

ORAL ARGUMENT HELD ON SEPTEMBER 11, 2020
No. 20-5204

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.
[20-5205],

CHEYENNE RIVER SIOUX TRIBE, et al.
[20-5209],

UTE TRIBE OF THE UNTAH AND OURAY RESERVATION
[20-5204],

Plaintiffs-Appellants,

v.

STEVEN MNUCHIN, SECRETARY, UNITED STATES DEPARTMENT OF
THE TREASURY,

Defendant-Appellee.

On Appeal from the United States District Court for the
District of Columbia (No. 1:20-cv-01002) (Hon. Amit P. Mehta)

**EMERGENCY MOTION TO SUSPEND STATUTORY LAPSE OF
APPROPRIATION AND EXTEND BUDGET AUTHORITY**

CORY ALBRIGHT
KANJI & KATZEN, P.L.L.C.
811 1ST Ave., Suite 630
Seattle, WA 98104
(206) 344-8100
calbright@kanjikatzen.com

RIYAZ KANJI
KANJI & KATZEN, P.L.L.C.
303 Detroit Street, Suite 400
Ann Arbor, MI 48104
(734) 769-5400
rkanji@kanjikatzen.com

*Co-Counsel for the Confederated Tribes of the Chehalis Reservation and the
Tulalip Tribes; Counsel for the Houlton Band of Maliseet Indians, Akiak Native
Community, Asa'carsarmiut Tribe, and Aleut Community of St. Paul Island*

September 29, 2020

Additional Counsel Listed on Inside Cover

Harold Chesnin
Lead Counsel for the Tribe
420 Howanut Road
Oakville, WA 98568
(360) 529-7465
hchesnin@chehalistribe.org

*Counsel for Confederated Tribes
of the Chehalis Reservation*

Doreen McPaul
Attorney General
Paul Spruhan
Assistant Attorney General
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-6345
dmcpaul@nndoij.org
pspruhan@nndoij.org

Counsel for the Navajo Nation

Lori Bruner
Quinault Office of the Attorney
General
136 Cuitan Street
Taholah, WA 98587
(360) 276-8215, Ext. 1406
LBruner@quinault.org

Counsel for Quinault Indian Nation

Bradley G. Bledsoe Downes
General Counsel
2332 Howland Hill Road
Crescent City, CA 95531
(707) 465-2610
bdownes@elk-valley.com

*Counsel for Elk Valley Rancheria,
California*

Lisa Koop Gunn
Office of the Reservation Attorney
6406 Marine Drive
Tulalip, WA 98271
(360) 716-4550
lkoop@tulaliptribes-nsn.gov

Counsel for Tulalip Tribes

Eric Dahlstrom
April E. Olson
1501 West Fountainhead, Suite 360
Tempe, AZ 85282
(480) 921-9296
edahlstrom@rothsteinlaw.com
aeolson@rothsteinlaw.com

Richard W. Hughes
Donna M. Connolly
Reed C. Bienvenu
1215 Paseo de Peralta
Santa Fe, NM 87505
(505) 988-8004
rwhughes@rothsteinlaw.com
dconnolly@rothsteinlaw.com
rbienvenu@rothsteinlaw.com

*Counsel for Pueblo of Picuris
Co-Counsel for the Navajo Nation*

Alexander B. Ritchie
Attorney General
Post Office Box 40
16 San Carlos Avenue
San Carlos, AZ 85550
(928) 475-3344
alex.ritchie@scat-nsn.gov

Counsel for San Carlos Apache Tribe

EMERGENCY MOTION TO SUSPEND STATUTORY LAPSE OF APPROPRIATION AND EXTEND BUDGET AUTHORITY

The Confederated Tribes Plaintiffs reluctantly file this Emergency Motion for Injunctive Relief with this Court to suspend any lapse in CARES Act Title V appropriations that might otherwise occur when the fiscal year ends tomorrow. Such a lapse would prevent effectuation of the Court's decision of September 25, 2020. Plaintiffs had hoped that, in the wake of the decision, the Secretary would provide sufficient assurance of his willingness and authority to disburse the remaining Title V monies to federally recognized Indian tribes and Alaska Native villages, either before the end of the fiscal year, or after its conclusion if he or the Defendant-Intervenors intend to seek further review of this Court's decision. The Secretary has declined to provide that assurance. While Plaintiffs believe, for the reasons explained below, that the Secretary's budget authority likely will not lapse, they cannot be sure that this or other courts will ultimately agree. Because clear Circuit precedent exists for the issuance of injunctive relief preserving the appropriations authority in these circumstances, *e.g., Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977), Plaintiffs seek such relief here pursuant to Federal Rule of Appellate Procedure 8(a)(2), D.C. Circuit Rule 8, and the All Writs Act, 28 U.S.C. § 1651.

Plaintiffs respectfully request that the Court decide this Emergency Motion before the end of the day on Wednesday, September 30, 2020, the last day of the

fiscal-year appropriation. Plaintiffs did not file this motion earlier because both before and after the merits decision issued on September 25, Plaintiffs asked the Secretary to render this motion unnecessary by confirming that his budgetary authority will not lapse at the end of the fiscal year or that he would disburse the remaining funds by that time. The Secretary has declined to provide the requested confirmation.¹ On September 29, 2020, counsel for the Secretary indicated that “The Treasury Department believes that if no one seeks further review or if the D.C. Circuit’s decision is upheld, then the district court could, after September 30, use its equitable powers to direct the Department to pay funds to non-ANC entities.” The Secretary, however, declined to confirm whether Treasury agrees that the funds have been obligated for payment to federally recognized tribes, whether Treasury will voluntarily pay federally recognized tribes if no one appeals or if the decision is affirmed, or whether Treasury agrees not to oppose the district court’s use of its equitable power to direct payment to federally recognized tribes.

I. PROCEDURAL HISTORY

In this action, the Confederated Tribes challenged Treasury Secretary Mnuchin’s determination that the Boards of Directors of Alaska Native regional

¹ Undersigned counsel contacted counsel for the parties on September 24, 28 and 29, 2020, in a good faith effort to determine their respective positions regarding the relief requested herein. The Secretary and the Defendant-Intervenors have not yet taken a position on the motion. The Cheyenne River Sioux Plaintiffs-Appellants and the Ute Tribe Plaintiff-Appellant consent to and support the motion.

corporations and Alaska Native village corporations (collectively, “ANCs”) are “Tribal governments” (*i.e.*, “recognized governing bodies” of “Indian Tribes,” 42 U.S.C. 801(g)(5)) entitled to a portion of the \$8 billion reserved for Tribal governments under Title V of the CARES Act. Congress appropriated these funds for fiscal year 2020. 42 U.S.C. § 801(a)(1), (c)(7). On April 27, 2020, the district court preliminarily enjoined the Secretary from disbursing funds to ANCs.

Confederated Tribes of Chehalis Reservation v. Mnuchin, No. 20-cv-01002 (APM), 2020 WL 1984297 (D.D.C. April 27, 2020). On June 26, 2020, the district court granted summary judgment in favor of the Secretary and the Defendant-Intervenors and dissolved its preliminary injunction, concluding that ANCs are eligible to receive Title V payments. *Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-cv-01002 (APM), 2020 WL 3489479 (D.D.C. June 26, 2020).

On July 7, 2020, the district court granted Plaintiffs’ motion for an injunction pending appeal, *Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-cv-01002 (APM), 2020 WL 3791874 (D.D.C. July 7, 2020), which this Court extended on September 14, 2020, Doc. #1861346. On September 25, 2020, this Court held that ANCs are not eligible for Title V funding and reversed the district court’s order granting summary judgment to the Secretary and Defendant-Intervenors and denying summary judgment to Plaintiffs. Doc. #1863446. Pursuant to this Court’s decision, Treasury should pay the

approximately \$535 million in Title V funds previously set aside for ANCs to federally recognized Indian tribes and Alaska Native villages, including the Confederated Tribes.

Congress appropriated Title V funds for fiscal year 2020, which raises the question of whether the Secretary's budget authority to disburse the remaining funds will expire on September 30. Plaintiffs believe the Secretary's authority will not expire for the reasons discussed in Section III(C) below, but the Secretary has declined to confirm that he agrees. Nor has the Secretary committed to disburse the remaining funds prior to the end of the fiscal year. Given the critical nature of the sums involved, Plaintiffs respectfully request that the Court exercise its equitable power to suspend Title V's lapse provision and extend the Secretary's budget authority until he disburses the funds. Such relief will ensure that this Court's decision and congressional intent are effectuated and will prevent irreparable harm to federally recognized Indian tribes and Alaska Native villages that are in dire need of emergency funds to fight the COVID-19 pandemic and protect their citizens.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Appellate Procedure 8(a)(2) and D.C. Circuit Rule 8(a)(1), Plaintiffs must show that (1) they are likely to prevail on the merits, (2) they are likely to suffer irreparable injury without relief, (3) other parties will

not be substantially harmed, and (4) an injunction is in the public interest.

Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986); *see also Martin v. Dep’t of State*, No. 03-5070, 2003 WL 21026740, at *1 (D.C. Cir. Apr. 29, 2003) (per curiam) (citation omitted); U.S. Court of Appeals for the D.C. Circuit, *Handbook of Practice and Internal Procedures* at 33 (Dec. 1, 2019).

Plaintiffs have not first moved in the district court because doing so would be “impracticable” under Federal Rule of Appellate Procedure 8(a)(2)(A)(i)—this case is still before this Court, which has reached a final decision but has not issued the mandate. *See United States v. Microsoft Corp.*, No. 97-5343, 1998 WL 236582 (D.C. Cir. May 12, 1998) (granting stay of preliminary injunction and concluding that first moving in the district court would be impracticable because “[t]he meaning of the consent decree is now before us, not the district court, and we have heard argument and deliberated upon that meaning”).

III. ARGUMENT

Plaintiffs do not believe that the Secretary’s authority to disburse the remaining Title V funds will expire at the end of fiscal year 2020 for the reasons outlined in Subsection C below. However, the Secretary has declined to commit to the same position or to pay out the funds by September 30. To avoid any uncertainty or future disputes regarding the same, Plaintiffs request that this Court exercise its equitable power to ensure that the money will remain available to

implement its decision. The traditional factors for injunctive relief all strongly support suspending the statutory lapse provision and extending the Secretary's budget authority: Plaintiffs have prevailed on the merits; Plaintiffs will suffer irreparable harm if the appropriation lapses; both the Government and the public have a strong interest in ensuring that this Court's decision is enforced and these funds are distributed as Congress intended; and the requested relief will not prejudice the Secretary or the ANCs. The motion should therefore be granted.

A. This Court Possesses the Equitable Power to Extend the Secretary's Budget Authority Beyond September 30, 2020.

As this Court has explained "a court may act to prevent the expiration of budget authority which has not terminated at the time suit is filed" because "[t]he equity powers of the courts allow them to take action to preserve the status quo of a dispute and to protect their ability to decide a case properly before them. In such situations, the courts simply suspend the operation of a lapse provision and extend the term of already existing budget authority." *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d at 588; *see also Rochester Pure Waters Dist. v. E.P.A.*, 960 F.2d 180, 184 (D.C. Cir. 1992) (discussing "a line of cases in which we awarded injunctions to avoid lapses in an agency's budget authority"); 28 U.S.C. § 1651(a) (All Writs Act providing that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *see*

also generally 31 U.S.C. § 1502(b). This “equitable doctrine” applies “so long as ‘the lawsuit was instituted on or before’” the statutory lapse date. *City of Houston v. Dep’t of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (citation omitted). The Confederated Tribes initiated this action in April 2020, promptly upon learning of the Secretary’s erroneous decision to disburse Title V funds to ANCs and months before the end of fiscal year 2020. This Court therefore may extend Treasury’s budget authority until all Title V funds have been disbursed.

B. The Four Factors Support an Injunction Suspending Title V’s Lapse Provision and Extending the Secretary’s Budget Authority.

All four factors strongly favor injunctive relief here. *First*, Plaintiffs have prevailed on the merits, Doc. #1863446, and the Secretary accordingly must disburse all remaining Title V funds to federally recognized Indian tribes and Alaska Native villages in accordance with the Court’s decision.

Second, Plaintiffs would suffer irreparable harm absent injunctive relief. It is “well-settled” that, “when an appropriation has lapsed,” a federal court “cannot order the expenditure of funds that were covered by that appropriation.” *See City of Houston*, 24 F.3d at 1424. This Court has concluded that federally recognized tribes are entitled to the remaining Title V funds. If that money is unavailable after September 30, Plaintiffs—and all other Indian tribes—will be forever denied the opportunity to receive hundreds of millions of dollars that Congress set aside for Tribal governments to serve their citizens during this public health crisis. An

injunction is necessary to avoid the risk that the final decision resulting from this Court’s, the district court’s, and the parties’ substantial investment of time and resources in expedited proceedings cannot be effectuated through distribution of the remaining funds.

Third, the final two factors—assessing the harm to the opposing parties and weighing the public interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, “in this case, the [Secretary’s] harm and the public interest are one and the same, because the government’s interest *is* the public interest.” *Pursuing Am.’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 511 (D.C. Cir. 2016). The public interest rests in ensuring this Court’s decision and Congress’s will are carried out so that Tribal governments receive Title V funds to combat the COVID-19 pandemic. *See Population Inst.*, 797 F.2d at 1082. An injunction extending the Secretary’s budget authority until the agency disburses the remaining Title V funds will make certain that this happens. Moreover, the preservation of Treasury’s ability to disburse those funds as Congress intended will in no way prejudice the Defendant-Intervenors.

C. The Secretary’s Ability to Disburse Title V Funds Should Not Lapse on September 30, 2020.

For purposes of this motion, it is not necessary for the Court to determine whether the Secretary’s budget authority and ability to disburse the remaining Title

V funds would in fact expire at the end of the fiscal year absent the Court’s exercise of its well-settled equitable power. If the Court is inclined to reach these issues, it should hold that the Secretary’s authority will not lapse.

Although Congress appropriated funds for the Coronavirus Relief Fund for fiscal year 2020, 42 U.S.C. § 801(a)(1), (c)(7), the Secretary’s budget authority and ability to disburse the remaining funds to Tribal governments extends beyond September 30, 2020. As initial context, the GAO has explained that:

The two basic authorities conferred by an appropriation law are the authority to incur obligations and the authority to make expenditures. An obligation results from some action that creates a liability or definite commitment on the part of the government to make an expenditure. ... The expenditure is the disbursement of funds to pay the obligation. ...

When an appropriation is by its term made available for a fixed period of time or until a specified date, the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. ... Thus, a time-limited appropriation is available to incur an obligation only during the period for which it is made. However, it remains available beyond that period, within limits, to make adjustments to the amount of such obligations and to make payments to liquidate such obligations.

1 Gov’t Accountability Office, *Principles of Federal Appropriations Law* (“GAO Red Book”) 5-3 to 5-4 (3d ed. 2004);² see also *id.* 5-71 to 5-72; 31 U.S.C. §§ 1552(a), 1553(a) (“After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account ..., the account

² <https://www.gao.gov/legal/appropriations-law-decisions/red-book>

shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.”). With the distinction between obligation and disbursement firmly in mind, it is clear for three independent reasons that the Secretary can disburse monies to the Tribes after the conclusion of the fiscal year.

First, the Secretary has already obligated and disbursed to federally recognized Indian tribes and Alaska Native villages approximately 90 percent of the \$8 billion in Title V funds, A-220, and any money left after September 30 will remain to adjust previous obligations under 31 U.S.C. § 1553(a). Thus, Treasury could disburse the remaining Title V funds as an adjustment to the amount it has already obligated and paid to Tribal governments. *See* GAO Red Book at 5-72 (“The expired account balance … remains available … to make upward adjustments in previously under recorded obligations.”).

Second, this litigation preserves Title V funds for disbursement after September 30 under 31 U.S.C. §§ 1502(b) and 1501(a). In *Matter of: Availability of Expired Funds for Non-monetary Judicial Awards*, 70 Comp. Gen. 225 (Feb. 4, 1991), the Comptroller General held that the balance of an expired appropriation was available to satisfy a court order requiring the Department of Veterans’ Affairs (“VA”) to pay benefits to eligible veterans who filed applications prior to the appropriation’s lapse date or who the VA determined were improperly denied

benefits. Because 31 U.S.C. § 1553(a) provides that the balance of an expired appropriation “continues to be available to cover obligations properly attributable to that appropriation,” 70 Comp. Gen. at 229, and because 31 U.S.C. § 1502(b) “provides that the expiration of an appropriation … does not ‘affect the status of lawsuits or rights of actions involving an amount payable from the balance [of the appropriation],’” *id.* (quoting § 1502(b)), the Comptroller General concluded that “the implementation of the court order or settlement agreement at issue constitutes such an obligation” under § 1553(a). *Id.* So too here: under § 1502(b), this litigation has preserved the availability of the remaining Title V funds, and Treasury may disburse the remaining money after September 30 in accordance with this Court’s decision.

Moreover, under 31 U.S.C. § 1501(a)(6), this litigation obligates the Secretary to pay Tribal governments the remaining Title V funds. Section 1501(a)(6) provides: “An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of … a liability that may result from pending litigation[.]” “[O]bligations may be recorded under [31 U.S.C. § 1501(a)(6)] only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government’s liability.” *Matter of: Availability of Fiscal Year 1982 funding for award of*

performance pay to members of the Senior Foreign Service, 62 Comp. Gen 527, 529 (July 8, 1983) (quoting 35 Comp. Gen. 185, 187 (1955)). Here, Treasury is “definitely liable for payment” of the remaining Title V funds under the CARES Act and this Court’s September 25, 2020 decision, and under § 1553(a) those funds will remain available after September 30 to satisfy the obligation.

Finally, the statute itself obligates Title V funds to Tribal governments, and any money left after September 30 will remain available to liquidate that obligation. In contrast to agency appropriations that do not mandate specific expenditures, the CARES Act’s plain text *requires* that the Secretary distribute the full \$8 billion to Tribal governments, and this Court has determined which entities constitute Tribal governments under the statute. *See* 42 U.S.C. § 801(a)(2) (“[T]he Secretary *shall* reserve ... \$8,000,000,000 of such amount for making payments *to Tribal governments*” (emphases added)), (c)(7) (“[T]he amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount ... the Secretary determines appropriate *to ensure that all amounts available ... are distributed to Tribal governments*” (emphasis added)). The Secretary’s discretion only extends to how much of the \$8 billion each Tribal government is paid. Thus, under 31 U.S.C. § 1553(a), any funds remaining after September 30 will be held in an account to liquidate the statute’s obligation to Tribal governments.

IV. CONCLUSION

For the foregoing reasons, the Confederated Tribes respectfully request that the Court exercise its equitable power to suspend Title V's statutory lapse provision and to extend the Secretary's budget authority until Treasury disburses the remaining funds in accordance with this Court's decision.

DATED this 29th day of September, 2020.

Respectfully submitted,

/s/ Cory J. Albright

Cory J. Albright, D.C. Bar # WA0013
Kanji & Katzen, P.L.L.C.
811 1st Avenue, Suite 630
Seattle, WA 98104
(206) 344-8100
calbright@kanjikatzen.com

/s/ Riyaz A. Kanji

Riyaz A. Kanji, D.C. Bar # 455165
Kanji & Katzen, P.L.L.C.
303 Detroit Street, Suite 400
Ann Arbor, MI 48104
(734) 769-5400
rkanji@kanjikatzen.com

Co-Counsel for the Confederated Tribes of the Chehalis Reservation and the Tulalip Tribes; Counsel for the Houlton Band of Maliseet Indians, Akiak Native Community, Asa'carsarmiut Tribe, and Aleut Community of St. Paul Island

Harold Chesnin
Lead Counsel for the Tribe
420 Howanut Road
Oakville, WA 98568
(360) 529-7465
hchesnin@chehalistribe.org

*Counsel for Confederated Tribes
of the Chehalis Reservation*

Lisa Koop Gunn
Office of the Reservation Attorney
6406 Marine Drive
Tulalip, WA 98271
(360) 716-4550
lkoop@tulaliptribes-nsn.gov

Counsel for Tulalip Tribes

Doreen McPaul
Attorney General
Paul Spruhan
Assistant Attorney General
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-6345
dmcpaul@nndoij.org
pspruhan@nndoij.org

Counsel for the Navajo Nation

Lori Bruner
Quinault Office of the Attorney
General
136 Cuitan Street
Taholah, WA 98587
(360) 276-8215, Ext. 1406
LBruner@quinault.org

Counsel for Quinault Indian Nation

Bradley G. Bledsoe Downes
General Counsel
2332 Howland Hill Road
Crescent City, CA 95531
(707) 465-2610
bdownes@elk-valley.com

*Counsel for Elk Valley Rancheria,
California*

Eric Dahlstrom
April E. Olson
1501 West Fountainhead, Suite 360
Tempe, AZ 85282
(480) 921-9296
edahlstrom@rothsteinlaw.com
aeolson@rothsteinlaw.com
Richard W. Hughes
Donna M. Connolly
Reed C. Bienvenu
1215 Paseo de Peralta
Santa Fe, NM 87505
(505) 988-8004
rwhughes@rothsteinlaw.com
dconnolly@rothsteinlaw.com
rbienvenu@rothsteinlaw.com

*Counsel for Pueblo of Picuris
Co-Counsel for the Navajo Nation*

Alexander B. Ritchie
Attorney General
Post Office Box 40
16 San Carlos Avenue
San Carlos, AZ 85550
(928) 475-3344
alex.ritchie@scat-nsn.gov

Counsel for San Carlos Apache Tribe

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing Emergency Motion to Suspend Statutory Lapse of Appropriation and Extend Budget Authority with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Riyaz A. Kanji

Riyaz A. Kanji

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(s) Riyaz A. Kanji

Attorney for Confederated Tribes Plaintiffs-Appellants

Dated: September 29, 2020