

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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THE SHAWNEE TRIBE,

*Plaintiff,*

v.

UNITED STATES DEPARTMENT OF THE  
TREASURY, et al.

*Defendants.*

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Case No. 1:20-cv-01999-APM

THE MICCOSUKEE TRIBE OF INDIANS OF  
FLORIDA,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF THE  
TREASURY and UNITED STATES OF  
AMERICA,

*Defendants.*

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Case No. 1:20-cv-02792-APM

PRAIRIE BAND POTAWATOMI NATION,

*Plaintiff,*

v.

SECRETARY, U.S. DEPARTMENT OF  
TREASURY

*Defendant.*

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Case No. 1:21-cv-012-APM

**MOTION**

Pursuant to Federal Rules of Civil Procedure 54(b) and 65 and Local Civil Rule 65.1, Plaintiff Prairie Band Potawatomi Nation (“Prairie Band Potawatomi” or “Prairie Band”), hereby moves to modify the preliminary injunction entered by this Court on April 26, 2021 (Dkt. No. 74, No. 20-cv-01999) to increase the amount set aside for the Prairie Band Potawatomi from \$7.6 million to \$11,680,105. The reasons for this increase in the amount of the injunction are more fully explained below. In addition, the Prairie Band requests that this Court order Defendant Secretary of the Treasury (“Treasury”) to specifically earmark the preliminary injunction funds separate and apart from funds set aside for other tribal governments, such as the Alaska Native Corporations (“ANCs”), so that the preliminary injunction will remain intact regardless of the outcome of litigation with other tribes or distributions to other tribes. As described below in the following Memorandum of Law, the modification is necessary to preserve the *status quo* and ensure that Prairie Band has a full and complete remedy in the event that it prevails in this litigation, as the Court has already found is likely to occur. (*Id.* at 8.)

**MEMORANDUM OF LAW**

On April 26, 2021, the Court issued a preliminary injunction (Dkt. No. 74, No. 20-cv-01999), finding that the Prairie Band Potawatomi was likely to succeed on the merits of its Administrative Procedure Act claim that Treasury had acted arbitrarily and capriciously in distributing funds to Tribal governments under the CARES Act. The preliminary injunction enjoined Treasury from disbursing \$9.6 million of remaining CARES Act funds, \$7.6 million of which was intended to cover Prairie Band’s estimated award shortfall. In this motion (the “Motion”), Prairie Band Potawatomi seeks modification of the preliminary injunction in two ways.

First, Prairie Band Potawatomi seeks to enjoin Treasury from disbursing an additional \$4,033,042 because the current injunction, as it stands, will likely not satisfy the entire shortfall

owed to Prairie Band. Treasury never provided any detail to the plaintiffs as to how Treasury computed Prairie Band's first award of CARES Act funds of \$2,456,891. On May 5, 2020, however, Treasury did disclose an excel spreadsheet, assigning an IHBG population metric of 883 to the Prairie Band.<sup>1</sup> The Prairie Band's initial complaint estimated the amount of money wrongfully withheld from the Prairie Band based on that population figure.<sup>2</sup> Only after Treasury filed the Administrative Record in this case on March 3, 2021 did it become clear that Treasury used the IHBG-derived enrollment of 747, rather than 883, as initially stated by Treasury. That lower number operated to *increase* the shortfall to Prairie Band, resulting in an undercount of its members by almost 84% as set forth in the second amended complaint. At the same time, dividing the distribution to Prairie Band by 747 rather than 883 *increased* the amount paid per counted tribal member to \$3,289. Of course, Prairie Band's actual certified population is 4,561, meaning that Treasury did not account for 3,814 (4,561 minus 747) Prairie Band members. The approximate shortfall owed to Prairie Band is therefore \$12,544,246 million (\$3,289 per uncoun-  
ted tribal member), as opposed to the \$7.6 million already enjoined. The additional \$4,033,042 that Prairie Band seeks to enjoin will cover the difference (while also giving credit for the recent supplemental distribution to Prairie Band in the amount of \$864,171).

Second, Prairie Band seeks to modify the preliminary injunction so that it specifically directs Treasury to designate and set aside the enjoined funds to satisfy any judgment owed to Prairie Band. Since the injunction was issued, Prairie Band has sought assurance from Treasury's

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<sup>1</sup> This document and the linked spreadsheet are attached as Exhibits F and G to the Rossetti Declaration dated January 6, 2021, filed in support of the Prairie Band Potawatomi's initial motion for preliminary relief in this action. *See* Dkt. No. 4-8, 4-9, No. 1:21-cv-00012.

<sup>2</sup> That estimate was further supported by Appendix A to the Harvard Report, Policy Brief No. 2, dated May 18, 2020, attached as Exhibit L-1 to the Rossetti Declaration dated January 6, 2021 in this action. Dkt. No. 4-15, No. 1:21-cv-00012.

counsel that the enjoined funds will not be disbursed to other parties when the related *Chehalis* litigation is resolved by the Supreme Court. Treasury has declined to provide any such assurance, let alone any information, about the enjoined funds and whether they are susceptible to being paid out during the pendency of this suit. Since Treasury has repeatedly taken the position that any additional distributions or payments to Prairie Band can only be provided out of funds appropriated under the CARES Act (a position with which plaintiffs strongly disagree, *see* Dkt. No. 65, No. 1:20-cv-01999 at 5-7), and since all such appropriated funds, according to Treasury, are now either set aside for the ANCs or being paid out to other tribes in the most recent distribution, it is necessary to provide further specificity as to the preliminary injunction so that the remedy which the parties are now relying on does not prove illusory.

Accordingly, to preserve the *status quo* and ensure the availability of a complete remedy in this action, Prairie Band respectfully moves to modify the preliminary injunction. In the alternative, Prairie Band seeks to enjoin the pending distribution of an additional \$83 million taken from the funds set aside for the ANCs, in order to preserve a remedy relating to its challenges to both the 2020 and the 2021 Distributions as pled in the second amended complaint.

### **BACKGROUND**

This case concerns Treasury's well-documented failures to distribute COVID-relief funding rationally and fairly to tribes as Congress directed in the CARES Act, 42 U.S.C. § 301 *et seq.* Relevant to this Motion, as part of the 2020 Distribution, Treasury awarded Prairie Band \$2,456,891. Declaration of Carol E. Heckman ("Heckman Dec."), attached hereto, at ¶ 2. Before commencing this action and having access to the Administrative Record (which was produced by Treasury on March 3, 2021 (Dkt. No. 61, No. 1:20-cv-01999)), Prairie Band Potawatomi estimated its damages based on preliminary information provided by Treasury as explained in greater detail

above. *Id.* ¶ 3. Using Treasury’s own documentation showing that it relied on an IHBG-derived population of 883 for Prairie Band, Prairie Band alleged an 80% undercount of its actual enrolled members in the 2020 Distribution. *Id.* However, the Administrative Record reflects that the IHBG Metric upon which Treasury relied upon was in fact even lower. AR-02 at 9 (FY 2020 IHBG Final Allocation); Heckman Dec. ¶ 4. Specifically, Treasury relied upon an IHBG Metric of 747 for the Prairie Band Potawatomi, as opposed to the IHBG metric of 883.<sup>3</sup> *Id.* This means that Treasury actually undercounted the Prairie Band members by almost 84%, significantly more than had been originally understood.

Prairie Band Potawatomi commenced this litigation challenging the 2020 Distribution on January 4, 2021.<sup>4</sup> Dkt. No. 1, No. 1:21-cv-00012. A few days later, on January 6, 2021, Prairie Band Potawatomi filed a motion for a preliminary injunction (Dkt. No. 4, No. 1:21-cv-00012) seeking to restrain Treasury from disbursing no “less than \$7,647,063” in order to preserve a remedy while the litigation proceeds. It is now clear that this original calculation was too low based on the information contained in the later filed Administrative Record, showing that Treasury

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<sup>3</sup> The discrepancy in IHBG Metrics of 747 and 883 for Prairie Band appears to be due to the fact that an IHBG Metric may reflect either “single race” or “multi-race” American Indian/Alaska Native (“AIAN”) populations within a HUD-identified formula area. Prairie Band’s “single race” IHBG Metric is 747, while its “multi-race” is 883.

<sup>4</sup> On June 8, 2020, Prairie Band Potawatomi commenced litigation raising similar claims to those set forth in the instant action. *Prairie Band Potawatomi Nation v. Mnuchin*, Case No. 1:20-cv-01491 (D.D.C.). This Court denied Prairie Band Potawatomi’s motion for a preliminary injunction to restrain Title V Funds that had not yet been distributed on the grounds, *inter alia*, that Treasury’s allocation methodology was committed to agency discretion by law and thus unreviewable under Section 701(a)(2) of the Administrative Procedure Act. The Prairie Band Potawatomi then voluntarily dismissed its action. The D.C. Circuit’s decision in *Shawnee Tribe*, however, effectively reversed this Court’s earlier decision and the Prairie Band promptly refiled suit.

in actuality relied on the lower IHBG Metric of 747 as noted above. AR-02 at 9 (FY 2020 IHBG Final Allocation); Heckman Dec. ¶ 4.

After the Administrative Record was filed and Prairie Band for the first time understood that the undercount was far greater than initially believed, the Plaintiffs filed a summary judgment motion which noted the corrected dollar value of the Prairie Band's claim. *See* Dkt. No. 70 at 8 n.2, No. 1:20-cv-01999. For some time after that motion was filed, however, the Prairie Band believed that a resolution was possible given Treasury's repeated urging that further briefing be put off pending the "new methodology" to be implemented. Heckman Dec. ¶ 6.

On April 26, 2021, this Court granted Prairie Band Potawatomi's motion for a preliminary injunction as well as one sought by Plaintiff Miccosukee Tribe. Dkt. No. 74, No. 20-cv-01999. In doing so, the Court preliminarily enjoined the Secretary from distributing an additional \$9.6 million of the remaining CARES Act funds, \$2 million of which was set aside for the Miccosukee Tribe and \$7.6 million for Prairie Band Potawatomi. *Id.* at 8.

A few days later, Treasury announced a new distribution award (the "2021 Distribution") on April 30, 2021. *See* Ex. A to Heckman Dec. Under the 2021 Distribution, which was apparently intended by Treasury to remedy the deficiencies with the first distribution, Prairie Band Potawatomi received a supplemental award of just \$864,161, or \$225 per uncounted citizen. Ex. B to Heckman Dec. In contrast, Plaintiff Miccosukee received a supplemental award that amounted to \$1,350 per uncounted citizen; Shawnee, \$1,721 per citizen. *See* Heckman Dec. ¶ 11. Had Treasury relied upon actual enrollment data as Prairie Band has long complained, Prairie Band Potawatomi estimates that it would be due \$12.5 million, as opposed to the \$864,161 it received in the 2021 Distribution. *Id.* ¶ 5.

Now that the Prairie Band has finally learned that that “new methodology” only provides it with \$225 per uncounted member, whereas it provides far more to tribes like Shawnee, hope of a resolution has evaporated. On May 21, 2021, Prairie Band therefore filed an amended complaint that, among other things, challenges the 2021 Distribution as an arbitrary and capricious implementation of the CARES Act. Dkt. No. 82, No. 20-cv-01999. It also corrects the amount sought by the Prairie Band as explained herein. *Id.* This motion to correct the amount in the preliminary injunction follows from the second amended complaint. *Id.*

### ARGUMENT

The Court’s power to modify a preliminary injunction, “like the power over all its orders, is inherent.”<sup>5</sup> *Trustees of IAM Nat’l Pension Fund v. M & K Employee Solutions, LLC*, No. 20-cv-433, 2021 WL 1546947, at \*11 (D.D.C. Apr. 20, 2021) (quoting *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir. 1984)). Under the Federal Rules of Civil Procedure, the Court is free to “revise[] at any time” before final judgment “any order or other decision.” Fed. R. Civ. Pro. 54(b). “When modifying a preliminary injunction, a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place.” *Trustees*, 2021 WL 1546947, at \*11 (quoting *Sierra Club*, 732 F.2d at 256); *see also Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000) (explaining that trial court “has complete power over interlocutory orders” and “may revise them when consonant with equity”). Modifying a preliminary injunction, unlike modifying a final judgment or permanent injunction, does “not require proof of a significant change in circumstances.” *Sierra Club*, 732

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<sup>5</sup> A preliminary injunction is an interlocutory “court order commanding or preventing an action.” Black’s Law Dictionary (11th ed. 2019).

F.2d at 257. The Court must merely analyze “whether or not the *status quo* is maintained by the modification.” *Id.*

Here, to preserve the *status quo*, the preliminary injunction must be modified in two ways. First, the amount enjoined must be increased by an additional \$4,033,042. As explained above, Prairie Band only recently learned that the numbers used to calculate its initial demand were too low. Now that the Administrative Record makes clear that Treasury used an IHBG Metric for Prairie Band of 747 rather than 883, the 2020 Distribution of \$2,456,891 amounted to \$3,289 for each of the 747 tribal members identified by the IHBG Metric. Heckman Dec. ¶ 5. Based on a per capita extrapolation of this 2020 Distribution,<sup>6</sup> had Treasury used Prairie Band’s actual enrollment of 4,561, Prairie Band Potawatomi’s 2020 Distribution would have been \$15,001,129, translating to a shortfall in payment of \$12,544,246, as depicted below:

Per capita award (2020 Distribution)	x	Members not counted	=	Damages
\$3,289		3,814		\$12,544,246

The original estimate of \$7.6 million was too low and did not accurately reflect the evidence in the Administrative Record. In prior analysis of its shortfall, Prairie Band Potawatomi had assumed that Treasury had relied on an IHBG-derived enrollment of 883 based on a provisional dataset that was published by Treasury. Heckman Dec. ¶ 3. The Administrative Record now demonstrates that the final dataset on which Treasury relied reflected a value of 747

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<sup>6</sup> There is no evidence in the Administrative Record that suggests that such an extrapolation is somehow inaccurate or unreasonable. To date, Treasury has not provided any information as to how per capita awards varied from tribe to tribe.



for Prairie Band, not 883 as originally anticipated. *Id.* ¶ 4. Prairie Band has therefore recalculated the shortfall and updated its complaint accordingly. *See* Dkt. No. 82, No. 20-cv-01999.

Second, the injunction must be modified to direct Treasury to specifically designate and set aside the enjoined funds for the purpose of satisfying a judgment to Prairie Band. Otherwise, the injunction might very well prove illusory. Treasury has not ruled out paying out the remaining CARES Act funds, including the ostensibly enjoined funds, following the conclusion of the related *Chehalis* litigation. Indeed, despite multiple requests from Prairie Band's counsel, Treasury has failed to provide any information as to how the enjoined funds are in fact being earmarked or set aside. Heckman Dec. ¶ 8. Through counsel, Treasury has refused to clarify, for example, whether the enjoined funds are the same as or commingled with funds currently enjoined for the ANCs or were being set aside in a distinct way for the plaintiffs in this litigation. *Id.* Prairie Band therefore has no choice but to seek the Court's assistance in preserving the availability of a remedy.

The interests of justice clearly weigh in favor of the Court exercising its discretion to order these two relatively modest modifications to the preliminary injunction:

***The Prairie Band Potawatomi has already established that it is likely to succeed on the merits.*** This Court has already issued the underlying preliminary injunction, holding that the Prairie Band Potawatomi is likely to succeed on the merits of its APA challenge. That decision was preceded by the *Shawnee* decision in which the D.C. Circuit reached the same conclusion regarding a similarly situated tribe. *Shawnee Tribe v. Mnuchin et al.*, No. 20-5286, 984 F.3d 94 (D.C. Cir. 2021).

That Treasury has since issued a supplemental award to Prairie Band as part of the 2021 Distribution does not alter the analysis. The supplemental award does not moot Prairie Band's

APA challenge (if anything, it adds support to it), nor does it materially alter the remedy to which Prairie Band is entitled.

Under the 2021 Distribution, Prairie Band received just \$864,161, a fraction of the \$12.5 million shortfall to which it is owed. Further, the 2021 Distribution had no coherent connection to enrollment and was as irrational as the 2020 Distribution. While Treasury has yet to fully disclose the manner in which the 2021 Distribution was implemented, the incomplete information that Treasury has so far provided illustrates gross disparities in per capita awards from tribe to tribe that are the hallmarks of arbitrary and capricious decision-making, as summarized in the following chart:

	Payment	Certified Population #	IHBG Population	# of Members not Counted	\$ per Member not Counted
Shawnee	\$ 5,200,000	3,021	0	3,021	\$1,721
Miccosukee	\$ 820,000	605	0	605	\$1,355
<b>Prairie Band</b>	<b>\$ 864,000</b>	<b>4,562</b>	<b>747</b>	<b>3,815</b>	<b>\$225</b>

See Heckman Dec. ¶ 11.

As the chart illustrates, Prairie Band Potawatomi received a supplemental award of \$864,161, or \$225 per uncounted citizen. Plaintiff Miccosukee, on the other hand, received a supplemental award that amounted to \$1,350 per uncounted citizen; Shawnee, \$1,721 per citizen. Indeed, taking into account both the 2020 and 2021 Distributions, Plaintiff Shawnee has received \$5.3 million in funding for 3,000 enrolled citizens and an IHBG Metric of 0. Prairie Band Potawatomi, despite having 4,561 enrolled tribal members and an IHBG Metric of 747, has received just \$3.3 million in funding. Whether from a census or enrollment approach, there is no rational basis for allocating 40% *more* funds to Shawnee for an enrolled population that is 33% *lower*. This is exactly the type of irrational decision-making that courts routinely find arbitrary

and capricious. *See New Orleans Channel 20, Inc. v. F.C.C.*, 830 F.2d 361, 366 (D.C. Cir. 1987) (affirming standard that agencies must treat similarly situated parties alike); *Petroleum Commc'ns, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (overturning action where agency did not “justify its failure to take account of circumstances that appear to warrant different treatment for different parties.”).

***The Prairie Band will likely suffer irreparable harm unless the additional funds are enjoined and set aside.*** Treasury has not yet challenged the irreparable harm prong in this or the related cases where tribal plaintiffs sought to enjoin the distribution of CARES Act funds, likely because the risk of irreparable harm is undeniable. Once the Supreme Court decides the merits of the ANCs’ appeal in the related *Chehalis* case, Treasury may be free to disburse all of the remaining CARES Act funds. Once the funds are disbursed, they cannot be recouped. *See Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) (plaintiffs entitled to interim relief pending challenge to funding formula). Prairie Band is therefore at risk of forever losing funds it is “entitled to receive to cover costs of combatting the COVID-19 pandemic in [its] communit[y].” *Conf. Tribes of the Chehalis Reservation v. Mnuchin*, 456 F. Supp. 3d 152, 164 (D.D.C. 2020). The requested preliminary relief will merely ensure that Prairie Band Potawatomi actually has available the full and complete remedy that the Court sought to protect last month when it issued the injunction.

***The balance of equities and public interest clearly support enjoining the additional funds and setting them aside.*** Treasury did not file any opposition to Prairie Band Potawatomi’s first request for a preliminary injunction seeking to have the Secretary enjoined from disbursing certain funds, the injunction now at issue. Dkt. No. 4, No. 1:21-cv-00012. This fact should betray any new concern that Treasury might seek to raise regarding the requested modifications. Indeed, the modifications that Prairie Band seeks are relatively modest and straightforward: based on

disclosures by Treasury in the litigation, the math underlying the initial damages computation yields too little, and is being corrected by virtue of the second amended complaint and this motion. The modifications are merely for the purpose of preserving the *status quo* for the pendency of this action. The temporary delay in disbursing these additional funds to which the Prairie Band is likely entitled will not unfairly prejudice any other tribe nor Treasury. Further, Treasury is not prejudiced by this upward adjustment of the amount enjoined because all of the necessary facts to calculate Prairie Band Potawatomi's claim, including Prairie Band's certified population and Treasury's actual allocation formulas, have been known to Treasury from the very beginning. Accordingly, the equities overwhelmingly favor modification of the preliminary injunction.

### **CONCLUSION**

Based on the foregoing and pursuant to Federal Rules of Civil Procedure 54(b), 65, and Local Civil Rule 65.1, Prairie Band Potawatomi respectfully requests that the Court modify its prior preliminary injunction to (i) enjoin an additional \$4,033,042 on top of the \$7.6 million already enjoined, and (ii) direct Treasury to specifically designate and set aside such funds for the purpose of satisfying any judgment to Prairie Band.

Dated: May 25, 2021

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