

Comments submitted by the Coquille Indian Tribe in response to Advance Notice of Proposed Rulemaking (25 CFR Part 140) 82 FR 9706; 81 FR 89015.

These are the comments of the Coquille Indian Tribe submitted in response to the Advance Notices of Proposed Rulemaking described above. This rulemaking solicits public comment regarding possible changes to 25 CFR Part 140 (Indian Trader regulations).

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

The Federal government should revise 25 CFR Part 140. The current Indian trader regulations are severely outdated and do not support the federal policy of Tribal self-determination nor do they recognize the challenges confronting tribal economic development in the early 21st Century.

The Coquille are a federally terminated-and-restored tribe. After negotiating an unratified treaty, having its lands unlawfully taken by non-Indians, suffering under the federal allotment policy and being terminated and restored, the Tribe found itself without any economic development resources and little developable land. Like other governments, the Tribe possessed a constitutional obligation to provide services to its members. But unlike nearly all non-tribal governments, Coquille found itself without a tax base.

The exercise of lawful taxing authority is a cornerstone of modern government. All levels of non-tribal benefit from some form of a taxing power. Unfortunately, tribes are very often unable to utilize a tax to support the services that they provide to their members, their communities and the general public.

What often prevents tribes from exercising taxation authority is the threat of dual taxation. State governments often assert tax authority in Indian country. Imposing tribal taxes over and above such state taxes would result in prices exceeding the market average, and would drive business to off-reservation locations. The current regime leaves tribes with a choice: overtax on-reservation businesses, or impose no tribal tax and struggle to pay for tribal member services.

Another aspect of the status quo that deters tribal economic development is the unpredictability of caselaw governing state taxation of nonmember activity within Indian country. Currently, that caselaw requires a balancing test between state, tribal and federal interests to determine whether a state tax should be imposed. This means that a tribe seeking to recruit economic development must convince investors to accept the risk of possible state taxation, a burden that troubles no other jurisdiction. Indian country would benefit from revised Part 140 that helps all parties better predict when state taxes do not apply.

The current Part 140 regulations fail to provide meaningful assistance to tribal economic development. They were drafted in 1957, at a time when the Coquille Tribe was terminated, and during a period when the BIA retained many vestiges of previous paternalistic and anti-self-determination policies. This is reflected in efforts to *control* what happens in Indian country rather than to *empower* what happens there. For example:

- To prohibit all trade in Indian country unless a person has a trader's license (140.2);

- To curtail BIA purchase of goods and services from Indian tribes (140.5);
- To prohibit the manufacture, sale, drinking or storage of intoxicating liquors (140.18);
- To prohibit certain matters involving certain identified drugs, which is already addressed by other Federal law (140.19); and
- To prohibit gambling, which is governed by separate Federal and tribal law (140.21).

Although there remain great wealth disparities between tribes and great diversity regarding how tribes generate revenue to provide governmental services, the unifying principle of modern U.S. Indian affairs is Tribal Self-Determination. Tribal Self-Determination is, “the principle that Indian tribes are, in the final analysis, the primary or basic governmental unit of Indian policy.” (Cohen’s Handbook of Federal Indian Law § 1.07 p. 94).

In recent years, Federal laws have evolved to favor tribal government empowerment. (See, e.g. Title V of the Indian Self Determination and Education Assistance Act (P.L. 106-260; P.L. 93-638); Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (P.L. 112-151); the Indian Trust Asset Reform Act of 2016 (P.L. 114-178); Indian Tribal Economic Development and Contract Encouragement Act of 2000 (P.L. 106-179); Indian Leasing Regulations at 25 CFR Part 162. These statutes aim to give tribes more control over their own resources for economic development. The Indian Trader regulation stands in stark contrast to this trend, and an update is overdue.

Tribal (and non-Tribal) economies have significantly changed. The Internet was in no way even a concept when the current Indian Trader regulations were adopted. Tribal and non-Tribal economies have grown in complexity. Many tribal economies have achieved some level of success and diversification. Most continue to struggle to marshal their (often meagre) assets in efforts to generate government revenue.

Part 140 should be revised to encourage and support these tribes. It should resolve questions about double taxation, encourage tribes to exercise their tribal sovereignty, including taxing authority, recognize and support the development of tribal business regulation, give tribes greater discretion over what types of trade should take place within Indian country and develop a process to better understand over time the barriers to further economic development in Indian country.

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

Yes.

- a. Licensing. The concept of licensing should be kept, provided that the decision over whether to license a trader should be a function that a tribe may perform if certain criteria are met; Tribes should continue to retain some authority to exclude business types that are repugnant to their culture and mores.
- b. Power to Close Unlicensed Stores. This power should be retained, provided that it should be a function that a tribe could assume.
- c. Forfeiture of Goods. This power should be retained, provided that it should be a function that a tribe could assume.

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?

Much of this function could be handled through a licensing function that is performed by the BIA, but which will be delegated to tribes that have adopted approved licensing regulations (similar in concept to HEARTH Act regulations).

The Rule must recognize the authority of tribes to adopt and enforce laws against non-Indians engaging in commerce on the Reservation. The Rule, however, could include default provisions that would apply unless a Tribe adopts a different rule.

The Rule could affirm concurrent Tribal government regulatory and adjudicatory jurisdiction over Indian traders. For traders located on reservation trust lands, the rule can recognize tribal jurisdiction.

The rule must grant tribes the ability to refer possible federal law violations to the US Department of Interior or Department of Justice or the agency charged with enforcement of the Federal law allegedly violated.

The rule could also encourage or support tribal efforts to conduct background and credit investigations of proposed traders.

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?

The Coquille Indian Tribe currently regulates tobacco, liquor and gaming-related businesses on its reservation. The Tribe also has adopted meaningful character standards that apply to all employees and contractors that have regular contact with children. The Tribe does not regulate other types of businesses, mainly because the Tribe has struggled to attract such businesses to its remote location. There are business opportunities that the Tribe has not pursued because of the current dual taxation regime.

Revisions to Part 140 could give tribes greater control over their economic development. Creating a tribal licensing authority will allow tribes to target the types of businesses that they wish to develop or attract and avoid businesses that they prefer would locate elsewhere. Local, tribal control will also encourage tribes to use economic development and land use planning, rather than an historically reactive approach.

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

The decision regarding what types of trade should be regulated should be one that is divided between federal and tribal governments. Generally, each government should regulate activity that is restricted under that government's laws. The Federal government, for example, regulates numerous business activities, including Indian gaming under the Indian Gaming Regulatory Act, interstate energy transmission under the Federal Power Act, pollution, the purchase and sale of securities and banking.

Trade that the Federal government chooses not to regulate should be subject to Tribal regulation. In many cases a Tribe might not choose to regulate an activity. For example, small Tribal member-owned businesses might remain unregulated.

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

- a. By eliminating the risk of dual taxation. The Indian Trader Statute grants the Secretary of the Interior authority to regulate business transactions in Indian country:

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. 25 U.S.C. § 262.

The Department's authority to establish rules is broad. The Supreme Court has upheld an expansive interpretation of the Department's rulemaking authority, stating that the Indian Trader Statutes, "show 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 made to reservation Indians on the reservation." *Warren Trading Post v. Arizona State Tax Commission*. 380 U.S. 685, 689 (1965).

The Secretary can exercise its Indian Trader Statute rulemaking authority to prohibit dual taxation of reservation transactions. This authority, however, should be properly characterized as a pre-emption of any conflicting state laws to satisfy the basic test for determining when states may tax on-reservation activity involving non-tribal members as described in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980). That test states, "first, the exercise of such [state taxing] authority may be preempted by federal law Second, [if not preempted by state law] it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." *Bracker* implements this second test through a balancing of the respective state, federal and tribal interests.

The Secretary should adopt a rule that clearly and unequivocally preempts state tax laws for on-reservation transactions. The rule should clearly and specifically identify which transactions qualify for this pre-emptive treatment. These transactions should include those that: (1) provide for the extraction of, or treatment of on reservation resources, (2) identify a reservation as the location in which a contract is made, (3) provide for the sale of goods or services by a business located on a reservation, (4) provide for the sale of goods located on the reservation, (5) provide for the sale of services to be performed on the reservation, (6) are identified under tribal law as being sourced on a reservation, (7) allow for the retroactive refund of state taxes paid during the period of time that a property is involved in the fee-to-trust process, if such property is ultimately transferred into trust.

It is possible that these regulations might need to address when "on-reservation value" is added to a product before it is sold to non-Indians. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court upheld imposition of Washington State cigarette sales taxes on tobacco stores that were licensed by the Confederated Tribes of the Colville Indian Reservation ("Colville"). Colville argued that its

own tribal tobacco taxing and licensing regime pre-empted the state tax. The Court determined that the state tax applied.

- b. By prescribing which reservation-related transactions are ineligible for dual taxation.

If the Bureau adopted a rule to pre-empt dual taxation of reservation-based transactions, litigation would ensue over which business dealings qualify as “on reservation”. The Bureau can help to mitigate both litigation and commercial uncertainty by adopting a rule to provide clear, predictable tax treatment of a range of transactions with various forms of connection to a reservation. A rule could help parties more precisely discern when state taxes would and would not apply. Some criteria to consider are:

- Where a service is provided;
- Where goods are delivered;
- Where title to goods transfers;
- Where a business is located;
- How a contract describes the location of a transaction;

If the Bureau ever does develop a draft rule, we would encourage it to do so based on input from tribes regarding the types of transactions that are affected by dual taxation.

Any such rule should take special consideration of the case law interpreting the application of state cigarette and tobacco taxes to on reservation sales to non-Indians. Judicial opinions on in this commercial field are relatively devoid of discussion of federal pre-emption. Take, for example, the leading federal case of *Washington v. Confederated Tribes of Colville* (supra), where the Court upheld imposition of a state cigarette tax, in large part because the Tribe there did not add value to the product being sold.

- c. By providing general tax exemptions for trade between Indian reservations, especially when such trade crosses multiple state and reservation boundaries.

7. What services do tribes currently provide to individuals and entities doing business in Indian country and what role do tax revenues play in providing those services?

The Coquille Indian Tribe aims to provide a safe and positive business environment that is protected by a transparent rule of law.

The Tribe maintains a police department that patrols all tribal lands. Tribal police also possess State law enforcement authority under Oregon Senate Bill 412 and spend a significant amount of time enforcing State criminal laws and violations near reservation lands. The Tribe also contracts for additional law enforcement, fire and EMT services to serve its reservation.

The Tribe pays for water and wastewater services, electrical services and land use planning services. The Tribe maintains roads and sidewalks. The Tribe has installed redundant fiber optic cable to provide reliable telecommunications and internet services to its reservation and surrounding region. The Tribe also supports local government services with hundreds of thousands of dollars every year.

The Tribe operates a clinic that provides medical care to reservation residents and employees and the general public.

The Tribe provides disaster response services to the reservation and surrounding lands. Through extensive watershed restoration projects, the Tribe contributes to clean water and salmon restoration.

The Tribe also maintains a set of laws, a webpage where they are available for viewing by the general public. Laws include a limited liability company ordinance, an economic development revolving loan fund Ordinance and a nonprofit corporations ordinance.

The Tribe maintains a constitutionally independent Tribal Court system, presided over by a former state court judge.

The Tribe annually sponsors a number of activities to assist businesses in the region, including: major sponsorship of the Coos Bay Maritime and Historical Museum, the Southwestern Oregon Community College programs to support forestry and medical professions and business development, significant support to local business development entities, including the Coos Bay North Bend Visitor and Convention Bureau, a perennial June 3 fireworks display, and over \$5.8 million in donations to local and regional charities,

Thank you for providing the Coquille Indian Tribe with an opportunity to submit these comments.