

**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
AMENDED MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 65.1, Plaintiffs Miccosukee Tribe (“Miccosukee”) and Prairie Band Potawatomi Nation (“Prairie Band Potawatomi”), hereby amend and supplement their previous joint motion for summary judgment against Defendants (collectively referred to as “Treasury”) on Plaintiffs’ claims for declaratory judgment and for judicial relief under the Administrative Procedure Act (“APA”) (5 U.S.C. § 701 *et seq.*). See Dkt. No. 70.¹ This amended motion, which refers to and incorporates by reference the prior summary judgment motion (Dkt. No. 70), is filed in support of Plaintiffs’ APA claims directed against Treasury’s supplemental awards allocated pursuant to a revised methodology announced on April 30, 2021 (the “2021 Distribution”). Plaintiffs continue to assert their APA claims against the distribution of Title V CARES Act funds distributed in May 2020 (the “2020 Distribution”) upon the grounds recited in the prior motion and briefing. Dkt. No. 70.

Accordingly, as set forth herein, this Court should enter judgment for Plaintiffs Miccosukee and Prairie Band Potawatomi and against Treasury because: (1) the awards issued pursuant to the 2020 Distribution were arbitrary and capricious, not in accordance with law, and not fully remedied by the 2021 Distribution; and (2) in the alternative, the awards allocated as part of the 2021 Distribution were arbitrary and capricious, and not in accordance with law. This amended motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 30, 2021, Treasury announced its long-awaited revised methodology for paying out additional Title V CARES Act funds to certain Tribal governments. The revised methodology

¹ Unless otherwise noted, docket references are to Case No. 1:20-cv-01999. Plaintiff Shawnee Tribe signed onto the original joint summary judgment motion but does not join in this amended motion.

was intended to take the D.C. Circuit’s *Shawnee* decision “into account”; to rectify the “substantial disparit[ities]” that existed for some tribes between their IHBG populations and actual enrollments; and to “provide[] significant relief to all three plaintiffs” in this case. *See* Ex. A (AR-8 at 2-3 (“Action Memo for Secretary Yellen,” dated Apr. 29, 2011)) and Ex. B (AR-9 at 2 (“Coronavirus Relief Fund Allocations to Tribal Gov’ts,” Apr. 30, 2021)).²

But good intentions are not by themselves enough for lawful and sound decision-making. The revised methodology, far from remedying problems with the first, simply introduced a host of problems of its own. At the forefront is the fact that the awards issued under the revised methodology are not “based on increased expenditures” incurred due to COVID, as the CARES Act requires. 42 U.S.C. § 801(c)(7). Instead, Treasury paid out the awards based on the *percentage* by which a tribe’s enrollment was undercounted in the 2020 Distribution, a figure that has no cognizable connection to actual increased expenditures or to Treasury’s previously announced proxy for increased expenditures: Tribal population, or enrollment. As a result, the 2021 Distribution arbitrarily pays out huge awards to tribes like Shawnee, while Prairie Band Potawatomi receives just a fraction of the amount which it would have been owed if an enrollment-based allocation had been used. This point is graphically illustrated by the table on page 10 that shows that Shawnee received \$1,721 per uncounted member, while Miccosukee and Prairie Band Potawatomi received just \$1,355 and \$225, respectively. In total, Prairie Band Potawatomi will have received a population award of \$3.3 million for a certified population of 4,515; Shawnee will have received \$5.3 million for a certified population of 3,021.

² “AR,” unless otherwise noted, refers to the administrative record produced and certified by Treasury relating to the revised methodology, as supplemented. *See* Dkt. Nos. 84, 86.

Even if Treasury could somehow square the revised methodology with the statute's requirements, which it cannot, such gross, unjustified disparities among parties that are similarly situated renders its decision-making arbitrary and capricious regardless. Accordingly, for the reasons below, Plaintiffs Prairie Band and Miccosukee are entitled to summary judgment on their APA challenges to the 2021 Distribution.

II. BACKGROUND

To date, Treasury has allocated two distributions of Title V funds to Tribal governments, the 2020 Distribution and the 2021 Distribution. The parties have already fully briefed and laid out the relevant material facts regarding the 2020 Distribution. Plaintiffs refer to and incorporate by reference the Background Section of their prior motion for summary judgment (Dkt. No. 70 at 3-10). The following background focuses on the second distribution of funds, the 2021 Distribution, that was intended to remedy the deficiencies with the first.

A. The 2020 Distribution of Title V Funds based on the original methodology.

Title V of the CARES Act (42 U.S.C. § 301 *et seq.*) appropriated \$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 (“Title V funds”). *Id.* § 801(a)(2)(B).

Central to this APA challenge, Congress directed the Secretary of Treasury to pay Title V funds to each Tribal government based on “increased expenditures” directly resulting from COVID-19. 42 U.S.C. § 801(c)(7). In addition, Congress required Treasury to consult with both the Secretary of the Interior and with Tribal Governments to select a methodology for distribution of funds. *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).

Last year, in preparing the first distribution of Title V funds, Treasury adopted an allocation methodology pursuant to which 60% of the funds were to be allocated to Tribal governments based on “Tribal population,” one of the proxies that Treasury used to determine increased expenditures due to COVID. Dkt. No. 70-8 at 2 (U.S. Dept. of the Treasury, Coronavirus Relief Fund Allocations to Tribal Governments, May 5, 2020)). In Treasury’s view, “[t]ribal 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.* It is significant here that Treasury presumed a *direct* correlation between population and increased expenditures (*i.e.*, that each additional tribal member correlated to the same amount of increased pandemic expenditure regardless of tribe). Treasury’s methodology reflects that presumption by calculating distributions so that each tribe would receive the same distribution amount per tribal member.³ Treasury used the term “pro rata” to achieve this result. Treasury first determined a “pro-rata payment for each Tribal government” by taking the tribe’s IHBG population as the numerator and all tribes’ collective IHBG populations as the denominator. Treasury then made an upward adjustment for tribes with fewer than 37 members. The final step was for Treasury to do a true-up consisting of a “pro rata reduction” (for tribes with

³ An exception was made for tribes with fewer than 37 members, which all received the same default amount of \$100,000.

37 or more members) so that the sum total of all distributions would not exceed \$4.8 billion. *Id.* at 3.

As has been well-documented in prior briefing and judicial decisions, there were numerous problems with the 2020 Distribution, a fact that Treasury now concedes. *See, e.g.*, Ex. C (excerpts from AR-5, Tribal Consultation Tr.) at 26 (“[T]here[] [have] been mistakes...”); *id.* at 28 (“[W]e are working to make sure that we can fix past mistakes of previous formulas and allocations.”). Most problematic, Treasury used an elective federal housing program formula, the Indian Housing Block Grant Data or “IHBG Data,” to allocate the population award. *See* Dkt. No. 70. “The IHBG data does not reflect actual tribal enrollment,” but instead “estimates a tribe’s ‘population’ in a geographical ‘formula’ based on population numbers drawn from census projects of the number of individuals who consider themselves ‘American Indian or Alaska Native’ on census forms.” *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 96 (D.C. Cir. 2021).

Using the IHBG Data, Treasury undercounted Prairie Band Potawatomi’s tribal enrollment by 3,814 members, or 83% of its population. *See* Dkt. No. 83-1 at ¶¶ 3-5. Prairie Band was awarded \$2,456,891 as part of the 2020 Distribution. *Id.* at ¶ 2. Plaintiff Miccosukee, for its part, was assigned by Treasury an IHBG population of 0, despite having an enrollment of 605. Dkt. No. 70 at 9. As a result, Miccosukee was awarded just \$100,000 in the 2020 Distribution, which was the minimum payment that Treasury paid out to any Tribal government.

After the 2020 Distributions were announced, three Plaintiff tribes filed suit against Treasury, challenging the awards issued as part of the 2020 Distributions under the APA. This Court originally dismissed the Plaintiffs’ cases but named plaintiff Shawnee appealed to the D.C. Circuit. In the appeal captioned *Shawnee v. Mnuchin*, the D.C. Circuit held that “the IHBG data is not a suitable proxy for ‘increased expenditures,’” especially with respect to tribes who were

assigned an IHBG population of 0. *Shawnee*, 984 F.3d at 102. The D.C. Circuit therefore reversed this Court and directed that a preliminary injunction enjoining the distribution of certain funds be entered in Shawnee’s favor. After consolidating all three lawsuits on remand, this Court later issued preliminary injunctions enjoining Treasury from disbursing certain Title V funds on the basis that Plaintiffs Miccosukee and Prairie Band Potawatomi are both likely to succeed on the merits of their challenges to the 2020 Distribution. Dkt. No. 74 at 8.

B. The 2021 Distribution of Title V Funds based on the revised methodology.

With the writing on the wall following the *Shawnee* decision, Treasury set out to devise a revised methodology. Ex. A (AR-08) at 1-2. As part of its process, Treasury hosted three virtual meetings with Tribal leaders and sought written comments from them as well. During these meetings, Treasury expressed a commitment to “working to make sure that we can fix past mistakes of previous formulas and allocations,” specifically the “population-based allocation.” Ex. C (AR-05) at 8-9, 28. To that end, Treasury sought from Tribal leaders’ “thoughts about the population-based allocations made in May 2020,” as well as their thoughts regarding “using enrollment as the basis for a reallocation.” *Id.* at 12. The meetings and comments reflected a consensus among Tribal leaders in favor of “using self-certified Tribal enrollment data in the reallocation formula.” Ex. A (AR-08) at 2.

On April 30, 2021, Treasury announced the 2021 Distribution based upon the revised methodology. *See* Ex. B (AR-09). In the announcement, Treasury stated that it made the distribution in response to this Court’s ruling that the Plaintiffs were likely to succeed on the merits of their claim that Treasury had acted arbitrarily and capriciously in issuing the original distributions to those Tribes. *Id.* at 1-2. Significantly, in the revised methodology, Treasury did not reject its original premise that population is the proper proxy for increased expenditures, and

that expenditures increase an equivalent amount per tribal member. Under the new methodology, Treasury presumes that an accurate population count (based on enrollment) is the operative yardstick for increased expenditures and determines distributions based on the extent to which a tribe's 2020 Distribution (based on IHBG population data) diverged from that yardstick. As Treasury put it in the April 30 announcement, "[t]his reallocation will provide additional payments when there is a substantial disparity between the Tribe's IHBG formula area population count and its Tribal enrollment count." *Id.* at 2.

Although Treasury made clear that it still viewed a tribe's population as the proper proxy for a tribe's increased relative expenditures (Ex. B, AR-09 at 2), the revised methodology does not use Tribal population in any coherent manner. Instead, Treasury allocated the awards based on the percentage by which a tribe's enrollment was undercounted in the 2020 Distribution using a tribe's so-called "population-to-enrollment" ratio. Ex. A (AR-08) at 2-3. The ratio was calculated by dividing a tribe's IHBG population by its actual enrollment and then subtracting the resulting share from one. *Id.* at 3. For example, among the Plaintiffs in this case:

Shawnee	$\frac{0 \text{ (IHBG Population)}}{3,021 \text{ (Enrollment)}}$	= 0	1-0= 1.0 population-to-enrollment ratio
Miccosukee	$\frac{0 \text{ (IHBG Population)}}{605 \text{ (Enrollment)}}$	= 0	1-0 = 1.0 population-to-enrollment ratio⁴
Prairie Band	$\frac{747 \text{ (IHBG Population)}}{4,515 \text{ (Enrollment)}}$	= .16545	1-.16545= .8345515 population-to-enrollment ratio

⁴ Treasury apparently assigned Miccosukee a population-to-enrollment ratio of 0.999998369122792, according to Treasury's counsel. It is unclear based on the information in the administrative record as to how Treasury derived this figure when Miccosukee was assigned an IHBG population of 0.

As the chart above illustrates, tribes with an IHBG population of 0 are ranked highest using the “population-to-enrollment” ratio.

Treasury calculated each tribe’s population-to-enrollment ratio and then ranked them. Only the tribes in the top 15% – the ones who had been severely undercounted in the 2020 Distribution – were entitled to awards as part of the 2021 Distribution. Ex. B (AR-09) at 3. Treasury did not reconsider the prior distribution decisions for the remaining 85% of tribes.

Had Treasury simply assigned awards to tribes in this top 15% based on a pro rata enrollment-based allocation, this amended motion for summary judgment might not have been necessary. In fact, as part of preparing the 2021 Distribution, Treasury actually calculated for each tribe “the amount such Tribe would have received under an enrollment-based allocation.” Ex. B (AR-09) at 3. But remarkably, Treasury did not use this allocation to distribute more funds to tribes with more enrolled members. Instead, Treasury chose to let a tribe’s population-to-enrollment ratio rank not only dictate whether a tribe was entitled to a supplemental award but also the size of the award. Specifically, payments of awards were “linearly phased-out” among the top 15%, “with the highest population-to-enrollment ratio” receiving “the largest percentage of the difference between the amount it would have received under the enrollment-based allocation and the IHBG formula. . . .” *Id.* Under this “phase-out” approach, the tribes with the highest population-to-enrollment ratios received approximately 95% of what they would have received if actual enrollment had been used instead of the IHBG Data; the lowest ranked tribal governments, including Prairie Band Potawatomi, received less than 20% of what they would have received.

On May 13, 2021, Plaintiffs Shawnee, Prairie Band Potawatomi, and Miccosukee received their supplemental awards under the 2021 Distribution as follows:

	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	\$ 864,161	4,562	747	3,815	\$225

See Ex. D (previously filed as Dkt. No. 83-3 (Email from Kuntal Cholera, re: Status Update on “New Methodology,” dated May 3, 2021)). To date, in total Title V funding, Prairie Band Potawatomi has received \$3.3 million in funding; Miccosukee \$925,196. Plaintiff Shawnee, on the other hand, has received \$5.3 million, despite having significantly fewer enrollees than Prairie Band.

C. Plaintiffs Miccosukee and Prairie Band amend their complaints to challenge the 2021 Distribution.

On May 19 and May 21, 2021, respectively, Plaintiffs Miccosukee and Prairie Band Potawatomi filed amended complaints challenging under the APA the supplemental awards allocated as part of the 2021 Distribution. Dkt Nos. 79, 82. On May 28, 2021, Treasury produced the administrative record regarding the 2021 Distribution. Dkt. No. 84. The administrative record does not disclose any of the awards to be paid out to specific tribes under the 2021 Distribution, nor does it identify any of the stats assigned to each tribe entitled to a supplemental award, such as each tribe’s “population-to-enrollment” ratio or the specific “phase-out” percentage assigned to it. Upon information and belief, only the named plaintiffs in this action have received any distributions, and the rest of the planned 2021 distributions have not been paid out. Counsel has requested the information as to planned payments to other tribes, but to date that information has not been provided

In its amended complaint, Prairie Band alleged that the 2021 Distribution was arbitrary and capricious in part because Treasury used two different IHBG populations for the Nation, one for the 2020 Distribution and another for the 2021 Distribution. This error had the effect of depressing the percentage by which Prairie Band was undercounted, *i.e.* its all-important “population-to-enrollment ratio.” On June 8, 2021, in response to this concern, Treasury supplemented the administrative record to reflect a correction to the revised methodology based on this obvious error identified by Prairie Band.⁵ *See* Dkt. No. 86 (AR-10). This correction to the revised methodology does not, unfortunately, address the more foundational errors undergirding the 2021 Distribution.

IV. LAW AND ARGUMENT

A. Standard of Review

The APA authorizes judicial review of federal agency action. 5 U.S.C. § 702. Under the APA, the Court must 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. Comm'ns Comm'n*, 940 F.3d 1, 49 (D.C. Cir. 2019) (internal quotations omitted).

⁵ Based on this revision to the revised methodology for the 2021 Distribution, Prairie Band expects to receive additional funds in the approximate amount of \$740,692, which, once confirmed, would increase its supplemental award and dollar amount per uncounted member, but would still leave Prairie Band well below what the other Plaintiff tribes received per uncounted member.

As set forth below, Plaintiffs Miccosukee and Prairie Band Potawatomi are entitled to summary judgment on their APA claims directed at both the 2020 and 2021 Distributions.

B. The awards issued pursuant to the 2020 Distribution were arbitrary and capricious, as Treasury now concedes.

Plaintiffs refer to and incorporate by reference their prior briefing regarding the 2020 Distribution. *See* Dkt. No. 70. At this point, the parties in this case appear to agree that the 2020 Distribution was, at least with respect to Plaintiffs, arbitrary and capricious and not in accordance with law. In promulgating its revised methodology, Treasury finally acknowledged that the IHBG Data “may prove insufficient” for “estimating a Tribal government’s increased expenditures,” when, for example, a tribe “does not have a formula area” or when the tribe provides “COVID-related assistance to enrolled members living outside of Tribal lands.” Ex. B (AR-09) at 2. Summary judgment should therefore be entered in Plaintiffs’ favor on their APA claims challenging the awards issued pursuant to the 2020 Distribution.

C. The awards issued pursuant to the 2021 Distribution were arbitrary and capricious.

The supplemental awards that Treasury allocated as part of the 2021 Distribution are at least as, if not more so, arbitrary than the first set of awards. As described below, the new awards were based on an allocation methodology that has no coherent connection to the statute, is undermined by the actual enrollment data Treasury has on hand, and which treats similarly situated parties differently. Accordingly, summary judgment should be entered in Plaintiffs’ favor on their APA claims challenging the new awards issued as part of the 2021 Distribution.

1. The allocation of awards for the 2021 Distribution has no coherent connection to increased expenditures due to COVID or Tribal population.

When an agency is charged with administering a statute, the agency’s “power to act” and “how” it acts “is authoritatively prescribed by Congress.” *City of Arlington, Tex. v. F.C.C.*, 569

U.S. 290, 297 (2013). Here, as the D.C. Circuit held in *Shawnee*, Treasury’s discretion under Title V of the CARES Act “is limited to ‘determining’ a method for allocating funds that is ‘based on increased expenditures’” due to COVID. *Shawnee*, 984 F.3d at 100, quoting 42 U.S.C. § 801(c)(7). “[H]owever the Secretary chooses to exercise his discretion” in allocating funds to Tribal governments under the statute, he “*must*” do so based on a methodology that is “based on increased expenditures” caused by the pandemic. *Id.* (emphasis added).

For the 2020 Distribution, Treasury tried, albeit with grave missteps, to use Tribal population as a proxy for increased spending due to COVID. *See* Ex. B (AR-09) at 2 (“In its original decision, Treasury selected IHBG formula area population as the relevant measure of population...”). Treasury’s allocation of funds for the 2021 Distribution, however, is not based on tribal population at all, let alone any methodology that bears any cognizable relationship to expenditures due to COVID as mandated by the CARES Act. The 2021 Distributions are disconnected from both the statutory objective (increased expenditures) and the agency’s own original premise that a pro-rata allocation per tribal member is the proper mechanism for meeting that objective.

By its own admission, Treasury allocated the awards for the 2021 Distribution not according to Tribal population, enrollment, or expenditures, but based on the percentage by which a tribe’s enrollment was undercounted in the 2020 Distribution. Ex. B (AR-09) at 2 (“This reallocation will provide additional payments when there is a substantial disparity between the Tribe’s IHBG formula area population count and its Tribal enrollment count.”) The *percentage* by which a tribe was undercounted in the 2020 Distribution does not correspond to its *actual* COVID expenditures. The 25 tribes with an IHBG population of 0, for example, had the highest population-to-enrollment ratios. *See* Ex. A (AR-08) at 3. They achieved this status not because

of anything having to do with their actual COVID expenditures or number of enrollees, but because their 2020 Distributions were what Treasury deemed its biggest qualitative mistakes. Thus, the supplemental awards do not comply with the statute’s requirements that the awards be “based on increased expenditures of each such Tribal government.” 42 U.S.C. § 801(c)(7).

While Treasury was right to recognize its mistake, it was wrong to arbitrarily favor the tribes for which Treasury believes it was most mistaken. Treasury is bound, like any agency, to operate within the confines of the statute it is implementing. *City of Arlington*, 569 U.S. at 297. The CARES Act does not give Treasury limitless discretion to simply pick new “winners” from the top 15% of “losers” from the 2020 Distribution. *See New Jersey v. E.P.A.*, 517 F.3d 574, 583 (D.C. Cir. 2008) (an agency “may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.”) (quotation marks and citation omitted). Accordingly, Treasury’s reliance on the population-to-enrollment ratio, a percentage figure that bears no rational relationship to actual COVID expenditures or tribal population, was arbitrary and capricious.

2. Treasury’s “phasing out” of awards based on a tribe’s population-to-enrollment ranking runs counter to the enrollment data that Treasury had on hand.

An enrollment-based approach to allocating Title V funds would have compensated Tribal governments based on their actual populations and COVID-related expenditures. Here, Treasury: (i) had actual enrollment data available (*see, e.g.*, Dkt. No. 70-4, 70-5); (ii) knew based on prior litigation and its consultations with Tribal leaders the wisdom and value of using enrollment data (Ex. A (AR-08) at 2); and (iii) had even calculated what “an enrollment-based allocation” would have looked like as part of preparing the 2021 Distribution. *Id.* at 3. And yet Treasury did not allocate the new awards based on an enrollment-based allocation; it chose instead to “phase out” awards based on a tribe’s population-to-enrollment ratio ranking.

Treasury's "phase-out" method led to absurd results that should have been obvious to Treasury based on the enrollment data that it had available. In the 2021 Distribution, for example, Plaintiff Shawnee received an award of \$5,200,000 for its 3,021 enrolled members after having received the minimum \$100,000 payment as part of the 2020 Distribution. Prairie Band Potawatomi, on the other hand, despite having 4,561 enrolled tribal members and an IHBG population of 747, received just \$3.3 million in total funding. *See* Ex. D. Whether from an IHBG population or enrollment approach, there is no rational basis for allocating 40% *more* funds to Shawnee for an enrolled population that is 33% *lower*.

Treasury's decision to allocate awards in a way that was so clearly contradicted by the actual enrollment data that it had available was arbitrary and capricious. *See Butte Cnty. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (overturning Interior land-into-trust action that relied on a basis contradicting other information in the record); *Cnty. of L.A. v. Shalala*, 192 F.3d 1005 (D.C. Cir. 1999) (vacating and remanding HHS determination regarding Medicare payments that provided inadequate rationale and failed to consider more recent information).

3. Similarly situated tribes were not treated the same for purposes of allocating the awards for the 2021 Distribution.

A "fundamental norm of administrative procedure requires an agency to treat like cases alike." *Westar Energy, Inc. v. Fed. Energy Regul. Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). An agency must treat similarly situated parties the same way unless there is a legitimate rationale for treating them differently. *See, e.g., Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2007) ("[A]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."); *Seaworld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) ("treating similar cases dissimilarly [is] the paradigmatic arbitrary and capricious agency action").

Here, there is no legitimate basis for distinguishing either Prairie Band Potawatomi or Miccosukee from other tribes who received larger distributions of CARES Act funds per uncounted member. While Treasury has not disclosed any individual awards assigned under the 2021 Distribution other than the awards to the named Plaintiffs, that information alone reveals gross disparities among similarly situated parties. *See* Ex. D. As noted above, Plaintiff Shawnee, despite having a smaller enrollment, received \$2 million more than Prairie Band Potawatomi; Shawnee also received approximately \$1,721 per uncounted tribal member in the 2021 Distribution while Miccosukee received only \$1,355, even though both tribes had an IHBG population of 0. And PB received \$225 per uncounted member, despite an 84% undercount of its substantial population. There is no rational reason for such gross disparities among tribes that are similarly situated.

The disparities are even more pronounced when comparing Plaintiffs' Title V awards to tribes that did not receive any 2021 Distribution. Miccosukee's additional distribution, for example, was less than half of the amount that other tribes with an equivalent population received in May 2020. Such other tribes received no May 2021 distribution because they were not severely undercounted. There is no rational basis for this disparate treatment. *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).

E. CONCLUSION

Based on the foregoing and pursuant to Federal Rule of Civil Procedure 56, this Court should grant judgment to Plaintiffs Prairie Band Potawatomi and Miccosukee.

Dated: June 18, 2021

LIPPES MATHIAS WEXLER FRIEDMAN LLP

s/ Carol E. Heckman

Carol E. Heckman*

James P. Blenk*

50 Fountain Plaza, Suite 1700

Buffalo, New York 14202

Telephone: (716) 560-7744

heckman@lippes.com

lredeye@lippes.com

*Admitted *Pro Hac Vice*

- and -

Michael G. Rossetti, DC Bar No. 477122

1900 K Street, NW

Suite 730

Washington, DC 20006

Telephone: (202) 888-7610

Counsel to Prairie Band Potawatomi Nation

/s/ Daniel G. Jarcho

Daniel G. Jarcho (D.C. Bar # 391837)

George B. Abney

Daniel F. Diffley

Jean E. Richmann

ALSTON & BIRD LLP

The Atlantic Building

950 F Street, N.W.

Washington, D.C. 20004

Phone: (202) 239-3300

Fax: (202) 239-3333

daniel.jarcho@alston.com

Counsel for Miccosukee Tribe of Indians of Florida