

MEMORANDUM OPINION AND ORDER

Plaintiff Prairie Band Potawatomi Nation moves to modify the preliminary injunction entered on April 26, 2021, by increasing the amount of undistributed CARES Act funds² set aside for Prairie Band from \$7.6 million to \$11,680,105. *See* Pl.’s Mot., ECF No. 83 [hereinafter Pl.’s Mot.], at 1. Prairie Band also requests an order directing Defendant Secretary of Treasury (“Treasury”) to earmark the enjoined funds separate and apart from funds set aside for other tribal governments, including Alaska Native Corporations (“ANCs”).³ *Id.* Treasury opposes Prairie Band’s motion on the grounds that (1) “Prairie Band cannot show that it is likely entitled to *any* additional payment, much less a payment for the amount they seek,” and (2) “Prairie Band’s request for an order” specifically setting aside the enjoined funds “is unnecessary.” *See* Resp. to Prairie Band’s Mot. to Modify the Prelim. Inj., ECF No. 85 [hereinafter Def.’s Opp’n], at 1, 3. For the reasons that follow, the court denies Prairie Band’s motion.

I.

On April 26, 2021, this court entered a preliminary injunction in favor of Prairie Band requiring Treasury to withhold \$7.6 million in remaining CARES Act funds to which the tribe claims entitlement. *See* Mem. Op. & Order, ECF No. 74 [hereinafter Mem. Op.], at 8. That ruling was based on the D.C. Circuit’s decision in *Shawnee Tribe v. Mnuchin*, in which the Circuit held that the Shawnee Tribe was likely to succeed on its claim that Treasury’s decision to use Indian

² Title V of the Coronavirus, Aid, Relief, and Economic Security (“CARES”) Act appropriated \$8 billion “for making payments to . . . Tribal governments” (“Title V funds”), 42 U.S.C. § 801(a)(1); *id.* § 801(a)(2)(B), for “necessary expenditures incurred due to the public health emergency with respect to [COVID-19],” *id.* § 801(d)(1). *See also id.* § 801(c)(7) (providing that the amounts paid to Tribal governments shall be based “on increased expenditures of each such Tribal government . . . relative to aggregate expenditures in fiscal year 2019 by the Tribal government”).

³ Some of the approximately \$535 million in remaining Title V funds is allocated for disbursement to ANCs, whose eligibility to receive such funds is dependent on a case pending before the Supreme Court. *See Yellen v. Confederated Tribes of the Chehalis Rsrv.*, Nos. 20-543 & 20-544.

Housing Block Grant (“IHBG”) formula area population data⁴ as a proxy for increased expenditures to allocate Title V funds, *see supra* note 2, was arbitrary and capricious. 984 F.3d 94, 101–02 (D.C. Cir. 2021). The Shawnee Tribe alleged that it had a population of 3,021 enrolled members, but the IHBG population data upon which Treasury relied to calculate the initial award of Title V funds (the “2020 Distribution”) showed “the Tribe had a population of zero.” *Id.* at 102. As a result of that discrepancy, the court observed, “the Tribe received the minimum payment of \$100,000, even though it ha[d] incurred significant medical and public health expenses in responding to the devastation resulting from the COVID-19 pandemic.” *Id.* (internal quotation marks and citation omitted). In finding “the IHBG data [was] not a suitable proxy for ‘increased expenditures,’” the Circuit noted that the same reasoning applied to the Miccosukee Tribe, a different plaintiff in this consolidated action, which claimed to have 605 enrolled members despite having an IHBG formula area population of zero. *Id.* (quoting 42 U.S.C. § 801(c)(7)).

Although Prairie Band was not discussed in *Shawnee*, this court found that Prairie Band too was likely to succeed on the merits because “Treasury’s original methodology vastly undercounted its population.” Mem. Op. at 8. Prairie Band has a certified population of 4,561, but the IHBG data on which Treasury apparently relied reflected the tribe’s population as only 883. *See* Pl.’s Mot. at 3 (citing an Excel spreadsheet attached to Treasury’s May 5, 2020 announcement of the 2020 Distribution). Based on that metric, Prairie Band alleged in its initial complaint that its 2020 Distribution award of \$2,456,891 was the result of an 80 percent undercount of its actual enrolled members. *See* Pl.’s Mot. at 5. The court granted Prairie Band’s request to enjoin

⁴ “The IHBG data does not reflect actual tribal enrollment. Instead, it estimates a tribe’s ‘population’ in a geographical ‘formula area’ based on population numbers drawn from census projections of the number of individuals who consider themselves ‘American Indian or Alaska Native’ on census forms.” *Shawnee*, 984 F.3d at 97 (citing 24 C.F.R. §§ 1000.302, 1000.330).

\$7,647,063 in Title V funds to preserve the status quo while the tribe's claims were litigated. *See* Mem. Op. at 8.

Three days after the court entered the preliminary injunction, on April 30, 2021, Treasury announced that, in light of *Shawnee*, it had revised its methodology for the purpose of allocating the remaining undisbursed Title V funds (“the 2021 Distribution”). *See* Status Report, ECF No. 76, Ex. A, ECF No. 76-1 [hereinafter Apr. 30 Announcement]. Under that revised methodology, Prairie Band received a supplemental award of \$864,161. *See* Pl.’s Mot. at 6. Unsatisfied with that amount, Prairie Band now seeks to increase the amount of funds enjoined for its benefit.

II.

A.

A court’s power to modify a preliminary injunction, “like the power over all its orders, is inherent.” *Trustees of IAM Nat’l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2021 WL 1546947, at *11 (D.D.C. Apr. 20, 2021) (quoting *Sierra Club v. U.S. Army Corps of Eng’rs*, 732 F.2d 253, 256 (2d Cir. 1984)). “When modifying a preliminary injunction, a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place.” *Sierra Club*, 732 F.2d at 256. That is, a court may modify a preliminary injunction to “maintain the *status quo*.” *Id.* The court enjoys wide discretion in deciding whether to grant a modification. *See id.*

B.

Prairie Band first contends that a modification is necessary to account for newly revealed information about how Treasury calculated Prairie Band’s 2020 Distribution. *See* Pl.’s Mot. at 3, 8. “Only after Treasury filed the Administrative Record in this case on March 3, 2021 did it become

clear [to Prairie Band] that Treasury used [an] IHBG-derived enrollment [figure] of 747, rather than 883” to calculate its 2020 Distribution. *Id.* at 3. Treasury’s use of this lower enrollment figure “operated to *increase* the shortfall to Prairie Band.” *Id.* The shortfall is more than the \$7.4 million presently set aside, says Prairie Band, because the lower population figure translates to a distribution per counted tribal member that is *greater* than previously understood: “dividing the [2020 Distribution of \$2,456,891] to Prairie Band by 747 rather than 883 *increased* the amount paid per counted tribal member to \$3,289.” *Id.* Because the tribe has an actual certified population of 4,561, Prairie Band maintains that Treasury failed to account for 3,814 of its members (4,561 – 747), resulting in an approximate shortfall of \$12,544,246 ($\$3,289 \times 3,814$), as opposed to the \$7.6 million already enjoined. *Id.* Subtracting the amount of Prairie Band’s 2021 Distribution (\$864,171), the Tribe seeks to enjoin an additional \$4,033,042 to “cover the difference” associated with the change in the IHBG-derived population metric. *Id.* at 3; *see id.* at 8–9.

The problem with Prairie Band’s argument is two-fold. First, Prairie Band fails to explain how its challenge to Treasury’s original allocation method—the 2020 Distribution—is not now moot. The Circuit in *Shawnee* held that IHBG population data was an “unsuitable proxy” for increased expenditures insofar as that data set assessed a zero population for certain tribes. *See Shawnee*, 984 F.3d at 102. But Treasury has since abandoned that methodology and announced a new approach that, presumably, seeks to rectify its error. *See* Apr. 30 Announcement at 3. Accordingly, the fact that the Circuit held in *Shawnee* that Treasury’s use of the IHBG population data was arbitrary and capricious as applied to some tribes does not speak to the merits of the agency’s recently announced methodology.

Second, Prairie Band’s insistence that it is entitled to more Title V funds is premised on the assumption that a statutorily compliant allocation method would produce an outcome that resembles the now discredited IHBG-data-as-proxy approach. But that assumption makes little sense. Prairie Band offers no argument that the CARES Act itself compels a per capita distribution comparable to the per counted tribal member amount that the IHBG approach produced. To the contrary, the statute requires only that Treasury allocate Title V funds based “on increased expenditures . . . relative to aggregate expenditures in fiscal year 2019.” 42 U.S.C. § 801(c)(7). It otherwise provides no direction or formula by which the court could ascertain how much Prairie Band might be owed. As a result, this court likely lacks the authority to direct Treasury to pay the tribe a sum certain. *See* Mem. Op. at 4 (holding that the text of the CARES Act does not support the “extraordinary circumstances” that might justify a “detailed remedial order”).

To be sure, the Circuit in *Shawnee* directed entry of a preliminary injunction for a specific amount, and the court has done the same for Prairie Band. But the question now presented concerns whether the amount set aside for Prairie Band will prove to be inadequate if the tribe ultimately prevails on the merits and receives a statutorily compliant distribution. Prairie Band has not convincingly shown that additional dollars must be set aside for that purpose.

C.

Prairie Band alternatively argues that the methodology used to calculate the 2021 Distribution is arbitrary and capricious, but for a different reason—that Treasury failed to treat similarly situated parties alike. *See* Pl.’s Mot. at 10–11. To illustrate its point, Prairie Band provides a chart, depicted below, showing “gross disparities in per capita award from tribe to

tribe.” *Id.* at 10. It shows that under Treasury’s new methodology Prairie Band received substantially less per tribal member not counted than the Shawnee and Miccosukee Tribes.

	Payment	Certified Population #	IHBG Population	# of Members not Counted	\$ per Member not Counted
Shawnee	\$ 5,200,000	3,021	0	3,021	\$1,721
Miccosukee	\$ 820,000	605	0	605	\$1,355
Prairie Band	\$ 864,000	4,562	747	3,815	\$225

This 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. *See generally* Def.’s Opp’n.

Nevertheless, enjoining additional funds is not required to rectify possible unequal treatment. The high-water mark under the new methodology belongs to the Shawnee Tribe at \$1,712 per uncounted member. Prairie Band received only \$225 per uncounted member. If Prairie Band were to show it must be treated the same as Shawnee, it would be entitled to, at most, an additional \$1,487 per uncounted tribal member ($\$1,712 - \225). When that amount is multiplied by the number of uncounted members Prairie Band claims—3,815—the resulting total is \$5,672,905 ($\$1,721 \times 3,815$). That amount is lower than the \$7.6 million already enjoined. Therefore, no modification is necessary to preserve the status quo.

D.


The court also declines to modify the preliminary injunction to direct Treasury to “specifically earmark” the enjoined funds for Prairie Band. Pl.’s Mot. at 2. The tribe seeks that modification because, it says, “Treasury has not ruled out paying out the remaining CARES Act funds, including the ostensibly enjoined funds, following the conclusion of the related *Chehalis* litigation.” *Id.* at 9. But the court has no reason to believe that Treasury would disregard the

existing preliminary injunction, which requires it to hold back the amount specified “until a final judgment is entered in this matter, or upon an earlier order entered by the court.” Mem. Op. at 8. So, under the court’s order, the enjoined monies are not to be dissipated even if the Supreme Court determines that ANCs are entitled to Title V funds. Treasury confirmed its understanding of that directive in a June 23, 2021 Status Report, stating that it would “retain sufficient funds” from the remaining, unpaid Title V funds to “comply with all applicable injunctions.” Status Report, ECF No. 89, at 1. An order to “earmark” the enjoined funds therefore is not necessary.

III.

For the foregoing reasons, the court denies Prairie Band’s motion to modify the preliminary injunction, ECF No. 83.

Dated: June 23, 2021



Amit P. Mehta
United States District Court Judge