

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRAIRIE BAND POTAWATOMI NATION

Plaintiff,

v.

STEVEN T. MNUCHIN, in his official capacity
as SECRETARY, UNITED
STATES DEPARTMENT OF THE
TREASURY

Defendant.

Case No.:

MOTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiff Prairie Band Potawatomi Nation (“Prairie Band Potawatomi”), hereby moves for a temporary restraining order and preliminary injunction that restrains Defendant Steven T. Mnuchin (“Secretary Mnuchin”), Secretary of the United States Department of the Treasury (“Treasury”), from disbursing CARES Act¹ funds until further order of this Court. Without this Court’s intervention, such disbursements are expected to take place imminently.

MEMORANDUM OF LAW

I. INTRODUCTION

In this motion (“Motion”), Plaintiff seeks to restrain Treasury from disbursing \$3.2 billion dollars of CARES Act funds to “Tribal governments”² until it adopts an allocation methodology

¹ Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. 116-136, 134 Stat. 281 (2020)

² “Tribal governments” is the term used to describe entities such as the Prairie Band Potawatomi in the CARES Act and will therefore be used herein.

that corrects its underfunding of tribes like Prairie Band Potawatomi that resulted from Treasury's arbitrary and capricious decision to ignore tribal enrollment when making distributions on the basis of Tribal population. Plaintiff believes that the disbursement of these funds ("Title V Funds") is imminent. For the reasons that follow, this Court should issue a TRO pending this Court's consideration of Plaintiff's meritorious Administrative Procedures Act challenge. (*See* Compl, (Doc. 1)).

In support of this Motion, Plaintiff submits the following: (i) its Complaint ("Complaint" (Doc. 1)), which is incorporated by reference herein; (ii) the Declaration of Michael G. Rossetti, dated June 8, 2020 ("Rossetti Declaration"), which sets forth certain materials underlying Treasury's adoption of an allocation methodology for the Title V Funds; (iii) the Declaration of Joseph P. Rupnick, Tribal Council Chairman, Prairie Band Potawatomi ("Rupnick Declaration"), dated June 3, 2020, which addresses Prairie Band Potawatomi's participation in Treasury's administrative process and the imminent and irreparable harm faced by Plaintiff; and (iv) the Declaration of Eric C. Henson ("Henson") ("Henson Declaration"), Adjunct Lecturer in Public Policy, Harvard Kennedy School, Harvard University, which attaches two academic papers written by Henson and his colleagues on behalf of The Harvard Project on American Indian Economic Development ("HPAIED"). These papers are referred to as HPAIED Paper 2 (Henson Dec., Ex. 1) and HPAIED Paper 3 (Henson Dec., Ex. 2).

II. BACKGROUND

A. The Cares Act and the Title V Coronavirus Relief Fund

Title V of the CARES Act amends the Social Security Act (42 U.S.C. § 301 *et seq.*), and appropriates \$150 billion for "payments to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). Of the \$150 billion, Congress set aside \$8 billion for

payments to Tribal governments. *Id.* § 801(a)(2)(B). The Prairie Band Potawatomi is a federally recognized Tribal government.

Although Congress mandated that United States Census Bureau (“Census Bureau”) population data was to be used to determine the distribution of Title V funds to States and units of local government (42 U.S.C. § 801(8)), there was no such requirement for distributions to Tribal governments.³ Instead, Treasury was given authority—*in consultation with* the Department of the Interior and *Tribal governments*—to determine the appropriate allocation. *Id.* Specifically, Congress directed:

From the amount set aside under subsection (a)(2)(B) for fiscal year 2020, the amount paid under this section for fiscal year 2020 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.

Id. (emphasis added).

B. Treasury Solicits Information from Tribal Governments

As directed by Congress, on April 2, 2020, and April 9, 2020, Treasury and the Office of the Assistant Secretary—Indian Affairs, United States Department of the Interior, held telephonic consultation sessions, where federal officials heard from representatives of Tribal governments across the United States. Treasury also solicited written comments from Tribal governments

³ Tribal governments are treated as a distinct category from state and local governments in Title V. *See e.g. Id.* at § 801(a)(1) (referencing payments to “States, Tribal governments, and units of local government”)

regarding their views on potential methodologies for the allocation. Prairie Band Potawatomi participated in both consultations and submitted written comments. (Rupnick Dec., ¶5, Ex. A.).

Following the conclusion of the consultation period, on April 13, 2020, Treasury published a form titled “Certification for Requested Tribal Data” on the Treasury’s website. The “Certification for Requested Tribal Data” sought individualized Tribal enrollment data from all 574 federally recognized Tribal governments. Prairie Band Potawatomi provided the requested data to Treasury prior to Treasury’s April 17, 2020, deadline. (Rupnick Dec., B.). Prairie Band Potawatomi Nation Tribal Council Chairman Joseph P. Rupnick certified Plaintiff’s actual tribal enrollment of 4,561. (*Id.*) (The data received by Treasury in response to this solicitation is referred to as the “Actual Tribal Enrollment Metric” or “ATE Metric.”)

C. Without Notice, Treasury Changes Course and Uses a Preexisting HUD Metric to Allocate Funds

On May 5, 2020, Treasury unveiled its plan to allocate Title V Funds (the “Allocation Document” (Rossetti Dec., Ex. F)). Treasury elected to award immediately sixty percent of the Title V Funds, or \$4.8 billion, “based on Tribal population” (the “Population Award”) because “Tribal population [was] expected to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased costs to address medical and public health needs.” (*Id.* at p. 2). Treasury stated that the remaining forty percent of funds would be distributed at a later date based on employment and expense data. (Rossetti Dec., Ex. E.)

Despite requesting enrollment data from Tribal governments only weeks earlier, Treasury elected to allocate the Population Award “on population data used in the distribution of the Indian Housing Block Grant[.]” (Rossetti Dec., Ex. E.). This measure (“IHBG Metric”) is not a tally of,

or even estimate or projection of, Tribal population. (*See* Rossetti Dec., Ex. G (“IHBG SS” or “IHBG Spreadsheet”) (Column: “AIAN Persons”).)

The IHBG Metric consists of the Census Bureau’s estimate of the number of American Indian and Alaska Native (AIAN) within a formula area that is assigned to a Tribal government, “adjusted for any statistically significant undercount” (24 C.F.R. § 1000.330). (Allocation Document (Rossetti Dec., Ex. F at p. 2-3). That formula area consists of (i) a Tribal Government’s formula area as it existed in 2003; (ii) nine static categories of property (24 C.F.R. § 1000.302(1)(i)-(ix)); and (iii) areas added by application of a Tribal government and at discretion of HUD (24 C.F.R. § 1000.302(2)). Then, the IHBG Metric is capped at “**twice a...tribe’s enrolled population**” (24 C.F.R. § 1000.302(5) (emphasis added)).

According to Treasury, it adopted the IHBG Metric because it was purportedly a “reliable and consistently-prepared” metric. (Allocation Doc. (Rossetti Dec., Ex. F), p. 2). This unsupported assertion is belied by, among other things, the fact that twenty-five Tribal governments are listed in the IHBG Metric as having a population of zero, a practical impossibility. (IHBG SS (Rossetti Dec., Ex. G.) Moreover, the IHBG Metric, by its derivation from Census Bureau estimates, is an estimate of members of a certain race within a certain area, not an estimate of citizens of a Tribal government.⁴

⁴ Furthermore, as is explained in more detail below, the scope of tribal governmental responsibility is measured by its citizenship, which is what tribal enrollment measures. While methods of defining citizenship vary by tribal custom, the sovereign right of tribal governments to define their membership and thus their citizenship is a core principle of federal Indian Law. *S. Dakota v. Bourland*, 508 U.S. 679, 694 (1993) (“Indian tribes retain inherent authority...to regulate tribal membership.”)

Pursuant to Treasury's Population Award allocation, the Prairie Band Potawatomi received \$2,456,891, which equates to \$2,782.43 for each of the 883 individual members of the Prairie Band Potawatomi counted in the IHBG Metric (as compared to the actual enrollment of 4,561).⁵

Treasury has not yet disbursed the remaining \$3.2 billion of Title V Funds but is expected to do so imminently.

D. Academic Experts Criticize Treasury's "Arbitrary and Capricious" Choice of Population Metric

Two papers by the HPAIED analyzed and heavily criticized Treasury's decision to use the IHBG Metric for the purpose of determining each Tribal government's Population Award. (Henson Dec., Exs. 1-2).

In HPAIED Paper 2 (Henson Dec., Ex. 1), HPAIED criticized the qualitative relationship between the IHBG Metric and Tribal Population. HPAIED argued that the most accurate count of Tribal government population is enrollment because this is the true measure of "the population to which tribal governments are responsible and over which they have jurisdiction." (*Id.* at p. 14). The choice of the IHBG Metric represented an "arbitrary and capricious deviation[] from known facts regarding various tribes' enrolled citizenship counts."

In a subsequent policy paper ("HPAIED Paper 3" (Henson Dec., Ex. 2)), HPAIED argued that actual Tribal enrollment should be used as the proper metric for determining any population-based allocation of Title V Funds. "Tribes are governing entities, populated by citizens—persons to which tribal governments owe duties of service and over whom they have jurisdiction." (*Id.* at p. 6). A Tribal government's obligations to its citizens does not end at the Tribe's borders, as

⁵ There is no publicly available information concerning each Tribe's Population Award. Such information has been requested from Treasury, and this Complaint will be amended as soon as Treasury's data is revealed.

“tribe after tribe is reaching beyond its geographic borders to serve their off-reservation citizens[.]” (*Id.*). Thus, “the appropriate measure of population in a sound allocation formula is the number of enrolled tribal citizens immediately before the coronavirus pandemic struck the U.S.” (*Id.*)

Conversely, the use of the IHBG Metric, which “focuses on the racial make-up of the residents of reservations and related tribal areas” is “wholly inappropriate data for the purposes of federal funding—*i.e.*, the CARES Act—that is explicitly aimed at supporting the economic stability and function of tribal governments.” (*Id.*) Furthermore, as is explained more fully below, many Tribal governments do not participate in the IHBG program or, like Prairie Band Potawatomi, are not reliant on the IHBG program. For non-participating Tribal governments, their IHBG Metric reflects a population of zero. (IHBG SS (Rossetti Dec., Ex. G).)

In its papers, HPAIED also focused on the absurd and inequitable results caused by the IHBG Metric. In Paper 2 (Henson Dec., Ex. 1), HPAIED concluded that Treasury’s approach “creates demonstrable inequity in the form of gross and frequent ‘under-representation’ and ‘over-representation’ of hundreds of tribes in the allocation process[.]” (Henson Dec., Ex. 1, p. 13).

HPAIED cites the example of the Delaware Tribe of Indians (Eastern) to demonstrate the “gross anomalies” produced by Treasury’s use of race-based datasets rather than Tribal government enrollment data: “[A]ccording to the IHBG dataset utilized by Treasury, the Delaware Tribe of Indians (Eastern)...has an **enrolled** population of more than 11,000 tribal citizens[.]” (HPAIED Paper 2 (Henson Dec., Ex. 1), p. 7 (emphasis added)). Yet, as Delaware Tribe’s population was zero according to the IHBG Metric, the Delaware Tribe received a minimum Population Award of \$100,000. (*Id.*). If Treasury had used federally maintained enrollment figures (“HUD Enrollment Metric”), Delaware Tribe of Indians (Eastern) would have received \$24 million. (*Id.*).

HPAIED concluded that: (1) the use of different, publicly available, population datasets has a significant impact on the amount of funding each Tribal government received; (2) Treasury’s decision to use the IHBG Metric prepared for the allocation of HUD housing monies, and derived from racial population data, resulted in “a number of tribes receiving *de minimis payments*” that did not reflect the actual population of Tribal governments or Tribal needs; (3) “Treasury’s decision to use racial population data from HUD’s IHBG dataset demonstrably produce[d] arbitrary and capricious allocations of CARES Act funds across tribes,” and; (4) the IHBG Metric was not reliable for Treasury’s stated purpose, resulting in “arbitrary and capricious allocations of the CARES Act monies.” (HPAIED Paper 2 (Henson Dec., Ex. 1), p. 2).

E. Prairie Band Potawatomi Citizens are Undercounted Due to Treasury’s Approach

Prairie Band Potawatomi had 4,561 enrolled members as of January 1, 2020. (Rupnick Dec., ¶7). According to the HUD Enrollment Metric, Prairie Band Potawatomi had 4,841 enrolled members. (FY 2020 Final Summaries (Rossetti Dec., Ex. H), Column: “Enrollment”).

Based on the IHBG Metric used by Treasury, which is also maintained by HUD, Prairie Band Potawatomi’s Population Award of Title V Funds was based on a population of 883. (*See* Allocation Document (Rossetti Dec., Ex. F), FN 9 (*citing* IHBG SS (Rossetti Dec., Ex. G)).

According to HPAIED Paper 2, if Treasury had used the HUD Enrollment Metric⁶, reflecting an enrolled population of 4,841, Prairie Band Potawatomi’s Population Award would have been \$7.65 million greater. (*Id.*, p. 10, Table 4).

The IHBG Metric failed to account for Prairie Band Potawatomi citizens who resided outside of the “formula area” despite the fact that Prairie Band Potawatomi, like many other tribes,

⁶ The Dept. of Housing and Urban Development, *FY 2020 Estimate Allocation Sheets* (2020).

provides services to all of its citizens, regardless of whether they reside on or off reservation. (Rupnick Dec., ¶3). The Actual Tribal Enrollment Metric and the HUD Enrollment Data did not have these failings. Moreover, until Treasury elevated the import of the IHBG Metric to the sole determinant of \$4.8 billion in funding, it played only a small role in the IHBG formula, by directing only directed eleven percent (24 C.F.R. § 1000.324) of one of four factors (24 C.F.R. § 1000.310) that contribute to the IHBG program grants to Tribal governments.

The facial and obvious flaws in the IHBG Metric and these suitable alternatives were never addressed by Treasury in the Allocation Document (Rossetti Dec., Ex. F). Prairie Bank Potawatomi raised these concerns in correspondence dated June 2, 2020. (Rossetti Dec., Ex. J.) Two days later, on June 4, 2020, Treasury published *Coronavirus Relief Fund Frequently Asked Questions on Tribal Population* (the “FAQ”). (Rossetti Dec., Ex. K.) The FAQ still fails to reconcile the IHBG Metric with any coherent notion of “Tribal population” and continues to ignore better alternatives to the IHBG Metric that would not disregard thousands of Prairie Bank Potawatomi enrolled citizens (and citizens of other of Tribal governments) who rely on services provided by the Prairie Bank Potawatomi.

III. STANDING

Plaintiff has standing to bring this action to enjoin the Secretary’s unlawful actions. To establish standing, a party must “demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

The Secretary’s action threatens Plaintiff with concrete, imminent injury in fact. *Id.* at 167. By relying on the IHBG Metric, Treasury undercounted Plaintiff’s enrolled population by

approximately 3,678 members, or eighty percent of Plaintiff's total enrollment. (*Compare* IHBG SS (Rossetti Dec., Ex. G) *with* Rupnick Dec., ¶7, Ex. B). In turn, Plaintiff received approximately \$7,647,063 less in the Population Award, according to HPAIED's independent analysis.⁷

Plaintiff has an immediate need for Title V Funds to offset unexpected expenditures and decreased revenues relating to COVID-19. (Rupnick Dec., ¶¶3-4). Treasury may disburse the balance of Title V Funds to Tribal Governments at any time. Once expended, these funds will not be able to be reallocated on terms that are equitable to the Plaintiff. Taken together, the reduced funding, the need for funding, and the imminence of an irrevocable action clearly constitute an injury in fact.

Plaintiff's injury is fairly traceable to Secretary Mnuchin's actions. *See Bennett*, 520 U.S. at 167. Treasury set the allocation formula for Title V Funds. (Allocation Doc. (Rossetti Dec. Ex. F)). In doing so, Treasury merely paid lip service to its obligation to consult with Tribal governments (42 U.S.C.A. § 801(c)(7)) and adopted an allocation methodology without fair notice to Tribal governments of its consideration of such methodology.

Finally, Plaintiff's injuries can be redressed by a favorable decision from this Court. *Bennett*, 520 U.S. at 167. If this Court rejects Treasury's faulty allocation methodology, Treasury may adopt an alternative metric that more closely follows the law and the facts, which would likely result in an increased Population Award to Prairie Band Potawatomi.⁸

IV. ARGUMENT

To obtain injunctive relief, Plaintiff must show: 1) they are "likely to succeed on the merits;" 2) they are "likely to suffer irreparable harm in the absence of preliminary relief;" 3) "that

⁷ HPAIED Paper 2 (Henson Dec., Ex. 1), Table 4.

⁸ HPAIED Paper 2 (Henson Dec., Ex. 1), Table 4.

the balance of equities tips in his favor;” and 4) “that an injunction is in the public interest.” *Winter 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.’” *Dallas 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. Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). Here, all four factors weigh strongly in favor of injunctive relief.

A. Prairie Band Potawatomi is Likely to Succeed on the Merits of Its APA Challenge to Treasury’s Allocation of Title V Funds

The Administrative Procedure Act (“APA”) authorizes judicial review of federal agency action. 5 U.S.C. § 702. As is pertinent to the instant challenge, the reviewing court shall hold unlawful and set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” (5 U.S.C. § 706(2)(A)), or that fails to observe procedure required by law (5 U.S.C. § 706(2)(D)).

The role of the court under the APA is to “ensur[e] that agencies have engaged in reasoned decision making.” *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Courts must review “whether the agency examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made, and whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Mozilla Corp. v. Fed. Commc’ns Comm’n*, 940 F.3d 1, 49 (D.C. Cir. 2019) (internal quotations omitted). As follows, “where the agency has failed to provide a reasoned explanation,

or where the record belies the agency's conclusion, [the courts] must undo its action.” *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (citation and quotation omitted). “The agency's statement must be one of reasoning; it must not be just a conclusion; it must articulate a satisfactory explanation for its action.” *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (internal quotations omitted).

Here, Treasury took three steps relevant to the allocation of the Population Award. First, Treasury adopted “Tribal population” for the purpose of estimating expenditure shortfalls faced by Tribal governments. (Allocation Doc. (Rossetti Dec., Ex. F), p. 1-2). Second, Treasury allocated sixty percent of the Title V Funds according to the IHBG Metric. (*Id.*, p. 2). Third, Treasury adopted the IHBG Metric as the “data for th[e] key variable” of “Tribal population.” (*Id.*).

Plaintiff’s objection, and Treasury’s error, is that it announced to the public, including Tribal governments, that it would be using Tribal population as its baseline data set, and it abandoned that approach for a less valid approach without advance notice to Tribal governments and with virtually no explanation about the administrative process for doing so. This Court should reverse Treasury’s allocation formula because it was arbitrary and capricious and because it was in violation of procedure required by law. *See* 5 U.S.C. §706(2)(A), (D).

i. Treasury’s Decision to Utilize the IHBG Metric was Based on Reasoning that was Facially Contradicted by the IHBG Metric Itself

In the Allocation Document (Rossetti Dec., Ex. F), Treasury was clear that it intended to identify “Tribal population” because “Tribal population is expected to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased costs to address medical and public health needs.” (*Id.*, p. 2). After setting “Tribal population” as the target, and despite soliciting actual tribal enrollment

figures, Treasury selected the IHBG Metric. (*Id.*). Treasury relied on the unsupported assertion that Tribal governments are “familiar with [the IHBG population metric] and already have been provided the opportunity to scrutinize and challenge its accuracy.” (*Id.*). Treasury further described the IHBG Metric as “reliable and consistently-prepared.” (*Id.*). Treasury did not provide support for these assertions, as is required for reasoned decision making. *See Mozilla Corp.*, 940 F.3d at 49.

In fact, these assertions are contradicted by the IHBG Metric. According to Treasury’s own tabulation, twenty-five tribes have a population of zero in the IHBG population count. (IHBG SS, Rossetti Dec., Ex. G). The reason for this is that a significant number of tribes do not participate in the Indian Housing Block Grant program. The IHBG Metric, therefore, plainly and directly refutes Treasury’s assertion that Tribal governments have familiarity with the metric and that the data are reliable. (Allocation Document (Rossetti Dec., Ex. F), p. 2). Indeed, the IHBG provides no data, let alone reliable data (*Id.*), for four percent of the Tribal governments for which IHBG Metric is maintained. (IHBG SS, Rossetti Dec., Ex. G). And far from engaging in scrutiny, these “zeroes” establish that at least twenty-five tribes have taken no action to correct their apparent extinction in this dataset. (*See Id.*)

Based on the foregoing, Treasury’s reliance on the IHBG Metric—based on a rationale that was contradicted by the IHBG Metric itself—was arbitrary and capricious. *See Hogen*, 613 F.3d at 190 (D.C. Cir. 2010) (overturning Interior land-into-trust action that relied on a basis contradicting other information in the record); *County of Los Angeles v. Shalala*, 192 F.3d1005, 1023 (D.C. Cir. 1999) (vacating and remanding HHS determination regarding Medicare payments that provided inadequate rationale and failed to consider more recent information). Plaintiff, therefore, presents a high likelihood of success on the merits.

ii. *Treasury's Decision to Rely on the IHBG Metric was Based on Reasoning that is Contradicted by the Methodology Underlying the IHBG Metric*

Treasury's assertions are not supported by the methodology underlying the IHBG Metric. Contrary to Treasury's abbreviated and conclusory observations, the IHBG Metric is not a "key variable" that reflects "Tribal population." (Allocation Document (Rossetti Dec., Ex. F), p. 2). Based on a glancing analysis of the IHBG methodology, it is clear that the IHBG Metric is not even *intended* to capture Tribal population in any meaningful sense.

The IHBG Metric is an algorithm – not a tally, or even projection, of "Tribal population" (Allocation Doc. (Rossetti Dec., Ex. F), p. 2). The IHBG Metric begins with the Census projection of the number of individuals who consider themselves "American Indian or Alaska Native" ("AIAN") on Census forms (within a certain geographic area) (*Id.*). 24 C.F.R. § 1000.330. This is a racial categorization that is neither necessary nor sufficient to count Tribal population. It undercounts enrolled individuals who may select different racial classifications on the Census form, and it also over counts individuals who select AIAN but are not enrolled in a Tribal government.

The IHBG is further limited to estimated AIAN in a gerrymandered "formula area" associated with a Tribal government (*Id.*). The "formula area" consists of (i) a Tribal Government's formula area as it existed in 2003 (24 C.F.R. § 1000.302(3)); (ii) nine static categories of property (§ 1000.302(1) (i - ix)); and (iii) areas added by application of a Tribal government and at discretion of HUD (§ 1000.302(2)). Then, the IHBG Metric is artificially capped at "**twice a...tribe's enrolled population**" (24 C.F.R. § 1000.302(5) (emphasis added)). These machinations are reflected in fractional values. For example, the IHBG Metric for Plaintiff is, most precisely, 882.668903225806. (Rossetti Dec., ¶9).

The IHBG does not only fail due to lack of precision. The methodology underlying the IHBG Metric directly conflicts with notions of tribal sovereignty and identity that have developed through history and through federal Indian Law. *South Dakota v. Bourland*, 508 U.S. 679, 694 (1993) (“Indian tribes retain inherent authority...to regulate tribal membership.”); see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 32 (1978) (“A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”). As tribes are political units, racial classifications are neither necessary nor sufficient to establish Tribal population. *Brackeen v. Bernhardt*, 937 F.3d 406, 428 (5th Cir.), reh'g en banc granted, 942 F.3d 287 (5th Cir. 2019) (“[U]nder some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of former slaves of tribes who became members after they were freed, or the descendants of adopted white persons.”)⁹ The same is true of geographic limitations on Tribal citizenship.¹⁰

In sum, the IHBG Metric is neither quantitatively nor qualitatively related to “Tribal population,” which is the measure that Treasury determined would “correlate reasonably well” with statutory factors (Allocation Doc. (Rossetti Dec., Ex. F) p. 2). Consequently, Plaintiff has a high likelihood of establishing that Treasury’s reliance on the IHBG Metric was arbitrary and capricious.

⁹ Further, Treasury fails entirely to explain why it chose a racially-based metric when other, non-racially based metrics were available to it that would have served its purposes at least as well without raising the potential for Equal Protection concerns inherent in using a racial classification.

¹⁰ HPAIED Paper 3 (Henson Dec., Ex. 2), p. 6 (“Tribes differ in the degree to which their citizens reside within their tribal borders. But in the enduring and current era of federal policies of self-determination through self-government, tribe after tribe is reaching beyond its geographic borders to serve their off reservation citizens; and, of course, it is a dominant characteristic of such tribal citizens that they routinely “come home” to their home reservations for services, to realize the cultural values of being in their home communities, and because they are citizens of the tribal nation.”).

iii. Treasury's Decision to Utilize the IHBG Metric Relied on Reasoning that was Directly Contradicted by the Context in Which the IHBG Metric is Used

Treasury's assertions are not supported by the context in which the IHBG Metric is actually used. The "zeroes" in the IHBG Metric (Rossetti Dec., Ex. G) are mere representations of the comprehensive failings with the IHBG Metric. Tribal governments have no duty to maintain the IHBG Metric or, for that matter, to participate in the IHBG program at all. And, many do not. (*Id.*) Further, Tribal governments face limited incentives to monitor and influence the IHBG Metric based on its narrow use and limited impact.

Prairie Band Potawatomi is just one example of a Tribal government that is not reliant on the IHBG program (Rupnick Dec., ¶9), and, therefore, has lacked an incentive to scrutinize the IHBG Metric. Unless Tribal governments have a direct motivation and need for housing assistance, there has been no reason to look at, let alone administratively challenge, the IHBG Metric.¹¹ Moreover, had Tribal governments been made aware that the IHBG Metric would be used in distributing Title V Funds, perhaps, closer scrutiny of the IHBG Metric would have been warranted.

Even if a Tribal government had motivation to maximize housing block grants, there is limited incentive to scrutinize the IHBG Metric. Indeed, the population number on which Treasury relied is attenuated by several degrees from the actual award that a Tribal government would receive. In fact, the IHBG Metric accounts for only eleven percent (24 C.F.R. § 1000.324) of one of four factors (24 C.F.R. § 1000.310) that contribute to the IHBG grant awards.

¹¹ By selecting the IHBG Metric without having provided notice of its intention to do so, Tribes such as Prairie Band Potawatomi were deprived of the opportunity to scrutinize the Metric knowing the application to which it would be put.

Contrary to Treasury's assertion that the IHBG Metric is regularly scrutinized and challenged for accuracy, some Tribal governments do not even participate in the IHBG program (IHBG SS (Rossetti Dec., Ex. G)); some tribes, including Prairie Band Potawatomi, are not reliant on the IHBG program (Rupnick Dec, ¶9); and even those Tribal governments that rely on IHBG program lack clear incentive, as a practical matter, to refine the accuracy of the IHBG Metric in an adversarial proceeding given the greater weight of other factors (24 C.F.R. §§ 1000.310, 1000.324). Thus, even for the purpose for which it is intended (which, to be clear, is not to estimate tribal population), the IHBG Metric is not a tried-and-true standard.

Treasury's reliance on the IHBG Metric based on this faulty justification was an arbitrary and capricious action. Plaintiff, therefore, presents a high likelihood of success on the merits of its claim.

iv. Treasury's Reliance on the IHBG Metric Yields Arbitrary and Capricious Policy Results

The IHBG Metric is not only unfairly and illogically applied to the disbursement of Title V Funds, its use as a proxy for "Tribal population" yields arbitrary and capricious results. Title V Funds were intended to offset "increased expenditures" of Tribal governments. 42 U.S.C. § 801(c)(7). Treasury adopted "Tribal population" as a proxy for projected expenditures. (Allocation Doc. (Rossetti Dec., Ex. F.)) The IHBG Metric, however, is needlessly attenuated from "Tribal population" for the purpose of projecting expenditures relating to the COVID-19 pandemic.

As Treasury was aware, the IHBG Metric was "developed by HUD for the specific context of the IHBG program." (Allocation Document, p. 2.) While Treasury tries to minimize this fatal flaw, its inherent limitations are actually compounded in the context of resolving budget shortfalls caused by a pandemic.

The greatest shortcoming of the IHBG Metric is that it fails to credit tribes for enrolled citizens who live outside the formula area. For the purpose of housing, the typical purpose of the IHBG Metric, this is reasonable approach. After all, if a tribal citizen is not living in the area, she is not driving housing demand in the area.¹²

Health care related expenditures are better captured by Tribal citizenship, *i.e.*, “persons to which tribal governments owe duties of service and over whom they have jurisdiction.”¹³ Such expenses are incurred by Tribal governments for on-reservation and off-reservation (or, in-formula-area/out-of-area) citizens alike.¹⁴ Based on Treasury’s own reasoning, Tribal population is expected to “correlate reasonably well” with relevant expenditures. (Allocation Doc. (Rossetti Dec., Ex. F)). By using the IHBG Metric, however, Treasury will treat Tribes with similar populations differently based on how their geographic area was selected, contravening a fundamental principle of good governance that similarly situated parties should be treated similarly. *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.”). Whatever the wisdom of including a geographic restriction in the context of

¹² HPAIED Paper 3 (Henson Dec., Ex. 2), p. 6 (“[IHBG Metric] may be appropriate for purposes of a federal housing program that seeks to improve on reservation housing for on reservation residents. But they are wholly inappropriate data for the purposes of federal funding –*i.e.*, the CARES Act – that is explicitly aimed at supporting the economic stability and functions of tribal governments.

¹³ HPAIED Paper 3 (Henson Dec., Ex. 2), p. 6.

¹⁴ *Id.* (“But in the enduring and current era of federal policies of self-determination through self-government, tribe after tribe is reaching beyond its geographic borders to serve their off reservation citizens; and, of course, it is a dominant characteristic of such tribal citizens that they routinely “come home” to their home reservations for services, to realize the cultural values of being in their home communities, and because they are citizens of the tribal nation.”)

the IHBG program, the IHBG Metric yields arbitrary inequities when applied to a public health and economic crisis.¹⁵

The IHBG Metric has no qualitative relationship to the “key variable” identified by Treasury (*i.e.*, Tribal population) and only an arbitrary quantitative correlation with this “key variable”, as demonstrated by the HPAIED Analysis.¹⁶ Accordingly, this Court should conclude that Plaintiff poses a high likelihood of success on the merits.

v. *Treasury Ignored Better Metrics that Would Have Actually Captured Tribal Population and that Would have Been More Consistent with the Controlling Statute*

Where agencies fail to consider information available to them that may better serve their needs, or fail to articulate a satisfactory rationale for not relying upon that information, their actions will fall. *Butte*, 613 F.3d at 194 (overturning agency action where agency failed to explain why it rejected information); *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 11 (D.C. Cir. 2006) (remanding FDA action where agency failed to state its rationale); *Shalala*, 192 F.3d at 1023 (vacating and remanding HHS determination regarding Medicare payments that provided inadequate rationale and failed to consider more recent information).

For the reasons set forth above, the IHBG Metric is not suitable for Treasury’s own stated purpose of making the Population Award on the basis of Tribal population. Treasury’s choice of the IHBG Metric is even further arbitrary and capricious because Treasury possessed at least two additional metrics that are superior to the IHBG Metric for the purpose of estimating population, the factor that Treasury itself determined would predict increased expenditures due to COVID-19.

¹⁵ HPAIED Paper 2 (Henson Dec., Ex. 1), p. 11 (“With regard to the credibility – *i.e.*, ability to avoid arbitrary and capricious results – of the various HUD racial population count series, we have seen above that different series yield widely different outcomes.”)

¹⁶ *Id.*

First, HUD regularly maintains the HUD Enrollment Metric. (FY 2020 Final Summaries (Rossetti Dec., Ex. H), Column: “Enrollment”). Treasury had access to this regularly maintained alternative metric that relied on a far superior methodology (*i.e.*, actual Tribal population) and possessed at least the same indicia of reliability that Treasury praised regarding the IHBG Metric. (Allocation Document (Rossetti Dec., Ex. F), p. 2). Second, Treasury could have relied on the ATE Metric that Treasury itself *solicited* from Tribal governments in connection with the allocation of Title V Funds. (Rossetti Dec., Ex. D; Rupnick, Ex. B).

Taken together, Treasury had two more recent, and more relevant, metrics to rely upon. Treasury did not adopt these and Treasury’s decision failed to document any consideration of them. Treasury’s allocation was therefore arbitrary and capricious. *Butte, supra; Alpha, supra; Shalala, supra.* Based on the foregoing, Plaintiff has a high likelihood of success.

vi. Treasury Failed to Engage in Meaningful Consultation with Indian Governments

One of the explicit constraints on Treasury’s discretion in determining how to award funds is that Treasury was required to consult with Indian Tribes. 42 U.S.C. § 801(c)(7). Implicit in that requirement is that such consultation be meaningful. A useful analog is notice-and-comment requirements, such as those contained in the Administrative Procedures Act at 5 U.S.C. § 553(b) and (c), which similarly exist so that agencies may solicit input from affected parties.

In order to satisfy such requirements, proposed rulemakings must include “either the terms or substance of the proposed rule or a description of the subjects and issues involved,” 5 U.S.C. § 553(b)(3), and must give “interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments,” 5 U.S.C. § 553(c). Similarly, the Tribal consultation requirements for the allocation of these funds exist to ensure that Treasury obtains the input of the affected parties, the Tribes themselves.

One central tenet of rulemaking is that, while an agency need not finalize a rule exactly as it was proposed, an agency decision must be a “logical outgrowth” of the information the agency provided. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250 (D.C. Cir. 2005) (vacating agency action where public did not have sufficient notice to comment on the final decision the agency made). A final decision is a logical outgrowth of a proposed decision where interested parties “should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C.Cir.2004) (internal quotations omitted). This practice exists to ensure that public has adequate notice to comment on the precise facts, issues, and rationale that the agency is considering as a basis for its decision.

Treasury’s action, however, comes from thin air. Treasury never indicated that it would use the IHBG Metric, nor did Treasury seek to confirm the accuracy or appropriateness of correlating population data with Tribal governments. (Rupnick Dec., ¶8). In particular, Tribal governments had no reason to expect that Treasury would select the IHBG Metric as the basis for awarding funds, especially where Tribal governments had just submitted their Actual Tribal Enrollment Metric to Treasury. (*See Id.*, ¶¶7-8). Tribal governments were, therefore, deprived of a reasonable opportunity to consult on the weaknesses of the metric Treasury selected. *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (“Something is not a logical outgrowth of nothing. The notice of proposed rulemaking contains nothing, not the merest hint, to suggest [the agency’s course of action].”).

Given such a failure to give Tribal governments notice of the basis for its allocation, Treasury effectively evaded its statutory obligation to consult with Tribal governments. It

therefore follows that this Court should vacate Treasury's allocation, as an arbitrary and capricious action pursuant to 5 U.S.C. § 706(a) *and* as an action taken "without observance of procedure required by law," pursuant to 5 U.S.C.A. § 706(d). *See Kooritzky, supra.*

vii. *Treasury's June 4 FAQ is an Improper Post Hoc Rationale That Fails to Overcome the Allocation's Shortcomings*

After learning of Prairie Band Potawatomi's objection to Treasury's use of the IHBG Metric (Rossetti Dec., Ex. J), Treasury published the FAQ (Rossetti Dec., Ex. K), which purports to address many of the issues raised herein. This document is clearly an improper *post hoc* rationalization that in any case fails to resolve the substantive issues raised by Plaintiff.

As a threshold matter, the FAQ is a *post hoc* rationalization of which the courts may take no cognizance. "Courts may not accept [a] *post hoc* rationalization for agency action; *Chenery* requires an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012) (internal quotations omitted, and citing *SEC v. Chenery*, 332 U.S. 194, 196 (1947)). A court "must confine [its] review to the adequacy of the reasons given by the [agency]." *Temple Univ. Hosp., Inc. v. Nat'l Labor Relations Bd.*, 929 F.3d 729, 734 (D.C. Cir. 2019). The FAQ, dated June 4, 2020, nearly a month after Treasury's announcement of the Population Award, is clearly a *post hoc* rationalization that may not properly provide support for Treasury's decision.

Even on the merits, the explanations and assertions in the FAQ document do not resolve the legal and logical issues set forth above. First, in explaining why Treasury did not use Tribal enrollment data, the FAQ states that tribal enrollment criteria "vary from tribe to tribe." (*Id.* (Rossetti Dec., Ex. K), p. 2.) This statement is true, in that it reflects the fact that Tribal governments are political entities exercising sovereign authority to determine their enrollment criteria. *South Dakota v. Bourland, supra; Santa Clara Pueblo v. Martinez, supra; Brackeen v.*

Bernhardt, supra. It does not follow, however, that varied tribal enrollment criteria in any way violates the statutory language that governs the Title V Funds, which is focused on increased expenditures by Tribal governments. 42 U.S.C. 801(c)(7). The Treasury's critique on the enrollment approach is no more than a rejection of principles of sovereignty in favor of a racial approach.

Second, the FAQ attempts to rescue Treasury's flawed decision by arguing that "tribal enrollment data" is not a suitable "proxy for population data." (FAQ, p. 2.) Of course, "tribal enrollment" is not so much a "*proxy* for population data" as it *is* the actual population of a Tribal government.

Further, in the Allocation Document, Treasury simply finds that "Tribal population is expected to correlate reasonably well" with increased expenditures (*id.*, p. 2), where it should have stated, if it so believed, that "Tribal population within a certain area" was the key variable. Having not done so in its original decision, Treasury may not retroactively alter the basis of its decision.

Third, Treasury stresses the value of the IHBG Metric because, unlike Tribal enrollment, it "distinguish[es] between members living within the tribal area from those living outside the tribal area." This ignores the fact, established above, that Tribal governments, including the Prairie Band Potawatomi (Rupnick Dec., ¶ 3), provide services to tribal members regardless of where they live.¹⁷

Fourth, the Treasury stressed the fairness of using the IHBG Metric because the "IHBG formula was developed through negotiated rulemaking with tribes in the mid-1990s and has been reconsidered over the years." (FAQ, p. 1) The IHBG *formula* refers to a multifactorial calculation that yields a dollar value award for tribes. The IHBG *Metric* accounts for eleven

¹⁷ HPAIED Paper 3 (Henson Dec., Ex. 2), p. 6.

percent of one-quarter of the factors that contribute to the IHBG award. (Section IV-A-iii, *supra*.) Whatever legitimacy was conferred on the formula through administrative rigor is not properly transposed onto one, minute, component that will direct \$4.8 billion.

B. Prairie Band Potawatomi will Suffer Irreparable Harm in the Absence of Preliminary Relief

Under this prong of the test for injunctive relief, a court considers whether irreparable injury is likely in the absence of an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249 (2008). That injury must be “must be both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotation, formatting omitted).

The injury faced by Plaintiff is certain, great, actual and not theoretical. If this Court fails to restrain Secretary Mnuchin, Treasury could disburse the funds and permanently ratify its flawed allocation approach. Treasury’s approach undercounts 3,678 Prairie Band Potawatomi citizens,¹⁸ resulting in a Population Award shortfall of approximately \$7.65m for the Prairie Band Potawatomi.¹⁹ Prairie Band Potawatomi’s claim to these funds will be forever foreclosed by their delivery unto other Tribal governments.

The injury faced by Plaintiff is imminent and beyond remediation. (Rupnick Dec., ¶ 13.) Treasury will make the last disbursement of Title V Funds in the coming days and, possibly, as soon as Tuesday, June 9, 2020. Once the Title V Funds are disbursed they cannot be recouped. *Confederated Tribes of Chehalis Reservation et al. v. Mnuchin*, No. 20-CV-01002 (APM), 2020

¹⁸ Compare IHBG SS (Rossetti Dec., Ex. H), p. 8 (Column: “AIAN Persons”) with Rupnick Dec., ¶7, Ex. B

¹⁹ HPAIED Paper 2 (Henson Dec. 1), p. 10, Table 4.)

WL 1984297, at *7–8 (D.C. Cir. 2020) (restraining Treasury from awarding Title V Funds to Alaska Native Corporations); *see Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) (plaintiffs entitled to interim relief pending challenge to funding formula). If Treasury’s adoption of the IHBG Metric is not resolved prior to further disbursement, Plaintiff will forever and permanently forego its “entitle[ment] to receive to cover costs of combatting the COVID-19 pandemic in [its] communit[y].” *Chehalis*, No. 20-CV-01002 (APM), 2020 WL 1984297, at *7. The harm is particularly acute considering the financial strain already faced by Plaintiff. (Rupnick Dec., ¶¶3-4).

C. The Balance of Equities and the Public Interest Support Prairie Band Potawatomi

The equities favor Plaintiff, and a preliminary injunction would be in the public interest. Where the government is the opposing party, these factors merge because “there is a substantial public interest ‘in having governmental agencies abide by the federal laws that govern their existence and operations.’” *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (*quoting Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)).

The instant APA challenge pertains to matters that are central to the public interest. Prairie Band Potawatomi litigates this issue in its own capacity and for the benefit Tribal governments across the country which may be similarly situated. The issues involved, including the efficient and equitable use of appropriated funds, are necessary to the fair administration of government. The significance of the Treasury’s action is evident in the scathing academic critiques of Treasury. (*See HPAIED Paper 2, Paper 3 (Henson Dec., Exs. 1, 2)*).

A short delay in Title V Funds is consistent with the public interest. Indeed, the Title V Funds are intended to compensate Tribal governments for “necessary expenditures incurred due to the public health emergency with respect to...COVID-19...during the period that begins on

March 1, 2020, and ends on December 30, 2020.” 42 U.S.C. §801(d)(3). Sixty percent of that period will not elapse until the end of August. A delay in funding will therefore smooth out – not needlessly delay – Title V Funding to tribal governments.

Moreover, Treasury can mitigate the delay in Title V Funding short of holding back all of the remaining balance of Title V Funds. Indeed, most Tribal governments will be entitled to additional Title V Funds no matter which metric is used. Treasury could therefore mitigate the effect of the preliminary injunction by issuing a portion of the funding and simply holding sufficient funds in reserve to re-allocate funds on an enrollment basis.

CONCLUSION

Based on the foregoing and pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, this Court should grant a TRO and preliminary injunction that restrains Secretary Mnuchin from disbursing CARES Act funds to Tribal governments until further order of this Court.

June 8, 2020

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