

Northern Arapaho Business Council

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August 1, 2017

Mr. Gavin Clarkson
Deputy Assistant Secretary - Indian Affairs
1849 C Street N.W.
Washington, D.C. 20240

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BCR

Re: Indian Trader Regulations

Dear Deputy Assistant Secretary Clarkson,

The Northern Arapaho Tribe has urged the Department to revise the Indian trader regulations since 2002. We were pleased to learn that the Department may undertake a revision. The Tribe renews its request that the Department issue revised Indian trader regulations that will reduce federal costs and regulation of local reservation economies and empower tribal governments to raise tax revenue for essential governmental services.

Background

As you know, Congress is authorized by the Constitution to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, Sec. 8, cl. 3. In addition, statutes require federal approval and regulation of vendors engaged in commerce with Tribes. "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he 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," 25 U.S.C. 261. "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.

25 C.F.R. Part 140 contains the regulations currently in effect regarding Indian traders. They require applications to be submitted "through the [Agency] Superintendent to the Commissioner of Indian Affairs," who is authorized to approve or reject them, 25 C.F.R. 140.9.

The Supreme Court has affirmed the right of tribes to impose a "permit tax on nonmembers for the privilege of conducting business within the Tribe's borders" as well as a tribe's "authority... to prescribe the terms upon which noncitizens may transact business within its borders," *Strate v.*

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A-1 Contractors. (1997).

As a result, there is a dual system of federal and tribal regulation of the same economic activities. A delegation of federal authority to tribes under the Indian trader statutes would reduce federal costs and involvement in regulating local economics, avoid duplication of effort and potential conflict, and also strengthen the effectiveness of tribal regulation.

The Indian trader regulations could be vastly improved by encouraging tribes to develop specific regulations which best meet the unique needs of their communities and by removing the federal government from the day-to-day issues involved in licensing and regulating vendors on Indian reservations.

There is also a dual system of state and tribal taxation of the same economic activities. *See Cotton Petroleum v. New Mexico (1989)*. Dual taxation in Indian country has suppressed economic development and limited the ability of tribes to raise tax revenue for essential governmental services. Federal policy has long promoted economic development in Indian country, yet Congress regularly considers cuts to funding for tribal governments. We urge the Department to issue a clear rule that new regulations pre-empt state or local taxation on the same economic activities already subject to tribal taxation authority.

Proposed Regulations

[The following would be *new* in part 140 of 25 C.F.R.]

'140.1 What Definitions Apply to this Part?

- (a) "Indian country" means "Indian country" as defined in 18 U.S.C. 1151.
- (b) "Person" means any individual, partnership, corporation, company or any other type of association and any agent or officer of any partnership, corporation, company or any other type of association.
- (c) "Trader" means any "person" who buys, sells, barter, rents, leases, permits or engages in any other transaction involving the acquisition or disposition of property or rights in property located or services performed within "Indian country," including any "person" offering, accepting or performing agreements regarding the same.

[Re-number existing '140.1 (Sole Power to Appoint) and the remaining regulations and add the following new sections:]

'140.28 How Can Tribes Assume the Commissioner's Authorities Under this Part?

- (a) Any federally-recognized Indian tribe ("tribe") may enact such laws and taxes of the tribe regarding the rights and responsibilities of traders and such laws and taxes shall govern and

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supersede these regulations except with respect to the following regulations, which remain in effect: 25 C.F.R. '140.2 (Presidential prohibition), '140.5 (Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases), '140.17 (tobacco sales to minors prohibited), '140.18 (intoxicating liquors), '140.19 (drugs), '140.20 (gambling), '140.24 (cash payments), '140.25 (trade in antiquities prohibited), and '140.26 (infectious plants).

(b) Any tribe which enacts laws or taxes regarding the responsibilities of traders and desires to replace or supersede these regulations with such laws or taxes, and to assume the authorities of the Commissioner of Indian Affairs regarding traders, shall notify the Secretary of the Interior of the same in writing at least thirty (30) days in advance of the effective date of the tribe's assumption of such authorities. Upon such assumption, the Commissioner of Indian Affairs shall be deemed as a matter of law to have appointed the tribe as his agent, with all powers and responsibilities hereunder delegated to the tribe. The tribe may appoint officials of the tribe as necessary to administer such laws or taxes.

'140.29 What is a Tribe's Jurisdiction Over Trade in Indian Country?

Tribal jurisdiction regarding trade or business in Indian country includes but is not limited to:

- (a) The Indian tribe's inherent jurisdiction over the land and any person or activity within the reservation;
- (b) The inherent power of the Indian tribe to tax the land, any improvements on the land, or any person or activity on trust or restricted land;
- (c) The Indian tribe's inherent authority to enforce tribal law of general or particular application;
- (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over nonmembers on Indian land; and
- (e) The authority delegated to any Indian tribe pursuant to these regulations or other federal law.

'140.30 What Taxes Apply to Trade Under this Part?

- (a) Traders and their property, persons, and activities shall be subject to any taxation by any Indian tribe with jurisdiction.
- (b) Traders and their property, persons, and activities subject to taxation by any Indian tribe (regardless of whether tribal taxes are actually levied) are not subject to any fee, tax, assessment, levy, or other charge (including but not limited to, business use, privilege, excise, and

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gross revenue taxes) imposed by any state or political subdivision of a state; provided however, this provision is subject to applicable federal and state law related to taxation of income of individual non-Indians.

(c) Mineral and energy development and any form of natural resources extraction on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge (e.g. severance or gross production tax) imposed by any state or any political subdivision of a state.

(d) Tax Sourcing: Tribal laws determine tax sourcing of sales of all products or services on trust or restricted fee land within the following framework:

- (1) When the product is received by any purchaser at a business location on trust or restricted land, the sale is sourced exclusively to that business location and the tribal government.
- (2) For delivery sales, the sale is sourced exclusively to the tribal government jurisdiction on trust or restricted land at the location indicated by instructions for delivery.
- (3) When subsections (1) and (2) do not apply, these sourcing rules are to be interpreted in a manner consistent with the State Streamlined Sales and Use Tax Agreement and the federal trust responsibility, where the tribal government is treated as a state or territorial government.

(e) Excise Taxes: Sales or production of any product on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge (e.g. motor fuel, tobacco or alcohol excise tax) imposed by any State or any political subdivision of a state.

(f) Personal Property Taxes: All forms of personal property located on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge imposed by any State or any political subdivision of a State.

(g) Tribal-State Tax Agreements: The administration of tribal and state tax laws are frequently addressed through voluntary agreements between tribes and states. Such agreements are encouraged, but not required. As a practical matter, agreements may be necessary for the administration of certain taxes, such as taxes on delivery sales.

Conclusion

We believe that these revised Indian trader regulations could reduce federal expense and involvement in local economic regulation, avoid duplication of effort and potential conflict between regulators, and also promote self-determination for tribes by delegating the Department's authority under the Indian trader statutes. Revised regulations can also help Tribes avoid the burden of dual state and tribal taxation in Indian country.

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We appreciate your attention to this important effort and look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy B. Brown". The signature is stylized and cursive.

Roy B. Brown, Chairman
Northern Arapaho Business Council

xc: Baldwin, Crocker & Rudd, P.C.