

Confederated Tribes of the Chehalis Reservation, et al. v. Mnuchin

*Ensuring the Proper Distribution of COVID Relief Funds to Tribal
Governments Under Title V of the Coronavirus Aid, Relief, and Economic
Security (CARES) Act, 42 U.S.C. § 801.*

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STATUTORY PROVISIONS

Title V (Coronavirus Relief Fund), 42 U.S.C. § 801, of the CARES Act provides in part:

(a) Appropriation

(1) In general

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for making payments to States, Tribal governments, and units of local government under this section, **\$150,000,000,000 for fiscal year 2020.**

(2) Reservation of funds

Of the amount appropriated under paragraph (1), the Secretary shall reserve—

...

(B) **\$8,000,000,000 of such amount for making payments to Tribal governments.**

(b) Authority to make payments

(1) In general

Subject to paragraph (2), **not later than 30 days after March 27, 2020**, the Secretary shall pay each State and Tribal government, and each unit of local government that meets the condition described in paragraph (2), the amount determined for the State, Tribal government, or unit of local government, for fiscal year 2020 under subsection (c).

...

(c) **Payment amounts**¹

...

(7) **Tribal governments**

From the amount set aside under subsection (a)(2)(B) for fiscal year 2020, **the amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.**

...

(d) **Use of funds**

A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section 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 March 27, 2020, for the State or government; and**
- (3) **were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.**

¹ See *The Shawnee Tribe v. Mnuchin*, No. 20-5286 (D.C. Cir.).

...

(g)Definitions

In this section:

(1)Indian Tribe

The term “Indian Tribe” has the meaning given that term in section 5304(e) of title 25.

...

(5)Tribal government

The term “Tribal government” means the recognized governing body of an Indian Tribe.

The Indian Self-Determination and Education Assistance Act (ISDA) defines “Indian tribe” at 25 U.S.C. § 5304(e):

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), **which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;**

DISTRICT COURT PROCEEDINGS

Origins of the Case

In early April 2020, Treasury held two telephonic consultations with Tribal leaders and Interior officials regarding the allocation of the \$8B reserved for Tribal governments.

On April 13, Treasury posted a request for tribal data form on its website, suggesting that Alaska Native regional corporations and Alaska Native village corporations (ANCs) would be eligible for Title V funds.

On April 17, the Confederated Tribes of the Chehalis Reservation, Tulalip Tribes, Houlton Band of Maliseet Indians, Akiak Native Community, Asa'carsarmiut Tribe, and Aleut Community of St. Paul Island filed for declaratory and injunctive relief, asserting a single claim under the APA. Case No. 20-cv-01002 (APM). Navajo Nation, Quinault Indian Nation, Pueblo of Picuris, Elk Valley Rancheria, California, and San Carlos Apache Tribe joined as plaintiffs a few days later.

On April 20, The Tribes moved for a preliminary injunction to enjoin the Secretary from treating ANCs as Tribal governments and distributing any portion of the \$8B to them. The Secretary informed the Tribes that Treasury had not yet made a final decision.

Later that day, Treasury requested the views of Interior on the eligibility of ANCs. The next day Solicitor Jorjani responded in a two-page letter, claiming that "it is unquestionable" that ANCs meet ISDA's definition of "Indian tribes." He did not mention the recognition clause.

On April 23, Treasury's General Counsel recommended that the Secretary deem ANCs to be Tribal governments, and the Secretary concurred.

District Court consolidated two other cases, filed on April 22 and 23:

- Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Oglala Sioux Tribe, Nondalton Tribal Council, Arctic Village Council, Native Village of Venetie Tribal Government, Case No. 20-cv-01059 (APM)
- Ute Tribe of the Uintah and Ouray Indian Reservation, Case No. 20-cv-01070 (APM)

Court heard oral argument on all 18 Tribes' motions for preliminary injunctive relief on April 24, inquiring whether the \$8B would remain available for payment to Tribes after April 26, 2020 (30 days following passage of the CARES Act).

Preliminary Injunction

Confederated Tribes of Chehalis Reservation v. Mnuchin, 456 F. Supp. 3d 152 (D.D.C. 2020)

On April 27, 2020, the District Court granted the Tribes' motions and enjoined the Secretary from paying Title V funds to ANCs.

- Rejected Secretary's argument that his decision was not subject to judicial review.
- "Plaintiffs easily satisfy their burden to show that they will suffer irreparable injury in the absence of immediate injunctive relief" because "[t]hese are monies that Congress appropriated on an emergency basis to assist Tribal governments in providing core public services to battle a pandemic."
- Plaintiffs were likely to succeed on the merits
 - Under a "clear grammatical construct" of statute, the recognition clause applies to all of the listed entities, including ANCs. The Secretary argued that the clause does not apply to ANCs, but it "cannot be reasonably construed to exclude ANCs."
 - "Recognized" and the recognition clause are terms of art that refer to federally recognized Indian tribes and Alaska Native villages. The Secretary agreed.
 - No ANC presently satisfies the recognition clause. The Secretary agreed.
 - Therefore, ANCs are not "Indian Tribes" and are not "Tribal governments" eligible to receive Title V funds.

Several ANCs and organizations representing ANCs then intervened as defendants, Treasury produced the Administrative Record, and the parties expedited summary judgment briefing.

Summary Judgment

Confederated Tribes of Chehalis Reservation v. Mnuchin, No. 20-CV-01002 (APM), 2020 WL 3489479 (D.D.C. June 26, 2020)

On June 26, 2020, the District Court entered summary judgment in favor of the Secretary and Defendant-Intervenors.

Injunction Pending Appeal

Confederated Tribes of Chehalis Reservation v. Mnuchin, No. 20-CV-01002 (APM), 2020 WL 3791874 (D.D.C. July 7, 2020)

Tribes quickly moved for an injunction pending appeal, which the District Court granted.

- “Because the question of statutory interpretation presented in this case is as complicated as it is consequential, it deserves an audience before a higher court while maintaining the status quo.”
- Tribes would suffer irreparable harm if the Secretary paid the remaining funds to ANCs.
- “[T]he public interest rests with the D.C. Circuit deciding whether this court got it right.”

District Court enjoined disbursement of the Title V funds until September 15, 2020, or resolution by a three-judge panel of the D.C. Circuit, whichever comes first, contingent on the Tribes pursuing an expedited appeal.

D.C. CIRCUIT COURT OF APPEALS

Expedited Proceedings

Parties jointly moved to expedite appeal, which the Circuit Court granted on July 21. Briefing occurred over the course of four weeks in August. Oral argument was held on September 11, 2020, before Circuit Judges Henderson, Millett, and Katsas.

Injunction Pending Appeal

Tribes moved in District Court on September 14, 2020, to extend injunction pending appeal until Circuit Court rules on the merits of the appeal. Two hours later, the Circuit Court extended the injunction pending appeal on its own motion.

Merits Decision

Confederated Tribes of the Chehalis Reservation v. Mnuchin, 976 F.3d 15 (D.C. Cir. 2020).

Circuit Court ruled on September 25, 2020, in a unanimous Opinion by Circuit Judge Katsas, that ANCs are not Tribal governments for purposes of the CARES Act because they do not satisfy ISDA's definition of "Indian tribe."

- As a threshold issue, the Court held that the Secretary's decision to provide CARES funding to ANCs is judicially reviewable under the APA.

- “ANCs are eligible for Title V funding only if they qualify as an ‘Indian tribe’ under ISDA. As explained below, ANCs do not satisfy the ISDA definition.”
- “[I]t is not grammatically possible for the recognition clause to modify all of the five nouns in the listing clause, plus the first noun in the more proximate Alaska clause (‘village’), but not the one noun in the preceding two clauses that is its most immediate antecedent (‘corporation’). If possible, we construe statutory text to make grammatical sense rather than nonsense.”
- “Because no ANC has been federally ‘recognized’ as an Indian tribe, as the recognition clause requires, no ANC satisfies the ISDA definition.”
- “Recognition” and the recognition clause are terms of art predating ISDA and “denoting federal recognition of a sovereign Indian tribe.”
- The Federally Recognized Tribe List Act of 1994 requires Interior to publish annually a list of tribes that satisfy the recognition clause, 25 U.S.C. § 5131(a), which reinforces this conclusion. ANCs do not appear on the list.
- The listing of ANCs in the ISDA definition of “Indian tribe” is not superfluous because the status of Alaska Native entities was highly unsettled in 1975, Interior recognized Indian tribes on an ad hoc basis until 1978, and “questions persisted for nearly two decades about the nature of tribal sovereignty in Alaska.”
- “By including both villages and corporations, Congress ensured that any Native entities recognized by Interior or later legislation would qualify as Indian tribes.”
- Court declined to give *Skidmore* deference to the agency interpretation, which traced to a 1976 internal Interior memorandum, because it was unpersuasive and inconsistent with a more recent Treasury regulation.

Injunction to Suspend Potential Appropriation Lapse

Treasury indicated that it would not act promptly to distribute the remaining \$533M to federally recognized Tribes. Nor would Treasury provide assurances that its budget authority over the remaining funds would not expire at the end of the fiscal year (September 30, 2020).

Tribes filed emergency motion on September 29, to extend the Secretary's budget authority and to suspend any potential lapse of the appropriation. Circuit Court granted the motion on September 30, providing that its injunction "will remain effective until seven days after final action by ... the Supreme Court."

PETITIONS FOR CERTIORARI

The Government and Defendant-Intervenors filed petitions for certiorari in the Supreme Court, which were docketed on October 26, 2020. Nos. 20-543, 20-544.

- The Petitions argue that there is an untenable Circuit Split between the D.C. Circuit’s CARES Act decision and the Ninth Circuit’s ISDA decision in *Cook Inlet Native Ass’n v. Bowen*, 810 F.2d 1471 (9th Cir. 1987).
- The Petitions argue that Congress intended that ANCs—unique among all Indian groups—would be exempt from the recognition clause, and has ratified a counter-textual agency reading of the ISDA definition by incorporating it into other statutes.
- Defendant-Intervenors argue that ANCs do in fact satisfy the recognition clause even though they are not federally recognized Tribes.
- The Petitions argue that the D.C. Circuit decision will negatively affect ANCs and Alaska Natives for COVID relief, ISDA contracting, and other statutory programs.

The petitions will most likely be conferenced by the Court on January 8, 15, or 22, 2021.

If the Supreme Court denies certiorari, the Secretary should promptly distribute the remaining \$533 million to federally recognized Indian tribes and Alaska Native villages per the D.C. Circuit decision. It remains unclear if Treasury will do so.

If the Supreme Court grants certiorari, briefing on the merits will follow, with oral argument potentially as soon as April 2021

Resources for Tribal Governments: Expenditure and Accounting of Title V Funds

Department of the Treasury Coronavirus Relief Fund Webpage

<https://home.treasury.gov/policy-issues/cares/state-and-local-governments>

Available Guidance Documents Include

- Guidance Regarding Expenditures of Title V Funds (updated September 2, 2020)
<https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf>
- FAQs (updated October 19, 2020)
<https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>
- Recipient Reporting and Record Retention Requirements
<https://home.treasury.gov/system/files/136/IG-Coronavirus-Relief-Fund-Recipient-Reporting-Record-Keeping-Requirements.pdf>
- Tribal Allocation Methodologies (first and second distributions)
- Information on How State and Local Governments Are Using Title V Funds