UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SHAWNEE TRIBE, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al. *Defendants*.	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*.	Case No. 1:20-cv-02792-APM
PRAIRIE BAND POTAWATOMI NATION, *Plaintiff*, v. SECRETARY, U.S. DEPARTMENT OF TREASURY, *Defendant*.	Case No. 1:21-cv-012-APM

PLAINTIFFS MICCOSUKEE AND PRAIRIE BAND POTAWATOMI'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Treasury's revised methodology for the 2021 Distribution "phased out" supplemental awards paid out to Tribes that were severely undercounted by the original methodology such that certain Tribes received practically all the funds they would have received under a per capita enrollment-based allocation, while other Tribes received only a small fraction of that amount. The difference in supplemental awards between those at the top and bottom of the phase-out was stark as illustrated by the differences in awards between Shawnee, Miccosukee and Prairie Band:

	Supplemental Award	Certified Enrollment #	IHBG Population	# of Members not Counted by IHBG	Award per Member not Counted
Shawnee	$ 5,202,604	3,021	0	3,021	$1,721
Miccosukee	$ 825,196	605	0	605	$1,355
Prairie Band[1]	$ 864,161	4,562	747	3,815	$225

The Court had occasion to briefly address these "seemingly inequitable results" in a recent Memorandum Opinion and Order. Dkt. 90 at 7. There, the Court raised alarm about the fact that "Prairie Band received substantially less per tribal member not counted than the Shawnee and Miccosukee Tribes." *Id.* The Court commented that "[t]his yawning disparity in per-uncounted-member funding is puzzling to say the least. Treasury, for its part, offers no defense or explanation for the seemingly inequitable results." *Id.*

This Court should reject Treasury's belated attempt to justify its approach set forth in its Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary

[1] As noted in Plaintiffs' opening brief, Treasury later supplemented Prairie Band's award with an additional $740,692, bringing its award per uncounted member from $225 to $420. Notably, this adjustment was made not because Treasury sought to alleviate the inequitable results identified in the chart above, but because Prairie Band notified Treasury that it had miscalculated Prairie Band's "population-to-enrollment ratio," which affected its ranking for a phased-out payment. *See* Dkt. 88 at 11.

Judgment (the "Response") (Dkt. 91). As explained below, none of Treasury's arguments find support in either Title V of the CARES Act or the administrative record.

At the outset, Treasury makes no secret of the fact that the supplemental payments are *not* based on tribal enrollment or some other proxy for approximating "increased expenditures" due to COVID, as the statute requires. Treasury concedes that the payments are "based on [Tribes'] IHBG-to-enrollment ratio" ranking. Response at 10. That is, Treasury not only ranked the undercounted Tribes according to their IHBG-to-enrollment ratios to discern which ones were eligible for a supplemental payment, but it also based the awards themselves on that ranking by phasing out payments as it went down the ranking scale. Predictably, this "phase out" approach caused "inequitable results" by creating "yawning disparit[ies]" in total and per capita awards among Tribes with similar numbers of uncounted members, as well as significant disparities in per capita awards among Tribes that were originally assigned IHBG populations of zero. Dkt. 90 at 7. Treasury nevertheless offers several explanations for why these "seemingly inequitable results" were justified, but none of these explanations can be traced to the administrative record. There is simply no record support for the proposition that zero population Tribes were necessarily harmed *more* by the original methodology than Tribes that were otherwise *severely undercounted,* like Prairie Band, as this Court appears to recognize. *Id.* Likewise, there is no support for the proposition that certain zero population Tribes were harmed more than other zero population Tribes. For both zero population Tribes and severely undercounted Tribes, the magnitude of the harm they suffered under the original methodology is measured by the number of tribal members that were not included in the IHBG data. It is *that* number — uncounted tribal members — that corresponds with expenditures.

Hemmed in by the statute and the administrative record, Treasury resorts to the standard of review, claiming that it is entitled to an "extreme degree of deference" for having "engag[ed] in a complex analysis involving multiple data sources." Response at 15. But courts cannot afford agencies "extreme deference" every time they do some math. If anything, Treasury needlessly overcomplicated its methodology here by phasing out payments when it could have paid out supplemental awards to those undercounted Tribes on a per capita basis. Indeed, with the benefit of prior orders and decisions in this and related litigations, along with additional tribal consultations, Treasury's task should have been relatively straightforward. That Treasury nevertheless so clearly missed the mark – as made evident by the "yawning disparity in per-uncounted member funding" – warrants less, not more, deference.

At the end of the day, though, no matter how "extreme" the deference, Treasury's revised methodology does not pass muster under the APA. Treasury's Response makes clear that the agency really has no satisfactory defense or explanation for having failed to get this population-based distribution right a second time.

II. ARGUMENT

A. Treasury concedes that the revised methodology's payments were "based on [Tribes'] IHBG-to-enrollment ratio" ranking, not enrollment or some other proxy for increased expenditures due to COVID.

Treasury acknowledges that the CARES Act required that payments to Tribal governments be "based on increased expenditures" due to COVID. Response at 8, 14 ("the allocation must be 'based on increased expenditures,' 42 U.S.C. § 801(c)(7)"). And yet Treasury concedes in its Response that the payments for the 2021 Distribution were "based on [Tribes'] IHBG-to-enrollment ratio" ranking (Response at 10), not Tribes' COVID expenditures or some other proxy for expenditures such as enrollment. An agency "violate[s]" the APA when, as here, it "fail[s] to

follow plain statutory language." *See Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 424 F. Supp. 2d 37, 46 (D.D.C. 2006).

Central to this discussion is the fact that Treasury has long maintained a direct correlation between tribal enrollment and COVID expenditures and continues to do so in connection with the latest COVID-relief bill.[2] Dkt. 70-8 at 2; Ex. B (Dkt. 88-2) at 1; *see also* Department of the Treasury, "Coronavirus State and Local Fiscal Recovery Funds, Allocations to Tribal Governments" (July 19, 2021) at 2 ("Enrollment is expected to correlate generally with the amount of resources Tribes need to address the public health impacts from the pandemic.").[3] "More members, more COVID expenditures," is the basic logic. As Plaintiffs noted in their opening brief, Treasury's original methodology adhered to this same logic because, besides a limited exception, each Tribe received the same distribution amount per tribal member counted by the IHBG data. *See* Dkt. 88 at 5.

Here, Treasury tries to squeeze the revised methodology within the statute's contours by pointing out that the payment methodology in fact "relies on enrollment data" (Response at 18), but nowhere does Treasury argue that it does so in a way that approximates COVID expenditures. Indeed, there is a world of difference between *basing* payments on enrollment and merely *using* enrollment as one variable in a larger equation, a difference that has cost Plaintiffs millions of dollars. If you order "the lobster" for dinner at a restaurant, and the waiter serves you lobster

[2] In its Response, Treasury suggests for the first time that enrollment might not adequately approximate COVID expenditures after all. Response at 19. This about-face by the agency in its brief finds no support in the administrative record for either the 2020 or 2021 Distributions and should be disregarded by the Court. The basis for judicial review is the rationale articulated by the agency at the time it made its decision, not a post-hoc rationalization by the agency or counsel in later litigation. *See, e.g.*, *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).

[3] *Available at* https://home.treasury.gov/system/files/136/Tribal-Government-Allocation-Methodology.pdf [last accessed July 30, 2021]

bisque, it would be little consolation to you that the soup has lobster in it. That is essentially what Treasury is trying to get away with here: while it is true in a literal sense that Treasury used enrollment data in issuing the awards, it was a Tribe's IHBG-to-enrollment ratio ranking that ultimately determined what percentage of its enrollment allocation was paid. In Treasury's own words:

> [The revised methodology] awards each qualifying Tribe a certain percentage of its enrollment allocation based on its IHBG-to-enrollment ratio. Those with the lowest IHBG-to-enrollment ratios, such as the Tribes with IHBG populations of zero, receive the highest percentage of their enrollment allocations; conversely, those with progressively higher ratios receive comparatively lower percentages of their enrollment allocations.

Response at 10. Far from being "based" on enrollment then, Treasury's revised methodology literally discounted enrollment by phasing out payments depending on a Tribe's ranking by IHBG-to-enrollment ratio, a percentage figure that bears no cognizable relationship to a Tribe's actual COVID expenditures. That simply does not square with the statute.

Treasury then argues that the payments issued under the revised methodology do not themselves need to correlate with increased COVID expenditures or enrollment for that matter because the supplemental payments are merely a "complement to Treasury's original methodology" (Response at 3); the argument being that, "in tandem," the 2020 and 2021 Distributions reasonably calculate payments for Tribal governments "based on increased expenditures," which is all the statute requires. Response at 18.

But two wrongs do not make a right. Here, Treasury rightly acknowledges in the administrative record that, "in certain instances," the IHBG formula area population that was used for the 2020 Distribution "prove[d] insufficient" "in estimating a Tribal government's increased expenditures." *See* Ex. B (Dkt. 88-2) at 2. The solution was for Treasury to come up with a

methodology (supplemental or otherwise) that *was* sufficient to estimate each Tribal government's increased expenditures, not to come up with another methodology that, even more than the first, was not "based on increased expenditures" due to COVID. The fact that Treasury failed to adequately estimate COVID expenditures for some Tribes under the original methodology does not give it license to do so again. Indeed, Treasury complains that "any methodology will necessarily provide an imperfect estimate of each Tribe's relative COVID-relative expenditures," even one that is based on enrollment. *See* Response at 19. Yet the problem with the revised methodology is not that it is an "imperfect estimate of each Tribe's relative COVID-relative expenditures," but that it is not an estimate of such expenditures at all.

In short, "the payments must be 'based on increased expenditures,'" which Treasury rightly concedes. Response at 8 (quoting *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 100 (D.C. Cir. 2021)). That the payments are not renders Treasury's action arbitrary and capricious. *Hornbeck*, 424 F. Supp. 2d at 58.

B. Neither the administrative record nor the *Shawnee* decision support disparate treatment among Tribes that were severely undercounted by the original methodology.

As Plaintiffs argued in their opening brief, there was no legitimate basis for Treasury to distinguish Prairie Band from other Tribes like Shawnee who received significantly larger distributions per uncounted tribal member. Likewise, there was no legitimate basis for Treasury to make significantly different per capita distributions among zero population Tribes, like Miccosukee and Shawnee. Treasury does not argue in its Response that Prairie Band, Miccosukee, and Shawnee are not similarly situated. Treasury's use of IHBG population data drastically undercounted Shawnee and Prairie Band by thousands of members, and Miccosukee by hundreds. Instead, Treasury argues that an agency may "'treat similarly situated parties differently' *so long as it* "'provides an adequate explanation.'" Response at 16 (quoting *Petroleum Commc'ns, Inc. v.*

F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994)) (emphasis added and brackets removed). Specifically, Treasury argues that "differential treatment" was justified among the Tribes that were severely undercounted in order to "focus limited funds on the Tribes whose IHBG figures were especially low in comparison to their enrollment figures, and who initially received the lowest population-based payments[.] " Response at 17.

None of Treasury's explanation is supported by the administrative record. In fact, the administrative record repeatedly draws similarities between Tribes that were assigned zeros and those other Tribes, like Prairie Band, that were significantly undercounted, never once suggesting that one was more harmed than the other. Specifically, in describing the "Basis for Reallocation," Treasury identifies two instances when "IHBG formula area population counts" "may [have] prove[d] insufficient": (i) "where the Tribe does not have a formula area . . . and therefore has a formula area population of zero," *and* (ii) where a Tribe's "formula-area population may not provide a sufficiently accurate indication of the number of persons for whom the Tribe provides services more generally." Ex. B (Dkt. 88-2) at 2. In either instance, Tribes "may have received a payment [under the original methodology] that significantly undercounted their potential expenditures[.]" *Id.* at 3. The administrative record therefore justifies treating the severely undercounted Tribes the same relative to one another. Treasury's belated attempt to now draw distinctions among these Tribes finds no support in the administrative record and is entitled to no weight. *See Kort v. Burwell*, 209 F. Supp. 3d 98, 112 (D.D.C. 2016) (holding that a post hoc rationalization in a reply brief "cannot cure [the] deficiency" of treating similarly situated parties differently); *see also Nat'l Black Media Coalition v. F.C.C.*, 775 F.2d 342, 354 (D.C. Cir. 1985) ("[C]ounsel's post hoc rationalization" is "entitled to little or no weight.").

In any event, Treasury's argument that Tribes that were assigned IHBG populations of zero were "likely" "underpaid [] the most" (Response at 17) is demonstrably wrong based on information that Treasury had when it made its decision. Treasury *knew* which Tribes were in fact underpaid the most: Treasury had certified enrollment data for each Tribe and knew what it had paid each Tribe under the original methodology. And yet Tribes like Shawnee were awarded significantly more per capita for uncounted members than Prairie Band simply because they had been assigned an IHBG population of zero under the original methodology.[4] Similarly, Shawnee was awarded significantly more per capita than Miccosukee even though both were originally assigned an IHBG population of zero. There is no rational justification for these "yawning disparit[ies]." Dkt. 90 at 7. Nothing in the record indicates that Shawnee had greater COVID expenditures than Prairie Band or Miccosukee. Accordingly, there is simply no justifiable reason for the revised methodology's "seemingly inequitable results." Dkt. 90 at 7.

Treasury then argues that it was "consistent with the D.C. Circuit's decision in *Shawnee*" (Response at 17) to prioritize awards to Tribes that were assigned IHBG populations of zero, but this argument finds no support in either the administrative record or the *Shawnee* decision itself.

The administrative record makes clear that the revised methodology was intended to rectify a broader problem than the one specifically addressed in *Shawnee*. In discussing the "[r]ecent litigation" that precipitated the revised methodology, for example, the record provides that "[t]hree of the several Tribes that were assigned a population of zero, or a low population that approaches zero, for their IHBG formula areas despite having substantial enrollment have challenged the population-based disbursement of Treasury's allocation methodology in federal court." Ex. B

[4] It bears mentioning that Treasury has not disclosed the supplemental payments that were issued to other Tribes apart from the awards to the three named Plaintiffs. There may indeed be even greater disparities in awards per uncounted member than has yet been disclosed by Treasury.

(Dkt. 88-2) at 1. Although the record notes that the D.C. Circuit found that at least one of the Tribes assigned an IHBG formula area population of zero was likely to succeed in its claim, the record correctly reflects the fact that, "[o]n remand, *the district court has issued orders finding that all three plaintiff Tribes have established a likelihood of success on their challenges to the methodology*…" *Id.* at 2 (emphasis added). The record confirms that the revised methodology was intended to "take[] [all] these decisions into account," not just the D.C. Circuit's decision in *Shawnee* that only addressed "zero" Tribes. *Id.*

None of this is intended to downplay the significance of the *Shawnee* decision to Plaintiffs' motion. The D.C. Circuit's decision in *Shawnee* compels the conclusion that the "zero-population" Tribes Shawnee and Miccosukee are entitled to a supplemental distribution based on tribal enrollment to ensure that distributions are based upon increased expenditures as the statute requires. But contrary to what Treasury contends in its Response, *Shawnee* did not decide, nor did it even address, whether "zero-population" Tribes were harmed more by the original methodology than other Tribes that were severely undercounted. That issue was not before the court; Prairie Band was not even a party to that appeal.[5]

If anything, the revised methodology is undone by the D.C. Circuit's decision in *Shawnee*, not supported by it. There, the D.C. Circuit was clear that Treasury's discretion under Title V of the CARES Act is "limited to 'determin[ing]' a method for allocating funds that is 'based on increased expenditures,'" a crucial aspect of the decision that Treasury entirely overlooked in its revised methodology. *Shawnee*, 984 F.3d at 100 (quoting 42 U.S.C. § 801(c)(7)). Had Treasury adhered to the actual holding and reasoning in *Shawnee*, it might have adopted a methodology in

[5] Prairie Band filed an amicus brief in support of Shawnee's appeal. The D.C. Circuit noted that Prairie Band had brought a "similar case" that had been dismissed. *Shawnee*, 984 F.3d at 98.

accordance with the law. Further, on remand following *Shawnee*, this Court relied on the D.C. Circuit's decision when it granted Plaintiffs' preliminary injunctions, making it clear that both Prairie Band and Miccosukee had the same or "substantially similar" legal claims as the Shawnee Tribe and warranted "the same injunctive relief." Dkt. 74 at 8. Treasury distorts the *Shawnee* decision beyond recognition.

C. Treasury is not owed the deference that it claims.

Treasury tries to deflect blows against the revised methodology by arguing that its supplemental allocation is entitled to an "extreme degree" of deference by the Court. Response at 14, 15. Treasury is not entitled to anything approaching such a favorable standard of review in this APA challenge for three reasons.

First, Treasury is not entitled to any deference where, as here, its action is at odds with the plain language of the statute that it is implementing. *See Hornbeck*, 424 F. Supp. 2d at 47-48. If an agency is directed by Congress to do "x" (*e.g.*, to issue payments to Tribes based on increased expenditures due to COVID), and it nevertheless does "y" instead (issues payments that are not based on increased expenditures), the agency is not entitled to deference no matter how many technical and complex tabulations were involved in arriving at "y." *See Global Tel*Link v. F.C.C.*, 866 F.3d 397, 417 (D.C. Cir. 2017) (holding that agency action that was "manifestly contrary to the statute" was "clearly unworthy of deference") (quotation omitted).

Second, even if Treasury's allocation was within the permissible confines of the statute, the allocation was not the sort of agency action that is eligible for "an extreme degree of deference" as was the case in *Alaska Airlines* or *Appalachian Power*, the two decisions Treasury relies upon. In *Alaska Airlines, Inc. v. TSA*, the D.C. Circuit was clear that an agency determination receives "an extreme degree of deference" only when the determination is one that involves "[c]omplex judgments about sampling methodology and data analysis" that falls "within the agency's technical

expertise." 588 F.3d 1116, 1120 (D.C. Cir. 2009) (internal quotation and citation omitted). *Alaska Airlines*, for example, involved TSA's audit methodology of an air carrier's passenger fees, while *Appalachian Power* involved EPA's state-by-state air emission projections. In both decisions, there was no question that the complex technical evaluations at issue fell within the agency's unique "technical expertise."

Here, in contrast, Treasury does not even attempt to claim any special expertise in allocating large sums of money to Tribal governments based on COVID expenditures. Indeed, the CARES Act appears to acknowledge Treasury's limitations in this area because the statute requires Treasury to generate the allocation for payments "in consultation with the Secretary of the Interior," the federal agency typically tasked with handling Native American affairs. 42 U.S.C. § 801(c)(7). This is not a situation then, as was the case in *Alaska Airlines* and *Appalachian Power*, where the agency was uniquely suited for the technical task at hand. Further, unlike the highly technical methodologies involved in those cases, Treasury needlessly overcomplicated its methodology here by phasing out payments to Tribes based on their population-to-enrollment ranking. The correct methodology – an equal amount per uncounted member – was clear, simple to apply, and obvious. Treasury is not entitled to deference for engaging in a complex data analysis when a simple one was more than adequate.

Third, as Treasury correctly points out, "'[t]he concept of 'arbitrary and capricious' review defies generalized application and must be contextually tailored [and] [a] reviewing court may also be more *or less likely* to give the fact-finder the benefit of the doubt depending on the circumstances.'" Response at 14 (quoting *Maggard v. O'Connell*, 671 F.2d 568, 571 (D.C. Cir. 1982)) (emphasis added). In *Maggard*, for example, the D.C. Circuit declined to give the agency the "benefit of the doubt" when it otherwise might have because of a "combination of danger

signals," including the fact that "[t]here [had] been a number of cases already holding the [agency's] regulations and findings to be arbitrary and capricious." 671 F.2d at 571.

Here, as in *Maggard*, there are the same sort of "danger signals" that warrant less deference, not more. "Treasury was not constructing this [revised] methodology on a blank slate." Response at 1. Treasury developed the revised methodology only after the D.C. Circuit and this Court had held that Plaintiffs Shawnee, Miccosukee, and Prairie Band were likely to succeed on the merits of their APA challenges to Treasury's original allocation methodology. Further, the fact that Treasury voluntarily adopted the revised methodology justifies less deference, as it appears to have been an attempt by the agency to short circuit meritorious APA claims on mootness grounds. *See* Response at 11 ("Plaintiffs' APA claims against the original methodology are moot"). Finally, in adopting the revised methodology, Treasury had the benefit of additional Tribal consultations that reflected a consensus among Tribal leaders in favor of "using self-certified Tribal enrollment data in the reallocation formula." Ex. A (Dkt. 88-1) at 2. That Treasury nevertheless issued supplemental payments under the revised methodology to Tribal governments based on some other criteria besides Tribal enrollment then warrants scrutiny, not deference.

Finally, even when an agency is owed "extreme deference," such deference is not an impervious shield to challenge. The agency must still explain its "assumptions and methodology" and provide a "complete analytic defense" for it. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1052 (D.C. Cir. 2001) (quotation and citation omitted). In *Appalachian Power*, for example, notwithstanding the technical nature of EPA's task at hand, the D.C. Circuit still remanded the case back to EPA when there were "stark disparities" between the agency's model and "real world observations." *Id.* at 1054. In this case, as described herein and in Plaintiffs' opening brief, there is a similar "stark disparity" between the agency's allocation of Title V funds and "real world

observations" regarding Tribal enrollment. Therefore, even if Treasury is owed the deference it claims, it would still not justify the yawning disparity in awards between similarly situated Tribes.

D. Treasury could have easily fashioned supplemental awards based on enrollment that included only Plaintiffs or those Tribes that were severely undercounted by the original methodology.

Treasury argues in its Response that it could not issue a supplemental award based on actual enrollment unless it did so for all Tribes, not just those that were severely undercounted. This argument is fundamentally flawed and should be rejected by this Court.

As Treasury acknowledges in its brief, an agency must generally "take account of circumstances that appear to warrant different treatment for different parties." Response at 16; *see Kelly v. U.S.*, 34 F. Supp. 2d 8, 15 (D.D.C. 1998). Here, there would be no need for Treasury to provide supplemental payments to those Tribes that were not severely undercounted by the original methodology because the IHBG population data adequately approximated their COVID expenditures. *See* Response at 18 n.2 ("[F]or the vast majority of Tribes, the IHBG data remains the better proxy"). Further, an agency is generally afforded discretion in line drawing, such as drawing a line between those Tribes that were severely undercounted (here, 15% of Tribes) and those that were not (the other 85%). Taking Treasury at its word that there was relatively limited funding available because of the pending ANC litigation,[6] Treasury was well within its rights to limit the supplemental payments to the 15% of Tribes that had been severely undercounted by the IHBG population data. This is not an effort by Plaintiffs "to have it both ways," as Treasury

[6] Treasury spills a lot of ink lamenting the fact that it had to "retain[] sufficient funds for [the] ANCs," (Response at 15), but this is beside the point. Treasury could have resolved Plaintiffs' problem with far fewer funds than it allocated under the revised methodology had it merely provided Plaintiffs, the only litigants with standing left to challenge the distribution, a per member enrollment-based allocation. Further, the fact that there are relatively limited funds left to distribute does not afford Treasury license to allocate those funds capriciously.

argues. Response at 17-18. Plaintiffs merely seek to have similarly situated Tribes, *i.e.* those that were severely undercounted by the original methodology, to be treated similarly with payments that correspond to their actual enrollments.

The simplest (and lawful) solution was for Treasury to make supplemental distributions to those 15% of Tribes based on a specific amount per uncounted tribal members. Had Treasury done so, the severely undercounted Tribes would have all received a supplemental payment that corresponded to their enrollments (and, by extension, expenditures), as opposed to only some receiving an amount that approximated those numbers. Nothing in the record suggests that this simpler approach was infeasible. Indeed, while Treasury argues in its Response that it would have been impossible to provide meaningful supplemental awards to *all* Tribes based on a per member enrollment-based allocation (something Plaintiffs have not argued for), Treasury never once argues in its Response that it was infeasible to do so for just *those 15%* that had been severely undercounted. That Treasury failed to consider and implement this "significant and viable and obvious alternative[]" to its needlessly complicated phase-out approach is enough to render its decision-making arbitrary and capricious. *District Hosp. Partners, L.P. v. Burwell,* 786 F.3d 46, 59 (D.C. Cir. 2015) (quotation omitted).

In short, Treasury was neither authorized nor required to pay new distributions to all or even most Tribes to address what Treasury has itself characterized as "unique concerns raised by a handful of Tribes[.]"[7] Response at 1.

[7] Indeed, as Plaintiffs previously briefed to this Court, Treasury can only fashion a supplemental award for these Plaintiffs only because of (1) limitations on Treasury's ability to obligate expired appropriations in the absence of a court order, and (2) limitations on the Court's power to order relief for non-litigating parties. *See* Dkt. 65 at 9-14. Treasury's ongoing mantra to the effect that there is not enough money to treat Tribes equitably rings hollow. But in any event, the issue before this Court at this time is one of liability, not remedy. We have shown above and in our prior briefing that Treasury's inequitable and unlawful treatment of Plaintiffs is without a rational basis and a violation of the APA.

E. Plaintiffs' challenge to the original methodology is not moot.

Plaintiffs have moved for summary judgment on their claims challenging both the revised methodology as well as the original methodology in which their populations were severely undercounted, a point that Treasury practically concedes. Ex. B (Dkt. 88-2) at 2.

Treasury nevertheless argues in its Response that Plaintiffs' claims challenging the original methodology are "now moot" because "Treasury has 'replaced [the] challenged' allocation methodology" with a new one, citing *Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016). But *Akiachak* involved a challenge to a regulation that "no longer exist[ed]" after it was replaced by another. 827 F.3d at 106. Here, in contrast, while the revised methodology does indeed "modify" the original methodology, which is something the parties agree on (see Response at 13), it by no means "replaces" the original methodology, nor does it render obsolete Plaintiffs' injuries. Indeed, the injury borne by Plaintiffs as a result of the original methodology remains alive and well: despite the revised methodology affording them supplemental payments, Plaintiffs *still* have not received an allocation from Treasury that adequately approximates their increased expenditures due to COVID. The Court could therefore afford relief to Plaintiffs on their claims against the original methodology (as modified by the revised methodology) by ordering Treasury to do what it is not yet done, namely adopt a new methodology that is "consistent with the corrected legal standards" and in "harmony" with the Court's rulings. *See PPG Indus., Inc. v. United States*, 52 F.3d 363, 365, 366 (D.C. Cir. 1995) (quotation omitted).

III. CONCLUSION

While Treasury ultimately made grave and unlawful mistakes in allocating the 2020 Distribution, Treasury deserves some credit for having had to allocate a massive sum of money to Tribal governments on a relatively limited timeframe under a new statutory scheme. But Treasury

deserves no such credit for the allocation under the revised methodology. This time around, Treasury had the benefit of the D.C. Circuit's decision in *Shawnee*, this Court's prior decisions and orders, the perspectives of the litigants, as well as additional tribal consultations, all of which counseled in favor of a supplemental allocation based on uncounted members. That Treasury nevertheless based the payments on some other criteria besides enrollment or another proxy for increased expenditures is damning. There was simply no reason for Treasury to have gotten the revised allocation so wrong.

Accordingly, for the reasons herein and those in Plaintiffs' opening brief, Plaintiffs' amended motion for summary judgment should be granted and Treasury's cross-motion denied. The Court should therefore enter an order directing Treasury to distribute Plaintiffs a supplemental award based on their total uncounted members, at least in line with Shawnee's award. *See* Dkt. 90 at 7 (explaining that, if Plaintiffs were treated the same as Shawnee, they would be entitled to $1,721 per uncounted member).

July 30, 2021

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