UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS, et al., Plaintiffs, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 1:20-cv-1136-APM

DEFENDANT'S OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant Steven Mnuchin, in his official capacity as Secretary of the Treasury, hereby files this memorandum in opposition to the Renewed Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 37) ("Motion" or "Mot.") filed by Plaintiffs Agua Caliente Band of Cahuilla Indians, Ak-Chin Indian Community, Arapaho Tribe of the Wind River Reservation, Cherokee Nation, Chicksaw Nation, Choctaw Nation of Oklahoma, Snoqualmie Indian Tribe, and Yurok Tribe of the Yurok Reservation.

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

STANDARD OF REVIEW 3

ARGUMENT 3

I. PLAINTIFFS ARE NO LIKELIER TO SUCCEED ON THE MERITS OF THEIR UNREASONABLE-DELAY CLAIM. 3

A. Plaintiffs' Additional Cases Do Not Justify Their Renewed Motion. 4

B. There are No New Facts Justifying Plaintiffs' Renewed Motion. 7

II. PLAINTIFFS STILL HAVE NOT DEMONSTRATED IMMINENT, EXTREME DAMAGE ABSENT THE RELIEF THEY SEEK. 8

III. THE BALANCE OF INTERESTS DOES NOT FAVOR AN INJUNCTION. 9

CONCLUSION 9

INTRODUCTION

Since the Court denied Plaintiffs' motion for a temporary restraining order or preliminary injunction, there have been no changed circumstances sufficient to justify renewing that motion. Accordingly, this opposition memorandum largely incorporates the arguments made by Defendant previously. *See* Mem. in Opp'n to TRO/PI ("PI Opp'n Mem.").

To the extent that there are any changed circumstances, they demonstrate that Defendant has been working diligently to make the payments at issue in this case, while simultaneously working to ensure that the payments are distributed fairly and consistent with congressional intent. Faced with an unworkable dataset, Defendant reasonably resolved to collect new data and to allocate payments based on those data. *See generally* Def. Status Rep. (ECF No. 31). That process was bogged down by missing, incomplete, and inaccurate submissions by hundreds of Tribal governments. Ex. 1 (Kowalski Decl.) ¶¶ 3-6. Nonetheless, through diligence and persistent follow-ups with those Tribes, Defendant has nearly completed its work and is set to begin payments on Friday, June 12, 2020. *Id.* ¶¶ 7-8. To understand the difficulty that the Secretary faced in balancing speed with fairness to the Tribes in arriving at this point, this Court need look no further than the latest related lawsuit, which asks this Court to second-guess the decisions of the agency and delay payments even further: *Prairie Band Potawatomi Nation v. Mnuchin*, No. 1:20-cv-1491-APM.

Plaintiffs have been aware of the work performed by Defendant during this period as well as the expected timing for payments. Yet Plaintiffs did not deem it necessary to renew their motion until Defendant indicated that the expected schedule would be delayed by approximately seven days, due to problems in the submission process. However, aside from maligning the efforts of the Defendant in a footnote, Plaintiffs have not even attempted to demonstrate, by new evidence or otherwise, how this additional delay irreparably harms them, or why the agency's efforts to provide additional time for submissions is unreasonable.

Instead, Plaintiffs' motion rests on the speculative possibility that the schedule may be delayed further. That is not enough to justify the extraordinary remedy of preliminary, let alone

mandatory and complete, injunctive relief. Defendant continues to expect that payments will start this Friday. Kowalski Decl. ¶ 8. Accordingly, Plaintiffs' premature motion should be denied.

BACKGROUND

The Court is, by now, intimately familiar with Title V of the CARES Act, Pub. L. 116-136, 134 Stat. 281 (2020). Defendant incorporates by reference the background recounted in its prior Opposition to Plaintiffs' Amended Motion (ECF No. 26) ("PI Opp'n Mem.") at 3-4.

On May 11, 2020, the Court denied without prejudice Plaintiffs'' motion for a preliminary injunction. Mem. Op. & Order (ECF No. 29) ("PI Op."). Plaintiffs had not "carried their burden to show that the Secretary's delay thus far [was] so egregious as to warrant mandamus relief." *Id.* at 2. The Court made clear that Defendant's allotted time was not "indefinite," however, and that Plaintiffs could renew their motion "should the Secretary's failure to distribute the remaining Title V funds persist for much longer." *Id.* at 15. More specifically, the Court signaled that the question of "egregiousness" would become "closer" "should the Secretary's delay verge on doubling the time Congress mandated." *Id.* And the Court made clear that "another two months" would "not be acceptable." *Id.* at 15 & n.4. The Court nonetheless stopped short of "set[ting] a firm date." *Id.* In order to keep the Court and Parties informed as to the progress of payments, the Court ordered a series of status reports by Defendant.

On May 15, 2020, Defendant filed the first of these status reports and attached a comprehensive plan to begin making payments by June 5 (ECF No. 31). Plaintiffs did not renew their motion at that time. The Court then ordered Defendant to file another status report in one week's time.

On May 22, 2020, Defendant filed its second status report (ECF No. 32). Defendant explained that it was implementing the plan previously announced; that it had opened the portal for Tribal government submissions; that the Tribal governments had been notified by email; and that the deadline for data submission was May 26, 2020.

On May 26, 2020, Defendant conveyed in its third status report (ECF No. 33) that nearly

two thirds of Tribes had not yet submitted the requisite data, and that Defendant was considering an extension of the submission deadline. Defendant later extended that deadline to 12:00 p.m. on May 29, 2020.

On May 29, 2020, as part of a joint status report (ECF No. 35), Defendant apprised the Court that there continued to be "issues" with the Tribes' submissions—many of which were either incomplete or incorrect. *Id.* at 4. Defendant acknowledged that, for those reasons, payment might be delayed past the original target of June 5, 2020.

On June 2, 2020, Defendant submitted its most recent status report (ECF No. 36). Defendant explained that, as of 2:00 p.m. that day, the submissions of 336 Tribes contained either incomplete or incorrect information. Another 57 Tribes had not yet submitted anything. Because of the additional time it would take to reach out to Tribes and obtain complete/correct data, Defendant anticipated moving the original target "back by approximately one week," *i.e.*, to June 12, 2020.

On June 5, 2020, Plaintiffs renewed their motion for preliminary injunctive relief (ECF No. 37) ("Ren. Mot.").

STANDARD OF REVIEW

Defendant incorporates by reference the standard of review articulated in its prior memorandum. PI Opp'n Mem. at 4-6. To obtain a preliminary, mandatory injunction that would effectively grant Plaintiffs complete relief on the merits of an underlying claim for mandamus relief, which is *itself* "an extraordinary remedy reserved for extraordinary circumstances," Plaintiffs face perhaps the highest burden in civil procedure. *Cf. id.* (collecting cases).

ARGUMENT

I. PLAINTIFFS ARE NO LIKELIER TO SUCCEED ON THE MERITS OF THEIR UNREASONABLE-DELAY CLAIM.

Defendant incorporates by reference its analysis of this case under the *TRAC* factors, and maintains that there has been no unreasonable delay sufficient to warrant mandamus relief. *See generally* PI Opp'n Mem. at 7-15. To the contrary, as the status reports filed by Defendant and

Exhibit 1 to this memorandum demonstrate, the Treasury Department has been working diligently to allocate payment amounts and make those payments. Specifically, Treasury staff have worked long hours, including nights and weekends, to respond to questions from Tribes; create and post a second request for information; conduct follow up and outreach to collect missing or incomplete information from Tribes; correct and verify data received; and develop an allocation formula for the remaining 40 percent to be distributed. Kowalski Decl. ¶ 7. And Defendant expects that, as it previously stated, payments will begin to be made this Friday, June 12, 2020. *Id.* ¶ 8.

Plaintiffs offer two reasons why their renewed motion should succeed. As a matter of law, they offer two new cases for the proposition that "the present delay is within the range in which this District has found to be unreasonable." Ren. Mot. at 3. As a matter of fact, they note that June 12, 2020, is 77 days after passage of the CARES Act, *id.* at 1-2, and decry in a footnote Defendant's "incompetence and abysmal data submission system" as a reason to think that the delay in this case rises to a level of egregiousness. *Id.* at 2 n.1. Neither argument is sufficient.

A. Plaintiffs' Additional Cases Do Not Justify Their Renewed Motion.

Plaintiffs previously cited one case in support of *TRAC* factors 1 and 2, which collectively govern how long a period constitutes a reasonable delay. *See* PI Mot. at 11 (citing *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 836 (D.C. Cir. 2012)). Defendant has already explained how that case does not support Plaintiff's motion. *See* PI Opp'n Mem. at 10. To the contrary, "*People's Mojahedin* is just one example where, despite significant transgression of statutory deadlines, the court refused to compel immediate action." *Id.* at 10-11 (collecting D.C. Cir. cases). The Court agreed that Plaintiffs had "identified no case," nor had the Court found one, "in which a court has interceded and compelled agency action in comparable circumstances." PI Op. at 12. Furthermore, "the D.C. Circuit has declined to issue mandamus relief in cases involving far more egregious delay." *Id.* (citing *In re Barr Labs*, 930 F.2d 72, 74 (D.C. Cir. 1991); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1097 (D.C. Cir. 2003)).

Despite that clear D.C. Circuit precedent, Plaintiffs now argue that "the present delay is within the range in which *this District* has found to be unreasonable." Ren. Mot. at 3 (emphasis

added). Putting aside that cases from "this District" are not binding on this Court, one of Plaintiffs' two additional cases is from *another* district entirely. *See id.* at 4 (citing *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 339–40 (E.D. La. 2011)). But in any event, neither case stands for the stated proposition.

The sole cited opinion from this district is *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Pompeo*, 2019 WL 4575565 (D.D.C. Sept. 20, 2019).[1] As with the D.C. Circuit precedent discussed above, the facts of that case are readily distinguishable from those here. The Plaintiffs in *Allies* were applying for special immigrant visas ("SIVs") pursuant to the Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, 123 Stat. 807 ("AAPA"), and the Refugee Crisis in Iraq Act of 2007, Pub. L. No. 110-181, 122 Stat. 395 ("RCIA"). 2019 WL 4575565, at *1. Both statutes provided that that "all steps under the control of the respective departments incidental to the issuance of such visas, including required screenings and background checks, should be completed not later than 9 months." *Id.* at *7 (citing AAPA § 602(b)(4)(A); RCIA § 1242(c)(1)).

For purposes of the unreasonable-delay analysis under *TRAC*, the court in *Allies* was comparing that "9-month statutory benchmark" to "the *5-year* average wait time" experienced by Plaintiffs. *Id.* at *6 (emphasis added).[2] Thus, the government had exceeded the statutory timetable by almost seven times. Translated into the context of the present case, Treasury would have approximately 200 days (or until October 13, 2020) to start making the remaining payments.

---

[1] Reconsideration was sought and denied, *reconsideration denied,* No. 18-CV-01388 (TSC), 2020 WL 587878 (D.D.C. Feb. 5, 2020).

[2] Plaintiffs suggest that the wait-time comparator was "18 to 52 months." Ren. Mot. at 3. They are wrong again. That was the span of delays originally alleged by the *named* Plaintiffs, before class certification was granted (provisionally) and discovery began. *Allies*, 2019 WL 4575565, at *2. By the time the merits of the case were before the court, Plaintiffs had determined "that class members with pending [Chief of Mission ("COM")] applications wait, on average, 2.5 years for a decision on their COM application," and that "Class members who receive COM approval wait an additional 3 years for a final adjudication." *Id.* at *6. "Plaintiffs contend[ed] that *these delays* violate[d] the AAPA and RCIA's 9-month timetable for reasonableness." *Id.* (emphasis added). Hence the court's comparison of nine months to *five years*, not to 18-52 months.

In *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332 (E.D. La. 2011), the question was whether the government had unreasonably delayed permit applications for deepwater drilling in the Gulf of Mexico. *Id.* at 333. There had been a moratorium on such permits after the Deepwater Horizon incident, and the plaintiffs in that case essentially alleged that the Department of the Interior had intentionally continued to delay permits even after that moratorium was lifted. *Id.*

As Plaintiffs here concede, there was no statutory timetable at issue. Ren. Mot. at 4. And as they point out, the court nonetheless found that a four-month delay was unreasonable. *Id.* But Plaintiffs omit a critical fact emphasized twice by the court: "It is undisputed that before the Deepwater Horizon disaster, permits were processed, on average, in two weeks' time." 781 F. Supp. 2d at 334, 228. Thus, the government in *Ensco Offshore* had exceeded its prior pace of processing by eight times. Translated into the context of the present case, Treasury would have approximately 240 days (or until November 22, 2020) to begin making the remaining payments.

Finally, citing *Allies* and a third case, *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30 (D.D.C. 2000), Plaintiffs argue that Defendant's failure to offer a "definite timeframe" militates in favor of finding unreasonable delay. Ren. Mor. at 3-4. Plaintiffs are wrong again. First, they either misrepresent or misunderstand the facts at issue in *Allies*, where "Defendants ha[d] not proffered a time frame for when they *expect to* adjudicate Plaintiffs' applications." *Allies*, 2019 WL 4575565, at *8 (emphasis added). The absence of any expected timetable prevented the court from "ascertain[ing] the length of time that has elapsed since the agency came under a duty to act."[3] *Id,* at *8. In this case, by contrast, Defendant has repeatedly offered (and updated) the timeframe by which it expects to start making payments, which is presently two days from now.

The plaintiff in *Muwekma* had been waiting for an answer on its petition for recognition for two years. 133 F. Supp. 2d at 37. The extent of the government's prediction had been that it

[3] It is unsurprising that the court in *Allies* would have focused on the expected timetable because any predicted timetable is, by definition, a prediction of the future. No defendant could satisfy the *TRAC* factors if it was required, with full certainty, to provide a date for future action, because that action is necessarily contingent upon unknown events. That being said, as with Defendant here, the ability to make a prediction with confidence increases as the date grows closer.

would take two to four more years "before the BAR would even begin consideration of the petition." *Id.* The court found that this "estimate does not commit any form of agency action, but rather suggests that there is no clear end in sight to the processing of the plaintiff's petition." *Id.* That is, again, not the case here. There *is* an end in sight because the remaining 40% of payments are expected to begin a mere two days from now.

B. There are No New Facts Justifying Plaintiffs' Renewed Motion.

Plaintiffs aver, at most, two additional facts in support of their renewed motion.

First, Plaintiffs focus on the fact that June 12, 2020, is 77 days after the CARES Act passed. But while Plaintiffs stress that 77 days is "more than two and a half times the amount mandated by Congress," they never argue why, as a matter of law or fact, a 77-day delay is egregious, while a 46 day delay was not.[4] Given the cases above, and those cited in Defendant's prior opposition, there is no reason to think that a delay of "two and a half times" constitutes per se egregiousness, particularly in light of the extensive and diligent work performed in the interim by Treasury.

Plaintiffs misquote the Court in an effort to demonstrate otherwise. *See* Mot. at 2 ("This Court made clear that if Defendant was on the 'verge on doubling the time Congress mandated to fully disburse Title V funds to Tribal governments' then Defendant's inaction could amount to sufficient 'egregiousness' to warrant injunctive relief.'") (quoting PI Op. at 15). The Court said that "should the Secretary's *delay* verge on doubling the time Congress mandated to fully disburse Title V funds to Tribal governments, then the question of egregiousness becomes a closer one than it is today." *Id.* In other words, if Defendant delayed more than 60 days past the deadline, or until June 25, 2020, then that delay might be egregious. Again, the Court referenced the "two months" that had allegedly been predicted by Mr. Kowalski on May 7, 2020. But the Court could not have meant 60 days after the CARES Act passed, or until May 27, 2020, or else it would have rejected out of hand Defendant's original proposal to start making payments on June 5, 2020.

The Court is best positioned to explain its intent, of course, which in any event is not

[4] The Court denied Plaintiffs' motion on May 11, 2020, 46 days after the CARES Act was passed.

controlling here. But if Plaintiffs had truly believed that this Court was suggesting that a 30 day delay was per say unreasonable, then they could have filed the present motion when Defendant first announced the target date on May 15, 2020. They did not. Rather, it was not until two weeks later that they even proposed renewing their motion, and another week before they actually renewed it. Thus, they could not have thought that a 70-day delay was egregious, either, and cannot now claim that a 77-day claim is egregious.

Second, in a footnote, Plaintiffs try to lay the blame for this delay at Defendant's feet. While the benefit of hindsight may enable outside observers to criticize agency processes, there has been nothing "incompeten[t]," "abysmal," or "hopelessly dysfunctional" about Defendant's actions. Mot. at 2 n.1. That rhetoric does not change the undisputed facts of Defendant's actions to date, or the causes of the delay. *See generally* Kowalski Decl. ¶¶ 3-7.

II. PLAINTIFFS STILL HAVE NOT DEMONSTRATED IMMINENT, EXTREME DAMAGE ABSENT THE RELIEF THEY SEEK.

Plaintiffs' renewed motion wholly ignores the element of irreparable harm, which is striking given that "the basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp.*, 58 F.3d at 747 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974), internal quotation marks omitted). *See* PI Opp'n Mem. at 15-16 (collecting cases for standard). In their conclusion paragraph, Plaintiffs assert that "*certain* Tribes have not curtailed essential services," that "the threat to the health and welfare of Plaintiffs' Tribal members" is "compounding," and that "the longer Defendant delays in distributing all of the Title V funds, the greater the harm incurred by Plaintiffs will be." Mot. at 5 (emphasis added). They do not cite, or attach, *any evidence* for those three propositions.

Plaintiffs say that they "will not restate the facts," Mot. at 2 n.3, but the evidence offered by Plaintiffs in their prior motion is now obsolete. As the Court knows, Defendant has since paid 60% of the money that is coming from the Coronavirus Relief Fund. Plaintiffs would have to, at a minimum, file new declarations to address the amount of payment received and how it has been used to mitigate the harms threatened before the money was paid. Plaintiffs may still argue that

they face irreparable harm from further delay, but they must support that argument with evidence.

A "possibility" of irreparable harm cannot support an injunction. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008)). Instead, the alleged irreparable injury "must be both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n,* 758 F.2d 669, 674 (D.C.Cir.1985) (per curiam).In this district, courts easily dispense with the irreparable-harm element where no evidence is offered. *See Miniter v. Moon*, 684 F. Supp. 2d 13, 16–17 (D.D.C. 2010) ("Nor has the plaintiff has offered any evidence of irreparable harm. Although the plaintiff makes a number of generalized allegations about the financial state of the *Washington Times,* Compl. ¶¶ 73-81, he fails to support a single one of these allegations with a shred of evidence."); *Barton v. Venneri,* 2005 WL 1119797, at *3 (D.D.C. May 11, 2005) (denying the plaintiff's motion for a preliminary injunction because the "plaintiff has not submitted any competent evidence into the record (i.e., affidavits, exhibits) that would permit the Court to assess whether she, in fact, faces irreparable harm").

The burden is squarely on the movant in this posture, and Plaintiffs have not carried that burden. The renewed motion should be denied on that basis alone.

III. THE BALANCE OF INTERESTS DOES NOT FAVOR AN INJUNCTION.

This element, too, is entirely ignored by Plaintiffs. Defendant incorporates its prior analysis, PI Opp'n Mem. at 18, the facts recited above and in its interim status reports, and urges the Court to find that the balance of interests favors denying Plaintiffs' renewed motion. If for no other reason, Defendant's continued intent to begin making payments this Friday justifies this Court's refraining from issuing the extraordinary order that Plaintiffs seek here.

CONCLUSION

Both the renewed motion and the underlying case will be moot once the balance of Coronavirus Relief Fund payments are made. That is expected to begin in two days. For the reasons stated above, the motion should be denied on its merits now. Alternatively, however, the Court

could deny it as moot once payments are made.

Dated: June 10, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ERIC WOMACK
Assistant Branch Director

/s/ Jason C. Lynch

Jason C. Lynch (D.C. Bar No. 1016319)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Rm. 11214
Washington, DC 20005
Tel: (202) 514-1359
Email: Jason.Lynch@usdoj.gov

Attorneys for Defendants