

DOI SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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April 10, 2017

Ms. Elizabeth K. Appel, Director
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C St. NW., Mail Stop 3642–MIB
Washington, DC 20240

Re: Docket ID: BIA–2016–0007, Comments on ANPRM for 25 CFR Part 140

Dear Ms. Appel,

On behalf of the Department of the Interior’s (DOI) Self-Governance Advisory Committee (SGAC), I write to submit recommendations in response to the Advanced Notice of Proposed Rulemaking (ANPRM) on the Traders with Indians Regulations issued December 9, 2016. SGAC appreciates that the Department took the initiative to consult with Tribes early in the process of revising these obsolete regulations and have provided Tribes an opportunity to submit comments prior to proposed rulemaking.

The regulations, as written, require the Federal government to license traders on Indian land. As a whole, these regulatory provisions are outdated and do not support modern Tribal economies, nor are they written in such a way that DOI could easily implement them. Today, Tribal governments have astute leaders with strong business acumen who encourage and regulate economic opportunities within their respective jurisdictions that bolster Tribal and local regional economies through infrastructure and community development, government services, job creation and a skilled workforce.

The SGAC supports this effort to update the Indian Trader Regulations (25 CFR Part 140) and proposes that future regulations are revised to reflect the principles below.

- Support inherent Tribal authority to regulate trade on Tribal land;
- Protect Tribes from dual taxation; and
- Strengthen Tribal jurisdiction over business activity on Tribal land.

Additionally, we have provided answers to the questions put forth by the ANPRM with respect to how and whether 25 CFR Part 140 should be updated by the Department.

1. Should the government address trade occurring in Indian Country through updates and why?

Yes. 25 CFR Part 140 is anachronistic and needs to be updated to reflect modern economic practices and current federal law and policies. These regulations have not been substantively updated since 1957, which means the focus and language of the regulations are at odds with the 1970’s federal policy to promote and support Tribal Self-Government.

For example, the regulations still require federal licensing of all trade on reservations except for trade conducted by “full-bloods.” The regulations also speak of “appointing” traders, which is no longer relevant. Additionally, part of the regulation implements a federal law repealed in 1996 to prohibit gambling activities. And, in practice, very few reservation businesses have federal licenses under 25 CFR Part 140 and certainly the Bureau of Indian Affairs (BIA) has not exercised its authority under the regulation to control pricing in recent decades.

In following the principal of self-determination, the regulation can and should recognize the Tribe’s authority to determine with whom (and how) it will do business with traders on Indian land. The legislative history of the 1834 Indian Trader law supports tribal self-regulation of trade. The House reported with respect to regulation of trade with and among Tribes, “each tribe, by adopting those laws as their own, and establishing competent tribunals, may relieve us from the burden of executing them, and it is hoped that this will be done...such regulations must be made either by the United States, or by the tribes. They will be more satisfactory if made by them, than if made by us, and it must be our desire to do nothing for them which they can do for themselves.” H.R. Rep. No. 23-474 at 19 (May 20, 1834). It is long past time to bring Tribal self-determination to Indian trade and commerce. Self-Governance Tribes already assume authority for governmental functions previously provided by the Federal government – often with greater efficiency than before Tribal assumption. Tribes can regulate commerce within their reservations with more certainty and efficacy than the current, outdated Indian Trader regulations allow.

SGAC believes that the regulations can be updated in a manner that does not undermine Tribal sovereignty, but rather empowers Tribes and clears the way for Tribes to establish their own priorities and develop and implement regulations that are more reflective of local conditions. Updates to the regulations can and should reflect the dual purposes of supporting Tribal economic development and promoting Tribal Self-Governance. The Department did this with the recent updates to 25 CFR Parts 162 and 169. The foundational principals that inspired and supported modifications to the leasing and rights-of-way regulations apply with equal, if not greater, force with the Trader regulations. In fact, the Department cannot achieve its stated goal of promoting healthy, vital Tribal economies by only addressing leasing of Indian land; the Department must go further to ensure its policies and principals are consistent across the regulation of all trade and commerce in Indian Country.

2. Are there certain components of the existing rule that should be kept and, if so, why?

Yes. Aspects of the prohibition against BIA employees engaging in business and trade with Tribes remain prudent to prevent conflicts of interest in the exercise of the Federal government’s Trust Responsibility. Also, any licenses that were issued to businesses under 25 CFR Part 140 should be grand-fathered in and continue to be valid, but subject to further regulation by the Tribe.

3. How can revisions to the existing rule ensure persons who conduct trade are reputable and that there are mechanisms in place to address traders who violate Federal or Tribal law?

Again, the suggestion that the federal government should protect Indians from disreputable traders is an outdated and paternalistic notion that does not have a place under a policy of Tribal self-determination and self-government. Tribes are capable of regulating and policing trade within their communities. Regulation updates should simply acknowledge the Tribes' authority and responsibility.

To require a federal license for Indian trade adds an unnecessary level of administrative burden and, as such, has a chilling effect on both trade and Tribal self-determination. As the Department sought to achieve with its updates to 25 CFR 162 and 169 (leasing and rights-of-way regulations), it should update the Trader regulations to limit BIA's involvement in regulating business in Indian Country and defer to Tribes to manage their own affairs in trade and commerce, when a Tribe chooses to assume this responsibility. Tribes are in a better position to know what is in the best interest of their communities. Updates to the Trader regulations should require the BIA to recognize and acknowledge Tribal laws regulating business activities on its land. As was done with 25 CFR Parts 162 and 169, the regulations should allow Tribal laws to supersede or modify 25 CFR Part 140 provisions, as long as certain conditions are fulfilled (*for e.g.*, the Tribe notifies BIA of the modifying or superseding effect and/or the Tribe's regulations meet minimum standards).

4. How do Tribes currently regulate trade and how might revisions to 25 CFR Part 140 help Tribes regulate business in Indian Country?

Many Tribes are regulating business and commerce using their own laws and court systems. Tribes commonly address safety, quality, standards, environmental protection, taxation and other matters through their regulations. In fact, Tribes are in a better position to regulate trade and commerce on their land in a manner that the federal government simply cannot. Tribes understand the particular needs of their community, the impact of competing regulation from state and local governments, and the general market conditions which would attract and retain business on their lands. Therefore, the Trader regulations should defer to Tribal laws and authority to the maximum extent, when Tribes choose to exert this authority.

5. What types of trade, and what type of trader, should be subject to the regulations.

All commerce on Indian land should be covered by 25 CFR Part 140. This should include activities related to oil, gas, minerals and natural resources. Trader regulation definitions should be modernized to encompass all actors and activities in relation to Indian commerce, and particularly to support Tribal authority to regulate (and tax) non-Indian economic activity on their lands. The Secretary of the Interior has broad authority under Indian Trader Statute to do this. The Indian Trader Statutes are a delegation of Congressional power to regulate commerce with the Indian Tribes, and provide broad regulatory authority to the Department of the Interior. The statute at 25 U.S.C. 262 covers "any person desiring to trade with the

Indians” and authorizes any regulations Interior “may prescribe for the protection of said Indians.”

Updates can also address Tribal preference laws. As the BIA stated in 25 CFR 162, “Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe’s specific preference in accord with tribal law ensures that the economic development of a tribe’s land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members.”

6. How might revisions to the regulations promote economic viability and sustainability in Indian Country?

Regulatory change is absolutely necessary to promote the sovereign authority of Tribes to create a fiscal environment that stimulates the flow of investment, technology and services to Indian Country. To that end, updates to the Trader regulations should address the following areas which are critical to developing sustaining economies in Indian Country: 1) enable Tribal regulatory authority and authorize any person to engage in trade within Indian land pursuant to the laws of the Tribal government; 2) provide clear rules for Tribal jurisdiction over business activity; 3) provide clarity and certainty as to the taxation of commerce in Indian Country; 4) delete regulatory burdens that are not necessary for BIA to meet its statutory and trust responsibilities and include provisions supporting Tribes’ sovereign rights; and 5) recognize any Tribal business license as if it were a Federal license.

In particular, the regulations should address the discriminatory effect of singling out commercial activity and natural resource development in Indian Country with dual taxation. Assessment of State and local taxes obstructs Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments. The presence of Federal regulatory pronouncements with respect to state taxing authority has ever-increasing importance to protecting on-reservation commercial activity. As the Department did with its recent update to regulations governing leasing and rights-of-way on trust lands, by updating the Trader regulations it can reaffirm the *Warren Trading* principles that, “Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders.”

State and local taxation also threatens substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. At the crux of Tribal sovereignty and self-governance is the power to tax. The regulations should underscore and promote this sovereign right and, to that end, pre-empt state and local tax of natural resource development, commercial activity, and personal property on Tribal trust land. State governments are increasingly imposing taxes on severance of natural resources, retail sales, and property. Tribal governments face a losing proposition when forced to collect state taxes: if they impose a Tribal government tax, then dual taxation drives business away. Or, Tribes collect insufficient (or no) taxes and suffer inadequate roads, infrastructure for

economic development, schools, police, courts and health care. To add insult to injury, reservation economies are funneling millions of dollars into state treasuries who spend the funds outside of Indian Country; state and local governments are not investing in Tribal communities commensurate with the tax revenue they receive from economic activity on trust lands nor are they providing emergency or other services to Tribes. At the same time, Tribal governments have increasing responsibility to fund Tribal community services, as well as the very infrastructure that is creating the tax-generating activity. This dilemma is fundamentally unfair to Tribal governments, undermines the Constitution's promise of respect for Tribal sovereignty, and keeps Indian reservations the most underserved communities in the nation. NCAI recently passed Resolution SD-15-045: "Urging the Department of Interior to Address the Harms of State Taxation in Indian Country and Prevent Dual Taxation of Indian Communities," which SGAC fully supports.

The very possibility of an additional State or local tax can make some business in Indian Country less economically attractive, further discouraging development in Indian Country. Indeed, uncertainty as to taxing jurisdiction and one's ultimate tax burden is seen as the single greatest impediment to non-Indian investment and location of businesses in Indian Country. This uncertainty forces Tribes to structure their economies in the manner most likely to limit the ability of the state to enforce its tax, rather than in the manner that makes the best business sense. For their part, non-Indian investors and partners are rarely willing to endure the expense and delay of obtaining certainty on taxation in Indian Country. Tax rulings can be obtained from many state taxing agencies, but they are fact-specific and dependent on case law underpinnings that are notoriously unreliable, or on the terms of negotiated state-tribal compacts with expiration dates that may not afford the investor sufficient security over the life of the project. Even when a Tribe ultimately prevails, litigation is often necessary to establish state tax exemption whenever a non-Tribal partner or investor is involved. Numerous inefficiencies result from this, including the direct cost and delay caused by extended litigation, as well as the chilling effect on both outside and Tribal investment.

To avoid unnecessary litigation, the regulation should protect the integrity of Tribal business licenses and should be recognized by the United States as a retained authority. Again, sovereigns regulate commerce and other activities under their authority. A business license issued by a Tribe under the regulation should have the same legal standing as one issued by the BIA. As such, a Tribal license would have the same preemptive effect as a federally-issued license because it would be recognized as an action that is governed under the Commerce Clause of the U.S. Constitution.

7. What services do Tribes currently provide to individuals or entities doing business in Indian Country and what role do tax revenues play in providing those services?

Tribes certainly can levy sales and use taxes, hotel occupancy taxes, cigarette taxes, utility taxes, and other excise taxes on economic activity in Indian Country. But, this source of revenue is extremely limited (if at all available) and generally viable only upon agreement with state and local taxing jurisdictions. At the same time, Tribal governments have

increasing responsibility not only to their citizens, but also to businesses located within and adjacent to their territory. Tribes provide services for public safety, environmental services, infrastructure (roads, water, sewer), judiciary, licensing/permitting, and so on. For their citizens, the essential government services also include housing, health care, public facilities, community support, legal assistance, and so on. The tax revenue is never enough to cover all of these expenditures. The imposition of state and local taxes undermines the Tribe's ability to fully fund these essential support services through their own tax revenues. And, the failure of states to reinvest the tax revenue they receive from Indian commerce back into Indian Country does serious harm to Tribes, their citizens, and the neighboring communities. This is harm that the Department should address through reform of the Trader Regulations.

In conclusion, updating the Traders with Indian regulations is an opportunity for the Department to align its economic development priorities with nearly 50 years of successful Federal Indian Policy. The time has come for these regulations to reflect the new landscape of Tribal governments and communities.

SGAC appreciates your consideration of these comments and looks forward to continuing government-to-government consultation on this very important undertaking to address Indian trade and commerce.

Sincerely,



W. Ron Allen
CEO/Chairman, Jamestown S'Klallam Tribe
Chairman, DOI SGAC