SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY

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August 29, 2017

VIA EMAIL: consultation@bia.gov

Attn: Revised Indian Trader Rules
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240

RE: Comments on ANPRM for 25 CFR Part 140

Dear Dr. Gavin Clarkson:

The purpose of this letter is to provide comments in response to the notice and request for input regarding the Bureau of Indian Affairs ("BIA") proposal to revise the Indian Trader Regulations currently found at 25 CFR Part 140. The notice and request for input, also communicated in a Tribal Leader Letter dated July 28, 2017, specifically opened the comment period through August 30, 2017 for input on the advance notice of proposed rule-making ("ANPRM") initially issued December 9, 2016. The Salt River Pima-Maricopa Indian Community (the "Community" or "SRPMIC") appreciates the opportunity to submit comments on these important rules. SRPMIC looks forward to additional dialogue and opportunity for input on this project through government-to-government consultation.

I. SUMMARY OF COMMENTS:

The Community urges the BIA to revise the Indian Trader Regulations to better align with Federal policy in promoting tribal self-governance and economic self-sufficiency. Of particular concern is the need to help tribes promote economic development by (1) preventing unnecessary dual regulation and taxation by state and local governments of commerce in Indian country, and (2) clarifying that tribes have the final say regarding trade within Indian country, including presumptions of tribal jurisdiction and application of tribal laws.

II. BACKGROUND:

The Community is a federally recognized Indian tribal government located within the State of Arizona. The Community is organized under a Constitution adopted and approved by the U.S. Department of Interior ("DOI") in accordance with Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984-988 and codified at 25 U.S.C. § 461 et seq. Vol. 75, No. 190, Federal Register at page 60812 (DOI listing of federally recognized Indian Tribes) (October 1, 2010). The Community Constitution confirms the sovereign duty and responsibility of the Community to promote self-determination, independence and the economic well-being of its members. Article VII, Section 1(e) of the Community Constitution, enables the Community to tax, generate revenue, borrow and expend revenue for public purposes.

The Community has approximately 10,000 enrolled members, and includes trust land of approximately 54,754 acres. The Community borders the cities of Scottsdale, Tempe, Mesa and Fountain Hills. A major portion of the Phoenix metropolitan freeway system (loop 101) is built upon Community land. The Community engages in numerous economic development activities consistent with the Federal Indian Self Determination and Education Assistance Act ("ISDEAA"), and the Community's inherent sovereignty.

In this regard, the Community has several developments within its lands which include both tribal member and non-tribal owned businesses. The Community enters into land and property leases specifically to promote business and economic activity within its borders. The Community also maintains a tax code located in Chapter 15.1 of the Community Code of Ordinances (http://www.srpmic-nsn.gov/government/ordinances/files/Chapter15.1.pdf). This is a comprehensive tax code including possessory interest tax, utility tax, hotel occupancy tax, and other taxing provisions for the generation of public revenue.

The Community maintains a Community Court system, a police department, a fire department, emergency services, schools, a health clinic, and other core services comparable to those typically associated with state and local governments. The Community also provides infrastructure as necessary to support commerce within Community lands.

The Community has entered into leases with numerous commercial developers, has coordinated land leases which aggregate allottee interests for development, and has entered into various development agreements designed to promote economic activities within the Community lands. Through such lease arrangements, the Community attracts both Indian-owned and non-Indian owned businesses to the reservation. The Community itself also owns and operates a number of enterprises on reservation, including, by way of example, athletic facilities and venues, hotels, a golf course, and gaming enterprises.

Subjecting businesses on Community lands to both state and local regulation and taxes imposes a substantial burden on the Community, and undercuts the Community's

core sovereign rights to regulate commerce and promote the public interests and needs of the Community and its members.

III. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COMMENTS:

1. The Community supports efforts to update the Indian Trader Regulations.

The Community supports an update to 25 CFR Part 140, as these regulations have not been substantively updated since 1957, and do not reflect subsequent federal policy promoting and supporting tribal self-governance. In particular, the current regulations require federal licensing which does not adequately reflect or recognize the development of regulatory and judicial functions by tribal governments since the 1950s. While the current regulations devote considerable attention to contracting and trade between BIA employees and Indians, the Community agrees with other commenters that the regulations should be rewritten to address changes in tribal economic development since the 1950s, including businesses on reservation tied to lease transactions with Indian and non-Indian businesses, and the considerable regulatory functions that tribal governments have assumed since the original regulations were published.

The current regulations also refer to Indians "of full blood" (140.3), Indians recognized as eligible for BIA services (140.5), and speak in terms of "appointing" traders (140.1) upon application to the BIA (140.9) who can determine the qualifications of traders in conducting business on reservation (140.9-140.15). The current regulations also address tobacco sales to minors (1040.17), intoxicating liquors (140.18), drugs (140.19), and infections plants (140.26) but do not address trade and contracts that have since become a bigger part of tribal economic development, including tribal taxation and the exercise of regulatory control of on reservation business.

The regulations should be revised to recognize tribal authority to determine with whom (and how) tribes will do business on Indian lands, and should defer to tribal regulatory and licensing authority for those tribes who exercise self-governance by assuming these regulatory functions.

2. The Community urges revisions to the regulations that would help to curb the threat of dual regulation and taxation.

The Community has enacted many laws that regulate business and taxation within Community lands. While it is without question that the Community can levy sales and use taxes, hotel occupancy taxes, cigarette taxes, utility taxes, alcohol taxes, and other excise and similar taxes on economic activity in Indian Country, the Community, as with other tribes, is limited in its ability to raise revenue in part because of the threat of dual taxation and regulation by state and local taxing jurisdictions.

This threat has become increasing prevalent with more non-tribal businesses conducting business on reservation. State and local governments have asserted the right to regulate and tax these non-Indian businesses, in part, based on "balancing" tests stemming from cases like *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which invited a particularized inquiry weighing tribal and state interests. This inquiry has proven to be an unpredictable "test" that often favors state interests in on-reservation activities for which there is no counterpart when tribes engage in off-reservation activities. Instead, the Community calls for a preemptive rule that reflects federal policy that tribes are empowered with the tools they need to achieve self-governance and self-determination, which cannot be done with state and local governments authorized to regulate on-reservation commerce.

The assessment of state and local taxes against business entities engaged in on-reservation commerce runs contrary to federal policies supporting tribal economic development, self-determination, and strong tribal governments. As the Department did with its recent update to regulations governing leasing and rights-of-way on trust lands, by updating the Indian Trader Regulations, BIA can reaffirm Congressional intent to take 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 of on-reservation commerce also threatens tribal sovereignty and self-governance by diminishing a tribe's power to tax. Businesses that are already subject to state and local tax, will be at a competitive disadvantage if also subject to tribal tax. The regulations should preempt state and local tax of commercial activity on-reservation.

3. <u>The Community urges revisions to the regulations to clarify that tribes have the final say regarding trade within Indian country, including presumptions of tribal jurisdiction and laws.</u>

The Community contends that the regulations should be rewritten to expressly incorporate tribal government regulatory authority over on-reservation commerce. The regulations should defer to tribes that have enacted their own tax and regulatory structures to address on-reservation commerce, and provide those regulatory enactments with preemptive force. The legislative history of the 1834 Indian Trader law supports tribal self-regulation of trade, and the revised regulations should reflect tribal assumption of these responsibilities in the nearly two centuries that followed. As part of the long history of Indian trader regulation, for example, the House reported that

> 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).

The Community, like many other tribal governments, has in fact exercised tribal self-determination by acting to regulate on-reservation commerce. The Community contends that the federal Indian Trader Regulations should be changed in fundamental scope to support tribal self-determination by recognizing the preemptive force of tribal regulation of on-reservation commerce. In this manner, the regulations can ensure that such commerce is exclusively a federal or (for tribes exercising self-governance) a tribal concern, with no room for dual regulation by state and local governments.

Business licenses and qualification to conduct business should be left to each tribe that enacts a business licensing law, with perhaps a federal standard limited to those tribes that do not exercise this right of self-governance. The regulation must recognize that tribes are capable of regulating and policing trade within their communities, and should acknowledge the tribes' authority and responsibility in this regard.

The Community agrees with other commenters that the revised rule should 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 expressly require the BIA to recognize and acknowledge tribal laws regulating on-reservation business activities.

Hand in hand with the right to exclusive regulation of on-reservation commerce, is the need for presumptive tribal jurisdiction for those tribes that have established forums and bodies of law to the regulation of commerce. All too often tribal jurisdiction is challenged unless consented to in writing by those conducting business on reservation, a concept that has no counterpart for businesses operating in state or local jurisdictions.

The Community notes that the regulations should be updated to reflect the fact that the form through which Indian businesses are conducted has changed over time. Indian owned or controlled businesses, including majority owned LLCs, corporations or other forms of entities recognized under applicable tribal law, should be recognized as Indian entities with preemptive force.

Finally, the Community joins with other commenters in noting that all commerce on Indian land should be covered by 25 CFR Part 140. The Indian 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.

V. CONCLUSION:

For the foregoing reasons, the Salt River Pima-Maricopa Indian Community urges the Department to amend the Indian Trader Regulations to reflect the well-established Federal policy of promoting tribal self-governance and tribal economic self-sufficiency by (1) preventing unnecessary dual regulation and taxation by state and local governments of commerce in Indian country, and (2) by clarifying that tribes have the final say regarding trade within Indian country, including presumptions of tribal jurisdiction and application of tribal laws.

Sincerely,

Delbert W. Ray, Sr.
President