The National Center
for American Indian Enterprise Development

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

The National Center for American Indian Enterprise Development (NCAIED) submits these comments in response to the Department's Advance Notice of Proposed Rule Making (ANPRM) issued December 9, 2016. NCAIED is a 501(c)(3) non-profit organization with over 40 years of experience in assisting American Indian Tribes, their enterprises, and tribal member-owned companies with business and economic development. NCAIED is the largest national Indian specific business organization in the nation. NCAIED has a keen interest in the Department's proposal to update the Indian Trader Regulations to promote economic development in Indian Country. As you may know, NCAIED hosted one of the consultation sessions for the ANPRM at NCAIED's annual National Reservation Economic Summit (RES) on March 13, 2017. We appreciates the opportunity to submit comments prior to proposed rule-making and look forward to promoting further advancement of tribal interests in this effort to update the Indian Trader regulations.

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, and to acknowledge and accommodate the prerogative of tribes as sovereign governments to address trade on their tribal lands or affecting their tribal communities. The existing Trader regulations have not been substantively updated since 1957, and their focus and verbiage are not only outdated but are also at odds with the federal policy enunciated in the 1970's of promoting and supporting tribal self-government. For example, the regulations still require federal licensing of all trade on reservation except for trade conducted by "fullbloods." The regulations speak of "appointing" traders, which is no longer relevant. Part of the regulation implements a federal law repealed in 1996 to prohibit gambling activities.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 a 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 and 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. Tribes can regulate commerce within their reservations with more certainty and efficiency than the current, outdated Indian Trader regulations allow.

   NCAIED submits that the regulations can be updated in a manner that does not undermine tribal sovereignty, but rather empowers tribes and clears the way for tribal regulation to take place. Updates to the regulations can and should reflect dual purposes of supporting tribal economic development and promoting tribal self-government. The Department accomplished these same objectives with the

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recent updates to 25 CFR Parts 162 and 169. The foundational principles 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 addressing only 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 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 conflicts with the 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' sovereign 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. 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 a Tribe's laws regulating business activities on its land. As was done with 25 CFR Parts 162 and 169, the regulations can 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 through their own laws. Tribes commonly address safety, quality, standards, environmental protection, taxation and other matters in their tribal laws, ordinances and regulations. In fact, Tribes are in a better position to regulate trade and commerce on their lands 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. In addition, the regulations should be reformed to create a presumption of tribal court jurisdiction. This is done in regulations presently governing trade with the Hopi and Zuni tribes at 25 C.F.R. § 141.15.

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, including 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 permit tribes to regulate (and tax) non-Indian economic activity on their lands. The Secretary of the Interior has broad authority under the Indian Trader Statutes to foster this tribal self-governance. These Statutes are a delegation of Congress' 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 also can 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 to stimulate 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 and sustaining economies in Indian Country: 1) enable tribal regulatory authority and authorize any person to engage in trade within Indian reservations 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 5) include provisions supporting tribes' sovereign rights.

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. And, the presence of federal regulatory pronouncements on state taxing authority has ever-increasing importance to protection of on-reservation commercial activity. As accomplished with its recent update to regulations governing leasing and rights-of-way on trust lands, the Department can and should update the Trader regulations and in them 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. An important aspect 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 into state treasuries millions of dollars that are spent 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 tribal trust lands. At the same time, tribal governments have increasing responsibilities 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 U.S. Constitution's promise of respect for tribal sovereignty, and keeps Indian reservations the most underserved communities in the nation.

The very possibility of an additional State or local tax can make some business in Indian Country less economically attractive and further discourage 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.

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 next 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.

We appreciate your consideration of these comments and look forward to continuing government-to-government consultation on this very important undertaking to address Indian trade and commerce.

Sincerely,

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The National Center for American Indian Enterprise Development