



Ewiiapaayp Tribal Office

Ewiiapaayp Band of Kumeyaay Indians

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VIA E-MAIL
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October 30, 2017

Attn: Revise Indian Trader Rule
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary - Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240

Re: Comments on ANPRM for 25 CFR Part 140

The Ewiiapaayp Band of Kumeyaay Indians submits comments in response to the Department's Advance Notice of Proposed Rule Making (ANPRM) issued July 28, 2017. The Tribe also submits and adopts by reference the comments submitted from other tribes and inter-tribal associations (see attachments).

In addition, the Tribe re-submits its comments in response to the Department's ANPRM issued December 9, 2016. The Tribe also submits and recommends by reference the comments to this ANPRM by other tribes and inter-tribal associations (see attachments).

The Ewiiapaayp Band of Kumeyaay Indians supports the Department of the Interior's efforts to modernize the Department's regulations at 25 C.F.R. Part 140. Our Tribe believes modernized 25 C.F.R. Part 140 regulations are in the best interest of Indian tribes, the Department as trustee, and will provide more certainty to Tribes, states and local counties with respect to commerce in Indian country. The Tribe's Ewiiapaayp Indian Reservation is divided into two sections. Big Ewiiapaayp is 5,465.13 acres with no infrastructure at all, off-grid, at elevation between 4,800 feet and 6,300 feet, with a single, 12-mile, unmaintained dirt access road without legal access. The only resource is wind. The Tribe's Little Ewiiapaayp is 10 acres that is leased to the inter-tribal health provider at \$1 per 25 years through 2037 as the Tribe's donation to support health care delivery to sister and neighbor Kumeyaay tribes and their citizens.

25 U.S.C. § 262 states "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." This broad statutory authority provides

the Department the regulatory discretion to speak clearly in support of tribal self-governance over commerce occurring in Indian country. In other words, the Department can modernize its regulations to reflect current practice where Tribal civil regulatory authority is recognized to be at its zenith within Indian country.

In addition, the Department is authorized to address dual taxation, an issue that has handicapped tribal governments through a series of common law decisions made which allow states to intrude on tribes' sovereign tax base.

1. Specific 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.

The Ewiiapaayp Band of Kumeyaay Indians is Lessor to the Tule Wind Energy Project 2, which will develop and operate 18-20 wind turbines in an array on the Ewiiapaayp Indian Reservation. The Tribe has no infrastructure to support a project, so the costs of project development are significantly higher due to higher construction costs, and result in a significantly decreased participatory rent revenue to the Tribe. The lack of a tribal tax base results in insufficient tribal revenues to develop reservation infrastructure.

For each project include:

a) details regarding Indian Country capital investment under the project:

The Tribe is ineligible to monetize negative tax proceeds (tax credits) that subsidize and make financeable the wind project, and is therefore prevented from developing the wind project on its reservation as an equity investor, and must occupy the position of lessor to a taxable lessee who finances and develops the project.

b) details regarding the annual tribal revenue associated with the project:

The Ewiiapaayp Band of Kumeyaay Indians' phase 2 of the Tule Wind Energy Project illustrates the significantly adverse impact of dual taxation on tribal projects. Professor Michael Mishkwish Connolly of San Diego State University developed an example of tribal wind project financials that directly represents the Ewiiapaayp Band of Kumeyaay Indians' project.

Professor Connolly's illustration of project financials considers a 100 MW wind project for 30 years, with the following variables:

- PPA of \$70 per MW-hr
- Capacity factor of .30
- Construction 250 MM
- Royalty 6% to tribe
- Property tax 1%
- Sales tax 7.5%
- Possessory Interest 1%

In this scenario the total revenues produced by the project are as follows:

- Royalty revenue to tribe = \$1,103,760 per year
- Sales tax .075 (67% of costs) = \$12,562,500 year one

- Property tax .01 (67% of costs) = \$1,675,000 depreciated to 0 in 30 years [Yields average of \$837,500 per year]

The results of the sample are as follows:

- Royalty \$15,193,070 or 35%
- Sales Tax \$12,562,500 or 29%
- Property Tax \$15,107,727 or 35%

Due to dual taxation, the Ewiiapaayp Band of Kumeyaay Indians would earn only 35% of total project revenues, while 65% of total project revenues flows to San Diego County.

c) the number of Indian Country jobs that could be created under the project:

The Tule Wind Energy Project Phase 2 is estimated to generate 21 full time equivalent (FTE) employees.

d) any specific impediment preventing forward progression on your project:

The Tule Wind Energy Project developer, nor any other developer, would agree to both a tribal tax and a State/local government tax. The Tribe's specific lease agreement agrees to pay to the Tribe the equivalent of State/local government taxes only if the entirety of equivalent State/local government taxes is replaced by tribal taxes, and such replacement is a final judicial certainty to the exhaustion of all administration or judicial appeal.

2. Any economic impact studies on the benefits of Indian Country economic development to surrounding communities:

See California Indian Nations Economic Impact study from 2012 (http://www.indiangaming.com/istore/Aug12_CNIGA%20Report.pdf).

3. Specific treaty provisions that require the United States to protect tribal economic interests.

In an extended legal opinion regarding the meaning of the trust responsibility, former Department of the Interior Solicitor Leo M. Krulitz concluded that "[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property." (Memorandum from Department of the Interior Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, at 2 (Nov. 21, 1978)). This opinion remains in effect today.

From the United Nations Declaration on the Rights of Indigenous Peoples, Article 29, Section 1., "Indigenous peoples have the right to the conservation and protection of the environment and the **productive capacity** of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination." [emphasis added]

The Tribe appreciates the opportunity to submit comments prior to proposed rule-making. The Tribe looks forward to additional dialogue and opportunity for input on this project through government-to-government consultation. We appreciate your consideration of these comments and look forward to continuing government-to-government consultation on this very important undertaking to address Indian trade and commerce.

Sincerely,

A handwritten signature in black ink that reads "Robert Pinto Sr". The signature is written in a cursive, slightly slanted style.

Robert Pinto, Sr., Chairman
Ewiiapaayp Band of Kumeyaay Indians