



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 Rules for Paycheck Protection Program

April 17, 2020

Re: Docket no. SBA-2020-0015 (13 C.F.R. 120)

To Whom it May Concern:

The Habematolel Pomo of Upper Lake, a federally recognized Indian Tribe (the “Tribe”) wishes to provide comment on the Small Business Administration’s Paycheck Protection Program.

My Tribe operates multiple Tribally-owned economic development arms (“Tribal enterprises”), from our Tribal trust land near Upper Lake, California. As is, sadly, the case for many Indian tribes, our trust land is rural and remote. We own and operate a small casino and small ecommerce companies that provide jobs for Tribal members as well as those in the surrounding communities. Our Tribal enterprises provide jobs both locally and nationally and, most important of all, they provide essential revenue that funds crucial Tribal government programs.

The economic health of our casino and our e-commerce small businesses have suffered greatly due to the coronavirus, and SBA loans offered through the Paycheck Protection Program would provide significant relief to my Tribe and the hundreds of people – Tribal members and non-members – that the Tribe employs throughout the region and the country. Tribal enterprises are the top employer in our rural community, as well as in similarly situated communities all over the country. The outdated reasons that the SBA appears to contemplate for denying aid to Tribal enterprises will significantly hurt my Tribe and other many other tribe as well as the communities and regions in which they play a major economic role.

Late last week, with no apparent consideration of the emergency situation, the SBA blindly adopted the blanket prohibitions for industries contained in 13 C.F.R. 120.110. We believe this action does not follow the intent of Congress and is an arbitrary and capricious interpretation of the obligations that Congress imparted to the SBA to administer the distribution of \$349 billion in aid to companies of less than 500 people through Section 1102 of the CARES Act (the Paycheck Protection Program).

The Paycheck Protection Program was designed to save the jobs offered by employers of less than 500 people across the nation as well as to aid them in surviving unprecedented challenges. It is meant to be the precise type of sweeping, wide-ranging action that is required in the face of an

unprecedented public health and economic crisis. The program was designed to promote employment and help American workers, not to allow the SBA to continue to apply the outdated morality-based criteria found in 13 C.F.R. 120.110.

Tribal enterprises such as casinos are major economic drivers in many regions of the country, including the region around my Tribe's trust land in rural northern California. Maintaining the exclusions under 13 C.F.R. 120.110 for the purposes of the Paycheck Protection Program runs counter to Congressional intent of saving jobs and employment opportunities. It further runs counter to the providing assistance to disadvantaged groups including tribal governmental enterprises—one of the very purposes of the Small Business Act itself.¹

We note that the Small Business Act itself has no prohibition at all regarding the gambling industry, (or any of the other industries named in 13 C.F.R. 120.110). Discretion is left to the Administrator. The industry prohibitions in 13 C.F.R. 120.110 simply should not apply in a situation where the SBA has been directed by Congress to help all small businesses preserve jobs. It should not apply to a situation where tribal entities who are engaged in these industries are crucial employers, especially in rural areas that will be decimated by the economic crisis caused by COVID-19. This is especially true when the political ideology under which the exclusions originated has clearly changed in the nearly 70 years since 13 C.F.R. 120.110 was originally adopted.

The prohibitions on extending loans to companies who derive a certain amount of income from legal gambling dates back to the 1950s and the nationwide “morality” discussion regarding that industry. The SBA's basic policy regarding loans to applicants in gambling activities has been in effect since the beginning of the Agency's lending functions in 1953.² At that time, “[b]oth the SBA and the Loan Policy Board (now defunct) recognized that the subject of gaming was a controversial issue, that there were strong differences of opinion about it, and that, even in those states where gambling has been legalized, there was opposition thereto on the part of many taxpayers. Both the Board and the Agency concluded that the use of taxpayer's funds for an application who has an interest in an enterprise where gambling takes place would be construed

¹ Section 2(b)(d)(2) of the SBA states Congress' findings that “...certain groups in the United States own and control little productive capital because they have limited opportunities for small business ownership.” Section 2(b)(f)(1) states that “many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control...such groups include...Native Americans [and] Indian tribes...” This section continues, stating Congress' belief that it is “in the national interest to expeditiously ameliorate the conditions” of these groups, and “that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups.”

² Hearing before the Subcommittee on Small Business of the Committee on Banking and Currency, House of Representatives, April 9, 1974, p. 290.

to be not in the public interest.”³ The result was, for a time, a full blanket prohibition on making loans to this industry.

The Agency intensively reviewed its loan policy on gambling in 1959, recognizing that its broad prohibitions “had created difficulties of interpretation, when applied to specific fact situations.”⁴ The Agency concluded that “[t]he Board was agreed that the intent [emphasis in original] was to prohibit the use of Government funds in gambling activities, irrespective of their legality in any State. To accomplish this, the Board felt it necessary to prohibit the granting of financial assistance to any small business enterprise, where a person in a position of responsibility with such enterprise could by virtue of that position be potentially able to misdirect funds intended for the small business enterprise to gambling activities.”⁵

In 1973, the Administrator made a change to the policy only for small business firms selling official state lottery tickets under a state license.⁶ This change permitted loans if the income from such sales constituted 1/3 or less of its annual gross.⁷ The next year, the Nevada delegation requested a similar review leading to a hearing in the House of Representative that eventually created the current 1/3 rule. In the SBA’s analysis, the Agency cited that “[l]egality and acceptability (or morality) are felt to be buttressed substantially in Nevada by the strict controls employed there.”⁸

Clearly, this 1950s or even 1970s philosophy should not be applied in the face of the changes in attitude both among the government and the populace in the intervening 50 to 70 years. The issues of the legality and morality of Indian gaming have already been directly addressed by Congress in the Indian Gaming Regulatory Act, which evidences Congress’ clear viewpoint on tribal gaming and, alongside the stringent regulation that tribes themselves engage in, certainly brings tribal casinos to a level of regulation and control that can be said to “buttress the legality and acceptability (or morality)” of that industry in Indian country. Further, the Paycheck Protection Program sets out clearly that the use of proceeds must be for very specific items (payroll, rent, etc.)—there is no policy concern that funds might be “misdirected” to gambling.

Congress clearly intends for tribally-owned enterprises to be included in loans offered pursuant to Section 7(a) of the Small Business Act.⁹ Further, we note that 13 C.F.R. 120.110 exempts from prohibitions against lending to government-owned entities “businesses owned or controlled by a Native American tribe.”¹⁰ Congressional support for self-determination and self-reliance is

³ Id.

⁴ Id.

⁵ Id.

⁶ Id. at 292.

⁷ Id.

⁸ Id. at 298.

⁹ “The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes [emphasis added], for purposes of this Act.”

¹⁰ 13 C.F.R. 120.110(j).

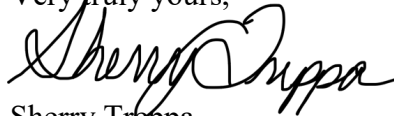
clear in the Small Business Act and many other acts such as the Native American Business Development and Tourism Act.¹¹ The SBA should make clear that this exclusion from 13 C.F.R. 12.110 applies to all tribal small businesses.

Tribes engage in economic development because they lack anything resembling a traditional tax base, owing to centuries of ruinous federal and state policy toward tribes. The role that tribal economic development plays in ensuring that members of Indian tribes have access to necessities and crucial services cannot be understated. The enormous role tribal enterprises play in regional economies should not be underestimated. The effects of applying the 13 C.F.R. 120.110 exclusions will be felt well beyond just Indian Country – they will be felt throughout the nation. If the losses that my Tribe, and others in our situation, have experienced and will continue to experience due to COVID-19 are not remediated the consequences could be truly dire not only for our tribal governments but for the surrounding economies as well—the ripple effect will be felt far beyond our borders.

When put in a historical context, there is no justification for applying the 13 C.F.R. 120.110 exclusions to the Payment Protection Act. Congress did not intend that the SBA would apply outdated morality and public interest concerns under which 13 C.F.R. 120.110 originated to thwart the mission Congress gave the SBA to aid, among others, tribal enterprises employing less than 500 people, regardless of the industry in which they operate.

Our request is that that the exclusions in 13 C.F.R. 120.110 be waived as they relate to entities owned and operated by Indian tribes for purposes of the Paycheck Protection Program set forth in Section 1102 of the CARES Act. We ask that this be done and communicated as soon as possible, considering the need for a timely response to the pandemic.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sherry Treppa", written in a cursive style.

Sherry Treppa

Chairperson, Habematolel Pomo of Upper Lake

¹¹ 25 USC 4301 et. seq.