



THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

August 29, 2017

Via email: consultation@bia.gov

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

On behalf of the Navajo Nation, this letter provides comments to the letter dated July 28, 2017 from Dr. Gavin Clarkson regarding the need to update the “Licensed Indian Traders” regulations found at 25 C.F.R. Part 140. In addition to the following comments, we are attaching, as Exhibit A, our previously submitted comments in a letter dated April 10, 2017 to Elizabeth Appel in response to the Department of Interior’s solicitation for public comments concerning potential modernization of the Part 140 regulations in an Advance Notice of Proposed Rulemaking published in the Federal Register at 81 Fed. Reg. 89015 (Dec. 9, 2016).

In Dr. Clarkson’s letter, he indicated that he would like a response to three items, which we addressed below.

- 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. For each project include:**
 - a) details regarding Indian Country capital investment under the project;**
 - b) details regarding the annual tribal revenue associated with the project;**
 - c) the number of Indian Country jobs that could be created under the project; and**
 - d) any specific impediment preventing forward progression on your project.**

As we have explained in my April 10, 2017 letter, dual taxation is an issue for the Navajo Nation. Not only does it take away the opportunity for more revenue for our Navajo government, we feel that it takes away business from the Navajo Nation. As one example, the Navajo Nation has solicited Walmart to place a store on the reservation. They have declined to do so, citing the fact that they already have stores at the borders of the reservation that can serve the Navajo

Nation. However, part of their decision may be based on the fact that the state and the Navajo Nation will have concurrent jurisdiction over their facility.

In regards to our energy resources, starting at the beginning of 2020, the Navajo Nation will start losing about \$38 million in annual revenue due to the closure of the Navajo Generating Station and the Peabody Coal Mine. About 440 Navajo employees and 79 contractors will also lose about \$56.2 million in income. In addition, there has been discussion that within the next 10 years, there may be a closure of the Four Corners Power Plant located near Farmington, New Mexico. The Navajo Nation receives about \$18 million in revenue from this plant. Although these plant closures may be due in part to the economics of the energy sector, any further reductions in the regulatory burdens on coal production can help the development of our future plans for our coal mines.

Furthermore, we want to take the federal government out of the mineral lease approval process, including oil and gas leases. As of now, it can take about 4 years to initiate a drilling program on the reservation. The length of time can be greatly reduced if approval authority is placed exclusively in the hands of the Navajo Nation. Also, from my understanding, the Bureau of Land Management sets and collects a fee for applications for permit to drill (APD) on tribal lands. Since the Navajo Nation performs a vast majority of the environmental studies and evaluations necessary for issuance of these APDs on its reservation, these APD fees should go to the Navajo Nation. In addition, any other regulations that make it unreasonably burdensome to develop the Navajo Nation's energy resources should also be reviewed.

In regards to our private business owners on the reservation, we understand that there is a concern regarding the long length of time to record and execute a leasing transaction with the Bureau of Indian Affairs (BIA) and its effect on development schedules. We heard that once an executed BIA leasing transaction document is submitted to the BIA for recording or execution, it takes 6 months to 1 ½ years, and sometimes longer, to process and return a recorded or executed document back to the Navajo Nation. We understand that an off-reservation company or a bank that is doing business on the reservation may not be comfortable with moving forward on a project unless they receive the recorded stamped lease document from the BIA, even if the lease or a modification of a lease has been executed by the parties. In an example, one business person indicated that they could not start renovation on one of their existing franchised restaurants until they received the recorded document from BIA and it took 14 to 16 months to receive the document from BIA. After 14 to 16 months, construction prices change and the project may have to be rebid.

Therefore, even though the Navajo Nation Trust Leasing Act and the HEARTH act may have taken the BIA out of executing the lease, outside companies and banks may not have legal comfort until an executed lease is recorded by the BIA. As such, BIA is still part of the

development process. Additionally, there are still leases that are governed by federal regulations, which require all leasing transactions to be executed by the BIA. We recommend that the Department of Interior review this matter to ensure that leases are timely recorded after BIA receives an executed lease and for those leases that are still governed by the federal regulations that BIA execute in a timely manner.

As a further discussion on leases, the Navajo Nation is looking to take over all the existing leases of Navajo land from the BIA through a process indicated as novation. We want to highlight this item so that the BIA headquarters can ensure this process of transferring BIA leases to Navajo is expedited through the BIA.

Another issue brought by a business person on the Navajo Nation is in regard to the equity interest required under the Indian Affairs Loan Guarantee Program for the financing of a project on the reservation. This business person has utilized the guarantee for several franchise projects and every time, he was required to obtain the minimum equity requirement. His view is that a person who has developed a good history of repayment on prior loans should be eligible for a lower minimum equity rate. The BIA should consider lowering the minimum equity rate if a person has an excellent business credit history.

As an additional comment on this 20% equity requirement, there are very few Navajo people who may have built enough equity to meet this requirement for certain projects and who are willing to risk their equity. For example, we understand that in order to open a McDonalds franchise, it requires about a \$1 to \$2.2 million investment, with \$750,000 of available liquid capital. Assuming a \$1 million investment, a Navajo person wanting to open a McDonalds franchise will need \$200,000 in order to qualify for a BIA loan guarantee. There are not that many, if any, Navajos who live on the reservation who can meet that requirement. Generally, people can build up equity with a home on fee land off the reservation, however building that type of equity is much more difficult for a home on the reservation. The Department of Interior should consider more creative alternatives for keeping its risk low (e.g. business experience, etc.) while lowering the equity requirement.

The Navajo Nation Trust Leasing Act and the HEARTH Act gave more authority to Indian tribes to approve leases by taking the federal government out of the process. We also want to extend this to right of ways. Infrastructure development such as power, telecommunications and roads are vitally important to build an economy. As such, we ask support from the Department of Interior to take the Secretary out of the process of executing right of ways and leave it exclusively with those Indian tribes who want this authority. Also, in executing right of ways over our lands, we also want to maintain our taxation, regulatory and adjudicatory authority within these right of ways.

Ultimately, our vision is that the Navajo Nation have full and exclusive authority to govern and regulate on its own lands. This may require changes to both laws and regulation, but this would allow Indian tribes to be truly self-determined. It would also eliminate federal bureaucracy that may hold up transaction occurring on the reservation. We encourage and expect the Department of Interior to support these efforts in full.

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

In 2012, our Navajo Division of Economic Development analyzed the tax data for selected towns and cities that surround the Navajo reservation. The result of their analysis was put into a document entitled "Navajo Economic Data Bulletin 002-0512," which is attached to this letter as Exhibit B. In essence, the analysis concluded that there was a substantial amount of money being transacted in these border towns and cities and Navajo could benefit substantially from capturing even a small percentage of the tax revenues.

We understand that the Department of Interior may be working with partners who are working on developing economic studies. If that is the case, our Division of Economic Development may be able to provide data necessary for the study. Our Division recently obtained some software that provides useful economic information that may be helpful. Utilizing this software, our Division of Economic Development developed a comparison of certain data between the Navajo Nation and the border towns surrounding the nation, which is attached as Exhibit C. If you need any further data that may be helpful for your analysis, please contact our Navajo Nation Washington Office and our Office can coordinate with our Division of Economic Development to provide that additional data.

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

In response to this item, we want to highlight two sections of the Navajo Treaty of 1868, the provision on the right to exclude and the provision on education. In regards to the right to exclude, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-145 (1982), the U.S. supreme court stated as follows:

This power [to exclude] necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian

land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation.

The Navajo Nation has utilized the right to exclude provision of Article 2 of Navajo Treaty of 1868 to argue for jurisdiction over non-Indians on tribal land. Article 2 of our treaty is an agreement by the U.S. that states:

The United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

This provision of the Navajo Treaty of 1868, in essence, imparts regulatory and adjudicatory authority over conduct on its land, as well as taxation of business activities. This provision also means that the U.S. agreed to protect Navajo jurisdiction.

In regards to education, an educated society is an important backbone of any developing economy. Article 6 of our treaty states the education obligation of the U.S. government as follows:

ARTICLE 6.

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

A large educated workforce on a reservation can bring in more businesses and investment. As such, the U.S. government's treaty obligation, as well as trust obligation, to provide an education to the Navajo people is an important part of building our economy and raising our standard of living.

As previously stated in our prior comment submission, the Navajo Nation strongly supports revising all federal Indian trader regulations to confirm tribal regulatory, judicial, and taxation authority over all on-reservation trade and commerce. If you have any questions regarding our submissions, please contact Jackson Brossy, Executive Director, Navajo Nation Washington Office at (202) 682-7390.

Respectfully,

THE NAVAJO NATION



Russell Begaye, *President*



Jonathan M. Nez, *Vice President*