October 30, 2017

Via Email

Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, D.C. 20240
Email: consultation@bia.gov

RE: Proposed Revisions to Indian Trader Rule

Dear Office of Regulatory Affairs & Collaborative Action:

On behalf of the Prairie Island Indian Community, please accept our comments in response to the July 28, 2017 letter to Tribal leaders regarding revisions of the "Licensed Indian Traders" regulations. We appreciate the opportunity to provide input on behalf of our Tribe.

The Indian Trader statutes, 25 U.S.C. 261 *et seq.*, delegated to the Department of the Interior the responsibility to oversee non-Indians engaged in commerce in Indian country and to regulate those traders to ensure the protection and well-being of tribal communities from adverse impacts of such commerce. To this effect, the DOI promulgated the current Indian trader regulations, 25 CFR Part 140 (Licensed Indian Traders), in 1957. The regulations have not been substantively updated and reflect policies that ignore tribal self-determination and tribal self-governance.

Revisions to the Indian trader regulations should be made in order to achieve the following:

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1. Modernize the regulations to promote the federal Indian policies of tribal self-determination and tribal self-governance by clarifying and reaffirming the right of tribal governments to self-regulate economic activities with non-Indians on tribal lands through the adoption and implementation of tribal laws and regulations; and
2. Preempt state and local taxation by creating a comprehensive federal regulatory scheme in which federal law—in deference to tribal commercial regulation and revenue generation—leaves no room for outside jurisdictions to impose their taxes or other regulatory authority.

Promote Tribal Self-Determination and Self-Governance

The Indian trader regulations should be revised to reflect and promote the federal Indian policies of tribal self-determination and tribal self-governance. The U.S. Supreme Court has characterized tribal taxing authority as a "necessary instrument of self-government and territorial management [that] derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing government services..." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding tribal tax on non-Indian mining activities).

Since the initial implementation of the Indian trader regulations, tribes have made substantial progress in the enactment of tribal law and code on a wide variety of matters, including non-Indian economic activity on tribal lands. In revising the rule, the Department of the Interior should focus on an approach that defers to and supports the laws and codes of tribal governments. The revised regulations should seek to minimize federal oversight and involvement in regulating business in Indian country and defer to tribes to management of their own tribal economy – tribal governments are best positioned to understand and respond to the needs of their communities. To this effect, the regulations should recognize acknowledge tribal laws and regulatory authority on its land. As was done with 25 CFR Parts 162 and 169, the revised regulations should allow tribal laws to supersede or modify 25 CFR Part 140 provisions, as long as certain conditions are fulfilled (*e.g.*, tribe must provide BIA with notice of intent to supersede or modify and certification that tribe's regulations meet minimum standards).

As a whole, the regulations are outdated and do not support modern Tribal economies. For example, the regulations still require federal licensing of all trade on reservations except for trade conducted by "full-bloods," except for trade with the "Five Civilized Tribes." The regulations also speak of "appointing" traders, which is no longer relevant. Additionally, part of the regulation implements a federal law repealed in 1996 to prohibit gambling activities. In practice, few tribal businesses have federal licenses under 25 CFR Part 140 and the Bureau of Indian Affairs has not exercised its authority under the regulation to control pricing in recent decades.

Eliminate Dual Taxation

The Indian trader regulation should be revised to eliminate dual taxation by expressly preempting state and local taxation on tribal lands. Tribal governments lack parity with state and local governments in exercising taxing authority and typically do not generate enough revenue to support essential government functions. Because tribal governments are unable to levy real property taxes and do not require tribal members to pay tribal income taxes, tribal governments rely heavily on sales and excise taxes. Yet, state governments have steadily encroached upon tribal taxing jurisdiction by asserting concurrent jurisdiction to collect sales and excise taxes from non-Indians engaged in commerce within tribal jurisdictions.

Tribal governments have sovereign authority to tax commercial activities within tribal lands, whether conducted by tribal members, nonmember Indians, or non-Indians. The U.S. Supreme Court has affirmed that an Indian tribe's tax power is "an essential attribute of Indian sovereignty." *Merrion*, 455 U.S. at 137. Although tribes have authority to tax nonmembers and non-Indians doing business in Indian Country, other jurisdictions can tax those same individuals for the same transactions. This results in dual taxation on tribal lands. Dual taxation hinders tribal revenue generating potential and remains a primary impediment to nation rebuilding in Indian Country. Tribes must weigh the costs of either lowering their taxes to keep overall pricing at rates the market can bear or forgo levying a tax at all. The application of an outside government's tax often makes the Tribal tax economically infeasible, leaving tribes with a limited revenue stream that is wholly inadequate to support the provision of governmental services.

The Supreme Court has directly relied on the specific regulatory scheme of Indian Trader statutes and regulations to rule that state taxation on Indian commerce with non-Indian business was preempted by federal law. *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (state taxation of gross receipts of licensed Indian trader from retail sales to tribal members preempted by Indian Trader statutes); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). In *Central Machinery*, because the sale of farm machinery by an Arizona corporation to an Indian tribe was "governed" by the Indian Trader statutes, Arizona's asserted tax was preempted by federal law. *Id.* at 165 ("It is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations."). However, the Supreme Court's more dominant approach in determining the validity of state taxation over non-Indian commerce in Indian country is to employ the preemption analysis test from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which balances the Federal and tribal interests versus the state interests. Since *Bracker*, court decisions have allowed states to tax certain on-reservation economic activities of non-Indians, even when the financial burden of the tax falls on the tribe. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

The revised regulations should clarify that the regulation of non-Indians engaging in commerce in Indian country is necessary to protect and promote the wellbeing of tribal communities through the preemption of state and local taxation on tribal lands. Normally, states lack a regulatory interest in taxing the activities of non-Indians on tribal lands and state revenue-raising interests should be easily outweighed by the tribal and federal interests in regulating Indian trader activities involving the tribe or its members free from state authority. The weight given to state revenue-raising interests is inappropriate and should not give a state the right to regulate commerce within a tribe's jurisdiction, much less tax transactions involving a sovereign tribe. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("State jurisdiction is preempted by operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.").

Regulations that achieve this preemption would provide a vitally necessary tool for promoting tribal economic activity and development of infrastructure and tribal government services in Indian country. States may also lack jurisdiction to tax value generated by activities in which the Tribe has a significant financial interest. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155-57 (1980) ("[T]he value marketed by the smoke shops to persons coming from outside is not generated on the reservation by activities in which the Tribes have a significant interest."). As was done with regulations concerning non-tribal entities on leased Indian lands, 25 CFR 162.017, revised Indian trader regulations should include language to the effect that non-Indian economic activity on tribal lands is "not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State" and that such economic activity "may be subject to taxation by the Indian tribe with jurisdiction." Such revisions would allow courts to invalidate state taxation in line with *Warren Trading Post* and *Central Machinery*. Or, at a minimum, such revisions would provide an unambiguous pronouncement of federal policies favoring tribal self-determination, promoting tribal economic development, and discouraging state and local taxation – the clear pronouncements of federal policies would tilt the scale towards preemption in a *Bracker* analysis.

Pidamayaye for your consideration of these comments. The Prairie Island Indian Community strongly supports revising the regulations at issue in a way that recognizes and promotes Tribal self-determination and Tribal self-governance.

Sincerely,

Shelley Buck

Shelley Buck
Tribal Council President
Prairie Island Indian Community

cc: Jessie Seim, Prairie Island Indian Community General Counsel (jseim@piic.org)