

August 30, 2017

Ms. Ashley Fry
Regulatory Documentation Specialist
Office of Regulatory Affairs and Collaborative Action
Office of the Assistance Secretary - Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Mail Stop 4660—MIB
Washington, DC 20240
Email: consultation@bia.gov

Re: Comments Regarding 25 CFR Part 140 (Licensed Indian Traders)

Dear Ms. Fry:

The Tunica-Biloxi Tribe of Louisiana, a federally-recognized tribe located near Marksville, Louisiana (“Tribe” or “Tunica-Biloxi Tribe”) hereby submits the following comments in response to the Department of the Interior’s (“Department”) July 28, 2017 Dear Tribal Leader letter requesting written comments relative to 25 CFR Part 140 (“Licensed Indian Traders Regulations” or “Regulations”). This request follows the Department’s Advanced Notice of Proposed Rulemaking, 81 Fed. Reg. 89016 (Dec. 2, 2016) (“ANPRM”) also regarding the Licensed Indian Traders Regulations.

As a preliminary matter, we applaud and appreciate the Department’s willingness to examine the possibility and advisability of amending the Regulations, as well as its acknowledgement that the current Regulations “largely reflect policies that ignore Tribal self-determination and the growth of Tribal economies.” 81 Fed. Reg. 89016.¹ As explained in more detail below, the Tribe feels strongly that the Regulations are severely outdated, no longer reflect the status of commerce on Indian lands and accordingly should be significantly revised. We also feel that this process presents a truly meaningful opportunity for the Department to work with Tribes to fundamentally change the existing objectives and purposes of the Regulations that currently impose an inconsistently implemented and unworkable federal regulatory scheme to one that promotes, encourages and recognizes the supremacy of tribal regulation of commerce within and on our Indian lands. We also believe that the Department has the authority and should amend the Regulations to eliminate unnecessary jurisdictional barriers and problems that have long impeded meaningful development of tribal economies.

I. Background on the Tribe

¹ Similarly, the Tribe appreciates the Department’s intent to undertake this process “in a manner that reflects the current Nation-to-Nation relationship with Tribes should the Department propose a rule that updates” the Regulations. (81 FR 89016).

The Tunica and Biloxi Indians have lived on their reservation near Marksville, Louisiana, for over two centuries, during which times the tribes, though speaking completely different languages, intermarried. The first half of the motto on the Tunica-Biloxi flag, "Cherishing Our Past," refers to the Tunica's pre-Marksville history -- an odyssey without parallel among Lower Mississippi Valley tribes. As recounted by Dr. Jeffrey P. Brain in "The Tunica Trail", the Tunica inhabited Quizquiz, a great center of power in northwestern Mississippi when the Spanish explorer De Soto encountered them in 1541. The Tunica exercised influence over a wide territory, encompassing present-day Arkansas, Oklahoma, Missouri, Tennessee, Louisiana, Alabama, and even Florida. They were traders and entrepreneurs of the first order. Under severe pressure from European diseases, famine, and warfare, the Tunica steadily moved southward, following the Mississippi River.

The Biloxi were a tribe on the Mississippi Gulf Coast at present-day Biloxi, Mississippi. They were the first people the French colonizers, Jean-Baptiste Le Moyne de Bienville and his brother Pierre Le Moyne d'Iberville, encountered in 1669. The Biloxi, like the Tunica, formed a strong alliance with the French, which for a while brought them important economic and political benefits. Later, after the French were expelled, they allied themselves with the Spanish rulers of Florida.

Through their commercial skills, trade and adaptability the Tunica accumulated unprecedented quantities of European artifacts, primarily from the French with whom they established close political and military ties, but also from the Spanish. In this lie the roots of the second half of the Tunica flag motto, "Building For Our Future," which refers to the intense struggle for Federal recognition (achieved in 1981 through the Federal acknowledgment process), to the ensuing effort to recover the so-called "Tunica Treasure" pilfered from the graves of their ancestors, and finally to the building of the Tunica-Biloxi Museum that houses the Tunica Treasure and serves as a memorial to the tribal ancestors. The struggle associated with the return of the Tunica Treasure "not only triggered the largest return of American Indian grave goods ever... but laid the foundation of a new Federal Law, the Native American Graves Protection and Repatriation Act."

Today, just thirty-five years after obtaining federal recognition, the Tribe has developed an impressive and solid economic base. It owns a first-class casino and resort and is the largest employer in Avoyelles Parish. It also operates a related RV park and golf course. In addition, the Tribe leases space for the operation of a fast food restaurant chain (which it previously owned) and has plans to develop recently acquired lands for commercial purposes. The Tribe is also involved in certain reservation based on-line commerce and recently entered into the filmed entertainment business. It also, years ago, created under tribal law an economic arm-of-the-tribe in the form of a wholly owned limited liability company, the sole member of which is the Tribe, to promote and develop additional commerce and business opportunities on the Tribe's reservation.

It is also worth noting that since the Tribe first commenced its commercial activities in 1994, the surrounding, generally urban area has experienced significant economic growth as a result of the adjacent commerce created by the Tribe.

II. Comments in Response to July 28, 2017 Dear Tribal Leader Letter (“DTL Letter”).

The DTL Letter solicits specific information from tribes, including “[s]pecific projects that your tribe or tribal organization cannot initiate or approve under existing regulatory requirements, but which you believe could move forward if new regulations gave tribes greater economic flexibility.”

Several years ago, the Tribe actively pursued the development and construction of a convenience store / gas station on its lands. The Tribe fully complied with all applicable environmental laws and after investing significant funds of its own, secured a multi-million dollar construction loan. The project would have created approximately 8-10 full and part time positions. However, the Tribe ultimately stopped pursuing the project because dual sales, motor fuels and cigarette taxes would have made the project unprofitable and even had the Tribe foregone its taxing authority, non-tribal taxation would have severely and adversely impacted the project’s profit margin. As explained in more detail in Part III.6 below, dual taxation continues to be an impediment to economic development on the Tribe’s lands.

III. Comments in Response to ANPR

The ANPRM solicits comments on seven specific questions. Our comments to each question are set forth below. As evident below, there is some degree of overlap between the issues presented in the questions as well as our comments thereto.

1. Should the Federal government address trade occurring in Indian Country through an updated 25 CFR part 140, and why?

As a general matter, the Tribe strongly believes that the Regulations should be updated because they are clearly outdated and are not consistent with current Federal policies of Tribal self-government and self-determination. As the Department notes, the Regulations were first promulgated in 1957 and were last modified in a piecemeal fashion in 1984, nearly thirty-five years ago. Perhaps more importantly, the underlying statute dates back to 1982.

We also believe that significant revisions are warranted because the Regulations have not been consistently nor uniformly implemented and do not accurately reflect, nor take into consideration, the existing and varying tribal commercial regulatory structure on many reservations. To the Tribe’s knowledge, we do not believe that the Department has issued any Indian Traders Licenses to individuals in connection with their business dealings with the Tribe on the Tribe’s lands. Also, as the Department notes, “many Tribes currently regulate trade occurring within their jurisdictions under Tribal laws and authority, often without Federal involvement.” (81 FR 89016) The Tunica-Biloxi Tribe is one such tribe and we provide details of our commercial regulatory structure in our response to Question #4, below.

Should the Department decide to revise the Regulations, we believe that the following key issues should be addressed and included in the revised Regulations:

- The acknowledgement and recognition of the *supremacy of tribal commercial regulation on tribal lands*, including e-commerce based on and originating from tribal lands.² We believe that tribes are in the best position to regulate commerce on and within their lands. Also, acknowledgement of tribal regulation and control over commercial activities and individuals entering into consensual relationships with tribes, such as trade, commerce and business, is a well-established principle of Federal Indian law. It is also consistent with numerous Federal statutes and regulations (i.e., 25 U.S.C. §§ 5301-5423 (ISDEAA); 25 U.S.C. §§ 5361-5399 (Self-governance); 42 U.S.C. § 7601(d) (EPA Treatment as a State); 25 U.S.C. § 3504(e) (TERA); 25 U.S.C. § 415 (HEARTH Act); and 25 U.S.C. § 5601-5636 (Trust Reform Act)) that allow for and encourage tribes to take control over primary control and regulation over programs and activities on their lands.³
- The *preemption of State taxation of commerce on Indian lands* that will result in the elimination of the significant burden and crippling effect of dual taxation on tribal economies and that will, in turn, accomplish the long-standing Federal policy of tribal economic self-sufficiency. We discuss this issue in detail in our response to Question #6, below.
- The acknowledgement and recognition of (i) the presumption of tribal court jurisdiction over individuals and entities who engage in commerce or business activities on tribal lands, as well as over disputes arising from such activities, and (ii) the requirement, whether in Federal or state court, of the exhaustion of tribal court remedies. However, the Tribe believes that the revised Regulations should also recognize that tribes have the authority to waive such requirements.
- Provisions that provide for a Federal enforcement component to violations of tribal laws regulating commerce on tribal lands, the utilization of which would be at the election of the particular tribe. This comment in no way should be interpreted as suggesting that Federal enforcement of violations of tribal law should supersede tribal enforcement; rather, it is intended as a supplement to tribal enforcement.

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

It is difficult for the Tribe to comment on this question as the Regulations have not been implemented with respect to commerce on the Tribe's reservation. However, in situations where

² The Tribe believes that there should not be a review or certification of tribal commercial regulations by the Department in order to acknowledge and recognize the supremacy and applicability of tribal laws and regulations governing commerce on the particular tribe's lands.

³ The Tribe is not opposed to the concept of continued Federal regulation of commerce on Indian lands if such regulation applies only in the event the particular tribe affirmatively elects to opt into such regulation.

the Regulations have in fact been applied to certain tribes, we would not oppose a grandfather provision for certain provisions or aspects of the Regulations as agreed to by these affected tribes.

The Department's additional discussion related to this question also solicits comments with respect to the event that the Department decides that no provisions of the existing Regulations should remain and opts to replace it with an entirely new rule. Should the Department decide to replace the Regulations with an entirely new rule, we urge the Department to include in such new rule the key issues we identify in our response to Question #1, above, and as relevant, our comments provided elsewhere in this submission.

In addition, the Department also asks what its role should be in the event that the Department decides to no longer issue Indian Trader Licenses. In such event, the Tribe believes that the Department should nevertheless take this opportunity to revise and refocus the Regulations in a manner that truly and meaningfully promotes tribal self-determination and self-sufficiency. Regardless of the administrative role that the Department ultimately may take under any revised Regulations, if any, the Regulations should still acknowledge and recognize, or establish, as the case may be (i) the supremacy of commercial regulation *by tribes* on their respective tribal lands, (ii) the acknowledgment of the preemption of state taxation that will eliminate the overwhelming problem of dual taxation of tribal economies and its devastating impacts; (iii) the express acknowledgement of the presumption of tribal court jurisdiction and exhaustion of tribal court remedies; and (iv) a mechanism by which the Federal government may, upon the request of the particular tribe, enforce violations of tribal law.

The Tribe also believes that should the Department elect to no longer issue Indian Trader Licenses, the tribes are more than adequately equipped to regulate and should they chose, license their business partners, vendors and traders.

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

While we appreciate the Department's concern, we believe that tribes are best and most adequately equipped to ensure that persons conducting trade or business with them (or their economic arms-of-the-tribe) or on tribal lands in general, are reputable actors. Tribes have the most at stake and potentially to lose as a result of dealing with disreputable or unsuitable persons, and accordingly, many have developed practices and mechanisms to shield and protect their assets from this threat. For example, the Tunica-Biloxi Tribe, as a matter of consistently applied tribal practice, requires that its business partners or those engaging in commerce on its lands undergo a thorough and comprehensive background investigation.

We also realize that other tribes may not have developed such practices or regulatory frameworks. Accordingly, the Tribe believes that should the Department revise the Regulations, they should include provisions that allow tribes to seek assistance from the Department to develop such practices and regulations.

As discussed in our response to Question #1, above, the Tribe also believes that a provision that allows, at the request of the impacted tribe, for Federal enforcement of violations of tribal, and if applicable, Federal laws governing on-reservation commerce will assist in ensuring that disreputable characters are not involved with commerce with Indian tribes.

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

Since the Tribe obtained federal recognition in 1981, the Tribe has consistently regulated trade over its lands and over individuals and entities doing business with the Tribe and its economic entities in accordance with tribal law and practice. Although the Tribe does not have one overriding comprehensive law governing trade and business on its reservation, it nevertheless vigorously regulates trade and commerce in the following ways:

- With respect to gaming, the Tribe regulates vendors providing services to its gaming enterprise in strict conformance with the Tribe's Gaming Ordinance, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA") and the Tribal-State Compact in effect between the Tribe and the State of Louisiana.
- Similarly, with respect to traders who have entered into lease arrangements with the Tribe, such arrangements are governed by federal law and supplementing tribal policies and laws. The Tribe intends to assert primary regulation over such leases pursuant to the HEARTH Act.
- The Tribe also requires all individuals and entities conducting business with the Tribe and its economic arms, to strictly comply with the Tribe's TERO, which in addition to containing employment related provisions, also includes provisions governing contracts entered into by the Tribe, and its entities and certain covered contractors.
- With respect to other economic activities taking place on the Tribe's lands involving vendors or traders, the Tribe's regulatory structure, at a minimum, includes a comprehensive system of due diligence and background checks on key principals, executives and officers of the prospective vendor or trader, as well as typical entity due diligence. The Tribe utilizes the experienced capabilities of its Gaming Commission to conduct certain background investigations and routinely engages outside consultants to undertake financial and business due diligence on the Tribe's potential business partners. This process involves comprehensive disclosure forms, consents, and thorough background investigations that show, among other things, violations by the applicant of applicable laws and regulations, as well as a history of litigation and any bankruptcy or insolvency filings.

This question also asks how revisions to the Regulations might help tribes regulate trade in Indian Country. In addition to our comments set forth herein, the Tribe believes that it may be useful for the Department to work with participating tribes to create a comprehensive data base of individuals and entities that have violated tribal or Federal laws regulating commerce on Indian lands. It may be beneficial for the Department to consult with the National Indian

Gaming Commission (“NIGC”) as the NIGC may have established a similar data base with respect to violations of Federal and tribal gaming laws.

5. What types of trade should be regulated and what types of traders should be subject to regulation?

The Tribe believes that the answer to this question depends to a large extent on the role that the Department will play in implementing, administering and enforcing any revised Regulations. First and foremost, the Tribe believes that it should be left to the tribes themselves to determine what types of trade and traders should be subject their regulation. In other words, each tribe should have the authority to determine the appropriate scope and reach of its respective regulatory structure.

Although tribes may adopt regulatory practices that vary in scope and application, the Tribe also believes that any Federal regulation pertaining to commerce engaged by third parties on Indian lands should expressly exclude types of trade, commerce or business that are already subject to Federal regulation. These would include, for example, gaming activities regulated pursuant to IGRA, certain energy related trade that may be regulated by Title V of the Energy Policy Act of 2005 (25 U.S.C. 3501-3506), leases regulated by applicable Federal or tribal regulation, as the case may be, and any other commercial activity already regulated by Federal law.

Also, as a general note, the Tribe believes that it would be beneficial for the Department to conduct a preliminary assessment as to the types of trade currently taking place on Indian reservations in order to determine the need or advisability of regulating the same. For example, the Tribe does not currently engage in many of the Department’s cited examples of trades that could potentially be included in the scope of any revisions to the Regulations.

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

Related to this question, the Department also requests “feedback on how revisions to the trade regulations could facilitate economic activity in Indian country and tribal economic self-sufficiency.” (81 FR 89017). The Tribe very much appreciates and is encouraged by these questions and their clear focus.⁴ In the Tribe’s opinion, this is the most important and overriding reason to revise the Regulations – to promote and facilitate economic activity, viability and sustainability in Indian Country.

⁴ The Tribe also appreciates the Department’s recognition that “dual taxation on Tribal lands can undermine the Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments. Dual taxation of traders and activities conducted by traders and purchasers can impede a Tribe’s ability to attract investment to Indian lands where such investment and participation are critical to the vitality of Tribal economies.” (81 FR 89016). The Tribe completely agrees with this statement and appreciates the Department’s awareness and insight into this problem.

In order to fully understand what is required to achieve this goal, it is necessary to identify in the first instance what impedes and hinders it. The Tribe feels very strongly that one of the most significant impediments and hurdles to meaningful development, viability and sustainability of economies in Indian country is the problem and resulting crippling effect of dual taxation - specifically, the ability of local jurisdictions to impose various taxes on commercial activities taking place on Indian lands or levied on a tribes' business partner, vendor or trader -- often completely irrespective of the level of governmental services, if any, provided by such jurisdictions.

The Tribe has experienced first-hand the adverse impacts of dual taxation on its ability to develop economic activity on its lands. Given the public nature of these comments, the Tribe is not in a position to discuss in detail its experiences with dual taxation, but can state that with respect to at least one trader engaging in trade on the Tribe's reservation, upon the trader realizing that it potentially would be subject to certain taxes imposed by both the Tribe (it did not have a problem with the concept of tribal taxation) *and those imposed by the Parish* for the same activities, the trader made it very clear that if it should be forced to pay both taxes, that it would be forced to cease its commercial activities on the Tribe's lands. This left the Tribe in a very difficult and disadvantaged position. Moreover, since the Tribe provided virtually all governmental services to the trader with respect to its on-reservation business operations that are typically funded from tax revenues, we believe it was especially unfair and inequitable and certainly not reflective of nor consistent with the Department's position of promoting and encourage trade and commerce on Indian lands.

The Tribe also is of the opinion that a relatively simply provision to the Regulations that acknowledges and confirms the supremacy of tribal regulation of commerce on tribal lands, and presumptive tribal court jurisdiction over the same, would provide much needed certainty and clarity to potential individuals and entities desiring to conduct trade and business on Indian lands.

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 such services?

This question involves two separate but related issues and we address each one accordingly. Our responses are specific to the Tunica-Biloxi Tribe.

a. Services provided by the Tribe to individuals and entities doing business on the Tribes lands.

The Tribe essentially provides to individuals and entities doing business on our lands the same governmental services that it provides to the Tribe's own businesses. These services are typical services that are generally provided by responsible governments to businesses and include the following:

- Law enforcement. The Tunica-Biloxi Tribal Police Department is charged with policing between three and five thousand people on the Tribe's lands including tribal members, employees and guests. The Police Department's services are extensive and include

patrolling all Tribal property, responding to calls for service, investigating criminal activity, making arrests, drug interdiction, monitoring traffic, attending to traffic accidents, and assisting other local law enforcement agencies. The Tribal Police Officers are also cross deputized with the Avoyelles Parish Sheriff's Office.

- Food and sanitary inspections. The Tribe has a Health Department that routinely inspects food venues to ensure compliance with applicable tribal law.
- Infrastructure. Utilizing Tribe, BIA, IHS, ICDBG funds, the Tribe has established and maintains an infrastructure that allows for and encourages business operations on its lands.

b. What role do tax revenues play in providing such services?

Unfortunately, given the very real problem of dual taxation for the Tribe, the Tribe cannot rely upon tax revenues to pay for these services because if it insists upon the payment of such taxes, and the non-tribal business operation is also subject to a state of local tax, the business, understandably, will elect to move off-reservation.