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October 30, 2017

Attn: Revise Indian Traders Rule
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street, NW, Mailstop 3642-MIB
Washington, DC 20240

Submitted via email to consultation@bia.gov

RE: Nafoa Comments on Modernizing the Indian Trade and Commerce Regulations (Docket: BIA-2016-0007)

The Native American Finance Officers Association (Nafoa) would like to submit the following comments regarding updating the Department of the Interior’s “Licensed Indian Traders” regulations (25 CFR Part 140). This effort demonstrates the importance of the Department of the Interior (DOI) in continuing its role as the economic trustee for Indian Country. Many DOI regulations have been, and must continue to be, modernized to acknowledge the tribal self-determination and self-governance to regulate trade, commerce, and economic development occurring on tribal lands to provide certainty in tribal jurisdiction.

The U.S. Constitution’s Commerce Clause states that Congress has the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹ However, antiquated federal statutes, regulations, and judicial interpretations have created a patchwork of uncertainty over jurisdiction to regulate trade and commerce on tribal lands.

Despite tribal governments’ status as sovereign nations, state governments have been imposing tariffs on economic activity occurring within Indian Country, when they would not be able to do so on other governments. Currently, federal courts, under the *Bracker Analysis*,² are making political decisions whether a state-imposed tariff applies to tribes on a case-by-case, fact-by-fact, and court-by-court determination. Attempting to discern precedent from these decisions leaves considerable uncertainty for tribal development—adding to an already difficult economic reality. Both capital markets and business arrangements avoid or compensate for uncertainty. The effect

¹ U.S. Constitution, Article I, Section 8, Clause 3.

² See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

of this uncertainty is that commercial agreements occur only when premiums and administrative costs are added. For activities and agreements deemed too cost prohibitive the result is unrealized diversification and stagnant community development. With a limited tax base to generate funds, tribal business-generated revenue is essential and often the only source of income for tribes to provide needed governmental services to their citizens.

Indian Country wants certainty in tax jurisdiction and to end the practice of governments taxing other governments. Nafoa welcomes DOI's engagement in this critical discussion regarding developing a strong, long-term strategy to end this practice. The solution includes a thorough review of what is possible within the language of the Indian Traders authorizing statutes as well as previous regulatory actions taken by DOI to utilize the full strength of the Indian Commerce Clause to provide certainty in trade jurisdiction. The goal of modernizing the regulations must be to empower tribal governments' right to self-determination, self-governance, and economic self-sufficiency.

Currently, courts view three classes of trade within Indian Country: non-Indians with Indians; Indian-to-Indian; and non-Indians to non-Indians. These very fact-specific determinations regarding tribal sovereignty and self-determination have been the source of uncertainty in tribal trade jurisdiction. A substantial reason for this is the reliance on statutes, regulations, and federal common laws which are time-locked in the eras in which they were passed, drafted, or decided.

The current Indian Traders statute and regulations provide a good example of such an issue, as the language demonstrates the federal governments' anachronistic views towards Indian tribes. 25 U.S.C. 261 was passed in 1876³ and 25 U.S.C. 262 was passed in 1901,⁴ but federal laws regulating trade with Indians date back to 1790⁵ and 1834.⁶ The statute and regulations read as protectionist measures aimed at traders of ill-repute⁷ coming on to tribal lands and entering into bad deals, trades, or indebting Indians with whom they were trading.⁸

What was not envisioned during this period was tribal lands becoming economic centers of activity and Indian tribes becoming employers for both Indians and non-Indians. Both advances

³ 19 Stat. 200 (Aug. 15, 1876); *see also* Act of June 30, 1834, 4 Stat. 729.

⁴ 31 Stat. 1066 (Mar. 3, 1901).

⁵ Act of July 22, 1790, ch. 33, 1 Stat. 137.

⁶ Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729.

⁷ *See* 25 U.S.C. § 261 (stating "authority to appoint traders to the Indian tribes and to make such rules and regulations as [the Secretary of the Interior] may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold *to the Indians.*") (emphasis added); *see also* 25 U.S.C. § 262, ("Any person desiring to trade *with the Indians on any Indian reservation* shall . . . be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe *for the protection of said Indians.*") (emphasis added).

⁸ *See Central Machinery Co.*, 448 U.S. at 163 (1980) (discussing the federal government's regulation of "trade with Indians to prevent 'fraud and imposition' upon them" and citing H.R.Rep. No. 474, 23d Cong., 1st Sess., 11 (1834) (Committee Report with respect to Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729)).

were driven by a return to self-governance, the right to self-determination, and tribal regulation of activities within their jurisdictional boundaries. In updating the regulations, it is essential for DOI to continue to take strides which empower tribal governments to develop and create trade and commerce codes and regulations as well as fully supporting the role of tribal courts in enforcing those codes.

In December 2012, DOI promulgated a Final Rule to revise its Indian lands leasing regulations that included terms to implement the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act of 2012 (Pub. L. 112-151). This Rule provides a process for the Secretary of DOI to approve tribal leasing regulations for residential, business, and wind and solar energy resource development.⁹ It provides a mechanism for tribes to rightfully take control over land leases and limit the potential impact of outside influence over tribal economic development. These regulations demonstrate Congress's intent that tribal governments should be regulating leasing and business in Indian Country. Further, it also makes strong statements regarding the applicability of state taxation and tribal tax authority subject to applicable federal law,¹⁰ stating:

“The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law.”¹¹

So far, 26 tribes have taken advantage of developing leasing regulations, and more are interested in developing codes and regulations governing these activities.

Next, DOI addressed the long-standing issue of inconsistent processes and systemic economic inequities in the granting of rights-of-way on Indian lands by implementing new regulations.¹² Taking effect in April 2016, the updated rights-of-way approval process, allows tribes and Indian landowners to control and manage the use of tribal lands. Just like the HEARTH Act regulations, it makes a strong statement on tribal authority regarding rights-of-way in Indian Country:

“The Federal statutes and regulations governing rights-of-way on Indian lands occupy and preempt the field of Indian rights-of-way. The Federal statutory scheme for rights-of-way on Indian land is comprehensive, and accordingly precludes State taxation. State taxation would undermine careful work of Federal actors analyzing the best interests of tribal beneficiaries under the trust

⁹ See 25 CFR Part 162.

¹⁰ See 25 CFR 162.017.

¹¹ Residential, Business, and Wind and Solar Resource Leases on Indian Land - Final Rule, 77 Fed. Reg. 72440, 72447 (Dec. 5, 2012).

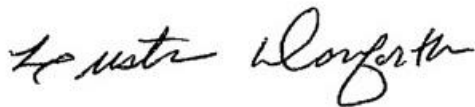
¹² See 25 CFR Part 169.

responsibility. . . . The Federal regulatory scheme is pervasive and leaves no room for State law.”¹³

DOI must establish trade regulations that allow for tribal governments to develop their own regulations and codes regarding trade and commerce, similar to those applicable pursuant to the HEARTH Act, which puts the decisions and power into the hands of tribes and fully acknowledges the right to self-determination and self-governance. It is essential for tribal governments to have the autonomy to regulate and enforce trade within their lands and enjoy the common governmental rights of regulatory preemption of trade, commerce, and taxing authority.

In conclusion, Nafoa is encouraged with the continuation of DOI’s commitment to improving the certainty of jurisdiction in Indian Country. Addressing certainty in jurisdiction is a continuing role for DOI as the economic trustee for Indian Country. The goal in the regulatory update of the Indian Traders regulations must be to continue to empower tribal governments to develop codes and regulate trade within Indian Country, through Constitutional and federal authorities. We look forward to continuing to work with DOI on modernizing the Indian Traders regulations, providing certainty in jurisdiction in Indian Country, and fully empowering tribal economic self-determination.

Sincerely,

A handwritten signature in black ink, appearing to read "Cristina Danforth". The signature is fluid and cursive, written in a professional style.

Cristina Danforth
President, Nafoa

¹³ Rights-of-Way on Indian Land – Final Rule, RIN 1076-AF20, p. 54 (Apr. 6, 2016), available at: <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-032117.pdf>.