UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

THE SHAWNEE TRIBE, Plaintiff, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, et al., Defendants.	Case No. 20-cv-1999

RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

Plaintiff's supplemental memorandum draws a distinction between the Department of the Treasury's choice to use Tribal population as a means to estimate increased COVID-related expenditures, and its choice to use particular data to estimate Tribal population, such that, in Plaintiff's view, the latter may be reviewable even if the former is not. But this is an immaterial distinction. Both "choices" are part of the *same methodology*, and indeed, were published in the *same document*. *See* Coronavirus Relief Fund Tribal Allocation Methodology, U.S. Department of the Treasury, https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology .pdf, at 1 (May 5, 2020) ("Allocation Mem.").

Importantly, the relevant statutory provision—42 U.S.C. § 801(c)(7)—provides no more "meaningful standard" by which the Court may assess one choice versus the other. Section 801(c)(7) states only that these funds must be used to cover certain "increased expenditures of each" Tribal government,[1] and that otherwise, "the amount paid . . . to a Tribal government shall

[1] More specifically, section 801(c)(7) states that the relevant funds must be distributed to cover "increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal

be . . . determined in such manner as the Secretary [of Treasury] determines appropriate." There is no dispute that regardless of what data Treasury used, all of the funds were distributed for the purpose of covering these "increased expenditures;" indeed, by statute, any recipient may *only* use these funds for COVID-related expenditures, *see* 42 U.S.C. § 801(d). That certain Tribes may have received more funds due to Treasury's use of imperfect Tribal population data means only that more of their COVID-related expenditures were covered; it does not mean that Treasury issued funds for an impermissible purpose. Thus, Treasury's methodology as a whole—including its chosen data source—allocates money for "permissible statutory objectives," and so courts are provided "no leave to intrude." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

In response, Plaintiff cites to three cases, none of which support Plaintiff's position. First, Plaintiff cites to *Policy & Research, LLC v. United States Dep't of Health & Human Servs.*, where the Court found that it could review whether the agency action at issue violated a prior agency regulation, since the prior regulation provided "clear guidelines by which to do so, or otherwise evince[d] an intent to constrain the [agency's] discretion." 313 F. Supp. 3d 62, 74 (D.D.C. 2018), *appeal dismissed*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018). But even assuming *Policy & Research*'s summary of the relevant legal standard is accurate, it is inapplicable here. There is no allegation that Treasury's use of particular data violates a "prior regulation." Again, both the choice to use Tribal population, and to use particular data for Tribal population in the methodology, are part of *the same agency determination* (the Allocation Mem.). Treasury never issued an independent, formal regulation generally declaring that it would rely upon actual Tribal enrollment figures; it concluded only, in an informal guidance memorandum, that it would

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government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity)."

specifically use Tribal population numbers as estimated by a particular data source.[2] Plaintiff cites to no case to support the odd proposition that an agency guidance document may constrain the agency's discretion *within the same guidance document*.

Plaintiff then cites to *Ctr. for Biological Diversity v. Trump*. No. 1:19-CV-00408 (TNM), 2020 WL 1643657 (D.D.C. Apr. 2, 2020). But there, the court simply concluded that the relevant statute—which stated that the funds at issue had to be spent for "law enforcement activities of any Federal agency"—provided a meaningful standard by which the agency action could be measured. *See id.* at *16. Here, by contrast, the relevant statute states only that the funds must be used to cover COVID-related expenditures. It provides no further guidance on how the funds must be allocated among the various Tribal governments.

Plaintiff finally cites to *Milk Train, Inc. v. Veneman*, which undermines Plaintiff's position. 310 F.3d 747 (D.C. Cir. 2002). There, a statute "appropriated $325 million" to "benefit livestock and dairy producers" and stated that "no less than $125 million" must be directed to dairy producers to compensate "for economic losses incurred during 1999." *Id.* at 749. The plaintiff challenged various components of the U.S. Department of Agriculture's ("USDA's") implementation of this statute, including USDA's decision to rely on "1997 and 1998 . . . data [to calculate] 1999 losses." *Id.* at 752. Although the Court discussed the merits of this particular challenge, it did not address whether the challenge was reviewable (and it is unclear whether USDA made a reviewability argument for this challenge).[3] Regardless, the plaintiff's argument—

[2] Further, there is no explanation for how Treasury's Allocation Mem. constitutes a formal agency regulation that can constrain future agency action. *See Policy & Research, LLC*, 313 F. Supp. 3d at 76 (noting only that "agencies" may "cabin their own discretionary funding determinations by generating formal regulations or other binding policies.").

[3] As Treasury explained in its response to the preliminary injunction motion in *Prairie Band*, the court in *Milk Train* did address whether the plaintiff's other challenges were reviewable. *See*

that USDA relied upon data from years outside of 1999—called into question whether USDA's "chosen manner of distributing the moneys extend[ed] only to the losses covered by the statute." *Id.* at 753. Here, by contrast, there is no question that regardless of what data Treasury used, all of the funds disbursed were intended to, and had to, apply to "losses covered by the statute" (COVID-related expenditures).

Furthermore, *Milk Train* conclusively undermines the merits of Plaintiff's claim. There, in determining how to allocate the relevant funds, USDA decided that it would look to milk "production levels [as] an appropriate proxy for economic losses." *Id.* at 754. However, even though the statute provided funds to cover 1999 economic losses, USDA relied on production data from 1997 and 1998. *See id.* at 752. USDA considered using data that would "target 1999 production," but it concluded that this "would significantly delay payments to producers, place additional workload on" the agency, "and require additional resources." *Id.* at 753-54. Although USDA acknowledged "the risk that the use of 1997-98 production data would inaccurately measure the level of 1999 production," it "concluded that the benefit of increased accuracy was not worth the additional delay in distributing funds and the administrative costs." *Id.* at 754. The court found USDA's reliance on 1997 and 1998 production data reasonable. It noted that "[a]n agency typically has wide latitude in determining the extent of data-gathering necessary to solve a problem," and emphasized that "any measurement by the Secretary of the amount of 1999 production would be subject to some level of uncertainty and error." *Id.* The court thus concluded that it would defer to the agency's judgment on the level of "uncertainty" that is "acceptable in view of the congressional purpose to get aid promptly to milk producers." *Id.* This reasoning

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Response to TRO and PI Motion, *Prairie Band Potawatomi Nation v. Mnuchin*, 20-cv-1491, ECF No. 16 (D.D.C. June 10, 2020).

applies fully here: (i) Treasury considered using alternative sources of data (such as direct Tribal enrollment certification data), but concluded that these sources came with their own challenges and errors, *see* PI Response, at 15-17, (ii) Treasury ultimately chose to rely upon a particular data source to estimate Tribal population (and thus estimate relevant, increased Tribal expenditures) despite potential inaccuracies due to the data's administrative benefits, *see* PI Response, at 14-16, and (iii) given the need to "get aid promptly to" Tribal governments, the Court should defer to the Treasury's judgment on the level of "uncertainty" that is acceptable in this context.

Accordingly, Treasury's methodology, as a whole, is unreviewable. Plaintiff's cases do not support its novel theory that although Treasury's determination that Tribal population is a proper proxy for estimating COVID-related expenditures is unreviewable, the selection of data used to estimate Tribal population *is* reviewable. And one case—*Milk Train*—conclusively undermines the merits of Plaintiff's claim. The Court should deny Plaintiff's motion for a preliminary injunction, and should dismiss this case pursuant to F.R.C.P. 12(b)(1) or 12(b)(6).

Dated: August 13, 2020

Respectfully submitted,

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