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October 30, 2017

Via Electronic Mail

Elizabeth K. Appel, Director
Office of Regulatory Affairs and 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: Comments of Cheyenne River Sioux Tribe to Docket ID: BIA-2016-0007 (Traders with Indians – Advance Notice of Proposed Rulemaking)

Dear Director Appel:

As Chairman of the Cheyenne River Sioux Tribe, I write on behalf of the Tribe to submit the following comments regarding the Federal Indian Traders License Regulations. The Cheyenne River Sioux Tribe calls upon the Interior Department to affirm the Federal government's longstanding policy of promoting tribal self-determination, self-government, and economic self-sufficiency by supporting tribal authority over trade and commerce in Indian country and by preempting dual or triple taxation of trade and commerce in Indian country.

A Framework for Updating the Federal Indian Traders License Regulations

The Indian trader statutes, codified at 25 U.S.C. § 261, *et seq.*, and the Licensed Indian Traders regulations at 25 C.F.R. Part 140, establish a program of “comprehensive federal regulation” of trade in Indian Country. *Central Machinery v. Arizona Tax Comm’n*, 448 U.S. 160, 165 n.14 (1980). Among other things, the statutes and regulations prescribe: procedures, criteria, and restrictions for the licensing of traders in Indian country, penalties for engaging in trade or commerce without a license, prohibitions against certain trade and commerce in certain areas, regulation of commercial premises and practices, and inspection and regulation of goods, services, and prices. The Federal Indian trader laws are designed, among other things, to protect our Indian people from fraud,

imposition, and exploitation, and ensure that all goods and services sold in Indian country are affordable and of good quality.

The Supreme Court has held that the Federal Indian trader laws and regulations preempt State taxation of commerce in Indian country. In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court held that the “apparently all-inclusive [Licensed Indian Trader] regulations and the statutes authorizing them would seem, in themselves, sufficient to 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 upon traders.” *Id.* at 690. *Accord*, *Central Machinery*, 448 U.S. at 164-165.

The Indian trader statutes and regulations are in full force and effect. Yet today, on many Indian reservations, local agencies of the Bureau of Indian Affairs no longer issue Indian trader licenses or otherwise implement the Federal Indian trader statutes or regulations. In recent years, under the Federal government’s Indian self-determination policy, the Secretary of the Interior has deferred enforcement of the Indian trader laws to provide Indian Tribes the opportunity to enforce their own Tribal business license laws.

We believe the Department should make its self-determination policy express and modernize the Federal Indian Traders License Regulations to:

- Affirm the Federal government’s policy of promoting Tribal self-determination;
- Affirm that the Federal government’s policy of promoting Tribal economic self-sufficiency, as set forth President Ronald Reagan’s *Statement on American Indian Policy* (1983);
- Affirm the Federal government’s interest in regulating trade and commerce in Indian country to protect Indian people from fraud, imposition, and exploitation, and to ensure that all goods and services sold in Indian country are affordable and of good quality;
- Affirm the authority of Indian Tribes to enact Tribal ordinances, consistent with the Federal Indian trader statutes and regulations, to regulate trade and commerce within their territories;
- Affirm that no person may engage in trade or commerce within Indian country except in conformity with the Federal Indian trader statutes and regulations and in conformity with any ordinance duly adopted by the Indian nation or Tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the Federal Register;
- Delegate Federal authority to Indian Tribes to regulate trade and commerce in Indian country with the support and assistance of the Secretary of the Interior;

- Affirm that the Federal and Tribal interests in regulating commerce in Indian country, as reflected in Federal law, preempt State and local taxation and regulation of commerce in Indian country; and
- Affirm that State and local taxation and regulation of commerce in Indian country conflict with Tribal self-determination, self-government, and economic self-sufficiency.

The Regulations Should Reinforce the “Bright Line” Rule Preempting State and Local Taxation of Trade in Indian Country

Tribal taxation is essential to Tribal self-government and economic development in Indian country. Like other governments, Tribes impose taxes to fund and develop our governments and to provide essential governmental programs and services to our people. Strong institutions of Tribal government are the cornerstone of Tribal self-determination, and effective Tribal programs and services are essential to economic development in Indian country.

Indian Tribes possess the inherent authority to tax most activities and transactions within their territories. Tribes have broad authority to tax their own members and, notwithstanding recent limitations imposed by the Supreme Court, Tribes retain the authority to tax nonmembers who engage in commercial dealings with the Tribes or their members, or whose activities occur on Tribal trust lands.

States and local governments are categorically barred from taxing Indian Tribes or Tribal members in Indian country, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987), but there are few bright line rules when it comes to State and local taxation of nonmembers in Indian country. Instead, the Supreme Court has employed a “flexible preemption analysis sensitive to the particular facts and legislation involved.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). According to the Court, such taxation is prohibited if it infringes on Tribal self-government or if it is preempted by Federal law. *Mescalero Apache Tribe*, 411 U.S. at 148. State taxation of nonmembers is preempted if it interferes with or is incompatible with Federal and Tribal interests, as reflected in Federal law, unless there are sufficient countervailing State interests to justify the assertion of State authority. The preemption analysis requires a particularized balancing of Federal, Tribal, and State interests and, thus, is inherently less predictable than the *per se* rule barring all State and local taxation of Tribes and Tribal members.

The Court’s case-by-case approach has created uncertainty for Tribes, States, and nonmembers seeking to do business in Indian country. It is difficult to determine *ex ante* whether a State or local government will have jurisdiction to tax a given nonmember transaction in Indian country. This uncertainty makes it difficult for nonmembers to evaluate the total cost of doing business in Indian country, and it may cause some nonmembers to avoid investing in Indian country altogether.

In *Warren Trading Post*, 380 U.S. at 690, and *Central Machinery*, 448 U.S. at 164-165, the Supreme Court applied its preemption analysis and held that States may not tax nonmembers who engage in retail trade and commerce in Indian country. The Court’s analysis hinged, in large part, on the Federal and Tribal interests in interest in regulating trade and commerce in Indian country,

as reflected in the Indian trader statutes and regulations, and in the Federal government's comprehensive regulation of trade in Indian country.

The "bright line" rule established in *Warren Trading Post* and *Central Machinery* may be in jeopardy if the Federal government, acting by and through the Interior Department, does not affirm its commitment to regulating trade and commerce in Indian country. It can do so by fully implementing and enforcing the Federal Indian trader statutes and regulations or by delegating authority to Indian Tribes to implement those laws. The laws themselves leave no room for States or local governments to impose additional burdens on traders in Indian country.

The Interior Department may authorize Tribes to administer the Federal Indian trader laws through the "self-determination" contracting provisions of the Indian Self-Determination and Education Assistance Act of 1975. Pub. L. 93-638, 88 Stat. 2203 (Jan. 4, 1975), *codified as amended at 25 U.S.C. § 450, et seq.* The courts have held that Indian Tribes may enforce Federal law – and exercise delegated Federal authority – when carrying out certain "self-determination" contracts. *See, e.g., United States v. Roy*, 408 F.3d 484, 490 (8th Cir. 2005) (upholding delegation of the BIA's law enforcement programs and services in Indian country to tribal officers through the Indian Law Enforcement Reform Act); *Allender v. Scott*, 379 F. Supp.2d 1206, 1209-10 (D.N.M. 2005) (holding that tribal officers lawfully exercised their power under a law enforcement "self-determination" contract to arrest and issue a citation to a non-Indian who committed an offense on fee land in Indian country, since such authority had been delegated to the Tribe by the Federal government); *Hopland Band of Pomo Indians v. Norton*, 324 F.Supp.2d 1067, 1072, 1074 (N.D. Cal. 2004) (holding that "the contractible programs, functions, services or activities under the ISDEAA comprehend the contracts to enforce federal law under the ILERA" and "[t]his necessarily includes giving the tribes the power to adequately enforce federal law and investigate violations thereof").

The Department may also provide that no person may engage in trade or commerce within Indian country except in conformity with the Federal Indian trader statutes and regulations and in conformity with any ordinance duly adopted by the Indian nation or Tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the Federal Register. This would involve a delegation of Federal authority to Tribes, *see e.g., United States v. Mazurie*, 419 U.S. 544, 556-557 (1975); *Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280, 1290-1291 (D.C. Cir. 2000), *cert. denied* 532 U.S. 970 (2001), and it would be consistent with 25 U.S.C §§ 2 and 9, which provide among other things that the Executive "may prescribe such regulations" as may be "fit for carrying into effect the various provisions of any act relating to Indian affairs." Delegating authority to Indian tribes to implement the Federal Indian trader statutes would carry into effect the provisions of those statutes.

The Interior Department should also affirm the "bright line" rule established in *Warren Trading Post* and *Central Machinery* by declaring in its regulations that the Federal and Tribal interests in regulating commerce in Indian country, as reflected in Federal law, preempt State and local taxation and regulation of commerce in Indian country. Such a declaration would also be within the Department's power under 25 U.S.C. §§ 2 and 9.

Without “Bright Line” Preemption, State and Local Taxation Threatens to Undermine Tribal Self-Government and Economic Development

State and local taxation of nonmember businesses in Indian country imposes significant economic burdens on Indian Tribes, and it has the potential to undermine Tribal self-government and Tribal economic development.

Infringement on the Tribal Tax Base

State and local taxation of nonmember businesses in Indian country infringes on the Tribal tax base. Under existing Federal law, an Indian Tribe can tax nonmembers who engage in commercial dealings with the Tribe or its members. *Montana v. United States*, 450 U.S. 544, 565-566 (1981). This includes nonmember businesses that provide goods and services to the Tribe or its members, and nonmember consumers who purchase goods and services from Tribal businesses. Tribes may also tax nonmember activities that threaten core Tribal interests, including Tribal health, welfare, and economic security. *Id.*

However, Tribal taxes on nonmember activities or transactions “do not, of their own force, preempt concurrent state taxes” on the same activities or transactions. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.05 (2005 ed.) (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 158 (1980)). As a practical matter, a Tribe’s ability to tax nonmember activities or transactions is severely impaired when State and local governments assert concurrent, or overlapping, taxing jurisdiction. The resulting double or triple taxation is often more than Tribal markets can bear, and Tribes may be forced to lower their tax rates or to eschew collection of their taxes altogether on nonmember transactions. This can have tremendous consequences for Tribes, depriving them of millions of dollars in tax revenue on activities occurring within their jurisdictions.

In *McCulloch v. Maryland*, Chief Justice John Marshall stated that, “the power to tax involves the power to destroy.” 17 U.S. (4 Wheat.) 316, 431 (1819). The Supreme Court has long recognized that, if permitted, state taxation in Indian country would “essentially destroy[]” tribes by depriving them of their tax base. *Bryan v. Itasca County*, 426 U.S. 373, 388-89, n.14 (1976).

Raising the Cost of Goods and Services

State and local taxation of nonmember businesses in Indian country raises the cost of the goods sold by those businesses to Indian Tribes and Tribal members. Whenever possible, nonmember businesses, like all others, pass the financial burden of the State and local taxes on to their Tribal customers in the form of higher prices. This burdens Tribal members by raising the cost of the ordinary, day-to-day goods and services they purchase from on-reservation, nonmember businesses. It also burdens the economic development initiatives of Tribal governments and Tribally owned businesses by raising the cost of construction, management, and other essential services they purchase from nonmember contractors and businesses. The impacts can be significant, especially on multi-million dollar Tribal economic development projects, where the imposition of State and local taxes can add tens or hundreds of thousands of dollars to the cost of the project.

Relocation of Nonmember Businesses Off-Reservation

If market conditions prevent nonmember businesses from passing the financial burden of Tribal, State, and local taxes on to their customers, the businesses may be forced to relocate off-reservation. In this way, double or triple taxation of nonmember businesses in Indian country creates a disincentive to investment in Indian country and reduces the supply of goods and services available to Indian Tribes and their members.

The Interior Department can address each of these concerns by affirming, in its regulations, that State and local taxation of nonmember trade in Indian country is incompatible with Federal and Tribal interests in promoting Tribal self-determination, self-government, and economic self-sufficiency.

Indian Tribes are sovereigns, and the power to tax Indian commerce on Indian lands is an essential aspect of Indian sovereignty and tribal self-government. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The imposition of dual (State and Tribal) or triple (State, local, and Tribal) taxation of commercial activity in Indian country frustrates the Federal government's Indian Self-Determination Policy and undermines the ability of tribes to fully fund essential services through tribal tax revenues. The failure of States to reinvest the tax revenue they receive from Indian commerce back into Indian country does serious harm to Tribes, Tribal citizens, other reservation residents, and neighboring communities. This is harm that the Department of the Interior should address through reform of the Trader regulations.

Thank you for the opportunity to submit our views on this important subject.

Sincerely,

A handwritten signature in black ink, appearing to read "H.C. Frazier". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Harold C. Frazier, Chairman
Cheyenne River Sioux Tribe