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

REPLY IN SUPPORT OF MOTION TO MODIFY PRELIMINARY INJUNCTION

In its Response to Prairie Band's request to enjoin an additional $4,033,042 of CARES Act funds, Treasury does not argue that it would suffer any material prejudice from the modified injunction, nor does it argue that third parties would be unfairly prejudiced by this relatively modest modification of the preliminary injunction that has already been entered. Instead, Treasury's opposition is based solely on the argument that Prairie Band has "failed to show that it is likely entitled to $11,680,105 (or any other amount) . . . " Response at 1. This is because, Treasury argues, even if the original allocation methodology was arbitrary and capricious, "that does not mean the plaintiff would necessarily be entitled to an additional payment" because this Court can only order Treasury to "adopt a revised methodology," not direct Treasury to pay a specific amount. Response at 2.

This argument fails to defeat Prairie Band's motion for three reasons. ***First***, the Court cannot accept Treasury's argument without in effect dissolving earlier injunctions in this case. This Court has already entered three injunctions that enjoined Treasury from disbursing certain CARES Act funds, one of which was mandated by the D.C. Circuit. *See Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 103 (D.C. Cir. 2021) (directing district court to enter an order enjoining Treasury from disbursing "only $12 million of the remaining Title V funds"). Were this Court to now accept Treasury's argument that the plaintiffs in this litigation are necessarily precluded from seeking to withhold a specific amount of funds, such a holding would not only undercut these prior orders, but also violate the D.C. Circuit's mandate, which the Court does not have "power or authority" to do. *See Role Models Am., Inc. v. Geren*, 514 F.3d 1308, 1311 (D.C. Cir. 2008).

Treasury tries to alleviate any concerns the Court might have about such a reversal by asserting that Treasury did not raise this argument in connection with those earlier orders. *See* Response at 2 ("[A]lthough the D.C. Circuit found that the plaintiff was entitled to a preliminary

injunction requiring Treasury to hold back a certain amount, Treasury had not raised the argument that it raises here"); *id.* at 3 ("Treasury did not oppose [the injunction entered on April 26, 2021] based on the arguments raised here."). But Treasury *did* raise this argument to *this* Court when it argued that the "appropriate remedy" in this case "would be to require Treasury to develop a new methodology, not to make payments pursuant to a methodology that meets certain extra-statutory requirements." Dkt. No. 71 at p. 11. Treasury pressed this position in papers that were considered and decided by the Court at the same time as the very preliminary injunction at issue in this motion.[1] *See* Dkt. 74.

Regardless, even if it were true that Treasury had never raised this argument before this Court, that would hurt, not help, its position. As one federal court held in similar circumstances, a party's failure to advance an argument in opposition to a preliminary injunction may preclude that party from asserting it later:

> Many of the arguments raised by Defendants in the [present] motion are being raised for the first time, despite the fact that Defendants had an adequate opportunity to present these arguments when opposing the motion for preliminary injunction. . . . [T]he Court, after considering the arguments before it in connection with the preliminary injunction determined that Plaintiff had demonstrated a likelihood of success on the merits. During that stage of the proceeding, Defendants did not raise a variety of defenses they raise now. ***Those arguments should have been raised in Defendants' opposition***. Their failure to do so divests them of the opportunity to do so now.

Liang v. Nguyen, No. CV 08-8211, 2009 WL 514073, at *2-3 (C.D. Cal. Feb. 26, 2009) (emphasis added).

[1] Treasury suggests in its Response that this Court's April 26, 2021 decision was internally inconsistent. *See* Response at 3. It was not. The fact that the Court declined to direct Treasury to pay a specific amount to plaintiffs on an interim basis is entirely reconcilable with the Court's decision to enjoin disbursement of certain CARES Act funds. The latter order was intended to ensure that plaintiffs have available an adequate remedy in the likely event that they succeed on their APA challenges. Dkt. 74 at 8.

Second, the D.C. Circuit has already rejected the sort of unbounded discretion that Treasury claims to possess in selecting a new methodology for the distribution of CARES Act funds to Tribal governments. In its Response, Treasury argues that, at most, this Court can only order Treasury to "adopt a revised methodology." Response at 2. But this is an oversimplification. As the D.C. Circuit held in *Shawnee*, Treasury's discretion under the CARES Act "is limited to 'determining' a method for allocating funds that is 'based on increased expenditures [relative to aggregate expenditures in fiscal year 2019]' and that is 'appropriate to ensure that all amounts available are distributed.'" *Shawnee*, 984 F.3d at 100. By its own admission, Treasury elected to award sixty percent of the Title V CARES Act Funds "based on tribal population" because "Tribal population [was] expected to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased costs to address medical and public health needs."[2] Far from being "baseless" then as Treasury contends, the amount of funds that Prairie Band seeks to enjoin in this motion is based on the premise that, had Treasury actually used "tribal population" as a proxy for increased expenditures as it purported, then Prairie Band ought to have received $15,001,129 in the 2020 Distribution, an amount that takes into account its actual tribal population. That Treasury still contends, even after the *Shawnee* decision, that it is free to devise any methodology of its choosing without restriction is troubling and explains why the new methodology it adopted this past April is so deficient.

Third, Treasury's argument provides support for the Court enjoining *more*, rather than less, CARES Act funds. If Prairie Band is likely to succeed on the merits of its APA challenge (as this Court has already held), but the Prairie Band is not necessarily entitled to a specific amount of

[2] U.S Dept. of the Treasury, Coronavirus Relief Fund Allocations to Tribal Governments, https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf.

funds as Treasury argues, the only fair and sensible solution would be to enjoin *all* of the reallocated $83 million in CARES Act funds set aside by Treasury for its 2021 Distribution, which funds have not yet been distributed (other than to the three Plaintiffs in this case). For reasons already explained, Treasury's 2021 Distribution methodology is hopelessly flawed and perpetuates the same flaws of the 2020 Distribution by creating new, arbitrary funding disparities and failing to fund tribes on the basis of tribal population. This is evidenced by the grossly disproportionate amounts provided to uncounted tribal members within this case alone. *See* Dkt. No. 82 at ¶¶ 53-68; Dkt. 83 at 9-11. Rather than restraining *none* of these funds, as Treasury would argue, the Court should restrain *all* of these funds until Treasury adopts a lawful methodology approved by this Court. Otherwise, Prairie Band (and the other plaintiffs) could very well be deprived of a remedy for Treasury's unlawful behavior simply because they could not prove the exact amount of funds to which they were entitled. Indeed, Treasury does not identify in its Response any prejudice that it or any third party would suffer if additional (or all) of these funds were set aside. In part for this reason, Prairie Band sought in the alternative in its motion for the Court to "enjoin[] the pending distribution of an additional $83 million taken from the funds set aside for the ANCs . . ." Dkt. No. 83, Br. at 4.

Finally, as to Prairie Band's request in its motion for an order directing Treasury to specifically set aside the enjoined funds for Prairie Band, Treasury's Response triggers ear-piercing alarm bells. In textbook doublespeak, Treasury tries to assure everyone and no one at the same time by stating that, "Treasury – for now – is not moving the Court to dissolve Prairie Band's earlier preliminary injunction." Response at 3. The subtext is of course that Treasury will move the Court to dissolve Prairie Band's earlier preliminary injunction as it has already signaled in its Response. *See* Response at 3 ("[T]he Court only now has a reason to resolve whether its decision

denying Plaintiffs' most recent preliminary injunction motion forecloses Prairie Band's request for modified preliminary relief here."). Unless the Court orders that the enjoined funds be earmarked for Prairie Band separate and apart from the funds set aside for the ANCs, Prairie Band will likely have to win its case *and* prove a superior claim to the funds over the ANCs, an issue which will ultimately have to be decided after discovery, briefing, and argument. Such needless expense and risk could be avoided simply by directing Treasury to set aside funds sufficient to cover Prairie Band's preliminary injunction from the $83 million that Treasury has already set aside for paying out the 2021 Distributions under the revised methodology. The $11.6 million that Prairie Band seeks to enjoin is just a small percentage of the total $83 million allocated for the new distribution.

Accordingly, for the reasons herein and those set forth in its opening papers, Prairie Band respectfully requests that the Court enter an order (i) modifying the preliminary injunction entered on April 26, 2021 to increase the amount enjoined to $11,680,105, and (ii) further enjoining the $83 million of reallocated funds to preserve an adequate remedy for Prairie Band pending the determination of the merits of this case.

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