



Ewiiapaayp Tribal Office

Ewiiapaayp Band of Kumeyaay Indians

4054 Willows Road
Alpine, CA 91901
TEL: (619) 445-6315
FAX: (619) 445-9126
E-mail: wmicklin@leaningrock.net

VIA E-MAIL
electronically to: <http://www.regulations.gov>

April 10, 2017

Ms. Elizabeth K. Appel, Director
Office of Regulatory Affairs & Collaborative Action
Indian Affairs, U.S. Department of the Interior
1849 C St. NW., Mail Stop 3642-MIB
Washington, DC 20240

Re: Docket ID: BIA-2016-0007, Comments on ANPRM for 25 CFR Part 140

The Ewiiapaayp Band of Kumeyaay Indians submits these comments in response to the Department's Advance Notice of Proposed Rule Making (ANPRM) issued December 9, 2016. The Ewiiapaayp Band of Kumeyaay Indians appreciates the opportunity to submit comments prior to proposed rule-making. We have provided answers to the questions put by the ANPRM with respect how and whether 25 CFR Part 140 should be updated by the Department. The Ewiiapaayp Band of Kumeyaay Indians looks forward to additional dialogue and opportunity for input on this project through government-to-government consultation.

1. Should the government address trade occurring in Indian Country through updates and why?

Yes. 25 CFR Part 140 is anachronistic and needs to be updated to reflect modern economic practices and current federal law and policies. These regulations have not been substantively updated since 1957, which means the focus and verbiage of the regulations are anachronistic and at odds with the federal policy enunciated in the 1970's of promoting and supporting tribal self-government. For example, the regulations still require federal licensing of all trade on reservation except for trade conducted by "fullbloods." The regulations speak of "appointing" traders, which is no longer relevant. Part of the regulation implements a federal law repealed in 1996 to prohibit gambling activities. And, in practice, very few reservation businesses have federal licenses under 25 CFR Part 140 and certainly the BIA has not exercised its authority under the regulation to control pricing in recent decades. Although, the Ewiiapaayp Band of Kumeyaay Indian has recently requested approval of an Indian Trader's License pursuant to 25 C.F.R. 140 for the Lessee to its federal business lease No. 5006171434 now managed by the Tribe under the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) delegation of authority from the Secretary of Interior to

the Tribe pursuant to its Business Site Leasing Ordinance. The HEARTH Act creates a voluntary, alternative land leasing process available to tribes by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. Sec. 415. Under the Act, once their governing tribal leasing regulations have been submitted to, and approved by, the Secretary of the Interior, tribes are authorized to negotiate and enter into leases without further approvals by the Secretary. Specifically, the Act authorizes tribes to execute agricultural and business leases of tribal trust lands for a primary term of 25 years and up to two renewal terms of 25 years each. Leases of tribal trust lands for residential, recreational, religious or educational purposes may be executed for a primary term of up to 75 years. In support of tribal self-determination, the Act requires the Secretary to approve tribal leasing regulations if the regulations are consistent with the Department of the Interior's leasing regulations at 25 CFR Part 162 and they provide for an environmental review process that meets requirements set forth in the Act. Interested tribes may submit their regulations to the Deputy Bureau Director, Bureau of Indian Affairs-Office of Trust Services. The Ewiiapaayp Band of Kumeyaay Indians believes the underlying authority in 25 U.S.C. 262 (25 C.F.R. 140) authorizes the Secretary to delegate authority for a tribe to issue Indian Trader Act licenses identical to the HEARTH Act.

The Ewiiapaayp Band of Kumeyaay Indians participated in the Self-Governance program since 2000. In 1975, the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. No. 93-638) was signed into law. The ISDEAA reaffirmed congressional support of the nation-to-nation relationship between the United States and each Tribal nation. The ISDEAA was enacted to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of Federal services and programs provided to the Tribes and their members, see 25 U.S.C. § 450a(b). It provided Tribes with the option to exercise their sovereignty by either (1) assuming the administration and operation of programs, services functions, or activities (PSFAs) from the Department of Interior/BIA or IHS or (2) continuing to receive PSFAs through the direct administration of BIA or IHS.

Following the passage of the ISDEAA, Tribes continued to advocate for increased autonomy in the administration of their PSFAs. The ISDEAA was revised substantially in 1988 to "remove many of the administrative and practical barriers that [persisted] under the Indian Self-Determination Act" (Senate Report 100-274) and was comprehensively amended in 1994. In 1996, Tribal leaders and representatives participated with Federal agencies in a negotiated rulemaking process that resulted in a Final Rule to implement the program now known as Title I Self-Determination Contracting, see 61 FR 32482-534.


The 1988 amendments authorized the initial Self-Governance Demonstration Project (Pub. L. No. 100-472) within the US Department of the Interior (DOI). Following the success of the DOI Self-Governance Demonstration Project, Congress extended the same authority to the IHS through the Indian Health Amendments of 1992 (Pub. L. No. 102-573). The first IHS Demonstration Project agreements were signed on September 30, 1993. In 1994 the IHS Tribal Self-Governance Demonstration Project was extended to 18 years, with authority to add 30 Tribes per fiscal year (Pub. L. No. 103-435). In 1996, the Tribal Self-Governance Advisory Committee (TSGAC) was created to provide advice to the Director of IHS and assistance on issues and concerns pertaining to Tribal Self-Governance and the implementation of the self-governance authority within the IHS.

In 2000, Congress enacted permanent authority for the IHS Tribal Self-Governance Program under Pub. L. No. 106-260, the Tribal Self-Governance Amendments of 2000 (Title V). This legislation required that regulations implementing the TSGP be developed through negotiated rulemaking. The IHS promulgated the regulations implementing the TSGP in the Federal Register on May 17, 2002, published at 42 C.F.R. Part 137.

Since the first Demonstration Project agreements were signed in 1993, nearly 60 percent of the 567 federally recognized Tribes in the United States participate under authority of the ISDEAA, and nearly all tribes contract for at least one 638 agreement.

The TSGP has proven to have a significant positive impact on the health and well-being of participating Tribal communities. The TSGP produces results because Tribal communities are in the best position to understand and address their own health care needs and priorities. Through the TSGP, Tribes continue to develop innovative solutions that address the health care delivery challenges facing their communities.

The Indian Self-Determination and Education Assistance Act (ISDEAA), also known as Public Law 93-638, authorizes Indian Tribes and Tribal Organizations to contract for the administration and operation of certain Federal programs which provide services to Indian Tribes and their members. Under the ISDEAA, Tribes and Tribal Organizations have the option to either (1) administer programs and services the IHS would otherwise provide (referred to as Title I Self-Determination Contracting) or (2) assume control over health care programs and services that the IHS would otherwise provide (referred to as Title V Self-Governance Compacting or the TSGP). These options are not exclusive; Tribes may choose to combine them based on their individual needs and circumstances. The following links provide comprehensive information about Title I and Title V regulations:

- [ISDEAA Title I \(25 U.S.C. § 450 et seq.\)](#)
- [Title I Regulations \(25 C.F.R. Part 900\)](#)
- [ISDEAA Title V \(25 U.S.C. § 458aaa et seq.\)](#)
- [Title V Regulations \(42 C.F.R. Part 137\)](#) 

The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) joint rule issued to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Pub. L. 103-413, the Indian Self-Determination Contract Reform Act of 1994, may be a guideline for an updated Indian Trader Act regulation. The previous joint rule was required by section 107(a)(2)(A)(ii) of the ISDEAA, and was intended to permit the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation. In section 107(a)(1) of the ISDEAA Congress delegated to the Departments limited legislative rulemaking authority in certain specified subject matter areas, and the joint rule addresses only those specific areas. As required by section 107(d) of the ISDEAA, the Departments developed this final rule with active tribal participation, using the guidance of the Negotiated Rulemaking Act. This rule became effective on August 23, 1996.

SUPPLEMENTARY INFORMATION: The 1975 Indian Self-Determination and Education

Assistance Act, Pub. L. 93-638, gave Indian tribes the authority to contract with the Federal government to operate programs serving their tribal members and other eligible persons. The Act was further amended by the Technical Assistance Act and other Acts, Pub. L. 98-250; Pub. L. 100-202; Interior Appropriations Act for Fiscal Year 1988, Pub. L. 100-446; Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472; Indian Reorganization Act Amendments of 1988, Pub. L. 100-581; miscellaneous Indian Law Amendments, Pub. L. 101-301; Pub. L. 101-512; Indian Self-Determination and Education Assistance Act Amendments of 1990, Pub. L. 101-644; Pub. L. 102-184; Pub. L. 102-573; Pub. L. 103-138; Indian Self-Determination Act Amendments of 1994, Pub. L. 103-413; Pub. L. 103-435; and Pub. L. 103-437. Of these, the most significant were Pub. L. 100-472 (the 1988 Amendments), Pub. L. 101-644 (the 1990 Amendments) and Pub. L. 103-413 (the 1994 Amendments). The 1988 Amendments substantially revised the Act in order to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs. Senate Report 100-274 at 2. The 1988 Amendments were also intended to remove many of the administrative and practical barriers that seem to persist under the Indian Self-Determination Act. *Id.* at 2. In fashioning the amendments, Congress directed that the two Departments develop implementing regulations over a 10-month period with the active participation of tribes and tribal organizations. In this regard, Congress delegated to the Departments broad legislative rulemaking authority.

In 1994, DOI and HHS tribes to review the 1994 NPRM closely for possible revisions. The Departments committed to establish a Federal advisory committee that would include at least 48 tribal representatives from throughout the country, and be jointly funded by the two Departments. In the meantime, Congress renewed its examination into the regulation drafting process, and the extent to which events since the 1988 amendments, including the lengthy and controversial regulation development process, justified revisiting the Act anew. This Congressional review eventually led to the October 1994 amendments. (Please note: the authority under 25 U.S.C. 262 / 25 C.F.R. 140 does not require any additional act of Congress in order to effect the update of the Indian Trader Act as proposed herein) In the Indian Trader Act Congress' prior delegation to the Department of general legislative rulemaking authority is in no way limited or restricted, and the Secretary's authority to promulgate interpretative regulations in carrying out the mandates of the Act is not limited or restricted as to the delegated authorization of the Secretary to promulgate regulations. The Secretary should, under authority of the Indian Trader Act, clarify the updated regulation in relation to chapter 171 of title 28 of the United States Code, commonly known as the Federal Tort Claims Act, the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, and conflicts of interest. The prior rule, promulgated as internal agency 25 CFR Part 900 Indian Self-Determination and Education Assistance Act Regulations PAGE 4 procedures, and tribal organization relinquishment procedures--is a model for update of the Indian Trader Act. Most important, the 1994 promulgation of regulations required the use of the notice and comment procedures of the Administrative Procedure Act, and promulgation of the regulations as a single set of regulations in title 25 of the Code of Federal Regulations (Section 107(a)(2)). Finally, the 1994 rule required that any regulations must be developed with the direct participation of tribal representatives using as a guide the Negotiated Rulemaking Act of 1990 in order to remain consistent with the

original intent of the ISDEAA and to ensure that the input received from the tribes and tribal organizations in the regulation drafting process was considered. The update to the Indian Trader Act, therefore, should require the Secretary to employ the negotiated rulemaking process. The Department may charter a negotiated rulemaking committee under the Federal Advisory Committee Act. The committee's purpose would be to develop an update to Indian Trader Act regulations that implement Secretarial delegation of federal authority under the Act to tribes to issue tribal licenses. The advisory committee should have a sufficient number of tribal members that represent Indian tribes—including two tribal members from each BIA. A minority number of members should be from the Department of the Interior. Additionally, four individuals from the Federal Mediation and Conciliation Service should serve as facilitators. The committee should be co-chaired by four tribal representatives and two Federal representatives. While the committee would be much larger than those usually chartered under the Negotiated Rulemaking Act, its larger size would be justified due to the diversity of tribal interests under the Act. In order to complete the regulations within a reasonable timeframe, the committee should be divided into the areas subject to regulation among working groups (such as taxation, jurisdiction, litigation, etc.). The workgroups would make recommendations to the committee on whether regulations in a particular area were desirable. If the committee agreed that regulations were desirable, the workgroups would develop options for draft regulations. The workgroups would present their options to the full committee, where the committee would discuss them and developed the proposed regulations. The first meeting of the committee should occur in 2017. At that meeting, the committee would establish the workgroups, a meeting schedule, and a protocol for deliberations. The committee should meet at least five times over the ensuing year to discuss draft regulations produced by the workgroups. Each of these meetings would generally last three days.

In following the principal of self-determination, the regulation can and should recognize the tribe's authority to determine with whom (and how) it will do business with traders on Indian land. The legislative history of the 1834 Indian Trader law supports tribal self-regulation of trade. The House reported with respect to regulation of trade with and among tribes, "each tribe, by adopting those laws as their own, and establishing competent tribunals, 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). It is long past time to bring tribal self-determination to Indian trade and commerce. Tribes can regulate commerce within their reservations with more certainty and efficiency than the current, outdated Indian Trader regulations allow.

The Ewiiapaayp Band of Kumeyaay Indians submits that the regulations can be updated in a manner that does not undermine tribal sovereignty, but rather empowers tribes and clears the way for tribal regulation to take place. Updates to the regulations can and should reflect dual purposes of supporting tribal economic development and promoting tribal self-government. The Department did this with the recent updates to 25 CFR Parts 162 and 169. The foundational principals that inspired and supported modifications to the leasing and rights-of-way regulations apply with equal, if not greater, force with the Trader regulations. In fact, the Department cannot achieve its stated goal of promoting healthy, vital tribal economies by only addressing leasing of

Indian land; the Department must go further to ensure its policies and principals are consistent across the regulation of all trade and commerce in Indian Country.

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

Yes. Aspects of the prohibition against BIA employees engaging in business and trade with tribes remain prudent to prevent conflicts of interest in the exercise of the federal government's trust responsibility. Also, any licenses that were issued to businesses under 25 CFR Part 140 should be grand-fathered and continue to be valid, but subject to further regulation by the tribe.

3. How can revisions to the existing rule ensure persons who conduct trade are reputable and that there are mechanisms in place to address traders who violate Federal or Tribal law?

Again, the suggestion that the federal government should protect Indians from disreputable traders is an outdated and paternalistic notion that does not have a place under a policy of tribal self-determination and self-government. Tribes are capable of regulating and policing trade within their communities. Regulation updates should simply acknowledge the tribes' authority and responsibility.

To require a federal license for Indian trade adds an unnecessary level of administrative burden and, as such, has a chilling effect on both trade and tribal self-determination. As the Department sought to achieve with its updates to 25 CFR 162 and 169 (leasing and rights-of-way regulations), it should update the Trader regulations to limit BIA's involvement in regulating business in Indian Country and defer to tribes to manage their own affairs in trade and commerce. Tribes are in a better position to know what is in the best interest of their communities. Updates to the Trader regulations should require the BIA to recognize and acknowledge The Ewiiapaayp Band of Kumeyaay Indians's tribal laws regulating business activities on its land. As was done with 25 CFR Parts 162 and 169, the regulations can allow tribal laws to supersede or modify 25 CFR Part 140 provisions, as long as certain conditions are fulfilled (*for e.g.*, the tribe notifies BIA of the modifying or superseding effect and/or the tribe's regulations meet minimum standards).

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

The Ewiiapaayp Band of Kumeyaay Indians licenses businesses and business activity, including through taxation, by its Tribal Code. Many tribes are regulating business and commerce through their own laws. Tribes commonly address safety, quality, standards, environmental protection, taxation and other matters by their regulations. In fact, Tribes are in a better position to regulate trade and commerce on their land in a manner that the federal government simply cannot. Tribes understand the particular needs of their community, the impact of competing regulation from state and local governments, and the general market conditions which would attract and retain business on their lands. Therefore, the Trader regulations should defer to tribal laws and authority to the maximum extent.

5. What types of trade, and what type of trader, should be subject to the regulations.

All commerce on Indian land should be covered by 25 CFR Part 140. This should include activities related to oil, gas, minerals and natural resources. Trader regulation definitions should be modernized to encompass all actors and activities in relation to Indian commerce, and particularly to permit tribes to regulate (and tax) non-Indian economic activity on their lands. The Secretary of Interior has broad authority under Indian Trader Statute to do this. The Indian Trader Statutes are a delegation of Congress's power to regulate commerce with the Indian tribes, and provide broad regulatory authority to the Department of Interior. The statute at 25 U.S.C. 262 covers "any person desiring to trade with the Indians" and authorizes any regulations Interior "may prescribe for the protection of said Indians."

Updates can also address tribal preference laws. As the BIA stated in 25 CFR 162, "Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe's specific preference in accord with tribal law ensures that the economic development of a tribe's land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members."

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

Regulatory change is absolutely necessary to promote the sovereign authority of tribes to create a fiscal environment to stimulate the flow of investment, technology and services to Indian Country. To that end, updates to the Trader regulations should address the following areas which are critical to developing sustaining economies in Indian Country: 1) enable tribal regulatory authority and authorize any person to engage in trade within Indian reservations pursuant to the laws of the tribal government; 2) provide clear rules for tribal jurisdiction over business activity; 3) provide clarity and certainty as to the taxation of commerce in Indian Country; and 4) delete regulatory burdens that are not necessary for BIA to meet its statutory and trust responsibilities and include provisions supporting tribes' sovereign rights.

In particular, the regulations should address the discriminatory effect of singling out commercial activity and natural resource development in Indian Country with dual taxation. Assessment of State and local taxes obstructs Federal policies supporting tribal economic development, self-determination, and strong tribal governments. And, the presence of federal regulatory pronouncements with respect to state taxing authority has ever-increasing importance to protecting on-reservation commercial activity. As the Department did with its recent update to regulations governing leasing and rights-of-way on trust lands, by updating the Trader regulations it can reaffirm the *Warren Trading* principles 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 upon traders."

State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. An important aspect of tribal

sovereignty and self-governance is the power to tax. The regulations should underscore and promote this sovereign right and, to that end, pre-empt state and local tax of natural resource development, commercial activity, and personal property on tribal trust land. State governments are increasingly imposing taxes on severance of natural resources, retail sales, and property. Tribal governments face a losing proposition when forced to collect state taxes: if they impose a tribal government tax, then dual taxation drives business away. Or, tribes collect insufficient (or no) taxes and suffer inadequate roads, infrastructure for economic development, schools, police, courts and health care. To add insult to injury, reservation economies are funneling millions of dollars into state treasuries who spend the funds outside of Indian country; state and local governments are not investing in tribal communities commensurate with the tax revenue they receive from economic activity on our trust lands. At the same time, tribal governments have increasing responsibility to fund tribal community services, as well as the very infrastructure that is creating the tax-generating activity. This dilemma is fundamentally unfair to tribal governments, undermines the Constitution's promise of respect for tribal sovereignty, and keeps Indian reservations the most underserved communities in the nation. NCAI recently passed Resolution SD-15-045: "Urging the Department of Interior to Address the Harms of State Taxation in Indian Country and Prevent Dual Taxation of Indian Communities," which the Ewiiapaayp Band of Kumeyaay Indians fully supports.

The very possibility of an additional State or local tax can make some business in Indian Country less economically attractive, further discouraging development in Indian country. Indeed, uncertainty as to taxing jurisdiction and one's ultimate tax burden is seen as the single greatest impediment to non-Indian investment and location of businesses in Indian Country. This uncertainty forces tribes to structure their economies in the manner most likely to limit the ability of the state to enforce its tax, rather than in the manner that makes the best business sense. For their part, non-Indian investors and partners are rarely willing to endure the expense and delay of obtaining certainty on taxation in Indian country. Tax rulings can be obtained from many state taxing agencies, but they are fact-specific and dependent on case law underpinnings that are notoriously unreliable, or on the terms of negotiated state-tribal compacts with expiration dates that may not afford the investor sufficient security over the life of the project. Even when a tribe ultimately prevails, litigation is often necessary to establish state tax exemption whenever a non-tribal partner or investor is involved. Numerous inefficiencies result from this, including the direct cost and delay caused by extended litigation, as well as the chilling effect on both outside and tribal investment.

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?

Tax revenues are indispensable to the Ewiiapaayp Band of Kumeyaay Indians administration of tribal government. The Tribe receives no funding for management of its resources and assets (including ground water, HEARTH Act business leases, building code standards, fire code standards, or tax administration). The Tribe's self-governance compact provides indirect rate funds but only limited to PFSA's and permitted costs). In actual practice, statutory limitations on recovery of indirect costs and regulatory restrictions on application of the indirect rate to PFSA's even from the Bureau of Indian Affairs (BIA), causes an under-recovery and shortfall of indirect rate revenues that the Tribe must supplement with its own, unrestricted,

discretionary funds. Tribes certainly can levy sales and use taxes, hotel occupancy taxes, cigarette taxes, utility taxes, and other excise taxes on economic activity in Indian Country. But, this source of revenue is extremely limited (if at all available) and generally viable only upon agreement with state and local taxing jurisdictions. At the same time, tribal governments have increasing responsibility not only their citizens, but also businesses located within and next to their territory. Tribes provide services for public safety, environmental services, infrastructure (roads, water, sewer), judiciary, licensing/permitting, and so on. For their citizens, the essential government services also include housing, health care, public facilities, community support, legal assistance, and so on. The tax revenue is never enough to cover all of these expenditures. The imposition of state and local taxes undermines the tribe's ability to fully fund these essential support services through their own tax revenues. And, the failure of states to reinvest the tax revenue they receive from Indian commerce back into Indian Country does serious harm to tribes, their citizens, and the neighboring communities. This is harm that the Department should address through reform of the Trader Regulations.

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