ORAL ARGUMENT SCHEDULED DECEMBER 4, 2020

No. 20-5286

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Shawnee Tribe,

Plaintiff-Appellant,

v.

Steven Mnuchin, Secretary, U.S. Department of the Treasury; U.S. Department of the Treasury; David Bernhardt, Secretary, U.S. Department of the Interior; and U.S. Department of the Interior,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A) Parties and Amici

All parties, intervenors and amici appearing in the district court and in this Court are listed in the Brief of Appellant.

B) Rulings Under Review

References to the rulings at issue appear in the Brief of Appellant.

C) Related Cases

There is one related case, not identified in the Brief of Appellant, which is currently pending in the U.S. District Court for the District of Columbia: *The Miccosukee Tribe of Indians of Florida v. United States Department of the Treasury*, No. 1:20-cv-02792-APM (D.D.C.). The Statement of Interest below addresses that case.

Respectfully submitted,

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TABLE OF CONTENTS

STATEMENT OF IDENTITY AND INTEREST IN CASE.....2

ARGUMENT.....4

I. THE DISTRICT COURT HAD AUTHORITY TO REVIEW TREASURY'S DECISION TO DISTRIBUTE $100,000 TO THE SHAWNEE TRIBE.....4

A. The Texts of the Administrative Procedure Act and the CARES Act Establish That Treasury's Specific Funding Decision for the Shawnee Tribe is an "Agency Action" Subject to Judicial Review.....4

B. Treasury's "Zero-Population" Distribution Decision Does Not Fall Within the Rare Exception to Judicial Review That Applies to Agency Actions "Committed to Agency Discretion by Law".....7

1. The District Court Focused on the Wrong Agency Decisions When Considering the Applicability of Judicial Review.....7

2. The District Court Had Authority to Perform Judicial Review Under the Statute's Directive to Determine Each Tribe's Distribution "Based on" Its Own Relative Expenditures.....11

CONCLUSION.....15

TABLE OF AUTHORITIES

Page(s)

CASES

Bennett v. Spear,
520 U.S. 154 (1997).....5

Heckler v. Chaney,
470 U.S. 821 (1985).....11

Karst Envtl. Educ. & Prot., Inc. v. EPA,
475 F.3d 1291 (D.C. Cir. 2007).....6

Lincoln v. Vigil,
508 U.S. 182 (1993).....11, 13

Mach Mining, LLC v. EEOC,
575 U.S. 480 (2015).....7

Mo. Pub. Serv. Comm'n v. FERC,
337 F.3d 1066 (D.C. Cir. 2003).....9

New Orleans v. SEC,
969 F.2d 1163 (D.C. Cir. 1992).....9

Newbury Local Sch. Dist. Bd. of Educ. v. Geauga Cty. Metro. Hous. Auth.,
732 F.2d 505 (6th Cir. 1984).....6

**Norton v. S. Utah Wilderness All.*,
542 U.S. 55 (2004).....5

Rattlesnake Coal. v. EPA,
509 F.3d 1095 (9th Cir. 2007).....6, 8

Sierra Club v. EPA,
356 F.3d 296 (D.C. Cir. 2004).....12

*The authorities upon which we chiefly rely are marked with asterisks.

The Miccosukee Tribe of Indians of Florida v. United States Department of the Treasury, No. 1:20-cv-02792-APM (D.D.C.) 3

STATUTES

5 U.S.C. § 551 *et seq*. ("Administrative Procedure Act") 4, 5, 8, 10, 12

5 U.S.C. § 701(a)(2) 7, 11

5 U.S.C. § 704 ..... 5, 8

42 U.S.C. § 801(f)(1) 14

GLOSSARY

1. "APA" stands for the Administrative Procedure Act.

2. "CARES Act" or "Title V" means Title V of the Coronavirus Aid, Relief, and Economic Security Act.

3. "IHBG/AIAN" refers to the dataset Treasury selected under the Indian Housing Block Grant program, which tracks American Indian and Alaska Native populations.

STATUTES & REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellant.

STATEMENT OF IDENTITY AND INTEREST IN CASE

The Miccosukee Tribe of Indians of Florida respectfully submits this brief as *amicus curiae* in support of Appellant. The Miccosukee Tribe includes 605 members and is located in Southern Florida. The federal government has recognized the Tribe's sovereignty since 1962, when the Secretary of the Interior approved the Miccosukee Constitution.

COVID-19 has seriously harmed the Miccosukee Tribe. The pandemic has devastated the Tribe's primary sources of employment and income, which are tourism and gaming. Many of the Tribe's businesses remain closed, and others that have reopened are operating at limited capacity. As a federally-recognized Tribe, the Miccosukee qualifies for pandemic relief distributed by the U.S. Department of the Treasury under the CARES Act, 42 U.S.C. § 801(a)(2)(B).

The Miccosukee Tribe has a specific compelling interest in the outcome of this case, which likely will determine the Tribe's rights under the CARES Act. Like the Appellant Shawnee Tribe, *amicus* Miccosukee Tribe received a CARES Act distribution of $100,000, based upon Treasury's irrational conclusion that the Tribe had no members. The Miccosukee Tribe has filed a parallel action challenging Treasury's distribution decision under the Administrative Procedure Act. The Tribe filed that action in July in the U.S. District Court for the Southern District of Florida, which recently granted the government's motion to transfer the case to the U.S.

District Court for the District of Columbia. *See The Miccosukee Tribe of Indians of Florida v. United States Department of the Treasury*, No. 1:20-cv-02792-APM (D.D.C.). Because the Miccosukee Tribe's case is still pending below, the Tribe appears in this Court as an *amicus* and not as a party, but its interests are directly implicated here. The Tribe respectfully requests the Court to consider the arguments below, which elaborate upon Appellant's arguments.[1]

[1] No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

ARGUMENT

The District Court's decision below turned on the question whether Treasury's decision to distribute $100,000 to the Shawnee Tribe is subject to judicial review. *Amicus* Miccosukee Tribe respectfully submits this brief to elaborate upon the Shawnee Tribe's discussion of the reviewability issue, to support reversal of the District Court's judgment.

I. THE DISTRICT COURT HAD AUTHORITY TO REVIEW TREASURY'S DECISION TO DISTRIBUTE $100,000 TO THE SHAWNEE TRIBE

A. The Texts of the Administrative Procedure Act and the CARES Act Establish That Treasury's Specific Funding Decision for the Shawnee Tribe is an "Agency Action" Subject to Judicial Review

The texts of the Administrative Procedure Act (APA) and the CARES Act establish that Treasury's specific funding decision for the Shawnee Tribe is an "agency action" subject to judicial review. In the CARES Act, Congress expressly referred to such funding determinations as individualized decisions that Treasury must make, within specific statutory constraints, for each Tribe: the "amount paid . . . to *a* Tribal government" must be based on increased expenditures of "*each such* Tribal government" relative to 2019 expenditures by "*the* Tribal government." 42 U.S.C. § 801(c)(7) (emphasis added). Those individualized decisions funding fall squarely within the APA definitions of "agency actions" that are subject to judicial review.

The APA expressly authorizes judicial review of five specific categories of "discrete agency actions." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004). One of those categories is an agency order withholding a grant of money (such as the full and fair distribution that the Shawnee Tribe seeks here). The APA's definition of "agency action" includes an order "withholding" or "deny[ing]" "relief." 5 U.S.C. §§ 551(13), (10)(B). An "order" is an agency's final disposition of a matter that is not a rulemaking (such as the matter at issue here). 5 U.S.C. § 551(6). "Relief" includes "the whole or part of an agency . . . grant of money." *Id.* § 551(11)(A); *see also Norton*, 542 U.S. at 62. The Shawnee Tribe challenges Treasury's order withholding a full and fair grant of CARES Act money to the Tribe, through an irrational decision-making process.

Treasury's agency action also is a "final" agency action. *See* 5 U.S.C. § 704 (providing for judicial review of final agency actions). Agency action is final if it is the "'consummation'" of the agency's decision-making process and determines "'rights or obligations'" or triggers "'legal consequences.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). The funding determination at issue was the consummation of Treasury's decision-making process for the Shawnee Tribe's distribution and determined the Tribe's right to payment.

Treasury's decision to distribute $100,000—no more and no less—was definitive. The agency repeatedly refused the Shawnee Tribe's pleas for a higher

distribution. *See* Opening Brief of Shawnee Tribe at 12-13. And Treasury still vigorously disputes, in this litigation, the Tribe's claim to a higher payment. In addition, under the methodology that Treasury Secretary Mnuchin formally adopted, publicly promulgated and implemented, the $100,00 payment was a "minimum" that could not be reduced.[2] The Treasury decision challenged here is like other agency grant decisions that courts have reviewed as final agency actions. *See, e.g.*, *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007) (agency "did undertake final agency action by making [a] $500,000 grant" to assist transportation project); *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (agency takes final agency action when it "decides to disburse the appropriated funds" under a grant application); *Newbury Local Sch. Dist. Bd. of Educ. v. Geauga Cty. Metro. Hous. Auth.*, 732 F.2d 505, 507 (6th Cir. 1984) (federal agency approval of housing subsidy reviewable as a "grant of money").

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[2] U.S. Department of the Treasury, Coronavirus Relief Fund Allocations to Tribal Governments (May 5, 2020) (attached as Ex. A) at 2. Treasury divided the $8 billion in appropriated CARES Act money into two separate funds: a $4.8 billion fund distributed under the population-based methodology at issue in this case and another $3.2 billion fund distributed under a different methodology based on Tribal employment and expenditures data. *Id.* at 2. Treasury emphasized that for the population-based distributions, "the total amount for all Tribes does not exceed $4.8 billion." *Id.* at 3. Treasury pinpointed this $4.8 billion ceiling by making *pro rata* (downward) adjustments to population-based distributions that exceeded $100,000. The Shawnee Tribe's $100,000 distribution was not subject to this *pro rata* adjustment. *Id.* at 3.

B. Treasury's "Zero-Population" Distribution Decision Does Not Fall Within the Rare Exception to Judicial Review That Applies to Agency Actions "Committed to Agency Discretion by Law"

The "'strong presumption' favoring judicial review of administrative action" is a foundational principle of administrative law. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation omitted). The District Court erred when it applied the rare exception to reviewability for agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That exception does not apply to Treasury's decision to award $100,000 to the Shawnee Tribe.

1. The District Court Focused on the Wrong Agency Decisions When Considering the Applicability of Judicial Review

Treasury made three distinct agency decisions in connection with the distribution to the Shawnee Tribe: (1) the decision to measure a Tribe's relative expenditures by using population data (instead of direct expense data);[3] (2) the decision to measure a Tribe's population by reference to information in the IHBG/AIAN dataset (instead of some other dataset);[4] and (3) the decision to distribute $100,000 to the Shawnee Tribe based on a claimed population of zero. The District Court analyzed the reviewability of the first two decisions but effectively ignored the third (which was the actual grant decision). Memorandum

[3] *Id.* at 2.

[4] *Id.* at 2 n.6.

Opinion and Order, No. 1:20-cv-1999-APM (D.D.C. Aug. 19, 2020), Dkt. No. 43 at 2, 5-6; Memorandum Opinion, No. 1:20-cv-1999-APM (D.D.C. Sept. 10, 2020), Dkt. No. 48.

At a minimum, the District Court erred by failing to undertake a separate analysis of Treasury's third and final decision, even assuming *arguendo* that the first two decisions were not reviewable. It is well established that a final agency decision can be reviewable even if prior determinations underlying the final decision are not. For example, the APA's text expressly distinguishes between "[a] preliminary, procedural, or intermediate agency action or ruling" that is "not directly reviewable" and "final agency action" that is reviewable. 5 U.S.C. § 704. That principle underlies court rulings that final grant decisions are reviewable, even though some precursor determinations concerning the grant funds are not. *See, e.g.*, *Rattlesnake Coal.*, 509 F.3d at 1103 (no reviewable action occurred until the agency "reviewed a grant application and decided to disburse the funds").

The District Court blurred the distinction between the general decision to use the IHBG/AIAN dataset for population determinations and the individualized decision to ignore a known and obvious discrepancy in that dataset, specific to the Shawnee Tribe, when determining the particular amount of its distribution. There is a sharp distinction between an agency's decision to rely upon a general category of evidence (which may be discretionary) and an agency's decision to ignore or

sidestep obvious discrepancies in that same evidence (which is not permissible). For example, whatever leeway an agency may have to choose a particular category of evidence as proof, "[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decision-making." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). And while an agency may have discretion to choose which studies it wants to rely upon, a decision to "rel[y] on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data 'is arbitrary…'[.]" *New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992).

In fact, Treasury's own actions implicitly acknowledge the clear-cut distinction between the general decision to use the IHBG/AIAN dataset and individualized funding decisions that involve specific applications of such data (to determine the particular amounts owed to each Tribe). Treasury acknowledged that the IHBG/AIAN dataset entirely omitted some Tribes that were eligible for distributions and included other Tribes that did not meet the CARES Act's statutory eligibility criteria. Treasury properly addressed these discrepancies, by obtaining different population data for the omitted Tribes and precluding distributions to ineligible Tribes:

> For Indian Tribes not included in the IHBG population data, HUD provided population figures at Treasury's request. Treasury will not include state-recognized Tribes

> that participate in the IHBG program but that are not Indian Tribes as defined by Title V of the CARES Act.

Ex. A at 3.

Treasury plainly recognized that its general decision to rely on the IHBG/AIAN dataset was distinct from the final funding decisions concerning the amounts actually owed (or not owed) to these Tribes—decisions that involved *departing* from the dataset when there were obvious discrepancies in it. Here Treasury *refused* to depart from the dataset when determining the distribution to the Shawnee Tribe, even though the erroneous "zero-population" listing was effectively the same as omitting the Tribe from the database (like the other Tribes described above). When notified of that error, the agency was intransigent, and it made the arbitrary and capricious decision not to adjust the Shawnee Tribe's distribution (even though the agency did make individualized adjustments for other Tribes as explained above). Like the final funding decisions for those other Tribes, the final funding decision for the Shawnee Tribe was distinct from the general decision to rely on the IHBG/AIAN dataset. That final decision was a reviewable order "withholding" or "deny[ing]" a "grant of money." 5 U.S.C. §§ 551(10)(B), (11)(A), (13).

2. The District Court Had Authority to Perform Judicial Review Under the Statute's Directive to Determine Each Tribe's Distribution "Based on" Its Own Relative Expenditures

The District Court erroneously held that it had no authority to review the challenged funding decision, applying the exception to judicial review for agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That exception only applies in "'those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Here there plainly *is* such a statutory standard: the directive that the funding determination for each Tribal government must be "based on increased expenditures of each such Tribal government . . . relative to aggregate expenditures in fiscal year 2019 by the Tribal government . . . ." 42 U.S.C. § 801(c)(7).

Treasury chose Tribal population as a proxy for increased relative expenditures, based upon the conclusion that "population is expected to correlate reasonably well with the amount of increased expenditures . . . ." Ex. A at 2. Even assuming *arguendo* that Treasury had unreviewable discretion to choose population as a proxy for expenditures, that did not mean "anything goes" when the agency determined the actual population of a Tribe. Treasury was obliged to determine

population through a rational decision-making process, and the Court has authority to ensure rationality by reviewing the agency's decision under the APA.

It is critical here that an irrational decision concerning the Tribe's population *also constitutes an irrational decision concerning the Tribe's increased relative expenditures*—given that the agency has chosen population as the exclusive measure for such expenditures. That point wholly undermines Treasury's assertion that it can determine population any way it wants to—even through a wholly irrational process that knowingly relies upon false data—and that the Court is powerless to step in. The logical extension of that assertion is that Treasury also can determine *relative expenditures* through a wholly irrational process (since Treasury has chosen population as a proxy for such expenditures). That obviously cannot be the case, given Congress's express directive that the distributions to Tribes "shall be . . . based on" increased relative expenditures. 42 U.S.C. § 801(c)(7). The Court has authority to review the agency's population determination for the Shawnee Tribe under that statutory directive. *Cf. Sierra Club v. EPA*, 356 F.3d 296, 307 (D.C. Cir. 2004) (reviewing agency decision under statutory requirement that it must be "based on" defined analytical method).

The District Court's contrary conclusion is unpersuasive, for three major reasons. *First*, the District Court equated the Shawnee Tribe's final funding decision with the general decision to rely upon the IHBG/AIAN dataset and then held that the

choice of the dataset was unreviewable. Memorandum Opinion, No. 1:20-cv-1999-APM (D.D.C. Sept. 10, 2020), Dkt. No. 48 at 5-6. As explained above in section I.B.1, the District Court should have analyzed reviewability of these two distinct decisions separately. Had it done so, it should have held, at a minimum, that the Court had authority to review the final funding decision.

Second, the District Court erroneously found unreviewable discretion in the CARES Act requirement that distributions must be "determined in such manner as the Secretary determines appropriate to ensure that all amounts [designated for Tribes] are distributed to Tribal governments." *Id.*; 42 U.S.C. § 801(c)(7). The District Court did not persuasively address the express statutory limits on this authority. In fact, the statute narrowed the Secretary's authority, directing that it had to assure that distributions were "based on" increased relative expenditures. That was a "meaningful standard against which to judge the agency's exercise of discretion." *Lincoln*, 508 U.S. at 191 (citation omitted).

Finally, in addition to overlooking that meaningful standard, the District Court misinterpreted the requirement that distributions must be "determined in such manner as the Secretary determines appropriate to ensure that all amounts [designated for Tribes] are distributed to Tribal governments." 42 U.S.C. § 801(c)(7). The plain meaning of that language is that the Secretary was empowered to develop methods to make sure that all, not just some, of the funds appropriated

for Tribes are distributed, and that Tribal governments (not other entities) receive them. That interpretation is reinforced by punctuation: the absence of a comma between the word "appropriate" and the word "to." That interpretation also is consistent with another provision that expressly directs Treasury's Inspector General to "conduct monitoring and oversight of the . . . disbursement . . . of funds made available under this section." 42 U.S.C. § 801(f)(1). However broad the Secretary's authority may be (under the statutory language relied upon by the District Court) to ensure that all funds were spent and not diverted, that is not the issue here. The issue here is the effect of the "relative expenditures" language in the statute. That language establishes a yardstick whereby the Court has authority to review the Secretary's population determination underlying the grant decision for a particular Tribe (as the agency's chosen measure for that Tribe's relative expenditures) to ensure that the decision is rational.

CONCLUSION

This Court should reverse the District Court's judgment.

October 16, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 2,485 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief has been set in a plain, roman style in a proportionally spaced, 14-point, serif typeface.

Dated: October 16, 2020

/s/ Daniel G. Jarcho
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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020 I electronically served the foregoin Brief & the following counsel for the parties through the Court's CM/ECF system:

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ADDENDUM

TABLE OF CONTENTS

U.S. Department of the Treasury, Coronavirus Relief Fund Allocation to Tribal Governments 1

EXHIBIT A

Coronavirus Relief Fund
Allocations to Tribal Governments
May 5, 2020

The CARES Act reserves $8 billion from the Coronavirus Relief Fund (the Fund) for payments to Tribal governments and provides that the allocation of payments to Tribal governments is to be determined by the Secretary of the Treasury in consultation with the Secretary of the Interior and Indian Tribes.[1]

Consultation process

In accordance with Treasury's Tribal consultation policy, Treasury and the Bureau of Indian Affairs conducted two telephonic Tribal consultations with Tribal leaders and received written comments from Indian Tribes. Treasury also appreciates the submissions made by Indian Tribes in response to Treasury's request for information.

Allocation determination

The CARES Act provides that the Tribal allocation is to be "based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity)" and "determined in such manner as the Secretary [of the Treasury] determines appropriate to ensure that all amounts" are distributed to Tribal governments.[2]

Based on a reasonable assessment of the reliability, verifiability, and relevance of available data and after consulting with the Bureau of Indian Affairs and Indian Tribes, Treasury has determined that it is reasonable and appropriate to allocate payments based on a formula takes into account population data, employment data, and expenditure data. This determination is also based on considerations of administrative feasibility—a particularly important factor in light of the need for prompt payment to Tribal governments to meet immediate needs.

By necessity and due to the statutory design, any allocation formula will yield only an estimate of increased eligible expenditures, and the statute therefore grants the Secretary discretion to devise a formula that the Secretary deems appropriate to ensure that all amounts are distributed to Tribal governments.[3] It is of course unknown at present what a Tribal government's increased expenditures will be over the course of the period beginning March 1, 2020, and ending December 30, 2020, during which expenses to be covered using payments from the Fund may be incurred.[4] Treasury determined that it would not be appropriate to rely entirely on Tribal governments' fiscal year 2019 expenditures in making allocations, *e.g.*, by providing payments to each Tribal government based on a fixed percentage of such Tribal government's fiscal year 2019 expenditures.

Treasury believes the allocation of payments should be focused on, to the extent administratively feasible, necessary expenditures that are due to the public health emergency, which are the only expenditures that may be made using payments from the Fund.[5] Treasury observed wide variability in expenditures reported by Tribal governments that appears to be related to differences in the extent to which Tribes and tribally-owned businesses engage in business activities. Although Treasury interprets the CARES Act to permit the provision of certain economic support to affected businesses, not all business expenses will be eligible. Treasury expects that Indian Tribes with less extensive tribally-owned businesses (and therefore

[1] *See* section 601(c)(7) of the Social Security Act, as added by § 5001(a) of the CARES Act.

[2] *See id*.

[3] *See id.*

[4] *See id.* at section 601(d)(3).

[5] *See id.* at section 601(d)(1).

lower overall expenditures) will have a proportionately greater increase in eligible expenditures than those Tribes whose prior year expenditure amount would include expenditures associated with large tribally-owned businesses.

In contrast, 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. The Federal government also has reliable and consistently-prepared data for this key variable, discussed further below, that permits payments to be made at this time. Given the importance of providing funding as soon as possible to Tribal governments to address health and human services costs and other costs directly related to COVID-19, Treasury has determined to distribute 60 percent of the $8 billion reserved for Tribal governments immediately based on population.

Treasury will distribute the remaining 40 percent of the $8 billion reserved for Tribal governments based on employment and expenditures data of Tribes and tribally-owned entities. The use of employment data is expected to correlate reasonably well with expenditures related to effects of the emergency, such as the provision of economic support to those experiencing unemployment or business interruptions due to COVID-19-related business closures. Data relating to expected increased expenditures is expected to correlate reasonably well with the variability in the per person costs of service delivery in different tribal environments. Treasury believes it is important to ensure that this data is as consistent across Tribal governments as possible and for that reason intends to request additional information in the near future from Tribal governments as to their employment and expenditures. Treasury intends to determine the specific weight given to employment and expenditure data after receiving such additional submissions. Final payments will be made after data on employment and expenditures are received, reasonably verified, and accounted for in the allocation formula.

Treasury determined that the total number of land acres held by the Tribal government and any tribally-owned entity would not provide a useful indicator of increased expenditures. Although the total number of land acres can indicate increased costs of providing services over a larger area, particularly in remote locations, there are some areas that are so sparsely populated that reliance on this factor likely would overstate the increased marginal costs of Tribal governments in these areas.

Tribal population data

For purposes of the payments based on Tribal population, Treasury will refer to the Tribal population data used by the Department of Housing and Urban Development (HUD) in connection with the Indian Housing Block Grant (IHBG) program.[6] This population data is based on Census Bureau data, and Tribal governments are familiar with it and have already been provided the opportunity to scrutinize and challenge its accuracy.[7]

The IHBG program allocation formula uses the American Indian and Alaska Native population count as determined by the Census of each Tribe's "formula area."[8] Although the definition of "formula area" was developed by HUD for the specific context of the IHBG program, the formula area corresponds broadly with the area of a Tribal government's jurisdiction and other areas to which the Tribal government's

[6] The IHBG formula includes total American Indian and Alaska Native (AIAN) population as part of the needs component. The remainder of the IHBG formula will not be referenced by Treasury in making payments from the Fund.

[7] *See* 24 C.F.R. §§ 1000.330(c), 1000.336.

[8] *See id.* at § 1000.302.

provision of services and economic influence extend. The IHBG formula area is also useful because it incorporates adjustments to address overlapping jurisdictions.

The IHBG population data used by Treasury for the Fund allocation is available from HUD.[9] For Indian Tribes not included in the IHBG population data, HUD provided population figures at Treasury's request. Treasury will not include state-recognized Tribes that participate in the IHBG program but that are not Indian Tribes as defined by Title V of the CARES Act. Treasury will follow the IHBG practice of calculating a payment amount for each Tribal government based on single-race and then multi-race data and allocating the larger calculation amount for each Tribe.[10]

Minimum payment amount

The population-based allocation will assign a minimum payment of $100,000 to the smallest Indian Tribes as set forth in step 2, below. Only Tribal governments with a population of less than 37 will receive the minimum payment. The decision to apply a minimum payment to such Indian Tribes reflects the greater relative significance that variations in population would have at the low end of the range and the greater marginal costs that small Indian Tribes have in providing services to their people. The establishment of this minimum amount also reflects the clear desire expressed by a substantial number of Indian Tribes during the Tribal consultation process and is set at an amount that should allow funds to be used by Tribes of this size for eligible expenditures.

Alaska Native corporations

As previously stated, Treasury, after consultation with the Department of the Interior, has concluded that Alaska Native regional and village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act are eligible to receive payments from the Fund. Payments are not being made to the Alaska Native corporations at this time due to pending litigation.

Population-based component of allocation formula

The allocation will result from Treasury taking the following steps:

> Step 1. Calculate the pro-rata payment for each Tribal government based on single-race and then multi-race data for each Tribe's IHBG formula area, and use the larger result for each Tribal government.
>
> Step 2. Assign a minimum payment of $100,000 to those Tribal government that would otherwise receive less than that amount under step 1.
>
> Step 3. For Tribal governments that would receive a payment greater than the minimum, a pro-rata reduction is made for those amounts above the minimum for each Tribe so that the total amount for all Tribes does not exceed $4.8 billion.

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[9] *See* https://www.hud.gov/sites/dfiles/PIH/documents/FY%202020%20Estimate%20Allocation%20Single-Multi.xlsx.

[10] Prior to 2000, the Census required a person to choose a single racial category. Starting in 2000, a person was allowed multiple responses. For example, a person with mixed ancestry could report that they were both AIAN and Asian. Since 2006, successive appropriations acts have directed HUD to run the IHBG formula twice—once counting the needs of all persons who report that they are AIAN, whether they say they are AIAN alone or AIAN in combination with some other race, and then again counting only the needs of persons who identify solely as AIAN. A Tribe's allocation is based on the definition—either AIAN alone or the broader definition of multi-race AIAN—which provides it with a higher share of total funds. *See, e.g.,* Further Consolidated Appropriations Act, 2020, Public Law 116-94, Div. H, Title II; 133 Stat 2534, 2985.