

Elk Valley  
Rancheria,  
California



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**VIA E-MAIL AND POSTAL SERVICE**

consultation@bia.gov

Elizabeth K. Appel  
Director  
Office of Regulatory Affairs and Collaborative Action  
Attn: Revised Indian Trader Rule  
Office of the Assistant Secretary – Indian Affairs  
1849 C Street, NW, MS 4660-MIB  
Washington, DC 20240

Re: Licensed Indian Traders Regulations; 25 CFR Part 140

Dear Ms. Appel:

On behalf of the Elk Valley Rancheria, California, a federally recognized Indian tribe, we offer the comments below in response to Dr. Clarkson's letter dated July 28, 2017. The Elk Valley Rancheria, California (the "Tribe") is located in Del Norte County, California. Del Norte County is California's northernmost coastal county and is California's coastal gateway to the Pacific Northwest.

In 1968, Congress created the 28,000 acre Redwood National Park. In 1978, Congress enacted legislation to expand the Redwood National Park. In that legislation, the Federal government sought to promote retraining for displaced workers and to assist communities with economic planning, grants, and transitions due to the expected loss of jobs and negative economic impact of the creation and expansion of the Redwood National Park.

The law included the Redwood Employee Protection Plan and other economic assistance for Del Norte and Humboldt counties in northern California. The statute outlined land acquisition methods, land rehabilitation contracts and cooperative agreements. It also directed the Secretary of the Interior to provide employment opportunities to people affected by the taking of land, and to contribute to the economic revival of Del Norte and Humboldt counties in northern California.



As a result of the Redwood National Park legislation, Del Norte County's per capita income dropped dramatically and average new housing values fluctuated severely in Del Norte County. But for the construction of the state prison in September 1989, Del Norte County would have suffered more destabilization of property values and retail sales.<sup>1</sup>

In part because of the history of the region, including Federal actions, the County is one of the poorest in California. The economic conditions in the County are nothing short of abysmal. In 2002, county per capita income was \$18,677, which was 43% below the statewide average of \$32,989, and ranked it 57<sup>th</sup> out of 58 counties.<sup>2</sup> According to the 2000 Census, 16.4% of families in the county lived below federal poverty levels, compared to 10.6% statewide.<sup>3</sup> The County also has a disproportionate number of individuals on public assistance programs; in fact CalWORKS and USDA Food Stamp participation rates are twice the state average and Welfare to Work rates are triple the state rate.<sup>4</sup> The County is one of the poorest in California. The economic conditions in the County are nothing short of abysmal.

Del Norte County has traditionally seen high unemployment in the last 20 years due to the decline in timber industry and fishing fleet operations. The County had an unemployment rate of 13.6% for December 2010. Adding a single job in the Del Norte County is equivalent to adding 61 jobs in Sacramento County. Ten new jobs in Del Norte County would have the same impact as a new employer moving into the Sacramento area and hiring 610 people.

The County is California's northern-most county on the Pacific coast, approximately 1,129 square miles in size. The largest and only incorporated city is Crescent City, population 7,609, including approximately 3,461 who are incarcerated in the Pelican Bay State Prison. The total population of the County is 27,507<sup>5</sup>, equating to nearly 28 people per square mile. Nearly 80% of the land in the County is publicly owned and includes the Redwood State and National Parks, which border the Tribe's

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<sup>1</sup> The state prison created 1,800 direct and indirect jobs in Del Norte County.

<sup>2</sup> Bureau of Economic Analysis, U.S. Department of Commerce, *Annual State Personal Income* <http://www.bea.doc.gov/bea/regional/spi/>, (Washington, D.C., 2004.)

<sup>3</sup> California Department of Finance, *California Statistical Abstract* (Sacramento, California, November, 2003), Table D-21.

<sup>4</sup> California Employment Development Department, *Planning Information Packet, Northern Rural Training and Employment Consortium (Butte, Del Norte, Lassen, Modoc, Plumas, Siskiyou, Tehama, Trinity and Shasta counties), 2004* (Sacramento, California: Labor Market Information Division, 2004).

<sup>5</sup> United States Census 2000 - [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US06&-box\\_head\\_nbr=GCT-PH1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-format=ST-2](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US06&-box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-2)





reservation; and the Smith River National Recreation Area, part of the Six Rivers National Forest.

The Tribe's reservation was established in 1906 for homeless and landless Indians of predominantly Tolowa and Yurok ancestry when 100 acres was set aside for Indians on the east side of Crescent City. However, the Tribe was terminated in 1960 pursuant to the federal California Rancheria Act and, as a result, the Tribe lost its federal recognition and much of the Tribe's reservation was converted to fee simple lands that were subsequently sold or seized for tax defaults. In 1979, individual members of several California Indian tribes filed suit in the United States District Court to challenge the illegal termination of several California Indian tribes and to seek restoration of tribal status and reservation status. In 1983, the United States entered into a stipulated judgment restoring the Tribe's status as a federally recognized Indian tribe. In 1987, the County entered into a stipulated judgment recognizing the restored boundaries of the Rancheria and declaring the Rancheria as constituting "Indian country" within the meaning of federal law and recognizing the Rancheria as a "reservation." Since restoration, the Tribe has re-acquired approximately 18% of the original reservation in trust status and has acquired additional aboriginal lands.

Given the small land base and membership of the Tribe, the Tribe's economic conditions mirror those of the surrounding County. By any meaningful measure, the Tribe, the community of Crescent City and the County are "distressed." The combination of economic conditions that include not only unemployment figures, but income and poverty levels highlight this fact. Del Norte County has minimal economic resources compared to other California counties and the situation has only gotten worse since the 2000 Census reported the following income figures. Worth noting is that while more recent figures for the county and state are readily available, there are no such figures for the Tribe or the reservation.

### **Household Income Compared to General Population**

<b>Location</b>	<b>Median Household Income</b>	<b>Per Capita Income</b>
Elk Valley Rancheria Tract 1.02 BG1	\$22,500.00	\$28,663.00
Elk Valley Rancheria Tract 1.02 BG2	\$14,250.00	\$28,663.00
Del Norte County	\$29,642.00	\$14,573.00
California	\$47,493.00	\$22,771.00



*\*Data from the 2000 U.S. Census*


As the table above shows, the median household income for Del Norte County is less than half of the median household income for the State of California. The percentage of individuals living in poverty within the County is also high at 20.2% compared with a State average of 14.2%. Given this, it is clear that Del Norte County is an economically distressed area.

Tribal Nations have united around the principle that economic activity taking place in Indian Country must generate revenue for the benefit of Tribal communities. Economic sovereignty is essential to Indian Country's ability to be self-determining and self-sufficient. As state and local governments attempt reach into Tribal coffers and siphon away revenue, Tribal Nations lose the opportunity for economic growth and sovereignty. If Tribal Nations are ever to achieve parity with other communities in the United States, we must have the opportunity to assess taxes on our lands free from the overreach and interference of other governments levying their own taxes.

Tribal governments have sovereign authority to tax commercial activities within our territories, whether conducted by Tribal citizens, other Indians, or non-Indians. The U.S. Supreme Court has affirmed that a Tribal Nation's tax power is "an essential attribute of Indian sovereignty." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Yet, when non-Indians engage in commerce in Indian Country, the courts apply a "flexible preemption analysis" (using a balancing test that weighs federal and Tribal interests against those of the state). 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 Tribal Nation. *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989).

This dual taxation hinders Tribal Nations from achieving our own revenue generating potential and remains a primary impediment to nation rebuilding in Indian Country. Although Tribal Nations have authority to tax noncitizens doing business in Indian Country, when other jurisdictions can tax those same noncitizens for the same transactions, Tribal Nations must lower 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 Tribal Nations with a limited revenue stream that is wholly inadequate to support the provision of governmental services.

The Indian Trader Statutes delegated to the Department of Interior (DOI) 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 Indian individuals, families, and Tribal Nation communities from adverse impacts of such commerce. The development of revised regulations to implement the Indian Trader Statutes by DOI to





clarify that the regulation of non-Indians engaging in commerce in Indian Country is necessary to protect and promote the wellbeing of Tribal Nation communities through the preemption of state and local taxation on Tribal lands. Regulations that achieve this preemption would provide a vitally necessary tool for promoting Tribal economic activity, job creation and sustainable nation-building in Indian Country.

The Tribe strongly encourages the Department to pursue revisions to the Indian Trader regulations that would have the effect of preempting state and local taxation on Tribal lands. Regardless of whether the Department proceeds with rulemaking, however, as a trustee to Tribal Nations, it should immediately initiate a dialogue with Indian Country on the deep and growing problem that dual taxation presents. In the spirit of Tribal self-determination, sovereignty, nation rebuilding, and economic development, the Department must work with Tribal Nations to develop an appropriate legal and policy framework for addressing this inequity.

## **Responses to Questions**


### **1. Specific projects that cannot be initiated.**

The Tribe has attempted for several years to secure financing for its proposed casino and resort. The Tribe has attempted to secure commercial loan financing; bond financing; tribe-to-tribe financing; EB-5 financing; New Market Tax Credits; and 30 year “mortgage” financing for said project. However, the Tribe has not been able to obtain any such financing in large part due limitations on ability to tax certain activities as well as the inability to utilize tax revenue to secure repayment of any bond or other financing.

To that end, the Tribe attempted to obtain alternative sources of funding, including Tribal Economic Development Bonds (“TEDBs”). The Tribe was authorized through two separate allocations to issue TEDBs totaling up to \$25,275,018.64.

TEDBs are a financing tool created by the American Recovery and Reinvestment Act of 2009 (“ARRA”). This financing tool allows Indian tribal governments, for the first time, to issue tax-exempt bonds for the same purposes as states and local governments without regard to two existing limitations: (1) the “essential governmental function” test, which the IRS has interpreted to bar certain projects that it believes are “commercial” in nature, and (2) the prohibition against the issuance of “private activity bonds” (other than for certain manufacturing facilities).

Unfortunately, the fundamental assumptions underlying the TEDBs included willingness of the bond market to sell TEDBs and that banks and other lending institutions would lend money to projects in Indian country. However, with the onset of the economic downturn in 2008 and the allocation of authority to issue TEDBs in 2009 and 2010, the fundamental assumptions have proven to be flawed.





30-year municipal bonds have proven to be relatively safe investments from a credit perspective for local governments. Tribal bonds, such as TEDBs, can prove to be similarly desirable over if there is a clear tax revenue stream that can fund the repayment of tribal municipal bonds.

Tribes can be high-quality issuers of bonds with high recovery rates that will provide safety for principal on top of attractive after tax yields. While it continues to be difficult to predict the breadth and depth of the current economic cycle and its ultimate effect on the bond market, authorizing an investment in diversified TEDBs should provide investors with continued tax-exempt income and adequate downside protection to entice potential investors with sufficient incentive to purchase TEDBs or other long term bonds if the issue of dual taxation is properly addressed.

The Tribe diligently attempted to garner interest in issuance of the Tribal Economic Development Bonds. However, due to the 2008-2009 economic downturn and dual taxation concerns, the Tribe has not yet been successful in issuing the bonds. The Tribe had many discussions with placement agents and financial institutions regarding financing for the Tribe's project as well as pursuing interest from private financing sources. In response to Tribal inquiries, we learned that commercial lending institutions were reluctant to lend money in the then-current economic conditions, especially when the Tribe could not clearly anticipate tax revenues to assist with repayment much like a state or local government.

Likewise, the Tribe has examined renewable energy projects, but the dual taxation issue, especially regarding local government collection of possessory interest tax on such projects, has made it nearly impossible for the Tribe to pursue such economic development opportunities.

## **2. Economic impact studies of benefits of Indian Country economic development to surrounding communities.**

As we are certain the Department is aware, there are many studies discussing the beneficial impact of Indian country economic development to surrounding communities. For example, we recommend that the Department review the following, among others:

- California Nations Indian Gaming Association - <http://cniga.com/wp-content/uploads/2017/02/12-2-16-Full-Report-Final.pdf>
- Arizona Indian Gaming Association - <http://www.azindiangaming.org/wp-content/uploads/2015/10/The-Economic-Impact-of-Tribal-Gaming-in-Arizona-2014.pdf>





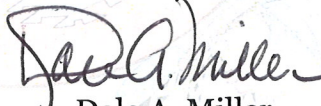
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- National Congress of American Indians - [http://www.ncai.org/resources/ncai\\_publications/securing-our-futures-report](http://www.ncai.org/resources/ncai_publications/securing-our-futures-report)
- U.S. Department of the Interior - "The Department of the Interior's Economic Contributions." This report documents the critical role that energy and mineral development plays in creating jobs and generating income throughout Indian Country. See e.g., <http://www.doi.gov/ppa/upload/DOI-Econ-Report-6-21-2011.pdf>; and <http://www.gpo.gov/fdsys/pkg/FR-2011-11-29/pdf/2011-29991.pdf>.
- Elk Valley Rancheria, California - socio-economic regional impact analysis for the resort casino proposed by the Tribe in Del Norte County. The analysis included accounting for local substitution effects on the economy and fiscal impacts on local government. See Appendix O to Final EIS in Support of Martin Ranch Fee to Trust Acquisition. [http://reports.analyticalcorp.net/elk-valley/martin-ranch/eis/feis/files/Volume-2/Appendix\\_O.pdf](http://reports.analyticalcorp.net/elk-valley/martin-ranch/eis/feis/files/Volume-2/Appendix_O.pdf)

## Conclusion

Thank you for your consideration of the Elk Valley Rancheria, California's comments.

Sincerely,



Dale A. Miller  
Chairman

cc: Elk Valley Tribal Council  
General Counsel

