UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, 988 S. 7500 E. Fort Duchesne, Utah 84026, Plaintiff, v. STEPHEN MNUCHIN, SECRETARY, UNITED STATES DEPARTMENT OF THE TREASURY, 1500 Pennsylvania Ave., N.W. Washington, DC 20220 Defendant.	MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION Civil Case No.: 1:20-cv-01070

Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, Plaintiff, Ute Tribe of the Uintah and Ouray Reservation, a federally recognized Indian Tribe, moves for a temporary restraining order and for a preliminarily injunction: 1) preventing Defendant from allocating and distributing funds set aside for tribal governments under Title V of the Coronavirus Aid, Relief and Economic Security Act to regional or village corporations established under the Alaskan Native Claims Settlement Act; and 2) requiring Defendant to allocate and distribute those funds to tribal governments as required by the Act.

This Motion is based upon the Court file in this matter and the attached memorandum of law.

INTRODUCTION

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), H.R. 748, 116th Cong. (2020), in response to the COVID-19 national public health emergency, and President Trump signed the Act into law on March 27, 2020. The total allocation under the Act is two trillion dollars. Titles I, II, and IV earmark hundreds of billions of dollars of the relief for corporations. Title V of the Act provides that $150,000,000,000 of the relief is for State, local, and tribal governments. Specifically at issue in this case is Section 601(a)(2)(B), which mandates that the Secretary of the United States Department of the Treasury "shall reserve . . . $8,000,000,000 of such amount for making payments to Tribal governments." Section 601(a)(2)(B).

The Secretary is required to divide up all of that $8,000,000,000 between the eligible tribal governments which apply for funds, and the Secretary is required to distribute the whole of the $8,000,000,000 to those tribal governments by April 26, 2020. Section 601(c)(7).

The primary issue presented in the current motion is whether the Secretary can give some of the $8,000,000,000 reserved for tribal governments to for-profit corporations in Alaska. That issue is presented because on or about April 13, 2020, Defendant Mnuchin decided to allow those corporations, which are eligible for relief under Titles I or II of the CARES Act, to also apply for a share of the $8,000,000,000 reserved for tribal governments.[1]

[1] U.S. Dep't of the Treasury, *Submission Required for Receipt of Coronavirus Relief Fund Payments* (Apr. 13, 2020), https://forms.treasury.gov/caresact/stateandlocal. After the Secretary decided to allow the corporations to apply under Title V, he has stated that he may or may not decide to give those corporations Title V funds. As will be discussed in this brief, his statement of indecision does not preclude a TRO.

DISCUSSION OF FACTS

On March 13, 2020, President Trump issued a proclamation declaring a national emergency because a new coronavirus, which causes COVID-19, was publicly transmitting throughout the United States. The President has subsequently issued disaster declarations for all 50 states, and many states and many tribes have issued orders designed to slow the spread of COVID-19. Those orders have closed businesses and public spaces, barred large gatherings, and required citizens to shelter in place.

COVID-19 will soon claim its 50,000th death in the United States. In addition to that human toll, the disease has indirectly led to large financial harm to businesses and governments.

Specific to Plaintiff Ute Tribe, the Tribe:

- Declared a state of emergency on March 11, 2020, Duncan Decl., Ex.1.
- Furloughed all non-essential employees on March 11, and subsequently extended that furlough indefinitely. *Id.*, Exs. 2, 3. Those employees remain furloughed. The Tribe has continued to pay furloughed employees, at a cost of $350,000 per week, not including costs for benefits. *Id.*, ¶9.
- Closed tribal buildings, other than as necessary for essential government operation. *Id.*, Ex. 4.
- Barred tribal members from travelling outside the Reservation, excepting only travel for medical and emergencies purposes. *Id.*
- Provided emergency assistance grants for health related costs, including costs for travel for medical purposes. *Id.* The cost of those to date is already $2,693,000. Duncan Decl. ¶10.

- The Tribe is incurring additional costs for overtime for emergency workers, unemployment, and other expenses. The Tribe is delivering meals to elders and children no longer able to access senior centers and public schools. It is incurring increased cleaning and sanitation supplies, accounting services associated with tracking expenditures above normal budgeted activity, and planning for reopening of tribal government. The amounts of those costs are not yet quantifiable.
- The Tribe has been forced to maintain all essential services for its citizens despite a reservation-wide shelter-in-place State of Emergency order and the closure of its tribal government and virtually all of its tribal enterprises.

At the same time that the Tribe's needs and costs are increasing, the Tribe's ability to pay for those needs is declining. Like other tribes, the Ute Tribe has very limited ability to obtain revenue through taxation, and the Tribe derives much of its money from oil production and other business activities on its Reservation. Oil prices have recently collapsed, as has other business activities on the Reservation. These developments are recent, but the Tribe expects the decrease in receipts by its government to be large.

The Tribe uses those receipts to provide for the health and safety of tribal members and others who live on or travel through the Reservation. As an example, although the United States provides police services on the Reservation as part of its trust responsibilities to tribes, the Tribe has determined that the number of officers provided by the United States is insufficient to protect the public, and the Tribe funds additional police positions. Similarly, the Tribe funds medical care, education, and other programs beyond the amounts by the United States. Duncan Decl.

In the best of times, unemployment and poverty has been high on the Reseseration. COVID-19 is providing an additional and seemingly unmeetable additional challenge. Congress

earmarked only .004 of the expenditures in the CARES Act for tribal governments. Tribal governments, including the Ute Tribe, need all of that money. That is precisely why they are bringing this suit to prevent the Secretary of the Treasure from giving that desperately needed funding to large for-profit corporations in Alaska.

DISCUSSION OF LAW

I. THIS COURT HAS JURISDICTION OVER THIS MATTER AND PLAINTIFF HAS STANDING TO PURSUE THIS ACTION.

This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362. Plaintiff Ute Tribe maintains government-to-government relations with the United States and has a governing body that is duly recognized by the Secretary of the U.S. Department of the Interior. Plaintiff asserts claims arising under the Constitution and laws of the United States, including the Administrative Procedures Act, 5 U.S.C. §§ 701-706. The allegations of the Complaint give rise to an actual controversy within the meaning of 28 U.S.C. § 2201.

The Tribe has standing to bring this suit. To establish standing,

> a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). These requirements are often described in short form as injury, causation and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992*)*.

The Tribe easily meet the requirements for standing.

The Secretary's action threatens to take money that Congress expressly earmarked for the Tribe and other tribes, and to give that money to Alaska Native Corporations ("ANCs"). That alone, establishes injury and causation.

To obtain funds under the CARES Act, tribal governments were required to complete a certification form created by the Secretary. The certification form shows that Defendant has determined to treat ANCs as tribal governments for purposes of allocating and disbursing Title V Coronavirus Relief Funds. The Certification asks each funding applicant to state its "Population: Total number of Indian Tribe Citizens/Members/*Shareholders*, as of January 1, 2020" (italics added) and includes a Note defining "Indian Tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 et seq.), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

The certification also asks for "Land Base: Total number of land acres held by the Indian Tribe and any tribally-owned entity (to include entities in which the Indian Tribe maintains at least 51% ownership) as of January 1, 2020 (to include lands held in trust by the United States, owned in restricted fee status, owned in fee, or selected pursuant to the Alaska Native Claims Settlement Act)." Lands "selected pursuant to the Alaska Native Claims Settlement Act" are ANC-owned lands. In *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520 (1998), the Supreme Court explained that through ANCSA "Congress authorized the transfer of . . . approximately 44 million acres of Alaska land to state-chartered private business corporations," id. at 524, "without any restraints on alienation or significant use restrictions, and with the goal of

avoiding ‘any permanent racially defined institutions, rights, privileges, or obligations,’” *id*. at 532-33 (citations omitted).[2] ANC-owned lands are *not* Indian country. *Id*.

The increased and necessary expenditures by Plaintiff and other federally recognized tribal governments resulting from the devastating impacts of the COVID-19 pandemic are exactly the costs that Congress intended Title V of the CARES Act to cover. Congress did not intend for these funds to be paid to private, for-profit corporations, who seek to maximize financial return for their tens of thousands of individual shareholders. Instead, it provided relief for for-profit corporations under much larger pools of money made available to for-profit corporations through other Titles in the CARES Act.

Two scenarios illustrate the injury caused by Defendant’s designation of ANCs as Tribal governments for purposes of allocating and distributing Title V Coronavirus Relief Funds. Under the first scenario, if Defendant allocates the $8,000,000,000 equally among all 574 federally recognized Tribal governments, each Tribal government would receive just under $14,000,000. If Defendant includes the 237 ANCs, however, an equal allocation among all 811 entities would reduce that amount to less than $10,000,000, a difference of more than $4,000,000 for each of the 574 federally recognized Tribal governments. Plaintiffs would thus lose approximately 30% of their properly allocated share of Title V funds through the illegal appropriation of those funds to ANCs.

Under the second scenario, Defendant may allocate the $8,000,000,000 considering the population, land base, employees, and expenditures of each Tribal government. The data requested

[2] *See also* ANCSA Reg’l Ass’n, *Overview of Entities Operating in the Twelve Regions,* https://ancsaregional.com/overview-of-entities/ (last visited Apr. 22, 2020) (“Through ANCSA, Alaska Native corporations hold title to roughly 44 million acres of land held in private corporate ownership.”).

by the Certification form indicates that the Secretary is considering this approach. Under this approach, the ANCs will have an outsized impact. Together, the ANCs own approximately 44 million acres of land.[3] These landholdings are equivalent to the total trust land base of *all federally recognized Tribal governments* in the lower-48 states combined.[4] The 12 regional ANCs alone have over 138,000 shareholders, employ more than 43,000 people worldwide, and generated more than $10.5 billion in revenues in 2018.[5] Under any formula that considers ANCs' corporate shareholders, land base, employees, and expenditures, the relief funds available to federally recognized Tribal governments, including the Ute Indian Tribe, will be vastly reduced.

Under either scenario, because some ANCs are closely affiliated with federally recognized Alaska Native villages, and many corporate shareholders are tribal members, some entities in Alaska would effectively "double dip" (in some cases "triple dip") from the limited pool of funds, with the same community receiving duplicative funding – one allotted to the corporation(s), and the other directly to the federally recognized Tribal government. On the other hand, if the Secretary properly allocates and distributes Title V funds directly to federally recognized Tribal governments only, Alaska Native villages may use their funds in partnership with ANCs if they determine that is the most effective way to meet the needs of their communities, consistent with the other requirements of the Act.

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[3] Res. Dev. Council, *Alaska Native Corporations*, https://www.akrdc.org/alaska-native-corporations (last visited Apr. 22, 2020).

[4] Office of the Special Tr. for American Indians, U.S. Dep't of the Interior, *OST Statistics and Facts*, https://www.doi.gov/ost/about_us/Statistics-and-Facts (last visited Apr. 22, 2020) ("The Indian trust consists of 55 million surface acres and 57 million acres of subsurface minerals estates held in trust by the 23 United States for American Indians, Indian tribes and Alaska Natives. Over 11 million acres belong to individual Indians and nearly 44 million acres are held in trust for Indian tribes.").

[5] Res. Dev. Council, *Alaska Native Corporations*, https://www.akrdc.org/alaska-native-corporations (last visited Apr. 22, 2020).

The Ute Tribe has submitted its certification for CARES Act funds with all required information to the Secretary to receive funds under Title V. While the exact amount that the Secretary will divert from the Tribe to for-profit corporations cannot yet be determined, there is no dispute that the amount of money that the Tribe will receive will be substantially lower if the Secretary carries through with his plan to provide Title V money to ANCs. "Any monetary loss suffered by the plaintiff satisfies this element [injury-in-fact]; '[e]ven a small financial loss" suffices. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55 (2d Cir. 2016) (quoting *Nat. Res. Def. Council, Inc. v. U. S. Food & Drug Admin.,* 710 F.3d 71, 85 (2d Cir. 2013).

While the economic loss described above is sufficient by itself to establish standing, the Tribe injury to the Tribe is not merely economic. As discussed in the statement of facts above, and in Ute Business Committee Chairman Duncan's accompanying declaration, the Tribe needs the money at issue to provide governmental services that are vital to the health and welfare of tribal members, tribal employees, and others who live or visit the Reservation. In fact, the money allocated in Title V of the CARES Act must be used only for governmental services to respond to a deadly virus, a virus that has sickened nearly 1,000,000 American to date and that has killed nearly 50,000 Americans. Congress provided the funding so that tribes had funds to lessen some of the harm from COVID-19. Taking those funds from the Tribe creates self-evident harm to the Tribe.

It is also clear that this Court currently has the power to redress the injury. That is, in fact, the whole purpose of this suit seeking to enjoin the Secretary from giving money earmarked for the Tribe to the ANCs.

After the Secretary allowed for-profit corporations to apply for money that Congress reserved for tribal governments, the Secretary has subsequently stated that he has not yet decided

whether he will give those corporations parts of the money reserved for tribal governments. That statement by the Secretary provides a glimmer of hope that the Secretary is going to abandon the action that the Tribe is challenging; but the possibility that the United States will abandon wrongful action is insufficient to moot this case. Instead, the case would only become moot if the Secretary were to make it "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n. 10 (1982). *See also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). That criteria for mootness has not yet occurred. The case is not moot, and payment of funds is imminent. This Court has jurisdiction, and the Tribe has standing to bring this suit.

II. ALL FOUR FACTORS FOR INJUNCTIVE RELIEF STRONGLY SUPPORT ISSUANCE OF THE REQUESTED INJUNCTION.

To obtain an injunction the Tribe must show that: 1) it is "likely to succeed on the merits," 2) it is "likely to suffer irreparable harm in the absence of preliminary relief," 3) "the balance of equities tips in his favor," and 4) "an injunction is in the public interest." W*inter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). "In this jurisdiction, courts evaluate the four preliminary injunction 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.'" *Dall. Safari Club v. Bernhardt,* No. 19-CV-03696 (APM), 2020 WL 1809181, at *3 (D.D.C. Apr. 9, 2020) (Mehta, J.) (quoting *Davis v. Pension Benefit Guar. Corp.,* 571 F.3d 1288, 1291-92 (D.C. Cir. 2009)). "The same standards apply for both temporary restraining orders and preliminary injunctions." *Experience Works, Inc. v. Chao,* 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977)). Here, all four factors strongly favor the issuance of injunctive relief.

A. THE TRIBE IS LIKELY TO PREVAIL ON THE MERITS

The primary merits issue in this case is one of statutory interpretation, and the applicable law is therefore familiar to this Court.

> In statutory construction, we begin 'with the language of the statute.' *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438,450 (2002). If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent' ... '[t]he inquiry ceases.' *Id."*

Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016). Here, the plain language of the CARES Act is clear and conclusive, and it is dispositive of the merits of this dispute.

Title V of the CARES Act only provides funding for governments. The Act defines the three types of governments that are eligible for funds under Title V. Those three are state governments, local governments, and tribal governments. In contrast Titles I, II, and IV provide funding for corporate entities. Quite simply ANCs are corporations, and they are required to look to Titles I and II for relief.

States, Tribal governments, and units of local government must use Title V funds "to cover only those costs of the State, Tribal government, or unit of local government that— (1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19); (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020." Section 601(d).

This Court is required to interpret the CARES Act consistent with that clear overarching structure. Title V is for governments, not for-profit corporations.

Drilling down further, the CARES Act defines tribal governments to exclude for-profit corporations. "The term 'Tribal government' means the *recognized governing body* of an Indian Tribe." Section 601(g)(5) (emphasis added). Title V further provides that "[t]he term 'Indian Tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304(e))." Section 601(g)(1).

The Indian Self-Determination and Education Assistance Act (ISDEAA) defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. §1601 et seq.], *which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*." 25 U.S.C. § 5304(e) (emphasis added). Notably, while this definition includes Alaska Native villages or regional or village corporations, it does so only when those entities are also "*recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*." *Id.* (emphasis added)

Secretary of the Treasury Mnuchin can perhaps be forgiven for not knowing what a "*recognized* governing body of an Indian Tribe" is, but anyone familiar with federal Indian law knows exactly what that means. "Recognized" means recognized by the United States as a tribal government, by inclusion on the federal list of recognized Tribes.

> "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to- government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members.

H.R. Rep. 103-781, at 3-4 (1993). Because federal recognition is of immense importance to tribes and the United States, Congress requires the Executive Branch to maintain, and to publish yearly, the list of recognized tribes. 25 U.S.C. § 5131 (formerly 25 U.S.C. § 479a-1) ("The Secretary [of the Department of Interior] shall published in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."). *See generally* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol'y Rev. 271, 275 (2001) (describing the process and standards for becoming a "federally recognized Tribe" and for being added to the annually published list of federally recognized tribes).

Dispositivly, ANCs are not on that list of recognized tribes. 85 Fed. Reg. 5462 (Jan. 30, 2020). There are currently exactly 574 federally recognized Tribes. 229 of those are in Alaska. 85 Fed Reg. 5466-67. There are other entities, like ANCs, unrecognized tribes, and other entities, which are not federally recognized tribes but which have some relationship to a federally recognized Tribe. But Title V of the CARES Act is for governments, and Section 601(a)(2)(B) is for tribal governments. ANCs are simply not tribal governments. *See also Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 534 (1998).

The Act specifies that the Secretary "shall" distribute Title V relief funds to "each State and Tribal government." Section 601(b)(1). The statutory language is unambiguous and mandatory. Thus, the Secretary has no discretion to disregard Congress's mandate by designating and treating ANCs as "Tribal governments." The Secretary is required to carry out the Congressional intent by disbursing relief funds to federally recognized Tribal governments, exclusive of ANCs.

Because the language and the structure of the CARES Act are clear, the Court need not turn to legislatively history, but that legislative history confirms that Title V is limited to relief for governments, including tribal governments. A few examples will suffice:

> We must help our local governments, and we will in this legislation. It will be distributed between both the local governments and the State. In the end, State and local governments will now get $150 billion, with $8 billion set aside for Tribal governments.

166 Cong. Rec. S2022-04, S2026-27 (March 25, 2020) (Statement of Senator Schumer).

> It is so important that we give State and local governments and tribes the resources they need to be on the frontlines in fighting this disease"

166 Cong. Rec. S2022-04, S2026-27 (March 25, 2020) (Statement of Senator Cantwell, contrasting relief under Title V with other portions of the CARES Act for corporations).

> One of the last provisions added to this bill was Title [VJ, which establishes a Coronavirus Relief Fund that provides $150 billion for the Secretary of Treasury to disseminate to States, Tribal Governments, and units of local government in fiscal year 2020. These funds are to alleviate severe financial 11ressure these governments are under during this public health emergency.

166 Cong. Rec. E346-05 (Mar. 27, 2020) (Colloquy) (Statement of Congressman Gallego).

> I was pleased to see and support an additional $8 billion for payments to Tribal governments through the Coronavirus Relief Fund in this bill. Because of the Federal Government's unique government-to-government relationship with Indian Tribes, providing these funds to Tribes directly-rather than through the States-is the right approach."

166 Cong. Rec. E341-02 (Mar. 27, 2020) (Colloquy) (Statement of Congressman Joyce).

The Tribe is likely to prevail on the merits of this case, because Title V of the CARES Act is the title which provides relief for governments. Relief for corporations is not part of Title V, but is provided for in other titles.

B. THE TRIBE WILL BE IRREPARABLY HARMED IF INJUNCTIVE RELIEF IS NOT GRANTED, AND THAT HARM IS IMMINENT.

As discussed in section I, above, the Tribe will be deprived of money if the Secretary is not enjoined. That deprivation is imminent, because Congress directed that the Secretary disburse all of the $8,000,000,000 by April 26, 2020. The injury is irreparable because once the Secretary disburses the $8,000,000,000, there is simply no legal remedy.

"It is a well-settled matter of constitutional law that when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation." *City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1424 (D.C. Cir. 1994); *id.* at 1426 (stating that "once the relevant funds have been obligated, a court cannot reach them in order to award relief"). *See also Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) ("Once the chapter 1 funds are distributed to the States and obligated, they cannot be recouped. It will be impossible in the absence of a preliminary injunction to award the plaintiffs the relief they request if they should eventually prevail on the merits."). *Compare Modoc Lassen Indian Hous. Auth.et al v. United States Dep't of Hous. & Urban Dev.,* 881 F.3d 1181 (10th Cir. 2017) *with Lummi Tribe of the Lummi Reservation, Washington et al v. United States,* 870 F.3d 1313 (Fed. Cir. 2017).

Modoc and *Lummi* both arose out of a program like that here, where Congress appropriated a finite amount of funds, and directed the Executive Branch to divide and distribute all of those funds between eligible entities. Plaintiff tribes in both cases complained they received a smaller share of the appropriation because the Executive Branch allocated funds incorrectly. Modoc filed that claim in a federal district court, while Lummi filed the claim in the federal court of claim.[6]

[6] The Lummi Nation also filed a claim based upon federal breach of contract. That claim remains unresolved but there is no potential for an analogous claim here.

The federal appellate court in *Lummi* held that the tribes could not bring suit for violation of federal statute in the federal court of claims, while the federal appellate court in *Modoc* held that the tribe could not obtain relief in a district court after the funds had been expended.

The injury is also irreparable because the federal sovereign immunity would prevent the Tribe from bringing a later suit to recover damages from the Defendant. *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008); *Modoc Lassen Indian Hous. Auth.*, 881 F.3d 1181.

The Secretary is required to disburse all $8,000,000,000 by April 26. Once he makes that required distribution, there is no remedy. The Tribe therefore has shown that an injunction is necessary to prevent immediate irreparable injury.

C. THE BALANCE OF HARMS AND PUBLIC INTEREST STRONGLY SUPPORT INJUNCTIVE RELIEF.

The discussion of the facts and law above show that the balance of harm and public interests strongly favor injunctive relief. Because the Secretary is the defendant, the balance of harms and public interest factors merge, *Jubilant DraxImage, Inc. v. U.S. Int'l Trade Comm'n*, 396 F. Supp. 3d 113, 120 (D.D.C. 2019). In Title V, Congress determined that providing $8,000,000,000 to tribal governments was in the public interest. Congress has defined the public interests, and this Court must require the Secretary to carry out that congressional determination.

CONCLUSION

The Ute Tribe and other tribes are facing a crisis. COVID-19 is threatening the health of its members and others who live and work on its Reservation. The tribal government has incurred and will incur additional costs to provide governmental services during this crisis; but at the same time the Tribe's sources of income are dropping.

Congress properly chose to provide for relief to tribal governments and other governments in Title V of the CARES Act, and this Court should issue the injunctive relief requested, so that tribes promptly receive the money as mandated by Congress.

CERTIFICATE OF COUNSEL

Counsel certifies that the complaint, the motion for TRO, and the accompanying declarations and exhibits to the motion will be emailed to Jason Lynch@usdoj.gov , based upon Counsel's understanding that Mr. Lynch represents the United States in a related matter, and delivery to him is the most effective way of providing prompt notice to Defendant.

Respectfully submitted this 23rd day of April, 2020.

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