

17th Annual ILPC & TICA Indigenous Law Conference

COVID Related Litigation, Catherine Munson



CARES ACT LITIGATION

- Congress appropriated \$150 billion for payments to States, Tribal governments, and units of local governments. \$8 billion was set aside in emergency aid for “Tribal governments” to address the COVID-19 pandemic.
 - *Chehalis* – WHO gets the funding
- The CARES Act required the Secretary to disburse those funds “no later than 30 days after March 27, 2020” 42 U.S.C. § 801(b)(1).
 - *Agua Caliente* – WHEN the funding distributed
- The amount paid shall be the amount the Secretary of Treasury shall determine, in consultation with Interior and Tribes.
 - *Prairie Band Potawatomi Nation* and *Shawnee Tribe of Oklahoma* – HOW the funding is allocated

Pandemic hurt tribes particularly hard

- *Coronavirus pandemic disproportionately exposes tribal economies and governments to economic hardship.*
- *Employment in tribal communities is much more heavily concentrated in the service sector. Over **30 percent** of occupations in some tribal communities are service occupations, higher than the U.S. average of 18 percent.*
- *Another way Native American employment and communities are more vulnerable to social-distancing policies is that tribal enterprise revenues often fund the operational activities of tribal governments, which are themselves large employers in reservation communities. When tribal enterprise revenues fall, tribal government jobs, services, and basic functions are at risk.*

Center for Indian Country Development – April 10, 2020.

Diverse Group Plaintiff Tribes

- Agua Caliente Band of Cahuilla Indians, Ak-Chin Indian Community, Arapaho Tribe of the Wind River Reservation, Chickasaw Nation, Cherokee Nation, Choctaw Nation, Snoqualmie Indian Tribe, and Yurok Tribe.
- “Plaintiffs’ injuries are ongoing, worsening, and irreparable such that if the Secretary does not immediately disburse the emergency relief funds, Plaintiffs will be forced to curtail essential governmental services and furlough or lay off a substantial number of employees.”
- April 30, 2020 – Complaint
- May 1, 2020 - Motion for a Preliminary Injunction

May 11, 2020 Ruling

- May 5, 2020, Treasury announced it would disburse 60% of funds based on HUD Indian Housing Block Grant Funding population numbers
- White House call regarding timing of distribution (1) US would wait until the Chehalis litigation complete; (2) could take as long as two months to collect economic data, pushing deadline past July or later
- Submitted supplemental declarations for smaller sized tribes
- May 11, 2020 Court denied request relief

TRAC Factors

- *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984).

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

- Because had distributed 60% of funding, did not yet amount to “egregious delay”

Second motion for injunctive relief

- June 5, 2020 Plaintiffs' re-filed the motion
- June 12, 2020 Secretary began distributing the remaining 40% of the emergency relief, withholding \$679 million, or roughly 8.5% of the tribal CARES ACT funds, due to a recently filed litigation by the Prairie Band Potawatomi Nation which challenged the methodology in allocation
- June 15, 2020 Court granted the Tribes' motion

Things that had changed...

- First, Secretary now taken more than twice the time Congress directed, 80 days and counting
- Second, Secretary continues to withhold \$679 million to resolve any potentially adverse decision in the Prairie Band case
- Third, Plaintiffs will have received most of the money they are entitled to receive, but not all of it because of the withholding
- Irreparable harm – affidavits and Congress made a policy judgment that tribal governments in dire need of emergency relief
- Voluntarily dismissed the case on July 2nd

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