



**Comments on ANPRM by Mashantucket Pequot Tribal Nation (“MPTN”)  
October 16, 2017 – With Additional Information Added from March 16, 2017 Submission**

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

Contemporary economic development for Tribes in the era of self-determination requires an expansion of legal safeguards, which should include an update of the Federal Trader Regulations at 25 CFR Part 140 (the “Regulations”). The Regulations should provide clear rules for tribal jurisdiction over business activity on Indian land, including a framework for tribes to regulate trade and the resulting taxes on Indian land. The Regulations should also provide flexibility for each tribe to establish procedures that match their unique circumstances and objectives.

The Indian Commerce Clause gives the exclusive right to Congress to regulate commerce with Indian tribes. U.S. Const. art. 1, § 8. Congress has delegated broad authority to the Department of Interior to regulate commerce in Indian country. *See* Indian Trader Laws at 25 U.S.C. 261-264. “Congress has taken the business of Indian trading so fully in hand that no room remains for state laws imposing additional burdens on traders.” *Warren Trading Post* 380 U.S. 685, 14. The legislative history of the Indian Trader Statutes, created by Congress in 1876 to prevent unfair treatment of Indian tribes in commercial activities, supports tribal self-regulation of trading.<sup>1</sup>

While regulating commerce with Indian tribes largely remains a federal role, the current Regulations have not been updated since 1957. We support the modernization of these Regulations to address current trade and economic development issues facing Indian country, in a manner consistent with the longstanding federal support of tribal self-governance in the era of Indian self-determination.

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

In our opinion, most of the provisions of the existing rule are not worth preserving. The Regulations should be modified to allow Tribes, if they elect to do so, to manage the regulation of their business dealings under flexible minimum standards included in new Part 140 provisions. Our thought is that this would be similar to the leasing regulations in 25 CFR 162 (the “Leasing Regulations”). If any components of the existing rule are kept, the objectives of fair and reasonable prices and dealings in 25 CFR 140.22 should continue, but the power to negotiate fair prices should be delegated to the tribes. Also, defined terms as currently included in 25 CFR Part 140.5, if kept, should be kept and used in a broader context to be applied to all sections of the Regulations.

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<sup>1</sup> A comprehensive enactment of 1834, as a predecessor of the Indian Trader Statutes, states in its legislative history that, “each tribe, by adopting those laws as their own ... 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), Act of June 30, 1834, 4 Stat. 729.

The BIA does not currently follow the licensing procedures outlined in 25 CFR 140.9 in certain districts. As such, it may be unnecessary to keep the current language, especially as federal licensing is inconsistent with the objective of Indian self-determination. However, provisions to grandfather current licenses should be included in the revised Regulations. Ultimately, the mechanics of licensing procedures, if maintained, should allow for a tribe, if it elects to do so, to implement their own licensing procedures and regulate under such procedures. Required minimum guidelines for licensing procedures would be beneficial to ensure that Tribes are meeting reasonable standards for issuing licenses, similar to minimum guidelines included in the updated Leasing Regulations, discussed below.

**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?**

We recommend that the revised regulations allow the option for tribes to license and regulate vendors within Indian country with minimum requirements in the Regulations similar to the safeguards incorporated into the new Leasing Regulations. For example, in the general business lease provisions, the Leasing Regulations do not provide a model business lease form to account for flexibility in negotiating business leases. However, the BIA reserves the right to provide other lease negotiation guidance, and there are certain mandatory terms that a business lease must contain, such as: identification of the land; purpose of lease; party names; term; and ownership of permanent improvements. 25 CFR 162.402 and 162.413. We think that similarly, the Regulations should require basic terms to be addressed in a business agreement, such as determining jurisdiction over particular activities on a reservation, party names, and applicable taxes.

Notwithstanding the negotiation flexibility in the Leasing Regulations, the BIA reserves the right to “recover possession, including eviction, on behalf of the Indian landowners and pursue any additional remedies available under applicable law...” 25 CFR 162.023. Emergency action is also available to the BIA if an individual or entity threatens to cause immediate and significant harm to Indian land. 25 CFR 162.024. These regulations strike a balance between tribal autonomy to negotiate material terms and federal protection in the event of a lease violation.

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

MPTN has a major gaming enterprise, Foxwoods Resort Casino, which operates under the Mashantucket Pequot Gaming Procedures, promulgated by the Secretary of the Interior (the “Gaming Procedures”). The Gaming Procedures contain provisions requiring certain registration/licensing for gaming and certain non-gaming vendors. When MPTN enters into a business relationship with a vendor at their gaming facility, MPTN implements safeguards to ensure that the vendor is reputable. Gaming service enterprise vendors (meaning gaming goods or gaming services) are currently licensed by the State of Connecticut and background investigations are performed by the State gaming agency and State law enforcement agency. Non-gaming enterprise vendors that annually provide \$50,000 in goods or services to a tribal gaming operation are also identified to the State gaming agency.

The Regulations should establish minimum requirements for tribes to set up regulatory procedures for entering into new trade agreements. Based on a tribe's business endeavors and objectives, they may establish clear and defined regulations and best practices for their specific commercial activities and consult the BIA when drafting specific terms.

Most new business relationships with MPTN/Foxwoods begin with a request from an MPTN/Foxwoods operating department for a particular good or service. This request is submitted to MPTN's procurement division, and if required, procurement will then release a Request for Proposal ("RFP"). The RFP format will vary based on the good or service requested, however, specific information is consistently requested, such as price quotes, key individuals involved, and a timeline for the service performed or delivery of good. Once MPTN identifies a vendor for the good or service needed, the vendor then must submit a vendor form to the Tribe's procurement department for review by the Tribe. Some of the salient information reviewed in the process includes the vendor's business form, tax ID number, and forecasted amount of annual earnings. After appropriate reviews and background checks are completed, business terms are drafted and negotiated by legal counsel; contractual language includes mechanisms to address violations of federal or tribal law.

**5. What types of trade should be regulated and what type of trader should be subject to regulation?**

The Regulations should encompass all aspects of tribal commercial activity, including any sale of goods and services on Indian lands, as well as business leases occurring on Indian lands.

Currently, the Regulations do not define the type of trader conducting business with a Tribe. We recommend that the revised Regulations apply to any person or entity conducting business with the Tribe or Indians within Indian Country.

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

Revisions to the Regulations promote economic viability by providing well-defined rules for tribal jurisdiction and authority over business activities within Indian country. The Department's revision and modernization of these regulations will help define tribal jurisdiction and authority (with minimal federal oversight), as well as help to erode dual taxation in Indian country while protecting tribal revenue. The federal government's absence in this area has been one factor leading to states and local municipalities asserting taxing authority within Indian country while providing no direct services within Indian Country. This essentially ousts the tribal governments from taxing in their own jurisdictions, because imposing a tribal tax in addition to state taxes will certainly halt real economic development. The burden of this dual taxation is further exacerbated by the fact that tribes often provide and pay for the government services within Indian country, while not receiving all of the tax revenue to support those services.

Dual taxation impairs the ability of a Tribe to provide essential government services by diminishing its tax base. MPTN understands that there is a maximum tax burden a taxpayer will

bear before abandoning an activity altogether, which would result in a greater loss of revenue, so they often reduce their tax base to equalize the impact of a concurrent state tax. In MPTN's case, MPTN provides governmental services and infrastructure maintenance on their reservation, yet they are restrained from asserting their full taxing authority to fund these governmental services because they do not want to expose their patrons, tenants, and vendors to double taxation.

Additionally, revisions to the Regulations would create predictability and transparency with business transactions in Indian country. This would instill greater confidence in vendors that they will not be subject to inconsistent regulatory requirements and excessive dual taxation.

**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?**

MPTN provides the following services for their patrons, tenants, and vendors:

- Public Safety: Fire; Police; 911 Dispatch
- Regulatory Affairs: Liquor Control; Surveillance; Gaming Commission
- Utilities: Water; Sewer & wastewater treatment plant; Electrical & natural gas distribution (including a Co-Gen plant)
- Tribal OSHA ("TOSHA"): regulation of employers to ensure safe working conditions
- Land Use Commission/Environmental Protection: Food safety inspections; Building code & enforcement; Natural resource; Regulatory permitting
- Judicial: Tribal Court and Court of Appeals, including tribal law enforcement and mediation; Mashantucket Employment Rights Office ("MERO") to ensure fair labor practices and Indian preference enforcement
- Public Works: Road paving and maintenance; Snow plowing of roads and public lots; Storm water catch basin cleaning and maintenance; Litter disposal; Grounds maintenance and landscaping
- US Post Office: contract facility where most tenants hold P.O. boxes

The estimated operating costs for these services are in excess of \$15 million annually. In addition to the annual operating costs to provide these services, the tribe has also made significant financial investment to install and maintain its infrastructure systems (i.e., utility plants and distribution networks, roadways and buildings). These services support the tribe's gaming operations and other tribal entities, as well as vendors and lessees who do business on the Reservation.

While the Tribal Nation provides essentially all government services on the Reservation, the annual State of Connecticut or local municipality taxes collected or paid by MPTN and its tenants on reservation are as follows:

- Sales and Use Tax (mostly on sale of retail goods):
  - MPGE owned outlets = \$1.4mm
  - Tanger outlet stores = \$5mm – 6mm

- Personal Property Taxes:
  - Between \$750,000 – \$1.5mm

The imposition of state and local taxes on MPTN on sales and personal property causes significant harm because it prevents MPTN from implementing tax policies and raising tax revenue for the programs and services it provides. State and local governments provide few services to the reservation, and the tax revenue lost to them both impacts our bottom line for maintaining and expanding services, as well as developing additional services. Furthermore, this overreaching by states onto tribal lands conflicts with the federal government's longstanding position of self-determination and economic development for Indian country.

**8. Additional information provided regarding request for specific accounts of ways that imposition of state and local taxes on MPTN has threatened economic development for MPTN.**

In ongoing efforts to expand and diversify MPTN's economy, the Tribe has entered into several business relationships where concerns about tax uncertainty have either jeopardized a project or caused the Tribe to forego its right to impose a tribal sales tax on consumers.

During negotiations with the organization that eventually built the Tanger Outlet mall on trust lands located within the Mashantucket Pequot Reservation, the absence of a real property tax was a major financial incentive for selecting Foxwoods as the location for the project. As part of the agreement, the organization also agreed to pay MPTN a quarterly payment in lieu of taxes ("PILOT") to cover the cost of tribal services provided to the facility, which the Tribe agreed they would forego in the event that a government other than MPTN imposed a tax related to the property. Once the Tanger Outlets were completed in 2015, the Town of Ledyard attempted to impose a real property tax that would have cost the organization several million dollars in taxes annually, and would have cost the Tribe its PILOT revenue. Through a time-consuming challenge by the Tribe, the Town eventually rescinded their tax imposition on the Outlets.

The Tribe is currently working with a developer on a significant project that would again involve construction on the Tribe's trust lands. MPTN expects to face the same tax challenges with the Town of Ledyard, and in comparison to Tanger Outlets project, the developer and project owner would have considerably more tax expense at stake due to the nature of the prospective amenities involved in this project. Again, the developers are expecting a more advantageous property tax environment operating on tribal lands and under the Tribe's regulatory framework, and again, the Tribe will have to invest considerable time, money, and resources to block the aggressive and improper tax overreach by the Town. It is worth noting that this development project would not be repositioned into a neighboring local municipality if the project were to fall through; the developers are only interested in the location due to the volume of patrons that the resort attracts. Tax uncertainty has not only put business endeavors at risk, but it has evolved into an anticipated, expensive, and undeserved cost of doing business that the Tribe must absorb in order to protect its business partners/investments.

Recently, MPTN has had to commit resources to challenge the State of Connecticut's imposition of sales tax on vendors who provide services and goods that are integral to the Tribe's gaming operations. Based on the value of these goods and services created on the Tribe's resort property, and consistent with a State revenue ruling issued to the Tribe, the Tribe expected to collect MPTN sales tax on the goods and services provided by these vendors. However, these tenants were contacted by the State and advised to collect and remit Connecticut sales tax, so the Tribe is losing this tax revenue while it attempts to challenge the State tax imposition. It is important to note that in no instance is the Tribe marketing a tax exemption; the Tribe has its own sales tax code that would tax these transactions except for the fact that imposing the tribal tax would result in dual taxation, which would further impede the Tribe's ability to attract businesses to the reservation.

In conclusion, not only does the tax overreaching and uncertainty in tax jurisdiction potentially impact significant business arrangements, it also costs the Tribe in several ways. The Tribe loses important tax revenue that becomes siphoned off by state and local municipalities while providing all of the public safety, public works, and regulatory infrastructure, and in turn, must incur the expenses to defending its vendors against these aggressive and inequitable tax assessments.