

[DC Circ. Seems Ready To Wade Into Tribal Virus Funding Fight](#)

Law360 -- The D.C. Circuit wasn't buying the U.S. Department of Treasury's line that the appellate court has no power to weigh in on how the agency decided to dole out virus relief funds to the Shawnee Tribe at oral arguments Friday morning.

The government has argued that the Coronavirus Aid, Relief and Economic Security Act gave the Treasury secretary a wide berth to decide how to disburse the funds set aside to help tribes offset an increase in expenditures due to the pandemic.

Treasury Secretary Steven Mnuchin decided to use Indian Housing Block Grant population data as a guide to determine allotment, but the Shawnee Tribe says the government relied on "clearly false" information that indicated the Shawnee had a tribal population of zero despite better data being available. Neglect of the better data meets the textbook definition of arbitrary and capricious, according to the tribe. Judges on Friday's panel seemed to agree, at least to the extent that Mnuchin's decision was reviewable. U.S. Circuit Judge Merrick Garland, in particular, spent a considerable amount of time exploring the issue. "Imagine the secretary said, 'I'm going to base my determination on the alphabet,'" Judge Garland said. "And the tribes that begin with the letters A through M get the money, and tribes that begin with M through Z do not — would we be able to review that?"

Judge Garland quickly interrupted when the government's answer began with, "I don't think so."

"That's sort of a yes or no question," the judge said. "You can explain, but I need a yes or no."

At the heart of the problem lies the type of data that the Treasury Department leaned on to divvy up the funds. The agency used the number of people living inside of each tribe's so-called formula area to determine tribal population and then extrapolated from there the size of its total population. Tribes with the greatest extrapolated population received the largest pandemic grants.

Formula areas are essentially property that is under the control of the tribe, such as reservations or lands that the government holds in trust for tribal use. But not all tribes have formula areas — the Shawnee Tribe being among them. So even though the tribe has more than 3,000 members, the Treasury Department chose a dataset that showed they had none. And instead of receiving \$6 million to help offset their budget during the pandemic, like other tribes of their size, the suit claims they only received \$100,000. The tribe lost its suit at the district court level after an Oklahoma federal judge found that their claims fell flat because the coronavirus relief bill gave the secretary the discretion to dish out the funds as he saw fit. The government is arguing the same, but other members of the panel seemed to think otherwise. U.S. Circuit Judge David S. Tatel started down that line of questioning right from the start, saying he wanted to get to "the core" of the case.

"You would be totally right about this if the statute said what you just said, that the money shall be distributed on the basis of the standard adopted by the secretary, but that's not what it says," Judge Tatel said. "It says 'based on increased expenditures as determined by the secretary.'"

So even if Secretary Mnuchin's decision to use population data wasn't reviewable, that population data would still need to be an accurate approximation for increased expenditures, Judge Tatel said.