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VIA FACSIMILE AND U.S. POSTAL SERVICE

April 28, 1999

Eleanor K. Meltzer, Attorney-Advisor
OFFICE OF LEGISLATIVE AND INTERNATIONAL AFFAIRS
U. S. Patent and Trademark Office
2121 Crystal Drive, Suite 902
Arlington, Virginia 22202

RE: Comments from the Pueblo of Sandia
Advisability of Prohibiting Trademark Registrations for
Official Insignia of Native American Tribes

Dear Ms. Meltzer:

The Pueblo of Sandia hereby submits the tribe's comments concerning proposed amendments to the Lanham Act to prohibit federal trademark registrations for insignias of "*any federally recognized Indian tribe.*" See S. 2260 (Cong. Rec. 7/23/98, pp S8822-24, S8837). We submit these comments in response to the Patent and Trademark Office's (PTO) December 29, 1998 and March 16, 1999 formal notices requesting comments. See 63 Fed. Reg. 71619 (January 1, 1999) and 64 Fed. Reg. 13004 (March 16, 1999).

The Pueblo of Sandia's official insignia, which is printed on the tribe's official stationery as shown above, is a depiction of Sandia Mountain under an arch of traditional Pueblo designs. The Pueblo has been known as Sandia Pueblo since the seventeenth century. The Mountain has enormous religious importance and significance to the Pueblo. Tribal members pray to it both morning and evening, and it is the location of innumerable shrines and sacred sites. From the Mountain, Sandia people gather the natural objects used in ceremonies and traditional activities. Given its religious and cultural importance, the Mountain silhouette was the natural symbol for the Pueblo. The tribe has used this official insignia since at least the 1980's. In these comments, the tribe responds to the various specific inquiries propounded by the Patent and Trademark Office. See 64 Fed. Reg. 13004.

How Best to Conduct the Study and Where Public Hearings Should be Held

For the reasons stated in previous comments submitted to the PTO by Native American organizations, tribes, and individuals, the Pueblo of Sandia also requests that there be at least ten (10) hearings across the country on the proposed amendment, and that one (1) hearing take place in Albuquerque, New Mexico. Albuquerque is centrally located so that members of the nineteen Indian Pueblos located north, south, and west of the city could attend hearings with no great hardship. The Pueblo of Sandia offers its tribal offices in Bernalillo, New Mexico — 4.5 miles north of the city of Albuquerque — as a possible locations for one hearing.

The tribe also urges that the PTO set up another method by which tribes, some of which will be located very far from any hearing location, may submit written statements for the PTO to consider during the hearing process. The PTO must take into consideration the limited resources of many Native American tribes and note that there are simply not enough funds to send representative to attend such hearings even though, the issues presented in this study are important cultural issues to all tribes.

Who Should be Consulted During the Study Process

The Pueblo of Sandia urges that members of tribes and tribal officials be consulted during this study process; obviously, representatives of Native American tribes, organizations, and advocates of Native American Cultural rights should be consulted for a full examination of the Native American positions on relevant issues.

As to material to be considered, the Pueblo agrees that both Indian law scholars and Indian law and related precedent should be considered. See, e.g. *Harjo et al. V. Pro Football, Inc.* Cancellation No. 21, 069 to Registration Nos. 1,606,810; 1,085,092; 987,127; 986,824, and 836,122 (Cancellation of registrations of various WASHINGTON REDSKINS marks). Cultural historians and cultural anthropologists and their works should also be considered. In addition, the Pueblo would like the opportunity to submit a written statement at the time of the hearing held in this area.

The Definition of Official Insignia and How the PTO Might Establish a List of Official Insignia

Official insignia should be defined as any insignia used by a tribe signifying its identity and/or insignia identified by the governing body of the tribe as official. The PTO could place a notice in the Federal Register requesting tribes to submit their official insignia, and through cooperation with the Bureau of Indian Affairs, mail copies of the notice to the governments of all tribes.

The PTO could use the same method it currently uses to ensure that the insignia of municipalities, states, and foreign countries are not registered as federal trademarks.

The Impact of Any Change in the Current Law or Policy

The change in the law would make the Trademark Act more consistent and avoid its possible present violation of fundamental Constitutional principles and Supreme Court Indian Law precedent. The Act has long prohibited registration of official insignia of "*the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof*" with no significant administrative problem. 15 U.S.C. § 1052(b).

Well established Indian law precedent dictates the recognition of the Indian tribes' sovereignty by the federal government and its agencies, and makes clear the fiduciary duty the federal government and its agencies owe to the tribes. United States v. Creek Nation, 295 U.S. 103 (1935); Seminole National v. United States, 316 U.S. 286 (1942). The Act's present failure to give official insignia of the tribes the same status as official insignia of cities, states, and foreign nations violates the law, offends fundamental equitable notions, and denies the tribes their equal rights under the Constitution. Changing the Trademark Act would cure these defects. No administrative difficulty in changing current law can justify allowing these defects to persist.

The Impact of Such Prohibition on Federal Registration and the New Uses of Official Insignia

The impact of such prohibition would mean that there could be no federal registration of the official insignia of Native American tribes by other parties. The tribes would continue to use their official insignia as they have used them in the past: to denote the identity or the government of the tribe.

The Administrative Feasibility of Changing Current Law

Since PTO has for many years been able to refuse registration of the official insignia of countless municipalities, states, and foreign nations, it has already demonstrated the feasibility of administrative changes that would refuse restriction to the official insignia of Native American tribes.

Whether the Changes in Scope of Protection Should be Offered Prospectively or Retrospectively

The law should have retrospective application if it is to advance the Congressional policy and purpose of the amendment. No business interest should justify the retention of federal registrations in official Native American symbols which Congress decides should not be registrable. Existing federal and state law dictates that non Native American institutions divest themselves of Native American property the institutions may have purchased for large amounts of money. See 25 U.S.C. 3001-3013; ARS 41-844-41-865 (1990). A trademark owner should not be shielded from the scope of the amended law because it registered a trademark before the Act was changed. Allowing present owners of marks that are Native American official insignia to continue to use these marks would make a mockery of the serious attempt of Congress and the United States Government to right a wrong, and would indicate quite clearly that *any* property rights of non Native Americans are to be valued more than the essential cultural values and sovereign identity of an entire tribe.

There would be no significant likelihood of confusion amongst consumers caused by the change in the law. It would at last be made clear to the public that official Native American tribal insignia and the like could only be used by Native American tribes, just as the official insignia of other non Native American governmental entities could only be used by these entities.

Statutory Changes Necessary to Provide Such Protection

The only statutory change is the amendment to 15 U.S.C. § 1052 to prohibit registration of the official insignia of Native American tribes.

Other Relevant Factors

Intellectual property rights and litigation of those rights are ever increasing. The amendment proposed by Congress would avoid costly litigation by Native Americans and their tribes to rectify the failure of the Trademark Act to protect them. The tribal resources saved could be used in hundreds of other necessary and productive ways. A change in the law would acknowledge and effectuate the duty of the federal government, pursuant to its fiduciary relationship with Native American tribes, to protect the insignia of Native American tribes. It would avoid potential problems under the Equal Protection Clause of the United States Constitution created by 1) the Trademark Act's current prohibition of registration of the insignia of municipalities, states and foreign countries; 2) its failure to explicitly treat the insignia of Native American tribes similarly; and 3) the PTO's current policy of permitting non-Indians not associated with the tribes to register tribal insignia.

Conclusion

The Pueblo of Sandia's comments have been structured to conform with the request of the PTO. The Pueblo desires the opportunity to submit additional written comments, documents, and articles as necessary prior to the New Mexico field hearing.

Sincerely,

Inez Baca

Inez Baca
Governor

DM/pd

cc: David Mielke, Esquire, Ussery and Parrish Law Firm
Chrono/File