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 MOTION FOR PRELIMINARY INJUNCTION

MEMORANDUM OF LAW

I. Defendants' Clear Error Is Reviewable Under the APA.

Defendants assert their selection of methodology determining "how" much a tribe receives under Title V is unreviewable because (1) a D.C. court said so; and (2) Title V contained an "abbreviated time-frame for disbursing the Funds."[1] [Dkt. 21, p.10]. Defendants mischaracterize Plaintiff's case, which does not solely challenge the methodology but also challenges the use of patently and objectively false data in that methodology. In doing so, Defendants omit half of the reviewability analysis – notably the most critical half.

The requisite starting point under the APA is a "'***strong presumption*** favoring judicial review of [an] administrative action." *Mach Mining LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1651 (2015) (emphasis added). The agency – not Plaintiff – carries the "heavy burden" to overcome the presumption of reviewability embodied in the APA. *Id.*

Defendants – and the federal district court in D.C. – rely on a Supreme Court case that

[1] Defendants also lump reviewability under whether Plaintiff will be likely to succeed on the merits to shift the burden to Plaintiff. Reviewability, however, is a jurisdictional issue and the burden remains on Defendants to prove it does not exist here. *Payton v. U.S. Dept. of Agri.*, 337 F.3d 1163, 1167-68 (10th Cir. 2003).

held that certain allocations of funds for federal programs from a lump-sum appropriation to a federal agency that administers those programs may be unreviewable under section 701(a)(2) of the APA, *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (993). In *Vigil*, an Indian tribe challenged the decision by the Indian Health Service (IHS) to discontinue funding for a discretionary health program administered directly by the IHS. The funding for this discretionary program was part of an annual lump-sum appropriation to IHS for health care services and programs provided to tribes and tribal members. Other than limiting the general purposes of the funds to health care, Congress provided no statutory limitations on how IHS could use those funds or what programs IHS could administer with those funds. *Id.,* at 193 ("the appropriations Acts for the relevant period do not so much as mention the Program [discontinued], and … speak about Indian health only in general terms"). The Court held that this lack of statutory limitation in the typical program appropriation to IHS granted absolute discretionary use of the funds for IHS programs, including which programs to administer and fund. *Id.*, at 185. Because the IHS decision to change the funding of programs that it administered was committed to agency discretion, the Court held that decision unreviewable. *Id.*

Further, "this ***narrow*** exception [*in Vigil*] does not 'typically' or 'presumptively' extend to all allocations of appropriated funds." *Planned Parenthood of New York, Inc. v. U.S.*, 337 F. Supp. 3d 308, 324-25 (S.D.N.Y.) (emphasis added); *see also McAlpine v. U.S.*, 112 F.3d 1429, 1433 (10th Cir. 1997) (citing extensive case law holding that Section 701(a)(2) is to be applied only to "a very narrow range of agency decisions."). To the contrary, this rare exception applies "***only*** '[w]here Congress merely appropriates lump-sum amounts ***without statutorily restricting what can be done with those funds***'," thereby providing no meaningful standard by which to judge the agency's actions. *Id.* (citation omitted and emphasis added). The mere fact that a statute contains some discretionary language does not make it unreviewable and Congress may

circumscribe agency discretion by including restrictions on the ***use*** of funding. *Multnomah Cnty. v. Azar*, 340 F. Supp. 3d 1046, 1061-62 (D. Or. 2018) (holding the use of the word "shall" and other mandates provides a standard against which to judge the agency's discretion). Even under *Vigil*, in order for a lump sum appropriation to be unreviewable, the appropriation must not "statutorily restrict[] what can be done with those funds" and requires the agency to possess peculiar expertise in determining which "program[s]" to fund. *Vigil*, 508 U.S. at 192.

To this end, this Court must look to the statute to assess whether Congress limited the agency's discretion. Title V does and, thus, *Vigil* is inapposite.

A. Defendants failed to overcome the presumption of reviewability.

Defendants boldly claim that "Plaintiff's entitlement to any of the Funds is based on whatever methodology Treasury selects." [Dkt. 21, p. 11], and that this decision is unreviewable. In other words, Defendants could have allocated all Title V funds to a single tribe and claim such an allocation would still be unreviewable by this Court.[2] That position is absurd, and contrary to the plain language and purposes of Title V.

The parties agree that any distribution or award of Title V funds must "meet permissible statutory objectives," which is to pay for increased expenditures related to COVID-19. [Dkt. 21, p. 10]; *Planned Parenthood*, 337 F. Supp. 3d at 331 ("It is well settled that an agency may only act within the authority granted to it by statute."). But, Defendants' decisions have not met "permissible statutory objectives" when they used data from a housing program, the participation

[2] Defendants admit that the question of "who" is entitled to Title V funds is reviewable [Dkt. 21, pp. 12-13]. Defendants' decision to base funding on participation in a tribal housing grant program, when not all tribes participate in that program, including the Shawnee Tribe, is tantamount to deciding "who" is eligible for funding. This decision is reviewable as a matter of law. *See also Confederated Tribes of Chehalis Reservation v. Mnuchin*, — F. Supp. 3d. —–, 2020 WL 1984297, at *5 (D.D.C. Apr. 27, 2020) (holding that determining "who" is entitled to such funds under the CARES Act was reviewable).

of which is discretionary, that resulted in the extinction of The Shawnee Tribe.

Furthermore, in order for Defendants to prove their action is unreviewable, they have to show there is no discernible law to apply. 5 USC § 701(a)(2); *see McAlpine*, 112 F.3d at 1433 (no meaningful standard by which to judge the agency's actions). The Defendants reliance on *Vigil* to stand for the unreviewability of their determination on how to distribute funds requires this Court to find that Title V – which contains express limitations on the use of funds – is the same in form and function as the wide open IHS lump-sum appropriation in *Vigil*. It is not.

Unlike in *Vigil* where there was no statutory language on the proper use or administration of the appropriated funds, 508 U.S. at 193, Title V's statutory scheme does contain limitations on the allocation and use of funds, such that a reviewing court can discern the intent of Congress. First, the amount tribes "***shall***" receive from Treasury ***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); *Agua Caliente Band of Cahuilla v. Mnuchin*, 20-cv-01136, 2020 WL 2331774, at *6 (D.C. May 11, 2020) (allocations under Title V are expressly limited and "shall be 'based on increased expenditures'"). Second, tribes can only use the money for "necessary expenditures incurred due to" the COVID-19 public health crises, 42 U.S.C. § 801(d)(17), and the Treasury can audit such uses, 42 U.S.C. § 801(f). Contrary to the silent appropriation bill in *Vigil*, here Congress has imposed explicit limitations on the discretion of the Secretary to determine the amount and use of funds.

To further distinguish *Vigil*, unlike IHS, there is no role for Treasury in administering programs to Tribes under Title V. *Cf.*, CARES Act, Title IV (tasking Treasury with the responsibility to administer lending programs). Defendants are not charged with allocating and using Title V funds for programs for the Defendants to administer, because the Defendants do not administer or use these funds for their own agency purposes. Treasury is not providing direct

services to tribes for purposes of implementing programs related to "necessary expenditures." Rather, Treasury is merely a conduit for sending funds to the tribes for the tribes' limited use for necessary expenditures related to COVID-19. See also, *Planned Parenthood*, 337 F. Supp. 3d 308, 325-26 (holding that *Vigil* and *Milk Train* do not apply where appropriation of funds was not "wholly committed to agency discretion").

Nor is the D.C. Court order in *Prairie Band Potawatomi Nation* dispositive. [*See* Dkt. 6-2, pp.1-6]. The Court – in a single sentence and citing only *Vigil* without any analysis – concluded that Defendants' selection of methodology is unreviewable. It failed to consider that the APA presumes review, even where lump sum appropriations are at issue, and it presented no findings as to how Defendants had overcome that presumption. In the end, Defendants have failed to carry their "heavy burden" to overcome the presumption of reviewability embodied in the APA. *Mach Mining LLC*, 135 S.Ct. at 1651. Thus, their decisions are reviewable.

B. Defendants "abbreviated time-frame" argument lacks merit.

Defendants also contend that, because Congress ordered Treasury to distribute Title V funds "within thirty-days" – ***an order in which Defendants openly said it did not have to follow*** – their decision to distribute funds based on false data is unreviewable. [Dkt. 21, p. 13]. Tellingly, this contention has already been rejected by the D.C. Court and Defendants themselves. Defendants asserted, and the D.C. Court rejected, that Treasury could be insulated from review of its Title V awards simply because of the nature of a "time-pressed determination … to address a public health emergency." *Confederated Tribes of Chehalis Res.*, 2020 WL 1984297, at *6 ("[t]he mere emergency nature of the funding does not render it unreviewable.").

Even Defendants themselves have disclaimed that the 30-day deadline was intended by Congress to be "rigid or absolute." *Agua Caliente*, 2020 WL 2331774, at *6. Defendants cannot

assert Congress' 30-day requirement demonstrates intent to preclude review here but, before another court, argue that deadline meant nothing.

What little case law Defendants do cite is unhelpful to them. Nowhere in *Morris v. Gressette*, 432 U.S. 491 (1977) does it hold that statutory deadlines are "strong indicia" of unreviewability, as Defendants contend. [Dkt. 21, p. 13]. Rather, the court in *Morris* determined an Attorney General's action under the Voting Rights Act of 1965 was unreviewable because it already afforded an "expeditious alternative to [judicial review]." *Id.* at 504-05. No such alternative exists here. Similarly, in *Block v. Comty. Nutrition Inst.*, 467 U.S. 340 (1984), the court held that the Secretary of Agriculture's actions *were reviewable* but rejected that consumers could participate in that regulatory process. *Id.* at 346-47. And *Am. Bank, N.A. v Clarke*, 933 F.2d 899 (1991) involved a "highly discretionary" statute providing what a comptroller "may" do – discretionary language that is notably absent from Title V.

Defendants' discretionary authority and urgency arguments fail to convert this presumptively reviewable action into an unreviewable one.

II. The Shawnee Tribe is entitled to injunctive relief.

A. <u>Plaintiff is likely to be successful on the merits</u>.

In arguing their actions were not arbitrary and capricious, Defendants suggest an overly permissive standard of review that would permit clear error. Instead, while "the scope of review under the 'arbitrary and capricious' standard is narrow . . . an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made'." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted). Furthermore, "[a]gency action is arbitrary and capricious if it 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

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agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Miami Tribe of Okla. v. U.S.*, 656 F.3d 1129, 1142 (10th Cir. 2011) (internal citations omitted). Even where discretion does exist, Courts have "frequently reiterated that an agency must cogently explain [the choice made]." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 48-49.

Once Defendants made the choice to use population data as part of the allocation methodology, they had a duty to avoid using objectively false data for the Shawnee Tribe because the use of such data would not be rationally connected to the choice made, could not be the product of reasoned decision-making, clearly ran counter to the record, and is "implausible." *Miami Tribe of Oklahoma*, 656 F.3d at 1142. Defendants do not deny the purposeful use of objectively false data; instead they consistently downplay their error in an effort to make it seem minimal. [*See* Dkt. 21, pp. 1, 11 n.7, 16 (arguing Plaintiff is overly concerned about "imperfect Tribal population data" or "data that imperfectly estimated")]. This case is not concerned with slight imperfections or misjudgments. Defendants determined that the population of The Shawnee Tribe was **zero** when it knew that data was false, which was "***so implausible*** that it could not be ascribed to a difference in view or the product of agency expertise." *Miami Tribe of Okla.*, 656 F.3d at 1142 (10th Cir. 2011) (emphasis added).

Nor do the Defendants offer an explanation for their reliance on false data that The Shawnee Tribe has zero population. Defendants' only proffered explanation for the use of the patently false HUD data for Shawnee Tribe in lieu of the solicited population data it received from the Shawnee Tribe is the post hoc rationalization that they were in a rush, some population certificates were "unreliable," other programs[3] use the HUD data, and tribal enrollment data is

[3] The fact that housing and transportation programs use this data is irrelevant and runs directly counter to Title V's objective. Nowhere in Title V does it say that only those tribes who have a housing or transportation program are entitled to funds (again, a "who" decision).

inconsistent. [Dkt. 21, pp. 14-15]. It is unclear how these reasons can support their decision to ignore accurate population data provided by The Shawnee Tribe when the objectively false HUD data reduced its population to zero – i.e., extinction. This is not merely a "difference in view."

In sum, Treasury's charge under the CARES Act was to distribute funds "based on increased expenditures of each such Tribal government." 42 U.S.C. 801(c)(7). Treasury determined to use Tribal population as a proxy for increased expenditures and then proceeded to count The Shawnee Tribe's population based on an Indian housing program, in which the Tribe does not participate. As a result, Treasury irrationally – and contrary to the evidence before them – assigned The Shawnee Tribe a population of zero. In no way is this a reasonable exercise of discretion. Even according to Defendants, the "arbitrary and capricious" standard requires that "an agency examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). If population is to be used as a proxy for increased expenditures, then depopulating The Shawnee Tribe, contrary to the evidence before them, and distributing funds on that basis is not grounded in relevant data, is inconsistent with Congress's instructions, and is the definition of a "clear error of judgment" made outside "the bounds of reasoned decisionmaking." It cannot be defended on review.

B. <u>Plaintiff has sustained irreparable harm</u>.

Defendants' dispute that Plaintiff has sustained irreparable harm[4] is that Plaintiff "delay[ed] in bringing suit," yet again without providing any legal standard. [Dkt. 21, p. 17]. In determining delay, the Court must consider whether it was reasonable, the party sat on its rights, and it prejudices the opposing party. *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016). Even then, binding precedent is clear that delay will not bar injunctive relief where it ***is "attributable***

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[4] Defendants argue this as a "balance of equities" issue; however, courts analyze it under irreparable harm. *Id.*

to plaintiff's attempts to negotiate." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) (rejecting plaintiff delayed in filing lawsuit nearly 2 years after discovering concerns because it attempted to "resolve the dispute") (emphasis added); *see also Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social and Rehabilitation Servs.*, 31 F.3d 1536, 1543-44 (10 Cir. 1994) (rejecting 3-month delay attributed to plaintiff's attempts to negotiate a settlement could defeat a claim of irreparable injury).

Defendants do not argue the delay was unreasonable or that Plaintiff sat on its rights. Instead, Plaintiff indisputably shows – and Defendants do not deny – that between May 5, 2020, when Defendants disclosed the use of the HUD data until ***6 days before this lawsuit was filed***, Plaintiff was actively engaged in dispute resolution efforts with Defendants. [Dkt. 3-3, 6-1, p.3]. Despite the promise of a reserve from which the Tribe could satisfy its claim,[5] on June 15, 2020, Treasury was ordered by the D.C. District Court to distribute the funds that Treasury had planned to hold in reserve. [Dkt. 3-5]. That is the date Plaintiff learned an urgent lawsuit was necessary. It responded to that need immediately.

As Defendants would have it, Plaintiff was required to file a lawsuit at the first sign of disagreement as the only means of resolving a dispute with a federal agency. That is contrary to public policy. *See, e.g., Southwest. Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F. Supp. 2d 1253, 1257 (D. Colo. 2003) (pointing to the "well-recognized public policy in favor of non-litigious solutions to disputes"). Good public policy does not demand filing a federal lawsuit at the first sign of a disagreement that might be resolved through discussions. Pursuing a sensible resolution is not "waiting" or "delaying," particularly where, as here, a resolution *was actually*

[5] As indicated in Plaintiff's Motion and first Reply, Plaintiff was reassured only 6 days before it filed its lawsuit that a reserve amount of $679 million was earmarked "to resolve any potentially adverse decision in litigation on this issue." [Dkt. 3-4, p. 3].

achieved before Treasury was ordered to revoke it.

Although Defendants, in a footnote, argue Plaintiff's damages are too uncertain to be irreparable because Plaintiff lacks the data to calculate it, Defendants seek to benefit from their own concealment of data, which they have readily conceded. *Confederated Tribes of Chehalis Res.*, 2020 WL 1984297, at *9 (noting Treasury's refusal to make public funding decisions before disbursing funds). "[I]t is this very uncertainty that amplifies the likelihood of harm." *Id.*

Finally, Defendants assert that any money withheld in this case would, in turn, "harm the entities that have not yet received payments from Treasury." But, these other entities are not before this Court, and Defendants lack standing to make this argument. In any event, the other entities that have not yet received payments are not necessarily entitled to full funds being withheld pending the outcome of the DC litigation. Treasury is apparently withholding at least $162 million from the first tranche (the Population Award) for the Alaska Native Corporations. However, if Treasury had given the Shawnee Tribe its equitable share of the Population Award, which the Tribe estimates at $12 million, then by rules of arithmetic Treasury would have only had $150 million available for the ANCs. This Court has characterized this as the ANCs bearing the full brunt of ensuring the Shawnee Tribe receives its equitable share. But, there is no harm – legal or otherwise – to the ANCs because they would not have received funds that rightfully belong to another tribe: the Shawnee Tribe.

III. Conclusion

The Shawnee Tribe respectfully requests the Court to enter a preliminary injunction to prevent the exhaustion of Title V funds that would otherwise be available to The Shawnee Tribe, of an amount no less than $12 million.

Dated this 23rd day of July, 2020.

/s/ Pilar M. Thomas

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 23rd of July, 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