



Habematolel Pomo of Upper Lake
375 E. Hwy 20, Suite I Upper Lake, CA 95485

Toll Free: 1-877-543-5102 - Fax: 707-275-0757

Habematolel Pomo of Upper Lake Comment Regarding the United States Small Business Administration Interim Final Rule for Paycheck Protection Program

“Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans”

April 20, 2020

Re: Docket no. SBA-2020-0020-0001 / 13 C.F.R. Part 120

To Whom it May Concern:

The Habematolel Pomo of Upper Lake, a federally recognized Indian Tribe (the “Tribe”) wishes to provide further comment on the Small Business Administration’s Paycheck Protection Program. This comment incorporates by reference the comment we submitted on April 8, 2020.

In the Interim Final Rule published on April 14, 2020, which has not yet been assigned a docket or RIN number, the SBA purports to clarify eligibility for certain classes of employer.

As we made clear in our April 8 comment, the SBA should not have blindly adopted the regulations in 13 C.F.R. 120.110 which define several classes of businesses that are ineligible for SBA 7(a) loans and therefore loans under the Paycheck Protection Program. We maintain that this was arbitrary and capricious, and contradicted the direct and clear intent of Congress, which was that the Paycheck Protection Program be a broad safety net for American businesses, regardless of industry. Our view is supported by not only the language of the CARES Act itself but by members of Congress who have separately addressed these concerns, such as Senators Martha McSally, Steve Daines, and Kevin Cramer, who asked that the SBA and the Department of the Treasury make clear that “any tribal business, including tribal gaming enterprises, are eligible for the PPP as Congress intended,” since “[t]he PPP is about keeping employees connected with their employers so that small businesses can quickly ramp back up their economic activity and help lift their communities into recovery after this health crisis is addressed.”¹

We made clear in our April 8 comment that the regulations in 13 C.F.R. 120.110 that specifically render legal gaming enterprises ineligible were based on 1950s and 1970s-era “morality” concerns that, even absent the pandemic, are outdated and deserving of reconsideration. To hold

¹ https://www.mcsally.senate.gov/sites/default/files/2020-04/McSally-Daines-Cramer%20Letter%20to%20SBA%20on%20Tribal%20Gaming-PPP_3.pdf

onto these regulations during a pandemic that is causing significant damage across the economy, even more so to Indian tribes such as my own, is particularly reckless and will be a direct cause of great consequences to my Tribe, to the surrounding communities, and across Indian country.

The Interim Final Rule at issue, despite purporting to offer a clarification of the rule regarding gaming establishments, offers no assistance to my Tribe and, I suspect, to hundreds of other Tribes. It does not do away with the requirement in 13 C.F.R. 120.110, but rather supplements it with an alternative test: if “the business’s legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and...legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business’s total revenue in 2019,” then the business is not rendered ineligible.

This new interim rule shows an absolute disconnect between the SBA and reality. We will submit our small casino in a very rural area as an example. Due to our remote location and a number of competing casinos in our area, the casino has a very limited market. This small casino nevertheless generated approximately \$9 million in gaming revenues in 2019. That our small, isolated casino in a highly competitive market would be over the arbitrary \$1 million dollar threshold set by the SBA illustrates that the proposed rule is wholly out of touch with reality. This new, unworkable standard appears to be, at best, an unsuccessful attempt to placate tribes; or, worse yet, provide a justification to prevent tribal businesses from accessing necessarily financial relief while other non-Indian companies deplete the Paycheck Protection Program fund.

To be clear, the net payouts have absolutely no connection to profitability of casinos. The limited market in our area has created a situation where no funds will actually flow to the Tribal government until the debt is retired, which will not be until several years from now. However, the casino supplies 124 jobs to a market that was at a nearly 20% unemployment rate when it was constructed. The Tribe further provides nearly \$300,000 annually to local governmental entities such as the county, the sheriff, and the fire protection district. SBA’s arbitrary and capricious actions are hurting not only our employees, but local governments and our entire regional economy as well.

The second component of the interim rule is equally preposterous. In addition to the \$1 million threshold discussed above, the SBA imposes a further limitation where legal gaming comprised no more than 50% of the business’s total revenue in 2019. Given our rural nature, our casino simply will not support a hotel. The rural nature also presents a challenge for our restaurant and other services, creating a situation where they account for only about 27% of the revenues. This rule creates a situation where the SBA is arbitrarily imposing unworkable standards that will severely impact rural tribal gaming facilities, with no reasonable basis for the rule nor consideration of the significant real-life consequences that the rule in its present state will cause.

The Interim Final Rule demonstrates that the SBA, rather than supporting the clear intent of Congress and taking the sensible path of abolishing the standard in the regulation for gaming businesses, has simply supplemented an outdated rule with a test that no casino can likely pass.

Congress made a few things very clear in the CARES Act: it was intended to apply broadly, across American businesses, which includes Tribal businesses of less than 500 employees; and

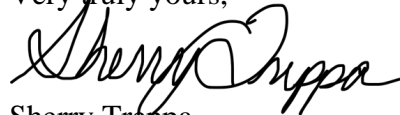
that the SBA must pass *new* regulations to implement it. All the SBA has done with this Final Interim Rule is continue its wholesale and inappropriate adoption of existing regulations, only supplementing an outdated standard with an impossible-to-meet alternative standard. This actively frustrates the purpose of the CARES Act, and it hurts tribes, many of whom rely on gaming for much or all of the funding for their government programs.

There are 574 federally recognized tribes in the United States. Each tribe has its own unique history and challenges. We are unable to understand why, when the SBA has the ability to provide immeasurable assistance to Indian country via broad economic stimulus, it continues to cling to outdated standards that rule out a significant portion of businesses in which tribes are significantly involved, and which provide necessary funding for essential tribal government programs across Indian country. Compounding our bewilderment is the fact that the SBA's position here runs entirely contrary to the clear intent of Congress in passing the CARES Act and the Paycheck Protection Program.

We can only conclude that this is an attempt to willfully deprive tribes and their businesses of funding that could mean the difference between life and death for tribal citizens across the country. This conclusion is augmented by the fact that, at the time of writing, the Paycheck Protection Program has run out of money. Tribes such as my own have spent weeks fighting for our businesses – the engines of our government funding – to be eligible for loans under the Paycheck Protection Program, and spent countless hours drafting comments such as this to demand workable lending standards that should have been included from the outset. While we did so, the money ran out. We can only hope that additional funding is added in the future in order to address the significant economic harms that this delay, and the arbitrary and capricious interim final rule, has already caused to my Tribe and the surrounding community.

We implore the SBA to finally abide by the clear intent of Congress and issue clear regulations to implement the Paycheck Protection Program in a manner that unequivocally includes all Tribal businesses of 500 employees or less, regardless of industry, and with no reference to the outdated prohibitions found in 13 C.F.R. 120.110.

Very truly yours,



Sherry Treppa

Chairperson, Habematolel Pomo of Upper Lake