

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION**

FLANDREAU SANTEE SIOUX TRIBE, a  
federally recognized Indian tribe; SANTEE  
SIOUX NATION, a federally recognized Indian  
tribe; and BIG SANDY BAND OF WESTERN  
MONO INDIANS, a federally recognized Indian  
tribe,

Plaintiffs,

v.

JOVITA CARRANZA, in her official capacity as  
Administrator of the United States Small Business  
Administration; and STEVEN MNUCHIN, in his  
official capacity as Secretary of the United States  
Department of the Treasury,

Defendants.

Civil Action No. 4:20-cv-04070-RAL

**VERIFIED FIRST AMENDED  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Plaintiffs the Flandreau Santee Sioux Tribe (“Flandreau”), the Santee Sioux Nation (“Santee”) and the Big Sandy Band of Western Mono Indians (“Big Sandy”) (collectively the “Tribes”) bring this complaint for declaratory and injunctive relief.

**INTRODUCTION**

1. This action under the Administrative Procedure Act (“APA”) challenges the U.S. Small Business Administration’s (“SBA”) Interim Final Rule, propounded on April 2, 2020 (and subsequently amended), implementing the Paycheck Protection Program (“PPP”) established by section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. 116-136 (Mar. 27, 2020), 134 Stat. 281, 15 U.S.C. § 636(a)(36). The Interim Final Rule renders statutorily-eligible Tribal business concerns ineligible for PPP loans in clear violation of the plain language of the CARES Act.

2. The SBA's no-casino rule makes lawfully operating tribal casinos, including Flandreau's Royal River Casino and Hotel, Santee's Ohiya Casino & Resort, and Big Sandy's Mono Wind Casino, ineligible for the PPP. The SBA's no-lender rule makes lawfully operating tribal lending businesses, including Flandreau's FSST Financial Services, LLC and Flandreau Management Services, LLC, ineligible for the PPP. These ineligibility rules are contrary to the express and unambiguous terms of the CARES Act, which provides that "any ... Tribal business concern ... shall be eligible to receive a [PPP] loan" if the business employs no more than 500 employees. Because the rule contravenes the law it purports to implement, the SBA's exclusion of tribal casinos and lending businesses from the PPP is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of the SBA's statutory authority, all in violation of the APA.

3. The Tribes seek to immediately enjoin the enforcement of the no-casino rule and the no-lender rule so that such rules will not prevent the Tribes from obtaining PPP loans to pay the employees of all their eligible Tribal businesses and meet other financial obligations of the Tribal businesses while such businesses are closed or in limited operation to protect the public health during the Covid-19 pandemic.

#### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1337, 1346(a)(2) and 1362, in that this is a civil action arising under the Constitution, laws, or treaties of the United States, this is a civil action arising under an Act of Congress regulating commerce, this is a civil action against the United States not exceeding \$10,000 in amount founded upon an Act of Congress or regulation of an executive department, and this is a civil action brought by an Indian tribe with a governing body duly recognized by the

Secretary of the Interior wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

5. This action arises under the Constitution, laws, or treaties of the United States, including but not necessarily limited to the following: the Administrative Procedure Act, 5 U.S.C. §§ 551-596 and §§ 701-706, and accompanying regulations; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the All Writs Act, 16 U.S.C. § 1651, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and federal common law.

6. The sovereign immunity of the United States has been waived with respect to the subject matter of this action and the relief requested herein by the APA, 5 U.S.C. § 702.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1) in that this is a civil action in which each of the defendants is an officer or employee of the United States or an agency thereof acting in his or her official capacity, or an agency of the United States, no real property is involved in the action, and a plaintiff, Flandreau, resides in this judicial district.

### **PARTIES**

8. Plaintiff Flandreau is a federally recognized Indian tribe located on the Flandreau Indian Reservation and headquartered at 603 West Broad Avenue, Flandreau, South Dakota 57028. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5463 (Jan. 30, 2020).

9. Flandreau owns and operates the Royal River Casino and Hotel (“Royal River”) on the Flandreau Indian Reservation in accordance with the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721. Flandreau owns and operates FSST Financial Services, LLC and Flandreau Management Services, LLC (together, the “Tribal Lending Businesses”) on the Flandreau Indian Reservation. The Tribal Lending Businesses are limited liability companies

wholly owned by Flandreau that are financial businesses primarily engaged in the business of lending.

10. Plaintiff Santee is a federally recognized Indian tribe located on the Santee Sioux Indian Reservation and headquartered at 108 Spirit Lake Ave W., Niobrara, Nebraska, 68760-8605. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5463 (Jan. 30, 2020).

11. Santee owns and operates the Ohiya Casino and Resort on the Santee Sioux Indian Reservation in accordance with IGRA. The Ohiya Casino and Resort includes a 45 bedroom hotel.

12. Plaintiff Big Sandy is a federally recognized Indian tribe with offices located on the Big Sandy Rancheria, 37387 Auberry Mission Road, Auberry, CA 93602. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5462 (Jan. 30, 2020).

13. Big Sandy owns and operates the Mono Wind Casino on the Big Sandy Rancheria in accordance with IGRA.

14. Defendant Jovita Carranza is the Administrator of the SBA, which administers the PPP under the CARES Act. Section 1114 of the CARES Act directs defendant Carranza, as the SBA Administrator, to issue regulations to carry out the CARES Act. Defendant Carranza and the SBA issued and are implementing and enforcing such regulations. Defendant Carranza is sued in her official capacity.

15. Defendant Steven Mnuchin is the Secretary of the United States Department of the Treasury. The SBA Administrator consulted with Defendant Mnuchin to develop the regulations to carry out the CARES Act, including the Interim Final Rules at issue here. Defendant Mnuchin is sued in his official capacity.

**GENERAL ALLEGATIONS**

**THE CARES ACT**

16. Amid massive disruptions to small businesses caused by the novel coronavirus (Covid-19) pandemic, the federal government enacted the CARES Act to provide over \$2 trillion in economic relief. The President signed the CARES Act on March 27, 2020.

17. Among other actions, the CARES Act established the Paycheck Protection Program, or PPP. CARES Act § 1102(a)(2).

18. The CARES Act situated the PPP provisions as a new paragraph 36 within section 7(a) of the Small Business Act, 15 U.S.C. § 636(a).

19. The CARES Act states, “Except as otherwise provided in [paragraph 36], the [SBA] Administrator may guarantee [PPP] loans under the same terms, conditions, and processes as a loan made under [§7(a)].”

20. In light of the extraordinary need for economic relief that the PPP seeks to address, paragraph 36 provides numerous exceptions to the general terms, conditions, and processes that generally apply to §7(a) loans. The PPP features expanded eligibility criteria compared with the SBA’s existing §7(a) loan programs (§1102(a)(2)(36)(D)) and authorizes banks to loan applicants up to \$10 million of federal funds (§1102(a)(2)(36)(E)). Lender and borrower fees are waived (§1102(a)(2)(36)(H)), the requirement that the borrower is unable to obtain credit elsewhere is waived (§1102(a)(2)(36)(I)), and no personal guarantee or collateral shall be required (§1102(a)(2)(36)(J)). Interest is capped at four percent. §1102(a)(2)(36)(L). The Act also forgives up to the full amount of the loan for eligible payments the borrower makes during the eight weeks after the loan origination date. §1106.

21. In subparagraph (36)(D), captioned “Increased Eligibility for Certain Small Businesses and Organizations,” the CARES Act provides PPP eligibility requirements as follows (emphasis added):

(i) In General.—During the covered period, in addition to small business concerns, **any** business concern, nonprofit organization, veterans organization, or **Tribal business concern** described in section 31(b)(2)(C) **shall be eligible to receive a covered loan** if the business concern, nonprofit organization, veteran’s organization, or Tribal business concern employs not more than the greater of—

(I) 500 employees; or

(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.

22. The “covered period” is the period beginning on February 15, 2020 and ending on June 30, 2020. §1102(a)(2)(36)(A)(iii).

23. A “Tribal business concern described in [Small Business Act] section 31(b)(2)(C)” is, in relevant part, a “small business concern ... that is wholly owned by one or more Indian tribal governments.” 15 U.S.C. § 657a(b)(2)(C).

24. Early versions of the PPP legislation did not expressly make Tribal business concerns eligible for the PPP. Congress decided to expressly provide eligibility for any “Tribal business concern,” even though such businesses would have been included as a generic “business concern,” to eliminate any ambiguity, to ensure that Indian tribes’ dual roles as governments and business proprietors would not affect their eligibility for federal assistance available to governments or to businesses, and to ensure that the PPP reached all tribally-owned businesses that meet the statutory criteria.

25. The CARES Act singles out the “accommodation and food services” industry – identified in the Act by reference to the “North American Industry Classification System

["NAICS"] code beginning with 72" – for special treatment to ensure the PPP covers businesses in this industry as fully as possible. For businesses in this industry, the Act waives affiliation rules and counts each location separately for purposes of counting 500 employees. §1102(a)(2)(36)(D)(iii), (iv). The industry includes "casino hotels," NAICS code 721120, and therefore includes the Royal River and Ohiya Casinos.

26. The CARES Act also provides the following "borrower requirement," subparagraph (36)(G):

(i) Certification.—An eligible recipient applying for a covered loan shall make a good faith certification—

(I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;

(II) acknowledging that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;

(III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and

(IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

27. The CARES Act, in subparagraph (36)(F)(ii)(II), directs lenders "evaluating the eligibility of a borrower for a covered loan within the terms of this paragraph" to "consider whether the borrower—(aa) was in operation on February 15, 2020; and (bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or (BB) paid independent contractors, as reported on a Form 1099-MISC."

28. PPP loans are to be used for payroll and salaries, group health insurance premiums, payments for mortgages, rent and utilities, and interest payments on existing debts. §

1102(a)(2)(36)(F). The aim of the PPP, therefore, is not to fund the business operations of the borrower, but rather to provide money to other people – employees, landlords, lenders, health insurance and utility providers – while the borrower’s business is temporarily closed or otherwise short of revenue because of the covid-19 pandemic. In short, the policy of Congress and the purpose of the statute is to keep small business personnel on payrolls until businesses can return to normal operation.

29. Congress authorized commitments of \$349 billion for the PPP and other §7(a) loans for the period from February 15, 2020 through June 30, 2020.

30. Lenders began to accept PPP loan applications almost immediately after the CARES Act became law. PPP loans are funded on a “first-come, first-served” basis.

31. The SBA publicly announced that the \$349 billion authorization for the PPP was completely exhausted as of Thursday, April 16, 2020, less than two weeks after the application period opened.

32. On April 23, 2020, Congress authorized a further commitment for PPP loans in the amount of \$310 billion. The president is expected to sign the appropriation shortly.

33. Section 1114 of the CARES Act gives the SBA Administrator emergency rulemaking authority to “carry out” Title I of the CARES Act, which includes the PPP.

*THE INTERIM FINAL RULE*

34. On or about April 2, 2020, the SBA issued an Interim Final Rule, “Business Loan Program Temporary Changes; Paycheck Protection Program.” The Interim Final Rule was published in the Federal Register on April 15, 2020. 85 Fed. Reg. 20811.



35. Under the heading, “How do I determine if I am ineligible?”, the Interim Final Rule states: “Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 ... except that nonprofit organizations authorized under the Act are eligible.” 85 Fed. Reg. at 20812.

36. Under the previously adopted 13 C.F.R. § 120.110, certain types of businesses are generally ineligible for SBA business loans. The list of ineligible businesses includes “Businesses deriving more than one-third of gross annual revenue from legal gambling activities,” 13 C.F.R. § 120.110(g), and “Financial businesses primarily engaged in the business of lending,” 13 C.F.R. § 120.110(b).

37. Thus, the Interim Final Rule for implementing the PPP incorporates the SBA’s general “no-casino rule” and “no-lender rule.”

38. The list of ineligible businesses under 13 C.F.R. § 120.110 also includes “Non-profit businesses.” 13 C.F.R. § 120.110(a). However, the Interim Final Rule specifies that despite their general ineligibility under § 120.110, “nonprofit organizations authorized under the Act are eligible.” 85 Fed. Reg. at 20812.

39. The list of ineligible businesses under 13 C.F.R. § 120.110 does not apply to the SBA’s “HUBZone” program, established by 15 U.S.C. § 657a – the section referenced in the CARES Act to define “Tribal business concerns.” Thus, a “Tribal business concern” under the CARES Act is not inherently, by reference, or otherwise, limited to non-gambling and non-lending businesses.

40. The SBA’s no-casino rule and no-lender rule originate with the SBA’s Loan Policy Statement issued in 1953. *See* Loan Policy Statement § 101.4(d)(8) & (9), 19 Fed. Reg. 5440, 5441 (Aug. 26, 1954). The no-casino rule and no-lender rule have remained in place, with some modifications, ever since. The SBA Loan Policy Board enacted the rules pursuant to 15 U.S.C. §

633(d), which authorizes the Board to establish general policies regarding “the public interest involved in the granting and denial of applications for financial assistance.”

41. On or about April 14, 2020, the SBA issued an amended Interim Final Rule, “Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans.” *See Exhibit A.* The amended Interim Final Rule, in part, amended the no-casino rule as applied to the PPP.

42. In the amended Interim Final Rule, the SBA opened PPP eligibility to businesses with small, secondary gambling operations – those whose gambling revenue in 2019 was not more than \$1 million and comprised less than half the business’s total revenue for the year. Amended Interim Final Rule § 2.b.

43. The amended Interim Final Rule states, “The Administrator, in consultation with the Secretary, believes this test appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity with the policy aim of making the PPP Loan available to a broad segment of U.S. businesses and their employees.”

44. Numerous members of Congress have urged Administrator Carranza and Secretary Mnuchin to rescind the SBA’s no-casino rule, expressing the view that the no-casino rule is contrary to the unambiguous language and intent of the CARES Act. Five such letters signed by a total of 51 Senators and United States Representatives are attached hereto as **Exhibit B.** Flandreau has also urged Administrator Carranza and Secretary Mnuchin to amend the PPP eligibility rules to clarify that any tribal business that meets the statutory qualifications is eligible for PPP. **Exhibit C.**

TRIBAL GAMING

45. Congress enacted IGRA in 1988 to statutorily authorize “the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” 25 U.S.C. § 2702(1); *see* 25 U.S.C. § 2701(4) (finding that the promotion of these objectives is “a principal goal of Federal Indian policy”).

46. With only very limited exceptions, IGRA requires that every tribal casino be solely owned by an Indian tribe. 25 U.S.C. § 2710(b)(2)(A).

47. Employees of tribal casinos are licensed by the tribe’s gaming regulatory authority in compliance with IGRA, tribal law, and tribal-state gaming compacts.

48. IGRA sets safety standards for gaming facilities, and requires that the “operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.” *See* 25 U.S.C. § 2710(b)(2)(E), 25 U.S.C. § 2710(d)(1)(A)(ii), and 25 CFR Part 559.

49. According to an economics firm that studies the tribal gaming industry, 246 Indian tribes operate over 500 gaming facilities in 29 states. The Covid-19 pandemic has effectively shut down the entire casino industry. At tribal casinos alone, it is estimated that 296,000 people have been forced out of work and \$665 million in wages have been lost. *See* <http://www.meistereconomics.com/coronavirus-impact-on-tribal-gaming>. While some tribal casinos are very large and staffed by thousands of employees, about 60 percent of tribal casinos have 500 employees or less.

FLANDREAU'S TRIBAL BUSINESSES

50. Flandreau owns and operates the Royal River Casino and Hotel in accordance with the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721, and the 2016 gaming compact between Flandreau and the State of South Dakota.

51. Royal River has been in operation since 1990.

52. Royal River employs approximately 250 people.

53. Royal River derives approximately 75.25% of its gross annual revenue from legal gambling activities.

54. Flandreau owns and operates the Tribal Lending Businesses, FSST Financial Services, LLC, and FSST Management Services, LLC. The Tribal Lending Businesses are financial businesses primarily engaged in the business of lending.

55. FSST Financial Services, LLC is a limited liability company wholly owned by the Tribe that was organized by the Tribe’s Executive Committee on February 12, 2014 by Tribal Resolution 14-19, and it has been in operation since then. It employs one person.

56. Flandreau Management Services, LLC is a limited liability company wholly owned by the Tribe that was organized by the Tribe’s Executive Committee on February 12, 2014 by Tribal Resolution 14-19, and it has been in operation since then. It employs nine people.

57. Flandreau can in good faith make the certification required for PPP applicants “that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations” of the Flandreau Tribal Businesses; “that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments;” and that the Flandreau Tribal Businesses have no §7(a) loan application pending and have not received

§7(a) funds since February 15, 2020, “for the same purpose and duplicative of amount applied for or received” under a PPP loan. *See* CARES Act §1102(a)(2)(36)(G).

58. The Executive Committee of the Flandreau Tribe temporarily closed Royal River on March 31, 2020 by Tribal Resolution 2020-52 to protect the health and safety of guests, employees, the community, and the wider public. Royal River has remained closed since then in compliance with federal and tribal law, and will face additional furloughs without PPP funding.

59. Royal River furloughed 225 employees, and approximately 25 employees remain employed. Furloughed employees were given two weeks of pay during the furlough, and Flandreau continues to pay for their healthcare benefits. Flandreau has a limited amount of cash reserves which will be completely depleted if the Casino does not reopen.

60. The Casino has debt obligations for a recently completed renovation which remain outstanding during closure.

61. The Tribal Lending Businesses remain open, however staffing has been an issue because of the Covid-19 pandemic, and several employees have been laid off. Additional recruitment efforts for employees will be necessary to sustain the business, including hiring bonuses and hazard pay. Some employees at the Tribal Lending Businesses are eligible for healthcare, and continue to receive benefits through the Covid-19 pandemic.

62. Royal River is eligible for a PPP loan under the CARES Act, but the SBA’s no-casino rule makes the Casino ineligible.

63. The Tribal Lending Businesses are eligible for PPP loans under CARES Act, but the SBA’s no-lender rule makes the Tribal Lending Businesses ineligible.

64. Flandreau applied to the First National Bank in Sioux Falls for a PPP loan for Royal River on April 2, 2020. The application was complete and submitted to the SBA through its portal

on April 3, 2020. On April 9, 2020, the SBA notified the Bank of its determination that Royal River was not eligible for the PPP loan. On information and belief, the determination was based on the SBA's no-casino rule. Flandreau also applied to the First National Bank in Sioux Falls for PPP loans for the Tribal Lending Businesses. On April 23, 2020, the SBA notified the Bank of its determination that FSST Financial Services, LLC is not eligible for a PPP loan. On information and belief, the determination was based on the SBA's no-lender rule. Flandreau anticipates a similar determination will be forthcoming for Flandreau Management Services, LLC. First National Bank advised Flandreau that the Bank expects the second round of funding to be fully spent on the first day.

65. The PPP would provide the Flandreau Tribal Businesses \$1,321,785 to supplement employees' income and ensure that they can meet their basic needs during this pandemic, while allowing the Tribal Businesses to survive in complete shutdown.

SANTEE'S TRIBAL CASINO

66. Santee owns and operates the Ohiya Casino and Resort in accordance with IGRA.

67. The Ohiya Casino has been in operation for over 24 years.

68. The Ohiya Casino employs approximately 98 people.

69. The Ohiya Casino derives over 75% of its gross annual revenue from legal gambling activities.

70. Santee can in good faith make the certification required for PPP applicants "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations" of the Ohiya Casino; "that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments;" and that the Ohiya Casino has no §7(a) loan application pending and have not received §7(a) funds since February

15, 2020, “for the same purpose and duplicative of amount applied for or received” under a PPP loan. *See* CARES Act §1102(a)(2)(36)(G).

71. Due to the Covid-19 pandemic, Santee began scaling back its casino operations beginning on March 15, 2020, and closed the Ohiya Casino on April 2, 2020, to protect the health and safety of guests, employees, the community, and the wider public. The Casino has remained closed since then.

72. Ohiya has struggled to maintain 40 of its 98 employees on its payroll while it has been closed. The balance of Ohiya Casino employees have been laid off since April 2, 2020, without benefits. If the Casino could obtain a PPP loan for the maximum amount for which it is eligible, the Casino would be able to maintain all of its 98 employees on its payroll for approximately 60 days. In the absence of a PPP loan, additional employees will be laid off indefinitely.

73. The Ohiya Casino is eligible for a PPP loan under the CARES Act, but the SBA’s no-casino rule makes the Ohiya Casino ineligible.

74. On or about April 6, 2020, Santee inquired with Great Western Bank (“GWB”), the financial institution that provides banking services to Santee and the Ohiya Casino, about submitting a loan application for Ohiya pursuant to the PPP. At that time Santee was informed that, while GWB is an Eligible Lender under the PPP, the SBA regulations rendered Ohiya ineligible for a PPP loan, because such regulations provided that businesses deriving more than one-third of gross annual revenue from legal gambling activities are ineligible for a PPP loan.

75. On or about April 20, 2020, the Ohiya Casino completed an application for a PPP loan and submitted it to GWB. GWB has reported that, at the current time, the SBA is not

accepting PPP loan applications. Upon information and belief, the Tribe and the Ohiya Casino anticipate a forthcoming denial of the loan application under the SBA's no-casino rule.

76. A PPP loan to the Ohiya Casino would provide \$651,202.63 to supplement employees' income and ensure that they can meet their basic needs during this pandemic, while allowing the Ohiya Casino business to survive in complete shutdown.

BIG SANDY'S TRIBAL CASINO

77. Big Sandy owns and operates the Mono Wind Casino in accordance with IGRA and the 1999 gaming compact between the Tribe and the State of California.

78. Big Sandy has operated the Mono Wind Casino for over a decade.

79. The Mono Wind Casino employs approximately 100 people.

80. The Mono Wind Casino derives approximately 85% of its gross annual revenue from legal gambling activities.

81. The Tribe can in good faith make the certification required for PPP applicants "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations" of the Mono Wind Casino; "that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments;" and that the Mono Wind Casino has no §7(a) loan application pending and have not received §7(a) funds since February 15, 2020, "for the same purpose and duplicative of amount applied for or received" under a PPP loan. *See* CARES Act §1102(a)(2)(36)(G).

82. The Tribe temporarily closed the Mono Wind Casino on March 23, 2020 at 1:00 p.m. to protect the health and safety of guests, employees, the community, and the wider public. The Mono Wind Casino has remained closed since then in compliance with federal and tribal law.



83. Despite the absence of business revenues, the Mono Wind Casino has continued to pay its employees during the temporary closure. Big Sandy and the Mono Wind Casino have a limited amount of cash reserves which will be completely depleted if Mono Wind does not reopen.

84. Mono Wind is eligible for a PPP loan under the CARES Act, but the SBA's no-casino rule makes the Casino ineligible.

85. Big Sandy applied to the Central Valley Community Bank in Fresno, California, for a PPP loan for the Mono Wind Casino. The bank informed Big Sandy that it has not processed the application. On information and belief, the bank has not processed the application because under the SBA's no-casino rule, the Casino is deemed ineligible for the loan.

ADDITIONAL FACTS PERTAINING TO ALL PLAINTIFFS

86. In the absence of immediate judicial relief from the SBA's no-casino rule and no-lender rule, Plaintiffs and their Tribal Businesses will irreparably lose their statutory right under the CARES Act to participate in the PPP. Because of the SBA's no-casino rule and no-lender rule, the Tribal Businesses have already lost their statutory right to participate in the PPP's first round of lending. It is widely reported, and the Tribes anticipate and believe, that the second round of funding will be expended almost immediately. See "PPP is Back ... But Small-Business Owners Must Act Fast," Apr. 23, 2020, <https://www.entrepreneur.com/article/349669>. The extraordinary volume of PPP loan applications submitted during the first round which led the government to refuse further applications when the funds ran out in less than two weeks, the limited funding now available, the uncertainty of any further appropriations, and the Tribal Businesses' urgent need for economic assistance, all require immediate judicial relief enjoining enforcement of the no-casino rule and no-lender rule for the PPP.

87. It is in the public interest to ensure maximum participation in the PPP by all statutorily eligible business concerns, including all Tribal business concerns. Axiomatically, the public interest favors ensuring that the SBA's administration of the PPP is accomplished in accordance with the CARES Act passed by Congress and signed by the President. Federal assistance available only through the PPP will allow Tribal Business employees to receive their paychecks to buy groceries, pay their bills, support their families, inject capital into their communities, and to not burden the other overstressed assistance programs of the federal, state and tribal governments.

88. Without assistance from the PPP, the Tribal Businesses will suffer irreparable harm, face additional furloughs and layoffs, and inevitably face permanent closure.

### **CLAIM ONE**

#### **(Declaratory and Injunctive Relief, 5 U.S.C. § 706 and 28 U.S.C. §§ 2201-2202)**

89. Plaintiffs incorporate by reference and realleges herein the allegations contained in the foregoing paragraphs of this Complaint.

90. The APA authorizes judicial review of federal agency actions. 5 U.S.C. § 702.

91. The APA provides that the reviewing Court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). It further provides that a reviewing Court shall hold unlawful and set aside agency action, finding, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. § 706(2)(C).

92. The CARES Act provides that "any ... Tribal business concern ... shall be eligible to receive a [PPP] loan" during the covered period, subject only to the following qualifications:

the Tribal business concern meets the Act's size requirement, makes the required good-faith borrower certification, and was in operation as of February 15, 2020.

93. A "Tribal business concern" under the CARES Act by definition includes tribal casinos and tribal lending businesses with 500 or fewer employees.

94. The CARES Act does not authorize the Defendants to impose additional eligibility criteria for the PPP such as a no-casino rule and the no-lender rule.

95. By excluding tribal lending businesses and most tribal casinos from PPP eligibility, Defendants have acted in a manner that is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the CARES Act and the APA. Plaintiffs are entitled to an order declaring the same.

96. By excluding tribal lending businesses and most tribal casinos from PPP eligibility, Defendants have acted in a manner that is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, in violation of the CARES Act and the APA. Plaintiffs are entitled to an order declaring the same.

97. Plaintiffs are entitled to a preliminary and permanent injunction enjoining Defendants not to apply a no-casino rule or a no-lender rule for purposes of PPP loan eligibility for Tribal business concerns under the CARES Act.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs request that this Court:

1. Enter a declaratory judgment in favor of Plaintiffs that Defendants' implementation and enforcement of a no-casino rule for Tribal business concerns otherwise eligible for the PPP is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

2. Enter a declaratory judgment in favor of Plaintiffs that Defendants' implementation and enforcement of a no-casino rule for Tribal business concerns otherwise eligible for the PPP is in excess of Defendants' statutory jurisdiction, authority, limitations, or short of statutory right.

3. Enter a declaratory judgment in favor of Plaintiffs that Defendants' implementation and enforcement of a no-lender rule for Tribal business concerns otherwise eligible for the PPP is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

4. Enter a declaratory judgment in favor of Plaintiffs that Defendants' implementation and enforcement of a no-lender rule for Tribal business concerns otherwise eligible for the PPP is in excess of Defendants' statutory jurisdiction, authority, limitations, or short of statutory right.

5. Preliminarily and permanently enjoin Defendants, their agents, employees, successors, and all persons acting in concert or participating with them not to enforce, apply or implement such laws against Plaintiffs, and to prioritize Plaintiffs' application or re-application for PPP loans and the funding of such loans upon approval, and to preliminarily enjoin Defendants to set aside and reserve sufficient funds from the moneys that Congress appropriated for the PPP expressly for the purpose of funding PPP loans for the Plaintiffs' Tribal Businesses.


6. Award Plaintiffs their costs, fees and expenses, including attorneys' fees, and granting such other and further relief as the Court may deem just and proper.

Respectfully submitted this 24th day of April, 2020,

By: /s/ Seth Pearman  
Seth Pearman  
Attorney for Plaintiff  
Flandreau Santee Sioux Tribe

Seth Pearman, Attorney General  
Flandreau Santee Sioux Tribe  
603 West Broad Avenue  
Flandreau, South Dakota 57028  
Telephone : (605) 997-3891  
Facsimile: (605) 997-5041  
spearman@fsst.org  
*Attorney for Flandreau Santee Sioux Tribe*

FREDERICKS PEBBLES & PATTERSON LLP



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Rebecca L. Kidder  
Fredericks Peebles & Patterson LLP  
1830 West Fulton Street, Suite 102  
Rapid City, South Dakota 57702  
Telephone: (605) 791-1515  
Facsimile: (605) 791-1915  
rkidder@ndnlaw.com

John M. Peebles, *pro hac vice pending*  
Tim Hennessy, *pro hac vice pending*  
FREDERICKS PEBBLES & PATTERSON LLP  
2020 L Street, Suite 250  
Sacramento, California 95811  
Telephone: (916) 441-2700  
Fax: (916) 441-2067  
jpeebles@ndnlaw.com  
*Attorneys for Flandreau Santee Sioux Tribe and  
Big Sandy Band of Western Mono Indians*

DAVENPORT, EVANS, HURWITZ & SMITH,  
L.L.P.



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Reece M. Almond  
206 West 14<sup>th</sup> Street  
Sioux Falls, SD 57101-2880  
Telephone: (605) 336-2880  
Fax: (605) 335-369  
[ralmond@dehs.com](mailto:ralmond@dehs.com)

Conly J. Schulte, *pro hac vice pending*  
CONLY J. SCHULTE, P.C., LLO  
9451 Mountain Ridge Dr.  
Boulder, Colorado 80302  
(402) 541-4590  
[conly@cschultelaw.com](mailto:conly@cschultelaw.com)  
*Attorney for Santee Sioux Nation*

**VERIFICATION**

I, Anthony Reider, President of the Flandreau Santee Sioux Tribe Executive Committee, the elected governing body of the plaintiff Flandreau Santee Sioux Tribe, hereby verify and declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Amended Complaint for Declaratory and Injunctive Relief and know the contents thereof, and that the matters contained in the Verified Amended Complaint pertaining to the Flandreau Santee Sioux Tribe are true to my knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 2020, at Flandreau, South Dakota.



**VERIFICATION**

I, Roger Trudell, Chairman of the Tribal Council of the Santee Sioux Nation, the elected governing body of Plaintiff-Intervenor Santee Sioux Nation, hereby verify and declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Amended Complaint for Declaratory and Injunctive Relief and know the contents thereof, and that the matters contained in the Verified Amended Complaint pertaining to the Santee Sioux Nation are true to my knowledge.

I hereby verify and declare under penalty of perjury that the foregoing is true and correct.

Executed on April 24, 2020, at Santee, Nebraska.



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**VERIFICATION**

I, Elizabeth Kipp, Chairperson of the Tribal Council of the Big Sandy Band of Western Mono Indians, the elected governing body of the plaintiff Big Sandy Band of Western Mono Indians, hereby verify and declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Amended Complaint for Declaratory and Injunctive Relief and know the contents thereof, and that the matters contained in the Verified Amended Complaint pertaining to the Big Sandy Band of Western Mono Indians are true to my knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 2020, at Auberry, California.



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