds. *See In re Roman Catholic Church of Archdiocese of Santa Fe*, 2020 WL 2096113 (Bankr. D.N.M. May 1, 2020). In reaching its decision, the court there noted that "courts retain an important role 'in ensuring the agencies have engaged in reasoned decisionmaking' by examining the reasons for the agency decisions, or lack thereof, and

determining 'whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" *Roman Catholic Church*, 2020 WL 2096113 at *5 (quoting *Judulang v. Holder*, 565 U.S. 42, 53, 132 S.Ct. 476, 181 L.Ed.2d 449 (2011)).; . Zeroing out the population of The Shawnee Tribe, then refusing the fix this obvious false data, resulted in a decision that is an abuse of discretion, amounts to a clear error of judgment, and is unbounded by the facts and reasoned decisionmaking. Under applicable law, including precedent within this Circuit directed to the CARES Act specifically, Defendants' decision is reviewable.

Lest there be doubt, Title V of the CARES Act expressly limits Defendants' discretion. It states that "the amount paid under this section for fiscal year 2020 to a Tribal government ***shall be*** … based on ***increased expenditures*** of each such Tribal government … relative to aggregate expenditures in fiscal year 2019 by the Tribal government." 42 U.S.C. § 801(c)(7) (emphasis added). This language limits Defendants' discretion to disburse funds and afforded a "statutory reference point" by which the court was able to review that discretion. *See Confederated Tribes of Chehalis Reservation v. Mnuchin*, 2020 WL 1984297, at *5 (D.D.C. Apr. 27, 2020) (holding that eligibility of Title V awards was reviewable because Congress had circumscribed the agency's discretion by supplying a concrete definition). Defendants' use of obviously false IHBG data resulted in inconsistent application of funds because some tribes participate in that program and others do not. In effect, it provided compensation not based on "increased expenditures" due to COVID-19 but based on whether tribes receive grant money under IHBG.

In making their distribution of CARES Act funds to tribes, Defendants counted the population of The Shawnee Tribe as **zero**, despite knowing that was not true.[2] If the "abuse of discretion" and "arbitrary and capricious" standard of review insulates Defendants' decision in

[2] Indeed, a zero population for The Shawnee Tribe literally means it does not exist – which is patently untrue.

this case, then it is impossible to imagine any decision by an agency that would fall on review. Defendants seek to protect themselves by asserting a standard with no limiting principle, which has already been rejected within the Tenth Circuit. As demonstrated by *Roman Catholic Church of Archdiocese of Santa Fe*, *supra*, 2020 WL 2096113, a federal agency's abuse of discretion in distributing funds under the CARES Act is reviewable under the APA when there has been clear error and unreasonable decisionmaking, as exists in this case.

In any event, the Motion does not argue that Defendants' discretion in selecting the methodology itself is the basis of its request for the temporary restraining order. The crux of the Motion is the fact that Defendants used objectively false data within that methodology. As stated above, Defendants do not dispute that they used ***objectively false*** data in that methodology when calculating Title V awards. Despite Defendants' efforts to conflate the use of a specific methodology to calculate the Title V awards with the false numbers used *in that methodology*, they are mutually exclusive issues, as is their failure to correct them. Had Defendants used accurate data in their methodology, all tribes would have been treated equally. Instead, some tribes received a windfall of Title V funds based on their participation in the IHBG program, whereas others were disadvantaged by the lack of participation in that program.

Defendants' reliance on the ruling in *Prairie Band* from the District Court of D.C. is misguided. *See* Dkt. 6-2, pp.1-6 ("Prairie Band Order"). Plaintiff in that case merely argued that Defendants' use of the IHBG formula "undercounted" its tribal population, not that it was wholly false. *Id.*, p. 2. To be sure, The Shawnee Tribe is not alleging that the IHBG number was slightly off; rather, the IHBG formula, which **Defendants unreasonably relied on and used, had *zero members* for The Shawnee Tribe, which is objectively false.** Defendants' unreasonable reliance, without consulting The Shawnee Tribe or providing justification for it, and in light of

readily available information to the contrary, was plainly arbitrary and capricious under the APA. *See* 5 U.S.C. § 706(2)(A); *Mozilla Corp. v. Fed. Cmmc'ns Cmm'n*, 940 F.3d 1, 49 (D.C. Cir. 2019) (requiring a court to review whether the "agency examined relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and choice made"). Once Defendants decided to rely on population data, they had a duty to do so in a way that was based on actual facts, and not arbitrary and capricious.

V. Defendants' contention the Title V funds have been exhausted is belied by its Opposition and the evidence.

Defendants' contention that all funds under Title V have been distributed is contradicted by their Opposition and unsupported by the evidence. Defendants provide no evidence that all funds have been distributed and the Title V funds are exhausted. Instead, they simply ask this court to take their word for it, which this Court should not do.

To the contrary, Defendants admit that they retain money allegedly allocated for the resolution of cases related to the Alaska native corporations and a "payment issue." There is no dispute that the Title V award amounts, including the retained money, are proportionate. If this Court were to determine that Defendants used false data in calculating Plaintiff's award, it would receive more money based on Defendants' methodology and effectively reduce other awards. Even if it were true all funds have been exhausted, Defendants should have no objection to the entry of a TRO pending the preliminary hearing where Defendants can provide evidence of such exhaustion. This outcome, however, would point to other serious problems with Defendants' behavior, including an egregious breach of the federal government's trust responsibility to tribes.

VI. Conclusion

The Shawnee Tribe respectfully requests that a TRO be entered to prevent exhaustion of funds that would otherwise be available to the Tribe, of an amount no less than $12 million.

Dated this 22nd day of June, 2020.

/s/ Gregory Bigler
Gregory Bigler (OK Bar No. 11759)
BIGLER LAW
P. O. Box 1927
Sapulpa, Oklahoma 74067

Pilar M. Thomas (pro hac vice pending)
QUARLES & BRADY LLP
One South Church Avenue, Suite 1800
Tucson, Arizona 85746

Nicole L. Simmons (pro hac vice pending)
QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391

Attorneys for Plaintiff

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 22nd of June, 2020, the foregoing document was filed with the Court using the CM/ECF system and served which provided service to all parties through their attorney of record.

/s/ Dawn McCombs