UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

The Shawnee Tribe, Plaintiff, v. **Janet Yellen, in her official capacity as Secretary of the Treasury, et al.,** Defendants.	Case No. 20-cv-1999

OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Roughly two and a half months after the D.C. Circuit remanded this case back to this Court—and weeks after the Court set a summary judgment briefing schedule at Plaintiffs' request—Plaintiffs now seek to litigate the merits of their claims through a *second* preliminary injunction motion. Plaintiffs seek an order requiring the Department of the Treasury to immediately issue a payment to each Plaintiff pursuant to a new methodology that meets certain requirements not found in the relevant statute. In support, Plaintiffs rely on two claims, one old and one new: (i) that Treasury's original methodology was arbitrary and capricious, and thus Treasury is legally obligated to adopt a new methodology (the original claim), and (ii) Treasury has "unreasonably delayed" issuing supplemental payments to Plaintiffs (a new claim raised only on March 26, 2021). Plaintiffs' claims lack merit, and the Court should therefore deny their Second Motion for a Preliminary Injunction.

First, Plaintiffs are not entitled to an affirmative injunction requiring Treasury to adopt any particular methodology, much less the methodology they outline in their motion. Generally, when a Court finds an agency action unlawful under the Administrative Procedure Act ("APA"), the appropriate remedy is to identify the legal defect in the agency action and set it aside. An affirmative injunction *compelling* agency action is appropriate only if the relevant statute *specifically* and *unequivocally* calls for that particular, discrete agency action. The statute at issue here, however, does not specifically and unequivocally require Treasury to use any particular methodology, and Plaintiffs do not argue otherwise. Plaintiffs, at most, can seek relief that instructs Treasury to do what it has already agreed to do voluntarily: cease further use of its original methodology, and exercise its discretion to develop a new methodology.

Second, Plaintiffs are also not entitled to an injunction compelling *immediate* payment of some unspecified amount of money by Treasury. Although the relevant statute requires Treasury to develop a methodology and issue payments thereunder by a fixed deadline that has now passed, Treasury *did* construct a methodology nearly a year ago, and it has paid out to Plaintiffs all of the funds appropriate under that methodology. Indeed, that is the basis of Plaintiffs' original claim: that Treasury *did* take action, which Plaintiffs believe was unlawful and should be revised. That is fundamentally in tension with Plaintiffs' newfound claim: that Treasury *has not* acted.

Third, Plaintiffs cannot satisfy the remaining preliminary injunction factors. To start, the equities do not favor Plaintiffs' requested relief. Plaintiffs inexplicably now move for a *second* preliminary injunction motion weeks after the Court—with input from the parties—set a process for further proceedings in this case. And Plaintiffs' motion is not predicated on any new facts previously unavailable to them. To the contrary, their motion includes a new claim and a new request for relief that could have been included in their *original* preliminary injunction motions. Furthermore, Plaintiffs' requested relief creates unjustifiable risks. Requiring Treasury to further accelerate the process of developing a new methodology could increase the risk of administrative errors in the disbursement of this zero-sum appropriation, potentially harming other parties.

Plaintiffs also cannot establish that they will necessarily suffer irreparable harm. Treasury is currently poised to complete its new methodology by April 30, 2021, and has already committed to begin issuing payments thereunder promptly afterwards. It is unclear whether Plaintiffs would receive payments on a materially quicker timeline under Plaintiffs' requested injunction. Treasury would still have to construct a methodology consistent with Plaintiffs' specifications, which would potentially require them to shift gears, further delaying the reconsideration process.

Accordingly, the Court should deny Plaintiffs' Second Motion for a Preliminary Injunction.

BACKGROUND

I. Statutory and regulatory background.

In March 2020, Congress enacted the CARES Act which, among other things, appropriated $8 billion dollars for "payments to Tribal governments" (the "Funds"). 42 U.S.C. § 801(a)(2). The Act tasked the Treasury Department with disbursing the Funds, and described the process by which the funds should be allocated among qualifying Tribal governments:

> [T]he amount paid . . . 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 . . . relative to aggregate expenditures in fiscal year 2019 by the Tribal government . . . 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.

42 U.S.C. § 801(c)(7). The Act provides no further, specific guidance on how Treasury must allocate the funds; it does not specify the precise amount that each Tribal government should receive, or otherwise specify the particular formula (or data source) that Treasury must utilize for allocating funds based on "increased expenditures." Additionally, the Act notes that, "[s]ubject" to certain exceptions not relevant here, "not later than 30 days after March 27, 2020, the Secretary [of Treasury] shall pay each . . . Tribal government," from the Funds, "the amount determined for" the "Tribal government." 42 U.S.C. § 801(b).

On May 5, 2020, promptly after the CARES Act was signed into law, Treasury published its methodology for allocating the Funds among qualifying Tribal governments. *See* Coronavirus Relief Fund Tribal Allocation Methodology, U.S. Department of Treasury,

https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology .pdf, at 1 (May 5, 2020) (hereinafter, "Allocation Mem."). Under this methodology, Treasury committed to distribute the Funds in two waves. In the first wave, Treasury sought to immediately distribute 60 percent of the Funds based roughly on Tribal population counts, which were "expected to correlate reasonably well with the amount of increased expenditures" due to COVID-19 ("Wave One"). *See id.* at 2. To ensure speedy disbursement of the Funds, Treasury chose to estimate population counts using a pre-existing data source: Decennial Census data used by Department of Housing and Urban Development for its Indian Housing Block Grant ("IHBG") program. *See id.* As a protective measure, and in response to comments from Indian Tribes, Treasury also generally guaranteed a minimum payment of $100,000 to Tribal governments that would have otherwise received less than $100,000 under Treasury's methodology for estimating population count. *See id.* Treasury determined that the second wave of payments, constituting 40 percent of the Funds, would be "based on employment and expenditures data of Tribes and tribally-owned entities" ("Wave Two"). *See id.*, at 2.

II. Litigation history.

Once Treasury published its methodology, it faced a series of lawsuits challenging *who* could receive the funds, *when* they would receive the funds, and in *what amount*. First, certain parties brought suit, arguing that Treasury's methodology improperly allocated funds to certain entities—Alaska Native Corporations ("ANCs")—that, according to Plaintiffs, did not qualify for those funds under. *See Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 20 (D.C. Cir. 2020), *cert. granted sub nom. Alaska Native Vill. Corp. Ass'n, Inc. v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021), and *cert. granted sub nom. Mnuchin v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021). The Court ultimately granted

summary judgment for Treasury, but the D.C. Circuit reversed, concluding that ANCs were not entitled to any of the Funds. *See id.* at 12. The Supreme Court agreed to review the D.C. Circuit's decision, and oral argument is currently set for April 19, 2021.

Second, although Treasury worked in earnest to rapidly develop a satisfactory methodology and promptly distribute the Funds, another group of parties brought suit seeking a preliminary injunction requiring Treasury to accelerate the distribution of the Funds. *See Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-CV-01136 (APM), 2020 WL 3250701, at *1 (D.D.C. June 15, 2020). Ultimately, the Court granted the preliminary injunction motion, *see id.* at *4, and Treasury promptly distributed all of the remaining Funds, except for the funds initially allocated to ANCs (which are still tied up in litigation) and a negligible portion of funds that were not distributed for logistical reasons, *see Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-CV-01136 (APM), ECF No. 45 (D.D.C. June 25, 2020).

Third, another group of parties—the Plaintiffs here—brought suit claiming that Treasury's methodology for issuing population-based payments (Wave One) was arbitrary and capricious because Treasury did not use a reliable data source when calculating Plaintiffs' population counts. *See Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 98 (D.C. Cir. 2021). The Court initially found that the determination of an appropriate allocation methodology was committed to Treasury's discretion under the relevant statutory provision, and was therefore not reviewable under the APA. *See id.* The D.C. Circuit, however, concluded that Treasury's allocation methodology is reviewable, and that Plaintiffs were likely to prevail on their claim that the use of "the IHBG formula area population data [was]" unlawful "at least with respect to some tribes." *Id.* at 101-02. The D.C. Circuit noted, however, that Treasury still retains "discretion" to "determin[e] a method for allocating funds" based on the limited guidance in section 801(c)(7), namely that the payments

must be "based on increased expenditures." *Id.* at 100. The D.C. Circuit then remanded the case to the Court for further proceedings on the merits to determine "[w]hether the Secretary will have to devise a new methodology." *Id.* at 103.

Following remand, the Court held several telephonic status conferences to determine how the parties should proceed in these litigations. *See*, *e,g.*, 1/14 Minute Order; 1/21 Minute Order. The Court initially instructed Treasury to "file a Status Report that advises whether the Treasury Department will re-consider the formula or data used to allocate the population-based distribution of" the Funds." 1/21 Minute Order. In response, Treasury informed the Court, and the Plaintiffs, that instead of requiring the parties to re-litigate the propriety of Treasury's original methodology for issuing the population-based payments, it would voluntarily devise a new methodology for allocating the remaining Funds. *See* ECF No. 60. Treasury noted that it would require a sufficient amount of time to craft an acceptable methodology which accounts for the unique circumstances here, namely that most of the remaining Funds were allocated to ANCs (whose eligibility for the Funds is the subject of a pending Supreme Court case, *see supra* at 5), and so Treasury must determine what it can still issue other Tribal entities while accounting for the ANCs' interests. *See id.* Treasury thus noted that it would finalize its new methodology by April 30, 2021, but would endeavor to complete it sooner. *See id.*; ECF No. 62, at 2. Treasury also noted any further merits-related briefing should wait until after the new methodology is released, since any further litigation relating to the original methodology would be an unnecessary expenditure of party and judicial resources, as the existing challenge to the prior methodology would soon be moot. *See* ECF No. 60, at 2.

Plaintiffs took a different view. Although Treasury confirmed that it would not rely on the original methodology in distributing the remaining Funds, Plaintiffs insisted that the parties

proceed to summary judgment briefing *before* Treasury had finalized its new methodology. At their request, the Court set the current summary judgment briefing schedule, whereby Plaintiffs' opening brief would be due on April 2, 2021. *See* 2/25 Minute Entry.

However, on March 26, 2021, the Plaintiffs belatedly sought to change how the parties would proceed. Plaintiffs now want to add a claim to their complaints and seek a second preliminary injunction, one that would affirmatively compel Treasury to "determine the Plaintiff Tribes' populations based upon a rational consideration of the population information available to the agency (other than the IHBG data)," and issue payments to Plaintiffs in an amount equal to the "amounts previously distributed to other tribes with equivalent populations[,] minus an amount necessary to protect the interests of the other tribes and ANCs currently litigating CARES Act cases."[1] PI Mot., at 8. In support, Plaintiffs effectively assert two APA claims: *(i)* the population-based component of Treasury's original methodology was arbitrary and capricious, and Treasury is now legally obligated to adopt a new methodology consistent with Plaintiffs' requested specifications, and *(ii)* Treasury has impermissibly delayed making supplemental payments to the Plaintiffs, and so Treasury must adopt a new methodology, and issue payments thereunder, immediately.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm

[1] Although Plaintiffs acknowledge that it is not "the Court's role to calculate a specific sum certain for Treasury to distribute or to dictate the specific population figure that Treasury must determine for the Plaintiff Tribes," Plaintiffs nonetheless ask the Court to order Treasury to construct a methodology within certain several "legal boundaries" proposed by Plaintiffs. *See* PI Mot., at 8.

in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

Courts in this Circuit traditionally have evaluated these four factors on a "sliding scale"—if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Alphapointe v. U.S. Dep't of Veterans Affairs*, 416 F. Supp. 3d 1, 8 (D.D.C. 2019) (Mehta, J.). *Winter*, however, called that approach into doubt and sparked disagreement over whether the "sliding scale" framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of a factor simply because one or more other factors have been convincingly established. *Id.* This question remains undecided by the D.C. Circuit. *See Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018).

Finally, where a movant seeks mandatory injunctive relief, *i.e.*, an injunction that "would alter, rather than preserve, the status quo by commanding some positive act—the moving party must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Elec. Info. Privacy Ctr. v. U.S. Dep't of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014) (citations omitted); *see also Nat'l Conf. on Ministry to the Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) ("A district court should not issue a mandatory preliminary injunction unless the facts and law clearly favor the moving party." (quotation omitted)).

ARGUMENT

I. Plaintiffs are not entitled to their requested mandatory preliminary injunction.

A. Plaintiffs are not entitled to an order affirmatively requiring Treasury to issue payments to Plaintiffs pursuant to a methodology consistent with Plaintiffs' specifications.

Plaintiffs are not entitled to an affirmative injunction requiring Treasury to issue each Plaintiff a prompt payment pursuant to a methodology bearing Plaintiffs' preferred requirements: that Treasury rely on a different population data source (but *only* for Plaintiffs), and then calculate what each Plaintiff will receive by first determining what other Tribes with comparable population counts received under the old methodology (based on IHBG data).

"Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995); *see also N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) ("When a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal."); PI Mot., at 8 (acknowledging that the Court cannot order "Treasury to distribute" a "specific sum certain.").

At times, "[t]he APA" does allow "a reviewing court to *compel* agency action," but only "under narrow circumstances." *Elec. Privacy Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1244 (D.C. Cir. 2018) (emphasis added). Under the APA, "Courts" may only "compel an agency to take a *discrete* agency action that it is *required* to take." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (emphasis in original). "Action is 'legally required' if the statute provides a *specific, unequivocal command* to an agency or a *precise, definite act* . . .

about which [an official has] no discretion whatever." *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1172 (D.C. Cir. 2016) (internal quotation marks omitted and emphasis added). Even "when an agency is compelled by law" to take *some* agency action, if "the manner of its action is left" largely "to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004). Thus, "[o]nly in extraordinary circumstances" do courts "issue detailed remedial" injunctions in APA cases. *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008); *see also Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) ("Once . . . the district court held that the" the agency's action was unlawful, it "should have remanded to the [agency] for further proceedings consistent with its" order. "Not only was it unnecessary for the court to retain jurisdiction to devise a specific remedy for the [agency] to follow, but it was error to do so.").

Here, Section 801(c)(7) does not "specific[ally], unequivocal[ly] command" Treasury to issue Plaintiffs payments pursuant to a different methodology that includes certain mandatory aspects that the Plaintiffs would prefer, much less an undefined "advance" on these payments. This section generally calls on Treasury to issue each qualifying Tribal entity a portion of the Funds "based on increased expenditures," which must be "determined in such manner as the Secretary determines appropriate." 42 U.S.C. § 801(c)(7). Even assuming this provision places some restrictions on Treasury's discretion over the design of an appropriate methodology, it does not impose the restrictions that Plaintiffs ask the Court to impose (*e.g.*, that Treasury assign new population counts to Plaintiffs alone based on a new data source). Indeed, although the D.C. Circuit previously held that the discretion afforded to Treasury under the statute is not total, it still acknowledged the existence of that discretion in developing a methodology. *Shawnee*, 984 F.3d at

100. Thus, even if section 801(c)(7) "is mandatory as to the object to be achieved," it "leaves [Treasury] a great deal of discretion in deciding how to achieve it." *Norton*, 542 U.S. at 66. "It assuredly does not mandate, with the clarity necessary to support judicial action," that Treasury issue each Plaintiff a payment pursuant to a methodology that fits Plaintiffs' extra-statutory specifications. *Id.*

Plaintiffs advance several theories in support of their request for affirmative relief, none of which has merit. For example, Plaintiffs argue that Courts can issue affirmative injunctions, even compelling agencies to issue monetary payments. *See* PI Mot., at 4-7 (relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). But they fail to explain why, under *section 801(c)(7)*, they are entitled to any particular affirmative injunction. As explained above, affirmative injunctions, even ones compelling monetary payments, are only appropriate if they are specifically and unequivocally called for by the relevant statutory provision. Here, as the D.C. Circuit explained, the appropriate remedy following a decision on summary judgment in Plaintiffs' favor would be to require Treasury to develop a new methodology, not to make payments pursuant to a methodology that meets certain extra-statutory requirements. *See Shawnee*, 984 F.3d at 103 (once the Court renders a decision on the "merits," Treasury may have "to devise a new methodology"). The latter remedy would improperly usurp—and effectively pre-determine—Treasury's decision-making process upon remand. *See*, *e.g.*, *Nat'l Tank Truck Carriers, Inc. v. U.S. E.P.A.*, 907 F.2d 177, 185 (D.C. Cir. 1990) (when a court finds that an agency has made "an arbitrary and capricious choice," it generally "will not, indeed [] cannot, dictate to the agency what course it must ultimately take").

Plaintiffs then argue that some affirmative injunction is required here, since the relevant CARES Act appropriation has already lapsed, and so the remaining Funds cannot be issued without

a court order. *See* PI Mot., at 9-10. But again, this mistaken argument—which suggests that this lawsuit is moot because Treasury now lacks the authority to make any further payment to the Tribes—does not justify the affirmative injunction Plaintiffs seek here. Regardless, the relevant appropriation has *not* lapsed: the D.C. Circuit issued an order stating that "any expiration of the appropriation for Tribal governments set forth in" the relevant CARES Act provision "*is hereby suspended*" until "until seven days after final action by [the D.C. Circuit] or the Supreme Court." Order, *Chehalis v. Mnuchin*, No. 20-5204, Doc. 1864207 (D.C. Cir. Sept. 30, 2020) (emphasis added). Thus, Treasury can issue certain payments from the Funds without any further court order.

Importantly, the D.C. Circuit suspended the expiration of the relevant appropriation in *Chehalis* to afford the defendants there—the Secretary of the Treasury and a group of ANCs—an opportunity to seek further review by the Supreme Court. As noted above, the Supreme Court granted certiorari in *Chehalis* to consider whether Alaska Native Corporations are eligible to receive CARES Act funds set aside for "Tribal governments," 42 U.S.C. 801(a)(2)(B). The *Chehalis* case is set for oral argument on April 19, 2021, and the Supreme Court will presumably issue a decision by the end of June. The pendency of those proceedings also weighs against granting the relief Plaintiffs seek here. Because Treasury has already distributed the lion's share of CARES Act funds for Tribal governments, most of what remains are funds previously allocated to the ANCs. The Supreme Court should be permitted to address the eligibility of ANCs to receive those funds without the prospect that the funds will be substantially dissipated by injunctions in other litigation.

Plaintiffs also argue that agencies "must treat similarly-situated parties the same way unless there is a legitimate rationale for treating them differently," and that Treasury's original methodology did not meet this standard. PI Mot., at 11. Even assuming this were a credible

argument against the original methodology, Treasury has already declared that it will not utilize that methodology when distributing the remaining funds.[2] *See* ECF No. 60. And Plaintiffs' argument is incorrect: Treasury's original methodology *did* treat all Tribal entities the same, using a single data source for everyone (the IHBG data). Plaintiffs' argument now appears to be the inverse: that Treasury should treat certain Tribes *differently*, using a separate data source *only for the Plaintiffs*. And Plaintiffs likely call for this unique methodology precisely because an alternative methodology that adjusts population counts for similarly situated Tribes as well may result in a lower supplemental award for Plaintiffs. If Treasury adopted the latter approach, then the population counts for other Tribes may increase to a sufficient degree such that Plaintiffs may ultimately be allocated an amount below what they believe they are owed.

Plaintiffs then assert a number of arguments against Treasury's forthcoming, new methodology. But again, it is unclear how these arguments support Plaintiffs' request for specific, affirmative relief now. And in any event, these arguments lack merit. For example, Plaintiffs argue that Treasury's new methodology may ultimately prove inadequate. This argument, however, is premature and altogether unknowable in the absence of a final agency decision. Once Treasury publishes its new methodology, Plaintiffs can assert a new claim against it if they believe it is legally deficient.[3] Relatedly, Plaintiffs argue that the new methodology cannot provide additional

[2] To the extent Plaintiffs believe that Treasury's new methodology "treats similarly situated parties differently" without an "adequate explanation," *Petroleum Commc'ns, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994), they can raise that claim once the new methodology is published. Until then, it is not ripe—and more to the point, for purposes of the instant motion, Plaintiffs cannot demonstrate likelihood of success on any such claim, which would effectively constitute a challenge to non-final agency action.

[3] Plaintiffs argue that because Treasury's new methodology may not satisfy Plaintiffs, their claims are not "moot." Plaintiffs misunderstand Treasury's position. Treasury's argument is that its decision to craft a new methodology moots Plaintiffs' claims *against the original methodology*. *See Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (It is "a perfectly uncontroversial and well-settled principle of law" that "when an agency has

funds to non-litigant Tribes, since the Court lacks jurisdiction to order any relief that may benefit a non-litigant. But Treasury is not asking the Court to *order* it to adopt a new methodology; it is adopting a new methodology voluntarily. And nothing in section 801(c)(7) precludes Treasury from adopting a new methodology that would benefit other Tribes in addition to the Plaintiffs. Furthermore, Plaintiffs' argument here conflicts with their argument that Treasury must generally treat similarly situated parties in a similar fashion.

Plaintiffs then argue that in electing to adopt a new methodology, Treasury effectively granted itself a voluntary remand without a Court order. But Treasury is simply exercising its statutory authority under section 801(c)(7) to "determine" the "amount paid to" each qualifying "Tribal government" from the relevant appropriation in "such manner as" it "determines appropriate." 42 U.S.C. § 801(c)(7). Although Treasury's decision may accomplish the same end as, and is thus substantively similar to, a Court-ordered remand does not mean that it too requires a Court order.

Accordingly, Plaintiffs are not entitled to their requested, affirmative injunction. The Court should instead let Treasury continue to craft a new methodology. To the extent Plaintiffs are dissatisfied with the new methodology, they can challenge it at the appropriate time.

B. Plaintiffs are not entitled to an injunction compelling Treasury to accelerate the finalization of a new methodology and the distribution of additional funds to Plaintiffs.

Plaintiffs claim that Treasury has been unjustifiably dilatory in crafting a new methodology, and issuing additional payments to Plaintiffs, and thus Plaintiffs are entitled to an injunction compelling immediate action. The APA "authorizes a reviewing court to compel agency

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rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot."). Treasury has not argued that any and every claim Plaintiffs may have against Treasury—including potential claims against the new methodology—would be moot as well.

action unlawfully withheld or unreasonably delayed." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003) (citing 5 U.S.C. § 706(1)). "Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Id.* at 1100. "[T]he time agencies take to make decisions must be governed by a 'rule of reason,'" where the Court may consider multiple factors, including "any statutory timetable" and "competing priorities" which tax the agency's "limited resources." *Id.* at 1100-01. The Court should also "consider . . . the complexity of the task confronting the agency." *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987).

Here, as a threshold matter, Treasury *had* already adopted a methodology for allocating the Funds among qualifying Tribal entities and promptly issuing payments. *See supra* at 4. Plaintiffs' claim here is not that Treasury was dilatory in adopting a methodology, but rather that Treasury's methodology was unlawful, and it must now adopt a new methodology. That is, of course, the very claim that they asked this Court to decide on summary judgment, notwithstanding the agency's stated intent to reconsider its prior decision. Because the agency has already acted, the question before the court is whether that action is arbitrary or capricious. Plaintiffs cannot argue that Treasury was dilatory in adopting *Plaintiffs'* preferred action since, until this Court has issued judgment on that question, Plaintiffs have no legal entitlement whatsoever to that action.

But even if this Court were to decide that Treasury could violate section 706(1) by failing to reevaluate its prior methodology, even in the absence of a final decision on summary judgment as to the original methodology, Treasury has already begun that process. As this Court is well aware, Treasury has already indicated that it is reconsidering its prior methodology, and it has indicated that it hopes to be finished with that process by the end of April 2021. *See supra* at 6. It is difficult to see how Treasury could complete this process any more quickly than it has already

indicated. Crafting a new methodology that accounts for the unique circumstances here—certain Tribes seeking additional compensation from a limited pool of funds allocated to other entities—is a complex task that requires sufficient time.[4] *See* ECF No. 60, at 2.

II. The remaining preliminary injunction factors counsel against Plaintiffs' requested relief.

The equities counsel against Plaintiffs' requested relief. To start, Plaintiffs were dilatory in filing a *second* preliminary injunction motion. Following several hearings where each party was given an opportunity to opine on how this case should proceed, the Court set a process for litigating the merits of Plaintiffs' claims. *See supra* at 7. Plaintiffs insisted upon a summary judgment briefing schedule, and the Court obliged. Now, weeks after the Court settled on how the parties would proceed, and on the eve of a summary judgment briefing schedule that they requested, Plaintiffs file another preliminary injunction motion—with little advanced notice to either the Court or the Defendants—which includes a new claim and a new request for relief that they could have included in their *initial* preliminary injunction motions. This alone is grounds for denying Plaintiffs' motion. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (The court's "conclusion that an injunction should not issue [was] bolstered by the delay of the appellants in seeking one;" appellants waited 44 days to bring suit, which the court found "inexcusable."). Furthermore, Plaintiffs' requested relief carries unjustifiable risks. Treasury's

[4] Shawnee's Motion to Amend its Complaint should be denied. A motion for leave to amend may be denied for reasons of "undue delay" or "futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). As stated herein, Shawnee was unjustifiably dilatory in amending its Complaint, and regardless, its new claim lacks merit. *See supra* at 14-15; *infra* at 15-16. To justify its delay, Shawnee notes that it gave Treasury notice of its amendment when Shawnee noted that time was of the essence. *See* ECF No. 68. But this does not provide notice that Shawnee was going to amend its Complaint to add a delay-related claim, nor does it explain why Shawnee did not include this claim from the outset of the litigation.

current timeline is based on its estimate of the time required to construct a new, satisfactory methodology. *See* ECF No. 60, at 2. An injunction that compels Treasury to accelerate its process even further may risk creating errors in the methodology which could potentially affect other interested parties.

In addition, it is unclear whether Plaintiffs' requested relief will result in Plaintiffs receiving additional payments on a materially accelerated timeline. Treasury is poised to finalize its new methodology by April 30 (at the latest), and will promptly make payments thereafter in the absence of a court order to the contrary. *See* ECF No. 60, at 2; ECF No. 62, at 2. Although Plaintiffs call for an injunction that requires immediate action, even Plaintiffs acknowledge that Treasury would still have to design a methodology (albeit one consistent with their preferred specifications), which could include gathering the necessary data. *See* PI Mot., at 12 (Plaintiffs are not dictating "which population figures" Treasury must "use (or what data [it] rel[ies] upon)," but note Treasury must "determine the Plaintiff Tribe's populations based upon" data "other than the IHBG data that the agency previously relied upon."). And recall that Plaintiffs do not ask for those payments in full, but rather a "material" advance on them. Thus, it is unclear whether Plaintiffs would suffer any material harm if required to wait until Treasury completes its current, ongoing process of crafting a new methodology that would in fact provide those payments in full.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' Second Motion for a Preliminary Injunction.

Dated: April 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

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