



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*



THE NAVAJO NATION

RUSSELL BEGAYE **PRESIDENT**
JONATHAN NEZ **VICE PRESIDENT**

Exhibit A

April 10, 2017

Via federal rulemaking portal,
<http://www.regulations.gov>,
for Docket ID: BIA-2016-0007

Elizabeth Appel, Director
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary—Indian Affairs
U.S. Department of the Interior
1849 C Street NW, MS 3642
Washington, DC 20240

Re: Comments on Indian Trader rulemaking

Dear Ms. Appel:

On behalf of the Navajo Nation, this letter provides comments on whether the Department of the Interior (“DOI”) should comprehensively update 25 C.F.R. Part 140, on Licensed Indian Traders. DOI solicited public comments concerning potential modernization of the Part 140 regulations in an Advance Notice of Proposed Rulemaking (“ANPRM”) published in the Federal Register. *See* 81 Fed. Reg. 89015 (Dec. 9, 2016).

Notably missing from the ANPRM is any reference to whether DOI is also considering updating 25 C.F.R. Part 141, concerning Business Practices on the Navajo, Hopi, and Zuni Reservations. We believe that this was an oversight, because both Parts 140 and 141 (collectively, the “Indian Trader Regulations”) are DOI regulations promulgated under the authority of the Indian Trader statutes (25 U.S.C. §§ 261-264) and neither regulation has been updated in decades. Also, the ANPRM serves “to modernize the implementation of the Indian Trader statutes consistent with the Federal policies of Tribal self-determination and self-governance,” 81 Fed. Reg. at 89015, and that goal should apply equally to both regulations. Indeed, because that goal should apply just as much to the Navajo, Hopi, and Zuni Reservations as other areas of Indian country, we recommend that DOI repeal Part 141 and merge its provisions into a revised Part 140 to provide a single, uniform Indian trader regulation for all Indian country. This also would facilitate compliance if necessary with Executive Order 13771, which requires elimination of at least two prior regulations for every new regulation issued. *See* 82 Fed. Reg. 9339 (Feb. 3, 2017).

The Navajo Nation strongly urges DOI to update **all** the Indian Trader Regulations to confirm the primacy of tribal regulation over on-reservation businesses, including preempting dual taxation for all on-reservation commerce and confirming that anyone who engages in such

activity on Indian reservations by that action consents to tribal civil jurisdiction. These three points are imperative to modernize implementation of the Indian Trader statutes. To explain these recommendations, this letter responds to the seven questions posed in the ANPRM. Also, before responding to DOI's specific seven questions, we provide here background on the Indian Trader statutes and regulations, with particular relevance to the Navajo Reservation. This history informs our comments, and it is imperative that this history be recognized and understood, as it shapes what should be done in the future.

History supports regulation to protect Indian Nations and preempt state authority

The United States first regulated trade with Indians through the Northwest Ordinance, in 1787, before adoption of the U.S. Constitution. Article III of the Northwest Ordinance provided that Indians' "land and property shall never be taken without their consent[] and in their property rights and liberty, they shall never be invaded or disturbed . . . ; but laws founded in justice and humanity shall . . . be made, for preventing wrongs being done to them" That mandate still provides sound basic guidance for future Indian trader regulations.

Next, just three years later, the first Congress under the Constitution enacted the first Trade and Intercourse Act regarding Indians, requiring federal licenses and specifying the requirements for such licenses. As discussed in *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685, 688-89 (1965), further Indian trader statutes were enacted in 1802, 1834, 1876, and 1901, and that comprehensive regulation of Indian traders has continued to the present. Specifically, those statutes provide that what is now the Bureau of Indian Affairs ("BIA") "shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations" governing the sale of goods to Indians. 25 U.S.C. § 261. Also, anyone desiring to trade with Indians on any reservation must establish to the satisfaction of the BIA that he is a proper person to engage in such trade under such rules and regulations as the BIA may prescribe "for the protection of said Indians." *Id.* § 262. Further, the President may prohibit any trade with Indians, *id.* § 263, and no person without a license may introduce goods or trade in Indian country or on any Indian reservation, or even be employed as a clerk by any Indian trader, *id.* § 264.

As the Supreme Court recognized over 60 years ago, these statutes and their implementing regulations show that Congress has taken the business of trading on Indian reservations so fully in hand that no room remains for additional state burdens on that trade. Therefore, as the DOI had previously determined, those federal laws bar states from imposing taxes on on-reservation sales to Indians. *Warren Trading Post*, 380 U.S. at 690. Any future revisions to federal Indian trader regulations must implement this basic preemption, while also supporting the goals of increasing tribal self-determination and removing barriers to tribal economic development.

The current general Indian trader regulations (Part 140) date back to 1957, while the Indian trader regulations for the Navajo, Hopi, and Zuni Reservations (Part 141) were promulgated in 1937 and then revised in 1975. These regulations were, not surprisingly, products of their eras. As such, they served largely to protect Indians against unreasonable prices and widespread abuses by Indian trading posts. Those concerns were well documented by a series of

hearings held on the Navajo Reservation in 1972 by the BIA and the Federal Trade Commission (“FTC”), which directly led to the revised Indian trader regulations for the Navajo, Hopi, and Zuni Reservations. See *Rockbridge v. Lincoln*, 449 F.2d 567, 571-72 (9th Cir. 1971) (noting those issues in requiring promulgation of such regulations); FTC Staff Report, *The Trading Post System on the Navajo Reservation* (June 1973) (“FTC Report”), available at <https://eric.ed.gov/?id=ED093515>; 40 Fed. Reg. 14320 (March 31, 1975) (noting BIA-FTC hearings in proposing these Indian trader regulations).

Among other things, the FTC recommended that the Indian Trader regulations governing the Navajo, Hopi, and Zuni regulations should be consolidated with the regulations for all other areas of Indian country in one comprehensive set of regulations governing all Indian traders. FTC Report at 40. This was because the other regulations were generally more stringent than the regulations for Navajo traders and “[e]xhaustive research and inquiry failed to disclose why the Navajo traders were exempted from coverage under these broader provisions.” *Id.* The FTC also recommended that the BIA “should delegate enforcement responsibilities to the Navajo tribal government.” *Id.* at 53. The FTC suggested that the Navajo Nation should have “primary enforcement responsibilities” and Indian “Tribes should ultimately enjoy sole authority for licensing and regulating traders.” *Id.* at 53-54. Also, because of federal preemption and the general inaccessibility of federal courts for most reservation plaintiffs, the FTC recommended that the existing Navajo tribal courts should be designated as the proper forum for exercising jurisdiction over reservation traders. *Id.* at 55.

Consistent with those recommendations, the federal Indian trader regulations for the Navajo, Hopi, and Zuni reservations require tribal approval of all licenses and renewals. 25 C.F.R. §§ 141.6(b), 141.9(d); 40 Fed. Reg. 39835, 39836 (Aug. 29, 1975). They also confirm tribal authority to assess and collect fees or taxes from reservation businesses, and to enforce those regulations or consistent tribal regulations. 25 C.F.R. §§ 141.11(a)-(b). This is consistent with the recognized sovereign authority of all Indian tribes, including the inherent authority to tax, as recognized in *Kerr-McGee v. Navajo Tribe of Indians*, 471 U.S. 195 (1985). There also is strong legal authority for the BIA to delegate to tribes administration of federal statutes. *E.g.*, *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (concerning alcoholic regulation); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (concerning rights of way).

The federal trader regulations for Navajo, Hopi, and Zuni also provide the following:

As a condition of doing business on the Hopi or the Zuni Reservation each applicant for a license under this part shall . . . voluntarily submit the applicant and the applicant’s employees or agents to the jurisdiction of the tribal court for the purpose of the adjudication of any dispute, claim or obligation arising under tribal ordinance relating to commerce carried out by the licensee.

25 C.F.R. § 141.15. This provision was included for Hopi and Zuni but not for Navajo because “[t]heir constitutions permit jurisdiction over non-Indians only if the non-Indians consent to it” whereas the Navajo Nation did not then need such a provision because it did not have the same constitutional limit. 40 Fed. Reg. at 39836. Unfortunately, that assessment was based on then-

applicable case law which did not limit tribal regulatory and adjudicative jurisdiction as the Supreme Court has since done. Therefore, the proposed rulemaking should still require tribal license approvals and confirm tribal regulatory authority, but also must confirm that all businesses on Indian reservations by that action consent to tribal regulatory and court jurisdiction. This is especially important following the Supreme Court's failure to issue a definitive ruling affirming tribal authority in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016). Tribal Nations must be able to protect their citizens from the sometimes unlawful and dangerous actions of those who come onto their reservations to conduct business.

In 1980, the BIA proposed to amend the general Indian trader regulations to restrict their consumer protections to Indians in isolated communities where retail sellers did not have competition. 45 Fed. Reg. 27952 (April 25, 1980). However, that proposal was not finalized because most comments by tribal councils, tribal attorneys, BIA field staff, and others were strongly opposed to it. 46 Fed. Reg. 1298 (Jan. 6, 1981). Those commentators instead supported diligent enforcement of trader regulations on all Indian reservations because all Indian reservation consumers need the protection of the federal government and because the failure of the federal government to regulate could result in more state taxation of transactions involving Indians on Indian reservations. *Id.* at 1298. The BIA then proposed to revise the general Indian trader regulations to make a violation of state consumer protection laws a violation of BIA regulations. *Id.* That proposal also was not finalized, likely because of tribal opposition to application of state laws on reservations. Together, these aborted rulemakings confirm that federal Indian trader regulations must cover all Indian reservations, and that they are needed to preempt state laws and state taxation, which impose undue additional burdens on on-reservation consumers.

Moreover, even without any general regulation updates since 1957, “[t]he Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader.” *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160, 165 (1980). This is because the fundamental purpose of the authorizing statutes is not limited to just trading posts, but applies more broadly “to protect Indians,” and they must be applied as broadly as their language. *Id.* at 165-66. Also, it is the existence of the Indian trader statutes, and not their prior administration that preempts the field of transactions with Indians occurring on reservations. *Id.* at 165. The broad, original mandate of the Indian trader statutes therefore should guide the proposed rulemaking, rather than the historic problems that guided prior rulemaking.

In addition, Indian trader regulations apply equally to businesses on non-Indian fee lands within the Navajo reservation. *Ashcroft v. U.S. Dep’t of the Interior*, 679 F.2d 196 (9th Cir. 1982). This is so even when those businesses cater to the tourist trade and only a small portion of their sales are made to reservation Indians. *Id.* at 198, 200 n.3. This is necessary to give effect to the legislative intent to protect Indians “on any Indian reservation,” which otherwise could be thwarted. *Id.* at 200. Also, inherent tribal authority properly encompasses such traders on non-Indian reservation lands because it is necessary to protect tribal self-government. *Id.* at 199. Therefore, the proposed rulemaking should not be limited to just Indian lands, but must apply throughout each Indian reservation. Also, subsequent case law without the benefit of further

relevant action by the BIA has failed to recognize the authority of the Navajo Nation and other tribal governments over licensed Indian traders on non-Indian reservation lands. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 & n.10 (2001). Accordingly, it is imperative that the BIA here exercise its undisputed supervening authority over Indian traders to expressly require that all those who conduct trade or commerce in Indian country thereby consent to tribal jurisdiction.

Furthermore, the current dated Indian trader regulations are limited insofar as they do not bar state burdens on Indian tribes and Indian traders, including all state taxes on Indian reservations. This is because the current trader regulations no longer impose a comprehensive federal regulatory scheme for all on-reservation business dealings. Also, current federal case law requires particularized inquiries absent express federal preemption, and it has not been documented previously that the economic burden of state taxes on all such sales interferes with tribal affairs. *Compare Ramah Navajo School Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982) (gross receipts taxes preempted); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (motor carrier and fuel taxes preempted) *with Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999) (gross receipts taxes not preempted); *Department of Tax. & Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994) (cigarette taxes not preempted); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (severance taxes not preempted); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (cigarette taxes not preempted); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2nd Cir. 2013) (personal property tax on leased slot machines not preempted); *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566 (10th Cir. 2000) (fuel taxes not preempted). This is so even though dual taxation places on-reservation businesses at a substantial competitive disadvantage and effectively limits tribes' practical ability to impose their own taxes, even though tribes have tremendous needs and otherwise limited abilities to raise revenues to support essential tribal governmental services. *See generally* Kelly S. Croman & Jonathan B. Taylor, *Why Begger Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country* (2016).

These issues have long been noted by tribal leaders and still demand attention. *E.g.*, Tribal Energy Self-Sufficiency Act and the Native Am. Energy Dev't & Self-Determination Act, S. Hrg 108-61, at 82, 84-85 (2003) (testimony for Eastern Shoshone Business Council and Southern Ute Tribal Chairman urging addressing dual taxation caused by *Cotton Petroleum*); Energy Dev't in Indian Country, S. Hrg 112-628, at 45, 52-53, 63 (2012) (testimony by Navajo Nation Vice-President Rex Lee, Jicarilla Apache Nation President, and Assiniboine and Sioux Tribes of Fort Peck Reservation Tribal Executive Board also criticizing dual taxation). This situation is especially acute for the Navajo Nation, which is located in three states, each with their own tax regimes. Therefore, to best ensure the ability of Indian tribes to provide revenue for essential governmental services, it is imperative that federal Indian trader regulations expressly preempt state taxation in Indian country. Finally, rather than allow for particularized inquiries in a balancing of federal, tribal, and state interests regarding dual taxation preemption as has been applied regarding recent Indian leasing regulations, the BIA here should act within the scope of its congressionally delegated authority to expressly preempt state taxation and regulation in updating the Indian trader regulations. *Compare City of New York v. F.C.C.*, 486 U.S. 57, 63-64 (1988) *with Seminole Tribe v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015); *Ute Mountain Ute*

Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011); *Agua Caliente Band of Cahuilla Indians v. Riverside County*, 181 F. Supp. 3d 725 (C.D. Cal. 2016); *Tulalip Tribes v. Washington*, No. 15-CV-00940 (W.D. Wash. Jan. 5, 2017) (concerning Quil Ceda Village).

All these lessons from the governing Indian trader statutes and prior regulations should be followed in the proposed rulemaking. These lessons also shape Navajo responses to each of the following questions posed in the recent rulemaking notice.

1. Should the Federal government address trade occurring in Indian Country through an updated 25 CFR part 140, and why?

The DOI absolutely should update Part 140 and consolidate in it the current related regulations in 25 C.F.R. Part 141 regarding the Navajo Reservation. This update and consolidation are needed to better fulfill federal trust responsibilities to protect Indian Nations and their citizens by confirming tribal authority over regulation of commerce on Indian reservations. This includes preempting dual taxation and confirming tribal jurisdiction over on-reservation businesses, as in the current Hopi and Zuni rule in 25 C.F.R. § 141.15.

The current Indian trader regulations are outdated, with the general regulations dating from 1957 and the Navajo, Hopi, and Zuni regulations dating from 1975. Multiple reasons support these critical updates to federal Indian trader regulations. These include the following:

- The current regulations pre-date the current federal policies of self-determination and self-governance, and should be updated to better reflect decades of federal policy development that advance tribal self-governance and self-sufficiency. Updates should support tribal authority to control and regulate the use of tribal lands, and the ability to fund the exercise of such tribal authority.
- The Navajo Nation Trust Land Leasing Act of 2000 (“Navajo Leasing Act”), the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (“HEARTH Act”), and the 2012 update of the BIA’s leasing regulations for Indian lands all reflect the federal government’s strong interest in promoting economic development, self-determination, and tribal sovereignty. Also, the BIA’s subsequently has approved the Navajo Nation General Leasing Regulations under the Navajo Leasing Act to strengthen and protect the Navajo Nation’s leasing authority, including regarding federal preemption of state and local taxes. *See* 80 Fed. Reg. 69692 (Nov. 10, 2015). Updates to the Indian Trader regulations should complement these prior efforts to support tribal sovereignty, self-determination, and economic development.
- While Indian Nations and their citizens currently generally do not face quite the same problems of monopolistic, abusive Indian trading posts as were common 70 or even 40 years ago, limited retail opportunities still exist on most reservations, often with higher prices than found outside reservations. On-reservation price differences are attributable in part to dual taxation and limited economic development in Indian country. These price differences impose undue burdens on all reservation residents. Dual taxation also unduly limits the ability of tribal governments to assess and collect taxes necessary to provide essential government services to all reservation residents. Updates to the Indian trader

regulations therefore should support the ability of federal and tribal government to reign in both opportunism that exploits tribal communities, and unnecessary burdens that undermine economic development in Indian country. Updates also should facilitate collection of tribal taxes that support tribal government services.

- The evolving jurisprudence of the Supreme Court over the last 40 years has unduly hampered the ability of tribal governments to protect the safety of their citizens from misconduct by those who come onto Indian reservations to conduct business. This situation is especially acute after the recent *Dollar General* case. Updates to the Indian trader regulations can enhance tribal authority to protect tribal citizenry.
2. **Are there certain components of the existing rule that should be kept, and if so, why?**

Yes, several provisions should be kept. These include provisions which currently only apply to Navajo, Hopi, and Zuni that require tribal approval of all licenses and renewals. 25 C.F.R. §§ 141.6(b), 141.9(d). DOI also should retain regulations that confirm tribal authority to assess and collect fees or taxes from reservation businesses, and to enforce those regulations or consistent tribal regulations. *Id.* §§ 141.11(a)-(b). Another provision of the current regulations that should be kept, but applied to all Indian Nations, is the federal mandate for consent to tribal jurisdiction that currently only applies to the Hopi and Zuni reservations. *Id.* § 141.15. This is needed for the reasons explained above, as highlighted by the Supreme Court decision in *Dollar General*. In addition to the confirmation of consent to tribal jurisdiction, there should be a grandfathering clause for currently valid licenses that the DOI or the BIA has issued under Parts 140 or 141, subject to renewal provisions discussed below.

Otherwise, as a general matter, updated federal Indian trader regulations should defer to tribal trader regulations where they exist and only provide a general backstop of federal regulation and licensing where tribal regulations do not exist. This general federal backstop may appropriately address various matters that otherwise should be addressed in tribal regulations. This may include prohibitions on political contributions, gambling, retaliation, withholding mail, and trade in antiquities or imitation Indian crafts. *See, e.g.*, 25 C.F.R. §§ 141.25-.30.

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

DOI should revise the current federal Indian Trader regulations to require that persons who desire to conduct trade in Indian country or renew such a license after a set, limited term submit information required to perform a background check by either the BIA or an Indian Nation pursuant to its laws. An appropriate term may be every two years. Required information to submit must include a Federal employer identification number, a tribal or state registration number if applicable, insurance or bonding information, and copies of all federal, tribal, state, county, or city licenses currently held by the applicant and business, and information on affiliations with any other businesses. Also, license applicants must disclose violations of business licenses and enforcement actions taken by any federal, tribal, or state regulatory

authority for trade-related activity, as well as any pending lawsuits involving the person or the business, and any outstanding tax liens and other unsatisfied judgments. All this will ensure that persons who desire to start or continue trade in Indian country are reputable.

Moreover, the federal Indian trader regulations must be revised to require maintenance of a tribal trader license where applicable to maintain a federal trader license. This should include automatic termination of a federal trader license upon revocation, lapse, or termination of an applicable tribal trader license. As with recently revised BIA leasing and right of way regulations, the federal Indian trader regulations should defer to the maximum extent possible to tribal enforcement of tribal trader regulations and allow tribal administration of the revised federal regulations. *See, e.g.,* 25 C.F.R. §§ 162.014(b), 162.016, 162.018, 169.8, 169.9, 169.107(a). Implementation of these mechanisms will enable Indian Nations to address traders who violate federal or tribal laws, because Indian Nations are in the best positions to exercise governmental authority over their territories.

4. How do Tribes currently regulate trade in Indian Country, and how might revisions to 25 CFR part 140 help Tribes regulate trade in Indian Country?

The Navajo Nation currently has numerous laws, which regulate trade and commerce within Navajo Indian Country. Revisions to federal Indian trader regulations should support and confirm the Navajo Nation's authority to regulate all such activities. This includes mandating consent to tribal jurisdiction, to protect the Navajo Nation and its citizens and residents, and preempting dual taxation, which seriously inhibits economic development and impairs essential Navajo tax revenue.

Current Navajo trade regulation includes the following:

- Navajo Business Opportunity Act, 5 N.N.C. Ch. 2 - requires that business entities within the Navajo Nation issuing requests for bids provide certified Navajo-owned businesses first opportunity to bid on projects for purchase of materials or services.
- Navajo Nation Business Site Leasing Act, 5 N.N.C. Ch. 11 - Governs new business site leases on previously withdrawn or leased land, including but not limited to: industrial parks, shopping centers, trading post sites, and other commercial leases.
- Navajo Uniform Commercial Code, 5A N.N.C. - Governs the sale of goods, enforcement of contracts, remedies for breaches of contract, obligations, and liabilities of those using negotiable instruments in transactions, and procedures for a creditor to enforce security interests.
- Navajo Corporation Act, 5 N.N.C. Ch. 19 - Provides for registration of corporate entities requesting permission to conduct business or non-business transactions within the Navajo Nation.
- Navajo Business and Procurement Act, 12 N.N.C. Ch. 15 - Prevents the Navajo Nation from issuing any lease permit or lease renewals, contracts, loans, or money to any person

or business entity who owes outstanding debts to the Navajo Nation, has failed to meet a material or contractual obligation to the Navajo Nation, has failed to comply with applicable laws, or has been found to have engaged in unlawful or criminal offenses within the previous ten years.

- Fuel Distributors Licensing Act, 24 N.N.C. - Requires that all businesses distributing fuel within the Navajo Nation obtain a license from the Navajo Tax commission.
- Navajo Preference in Employment, 5 N.N.C. § 300-319 and 15 N.N.C. Ch. 7 - Expands and Protects employment and training opportunities for Navajo workers within the Navajo Nation and subjects construction contractors to payment of the Navajo Nation prevailing wage rate for non-federally financed construction projects.
- Repossession of Personal Property, 7 N.N.C. Ch. 5 - Provides legal procedures for repossession of personal property specific to the Navajo Nation.
- Business License Regulations, promulgated per 2 N.N.C. § 501(B)(2)(a) - Provides for licensing those who conduct business within the Navajo Nation, and a mechanism to obtain, monitor, and analyze commercial and economic activity for consumer protection, economic development planning, and policy development.

Among other things, the Navajo Business License Regulations provide for revocation of such licenses after notice and an opportunity to be heard for any of the following reasons:

1. Fraud, misrepresentation or incorrect statement contained in the application for license;
2. Fraud, misrepresentation or incorrect statement made in the course of carrying on the business or trade;
3. Any violation of those Regulations or any other Navajo Nation law or policies;
4. Conviction of a crime of moral turpitude;
5. Conducting business or trade in an unlawful manner or in such a manner as to constitute a breach of the peace or constitute a menace to the health, safety or general welfare of the public;
6. Unconscionable and other unfair business practices;
7. Abandonment of the business for which the license was issued; or
8. A determination of ineligibility as provided by the Navajo Business and Procurement Act, 12 N.N.C. § 1501 *et. seq.*

Also, while the Navajo Office of Hearings and Appeals exercises final review over any protests for denial, renewal, or revocation of a business license, many other provisions of Navajo law are supplemented and enforced by the existence and operation of the Navajo Nation courts, “an experienced court system in which trained trial and appellate judges adjudicate thousands of cases per year.” *Means v. Navajo Nation*, 432 F.3d 924, 933 (9th Cir. 2005). Revisions to federal Indian trader regulations should confirm the authority of Indian Nations to regulate traders through all such manner of tribal laws and institutions.

5. What types of trade should be regulated and what types of traders should be subject to regulation?

All types of trade and traders on Indian reservations should be subject to regulation by Indian Nations or, in the absence of applicable tribal regulations, federal Indian trader regulations. This should include not only trade and commerce in the traditional and broad sense of selling goods and services as defined in Section 140.5(a)(1) of the existing rule. Consistent with the broad understanding of Congress through multiple enactments going back over 200 years, this should include all business and commerce with Indians and Indian Nations. This should include confirmation of tribal authority and preemption of dual taxation over such areas as commerce as mineral extraction, forestry, and agriculture. The only entities or businesses that should be excluded from such regulations are those owned or operated by Indian Nations or their wholly owned enterprises or federal or state governments.

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

The business sector will look to a variety of factors to guide decisions on whether the anticipated return on investment for a given business opportunity supports the proposed investment. This includes market demographics, work force capacity, competition, available infrastructure, and tax and other regulatory burdens. The primary impediment to robust investment in Indian country remains the prospect of dual taxation, as it impacts all of these issues, directly or indirectly. An update to federal Indian Trader regulations that bears these considerations in mind will promote economic viability and sustainability in Indian Country.

To be clear, dual taxation drives away business. It increases the costs of doing business in Indian country and siphons revenues generated in Indian country to areas outside Indian Country. It also impairs the ability of Indian tribal governments to develop and maintain infrastructure, education, and job training opportunities, as well as law enforcement, first responder and other public safety services. This makes the infusion of capital into Indian country less attractive. Even the prospect of a future dual taxation situation where one does not currently exist can discourage investment in Indian country.

Furthermore, when facing the risk of dual taxation, some Indian tribal governments out of necessity will make the difficult decision to impose a nominal tribal tax or to completely forgo collecting any tribal tax. For example, the Navajo Nation provides for an express tax credit under its Business Activity Tax ("BAT") specifically related to the sale of coal severed from the Navajo Nation reservation. Under this provision, coal mining companies receive a credit against their Navajo BAT liability for up to 25% of the amount of similar state taxes that are imposed and paid. This is exactly the type of instance where the Nation is foregoing its own tax revenue for activity conducted on its territory, with respect to Navajo natural resources, in order to avoid a dual taxation burden that, if fully imposed, could drive business off the territory or out of business. The Nation has done so in order to accommodate the State's ability to impose its own tax. Under either scenario, activity in Indian country is generating the tax revenue, but Indian country is not benefiting at the level that it is capable of or should, or at which other sovereign governments would normally achieve. Some states allocate tax dollars for on-reservation services. However, the amount generated by a state's imposition of taxes on-reservation generally substantially exceeds the amount the state allocates for on-reservation services. The

amount of funding necessary to meet core tribal governmental needs continues to be elusive. The end result is Indian country falls further behind.

To successfully promote economic viability and sustainability in Indian country, it is imperative that revisions to the Indian Trader regulations include provisions expressly mandating that all Indian Traders must adhere to tribal law and consent to tribal court jurisdiction concerning their on-reservation activity. The language in 25 C.F.R. Section 141.11 that does not “preclude” imposition of tribal fees or enforcement of tribal regulations is insufficient, as made clear in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 & n.10 (2001). Therefore, the updated language should be similar to what is required presently for Hopi and Zuni traders under 25 C.F.R. Section 141.15, by conditioning authority to conduct business on submission of disputes arising under tribal law to tribal courts. The regulation revisions should provide clarity and certainty as to taxation of commerce, by expressly preempting state jurisdiction and taxation rather than merely providing for applicable federal law, which under recent case law means particularized balancing of federal, tribal, and state interests. Any regulatory updates also should protect existing and promote future tax, regulatory, and services agreements that Indian Nations may choose to negotiate with state and local governments.

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 such services?

The Navajo Nation has a comprehensive tax code, primarily codified in Title 24 of the Navajo Nation Code. The Nation also has established the Navajo Tax Commission to oversee Nation tax administration, and presently imposes nine taxes: Possessory Interest, Oil & Gas Severance, Business Activity, Sales, Hotel Occupancy, Tobacco Product, Fuel Excise, “Junk Food” and Liquor. In FY 2015 and FY 2016, these taxes generated more than \$115 million and \$112 million, respectively, in governmental revenues. For recent tax collection totals publicly reported by the Navajo Tax Commission, see <http://www.navajotax.org/>.

The Navajo Nation designates some of its tax revenues directly for specific tribal government funds, with the balance of tax revenues allocated to the Nation’s general fund. For example, a portion of Sales Tax revenues is allocated by statute to the Nation’s Judicial/Public Safety Facilities Fund, the Nation’s Scholarship Fund, the Nation’s Economic Development Fund and to the Nation’s Sales Tax Trust Fund. *See* 24 N.N.C. § 620. In turn, Hotel Occupancy Tax revenues are allocated to the Navajo Nation Tourism Fund, *see* 24 N.N.C. § 714, and a portion of Fuel Excise Tax revenues are allocated to the Navajo Nation Road Fund, *see* 24 N.N.C. § 923. Revenues generated by the Healthy Diné Nation Act of 2014 are allocated to the Nation’s Community Development Wellness Projects Fund, *see* 24 N.N.C. § 1020, and revenues generated by the Liquor Tax are allocated to the Nation’s Division of Public Safety Alcohol Tax Fund, *see* 24 N.N.C. § 1213. Additionally, Nation law provides for local governments of the Nation to impose local components of some Nation taxes under certain circumstances.

Whether allocated to special funds or allocated to the Nation’s General Fund, taxation revenues support day-to-day governmental activities and operations of the Nation. This includes infrastructure, public safety (law enforcement, fire, emergency medical, health, and food service inspection), schools, health care, legislative and judicial services, economic development, community development, human resources, and natural resources management, among other essential governmental services. Individuals and entities who are located within, or who conduct

business on, the Navajo Reservation, whether they are Navajo citizens or not, all benefit from these services, both directly and indirectly. The Nation is without question the primary provider of governmental services to all residents of the Reservation.

Unfortunately, the Navajo Nation cannot rely more on tax revenues to provide financial support for essential governmental services because of the limits from dual taxation. This confirms the need for updating federal Indian trader regulations to confirm tribal regulatory authority and to preempt state and local jurisdiction and taxation.

Conclusion

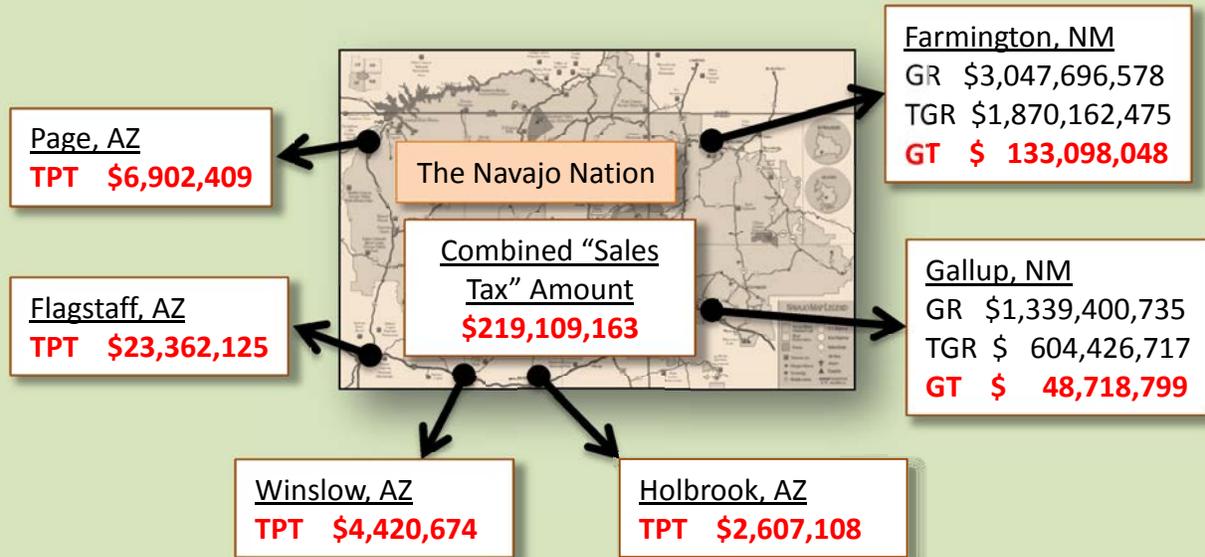
As explained here, the Navajo Nation strongly supports revising all federal Indian trader regulations to confirm tribal regulatory, judicial, and taxation authority over all on-reservation trade and commerce. This is essential to update those regulations to reflect application of the broad historic governing Indian trader statutes in a modern context, including due respect and support for tribal self-determination and economic development. Thank you very much for considering these comments. If you have any questions regarding these, please contact Jackson Brossy, Executive Director Navajo Nation Washington Office at (202) 682-7390.

Respectfully,

THE NAVAJO NATION



Russell Begaye, *President*



NAVAJO
NATION
DED

NAVAJO ECONOMIC DATA BULLETIN 002-0512



Consumers pay millions in sales tax at border towns. Northwestern NM reaps greatest benefits.

Navajo Nation DED Support Services reviews 2011 GT & TPT collected at border towns around Navajo.

Introduction

In numerous policy discussions on the Navajo Nation, one question that often comes up: How much do consumers pay in sales tax at border towns located around the Navajo Nation?

The answer to the question is basically analyzing all tax data for the selected towns and cities for a specific year. The more difficult question is how much of this is paid by Navajo consumers. This is difficult to find because there has been no direct measurement of how many Navajo consumers pay sales tax at selected border towns. That is, there has been no survey assessing such an inquiry or otherwise. Despite this challenge, one can still use anecdotal data and information to draw inferences from sales tax paid collectively at selected border towns.

The Division of Economic Development Support Services has explored this situation. Based on research, interviews, and analysis, the results are provided herein.

In March 2012, contacts with New Mexico and Arizona officials were made to obtain 2011 tax data. Respective websites were also used to extract tax data and information. Only those prominent towns or cities that border Navajo Nation were reviewed. Interviews were also conducted with McKinley County, NM Department of Finance and AZ Department of Tax Revenues.

Highlights

- In 2011, about \$219,109,163 of sales tax were collected by New Mexico and Arizona from selected border towns located on the fringes outside of the Navajo Nation!¹
- Farmington, NM collected a gigantic amount of \$133 M in sales taxes in 2011.
- Gallup, NM followed next with a collection of over \$48 M, yet that amount is only 36% of Farmington's collection.
- The selected Arizona cities and towns bordering the Navajo Nation collectively amassed a total of only about \$37.3 M in 2011.

¹ Source: Gross Receipts Tax data was obtained from New Mexico Department of Revenues (03/2012). Transaction Privilege Tax data was obtained from Arizona Department of Tax Revenues (04/2012).

- Farmington and Gallup, NM together collected over \$181.8 M in sales taxes.

Sales Tax

There are different ways that states across this country collect sales tax imposed upon products or services procured. There are usually other additional taxes collected as tax revenues for states. The Navajo Nation is not any different. Currently, there is a 4% sales tax imposed on products and services procured on the Navajo Nation.

In New Mexico, Gross Receipts Tax (GT) is imposed on taxable gross receipts (GR) as sales tax. For example, in 2011, there was a Gross Receipts total of \$3,047,696,578 for Farmington, NM. Of this amount, \$1,870,162,475 was taxable resulting in sales tax revenues of \$133,098,048. States that collect taxes using GT usually hold the businesses accountable for collecting the taxes.

Some states use Transaction Privilege Tax (TPT) as a form of sales tax such as Arizona. For instance, in 2011, Page, Arizona collected \$6,902,409 in TPT. States that collect taxes using TPT usually hold the consumers accountable for paying the taxes, yet almost always the businesses collect the taxes as a courtesy to the state.²

Sales Tax Collection Comparison

If one reviews the sales tax collected from selected municipalities around the Navajo Nation, one can see there are two big generator cities in northwestern New Mexico and a few minor generator cities in northeastern Arizona. Figure 1 displays the taxes collected at selected locations, which included Farmington and Gallup in New Mexico as well as Holbrook, Winslow, Flagstaff, and Page in Arizona.

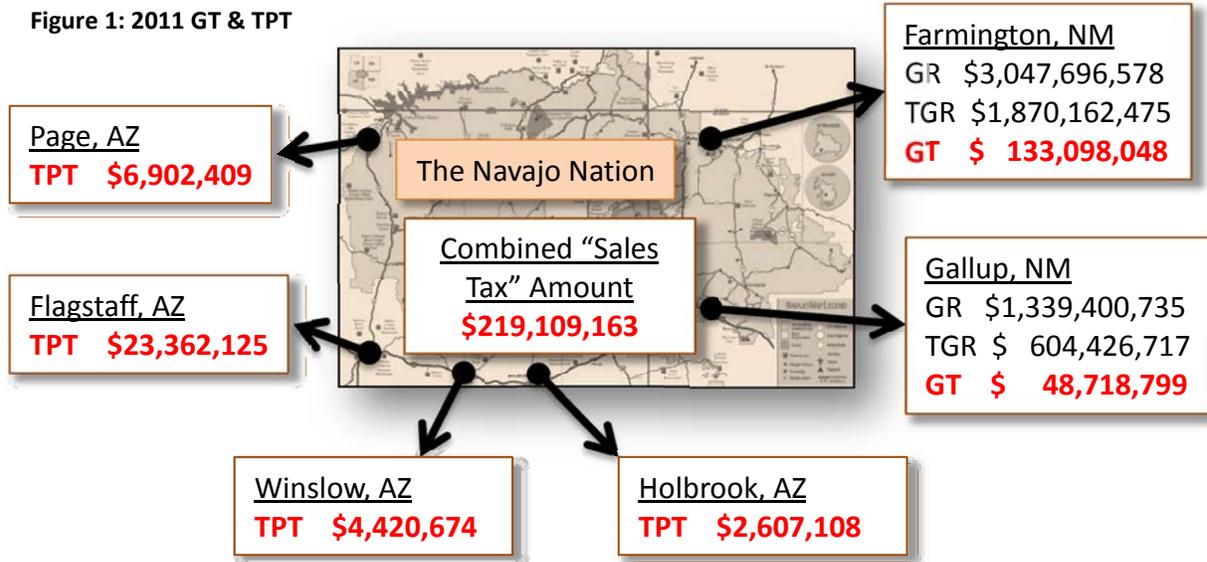
Farmington, NM collects an enormous amount of sales tax for procured products and services. Farmington has a population of about 45,877, similar in size to Roswell, NM with a population of 48,366.³ Farmington and Roswell enjoy diversified business dynamics, from retail to agriculture to energy development. Similarly, both cities enjoy an influx of shoppers from out of town.

² Interview, Elaine Smith, AZ Depart. of Tax Revenues, 03/21/12.

³ 2010 US Census Bureau (within city boundaries).

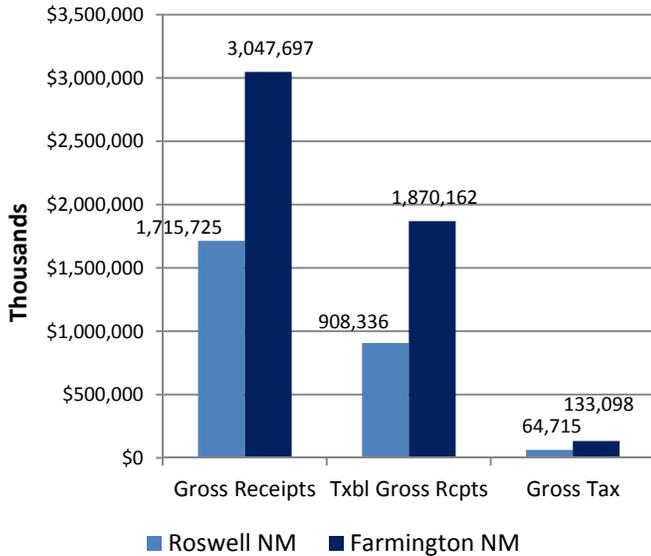
Navajo Economic Data Bulletin 002-0512

Figure 1: 2011 GT & TPT



Yet the economics of the two cities are very different! Farmington had an extremely vibrant gross receipts business activity of about \$3.04 B in 2011.

Figure 2: Farmington v. Roswell - 2011 GR (000)



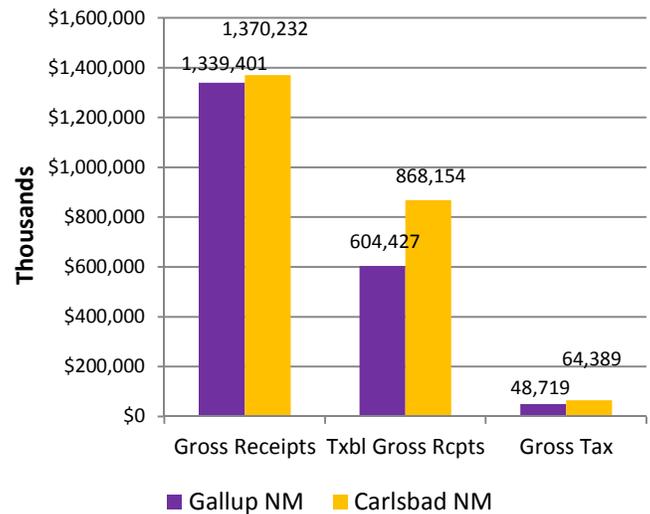
Roswell had gross receipts business activity of \$1.72 B, about 56% of Farmington's GR (See Figure 2).

In a similar comparison, Gallup, NM with a population of 21,678 is about the size of Carlsbad, NM which has a population of 26,138.⁴ Both cities enjoy commerce from retail, tourism, and major highway markets (See Figure 3).

⁴ 2010 US Census Bureau (within city boundaries).

In 2011, both cities had similar economic data: gross receipts activity of about \$1 B. Carlsbad had a higher gross tax. Gallup had medical and food deduction of about \$118 M compared to Carlsbad at about \$82 M, which resulted in less taxable gross receipts for Gallup.

Figure 3: Gallup v. Carlsbad - 2011 GR (000)



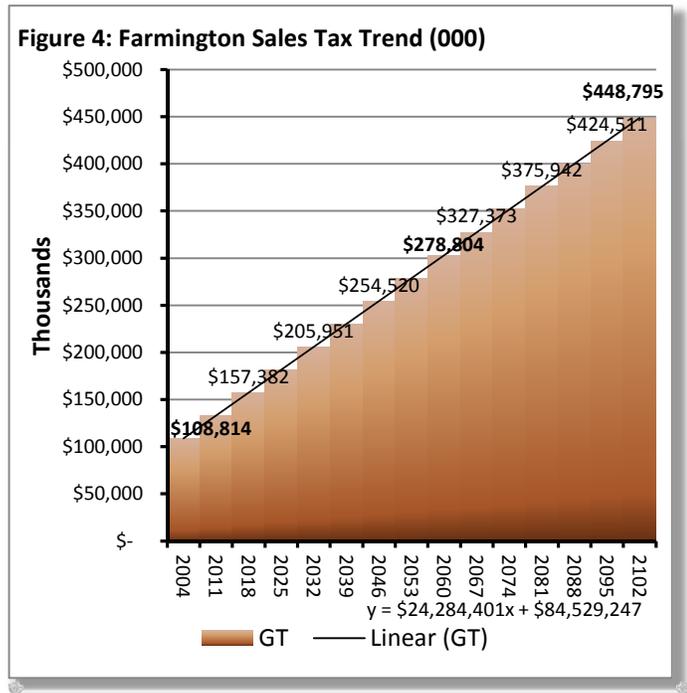
Sales Tax Trends

A cursory review of sales tax collection trending at both Farmington and Gallup, NM reveals phenomenal upward trends. If projected out several years, the collection is going to be astronomical for both cities.



The idealistic trend line projections are provided only to encourage discussion on sales tax impact.

For Farmington, NM, sales tax collection per year went from \$108.8 M in 2004 to \$133.1 M in 2011 (See Figure 4). That's an increase of 18.3% in only 7 years! Projected out, the sales tax collection will approach a



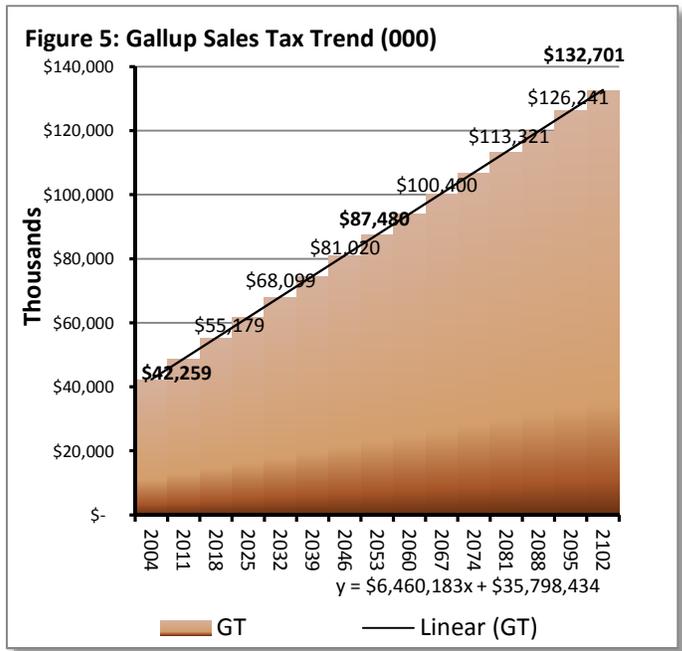
whopping \$278.8 M in 2053.

For Gallup, NM, sales tax collection per year went from \$42.2 M in 2004 to \$48.7 M in 2011 (See Figure 5). That's an increase of 13.3% in 7 years. Projected out, the sales tax collection will approach a remarkable \$87.5M in 2053. Although not as dramatic as the projected tax collection for Farmington, Gallup will probably continue to increase tax collection at a significant rate.

Tax Revenues Distribution

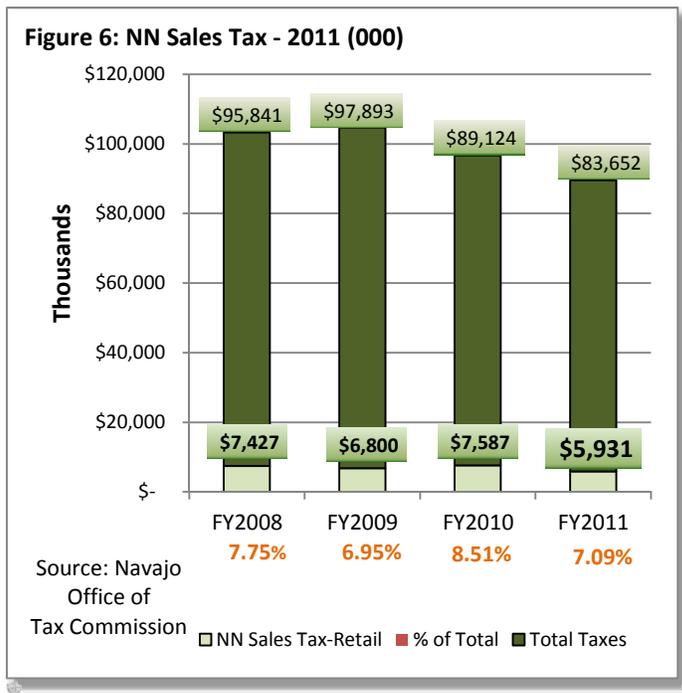
Many states have tax revenue sharing laws and regulations as a way to assist local communities using these funds for services, economic development, or public safety. State laws mandate different tax revenue sharing schemes.

For Arizona, a tiered tax revenue sharing scheme is used to assist towns, counties, and cities to address public services like many states. However, there is also an Arizona law that prohibits the state from redistributing tax revenues to communities located on Native American reservations or tribal lands.



Navajo Nation Sales Tax

What is the situation with Navajo Nation sales tax? How much is collected through the 4% sales taxes paid on sales made on the Navajo Nation? According to Office of Navajo Tax Commission, the total sales tax collected in 2011 was \$5,930,616 (See Figure 6).



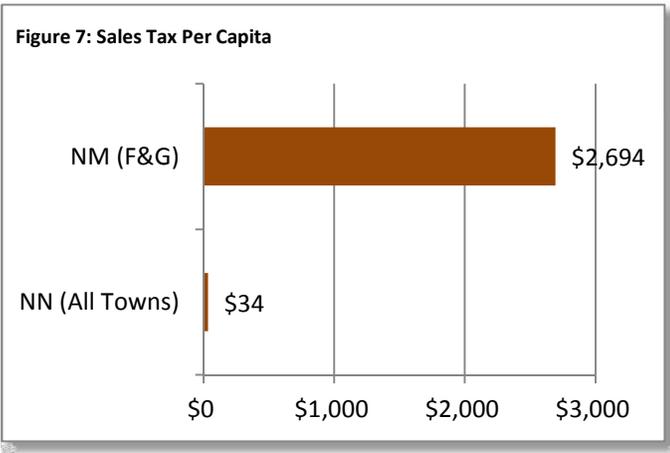
Looking at Navajo Nation sales tax collection over about a decade, there was an increase from 2001 to 2009, then declined to 2011. There was \$38.1 million of retail sales tax revenues in FY2001 to a high of \$97.9

Navajo Economic Data Bulletin 002-0512

million in FY2009, then declined to \$83.7 million in FY2011 (See Figure 6).

Per Capita "Sales Tax"

In 2011, the Navajo Nation collected sales tax of about \$5.9 M from businesses (See Figure 6) compared to New Mexico which collected about \$182 M from Gallup and Farmington businesses. Using an estimated population of 173,000, the Navajo Nation had a Sales Tax Per Capita of \$34 compared to New Mexico's Sales Tax Per Capita of \$2,694 (from Gallup and Farmington gross receipts). Put differently, New Mexico collected sales tax from only 2 cities about 79 times⁵ that of the Navajo Nation collecting from all towns (See Figure 7).



Consumer Survey

Reviewing original survey data obtained from Navajo consumers in January 2012⁶, many of the surveyed consumers had indicated they shopped off Navajoland, and consequently, paid sales tax. About 800 Navajo consumers from the 110 chapters participated.

They indicated they shopped at border towns for food and clothes, especially at Farmington and Gallup, NM. Asked where they shopped for food, over 60% of them indicated they shopped at groceries stores located only off the Navajo Nation such as Walmart, Safeway, Albertson's, Fry's, or Sam's Club. About 21% of the consumers indicated they had shopped at

⁵ 2,694/34 = 79

⁶ "Shopping Preference of Navajo Consumers," Navajo Economic Data Bulletin 001-0212, Navajo Nation Division of Economic Development, January 2012.

grocery stores located on the Navajo Nation such as trading posts, Basha's, or Local Store. Data on purchases of clothes suggested no trends.

Northwest NM County Data

Looking at county data, there is significant economic activity for both McKinley County and San Juan County. For McKinley County in 2011, the gross tax collected was \$82,255,303 (See Figure 8). Gallup was 59% of McKinley County GT. For San Juan County in 2011, the gross tax collected was \$247,305,266 (See

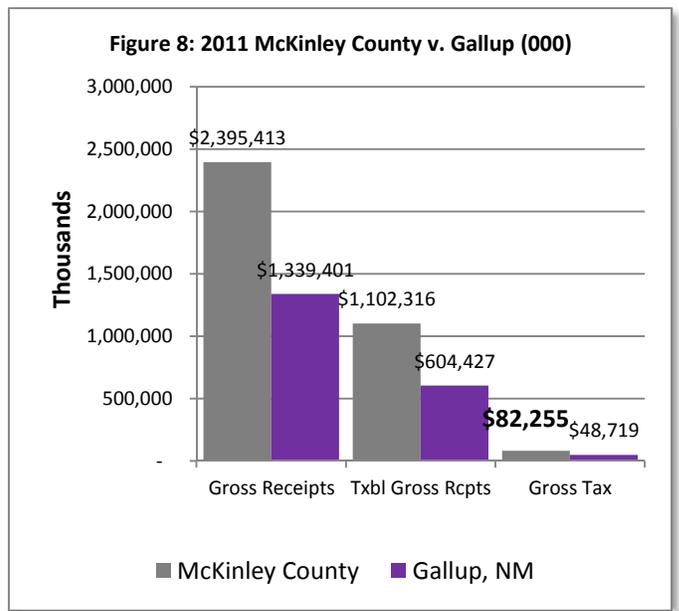
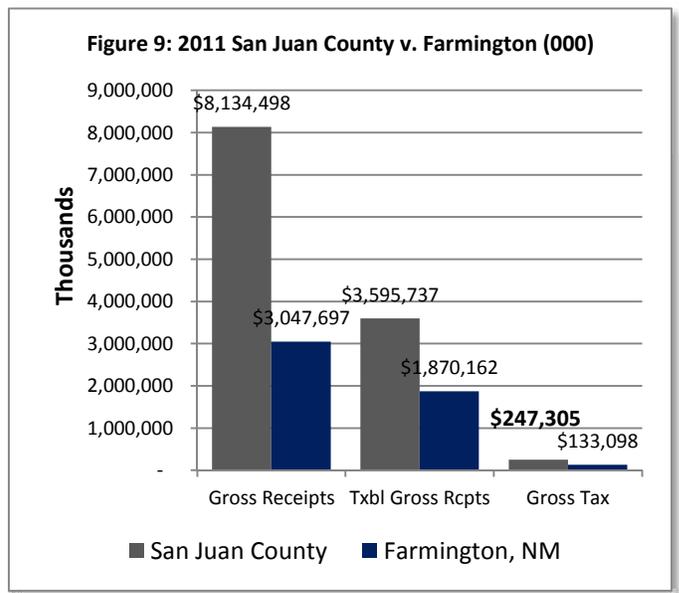


Figure 9). Farmington was 54% of San Juan County GT.



Policy Implications

Sophisticated Navajo Tax Policy

Based on changing economics on and near the Navajo Nation, policymakers should consider debating and adopting a more comprehensive, fair tax policy. For instance, a tax policy should not be changed only in reaction to current populist ideas or a “crisis.”

Navajo Nation should consider establishing progressive tax policy in assessing tax valuations and executing fair taxes in commerce, business-to-business, government enterprising, individual income tax, and other means of tax revenues.

Business Friendly Tax Incentives

Businesses located on the Navajo Nation confront substantial challenges. The Navajo Nation should encourage aggressive development of entrepreneurship and small businesses to spur growth, commerce, and generation of appropriate tax revenues.

The Navajo Nation should consider establishing Navajo business tax credits for businesses located on Navajo tribal lands. As well, businesses that offer services or products to Navajo chapters should be encouraged with business-friendly tax benefits.

Coordination Policy

The Navajo Nation economic landscape is dotted with numerous key players which each has a certain mission in achieving goals and objectives in a specific industry. For instance, the latest Navajo Nation enterprise, Navajo Gaming, has implemented its strategies to establish the Navajo Nation as a prominent player in the gaming industry. The enterprise has built several casinos which created or established jobs, contracts, and revenues.

Still there is a critical need for key players of economic development on the Navajo Nation to coordinate, plan, and collaborate on economic initiatives, projects, and joint ventures. If a mandated coordination policy was implemented, better communication, collaboration, and execution could be achieved for the Navajo Nation.

General Conclusions

- Disproportionately, Navajo Consumers migrate from Navajo Nation communities located in Arizona to either Farmington or Gallup, NM to purchase food, clothes, ranch feed & supply, and services. Collectively with Navajo Nation-based businesses and central government, these consumers spend enormous amounts of funds for products and services, as well as paying sales tax that eventually end up at coffers of neighboring state governments as tax revenues.
- There is substantial money being transacted at border towns around the Navajo Nation. If even 10% of the sales tax was “captured,” the Navajo Nation could benefit from tax revenues estimated in the millions (i.e., \$20 M) per year.
- There is currently no sustaining economic policy that “captures” the substantial money being transacted at border towns. An aggressive economic policy, coupled with a progressive tax policy, would offer opportunities for the nation.
- The enormity of the sales tax collection from border towns around the Navajo Nation behooves all tribal divisions, offices, and programs to reassess their activities to support collective goals and objectives that result in economic growth and development ON the Navajo Nation.
- Burdensome program requirements that stifle economic ideas, initiatives, and projects should be eliminated or severely abridged so that economic policy of growth and development is realized. Those programs that continue such economic obstacles should be assessed for accountability and viability.
- Funding through the annual Navajo Nation budget appropriations process should be rigorously reassessed so that enough funding is allocated for formidable economic development and strategy.
- Understanding data and statistics on economics of the Navajo Nation provides the impetus for making informed economic decisions and policies. Use of data for making decisions must be institutionalized.
- Leadership that understands and appreciates the use of data and statistics for key decisions is critical for establishing a sustainable economy of the Navajo Nation.
- Technical capacity of personnel must be elevated at key Navajo Nation entities (i.e., divisions, offices, enterprises) so that sound, realistic economic, tax, and operational policies are realized!

Economic Data and Tools

This Economic Data Bulletin was completed under the auspices of Division Director Albert Damon, Jr. and Chief Financial Officer Raymond Nopah. Lester Tsosie, MPA, MBA authored this Economic Data Bulletin. More bulletins on financial, operational, managerial, and strategic development will be published.



Exhibit C
Comparison of Navajo Nation vs. Border Towns
Via IMPLAN software

	Navajo Nation	Border Towns
GRP	6,124,036,222	9,759,591,773
Total Personal Income	7,558,440,448	6,558,747,312
Total Employment	74,107	124,322
Number of Industries	3,542	1,459
Land Area	33,804	8,127
Population	218,648	191,380
Total Households	64,626	67,936
Average Household Income		
	Navajo Nation	Border Towns
Employee Compensation	2,832,070,172	5,017,414,313
Proprietor Income	177,784,415	443,830,580
Other Property Type Income	2,566,178,834	3,395,437,830
Tax on Production and Import	548,003,070	902,909,049
Total Value Added	6,124,036,491	9,459,591,772
	Navajo Nation	Border Towns
Household Demand	5,026,850,579	6,327,108,752
State/Local Government	1,331,164,906	2,124,876,820
Federal Government	1,451,651,042	1,179,130,899
Capital	876,655,179	1,890,866,963
Exports	7,540,987,636	9,676,174,945
Imports	-9,670,892,067	-10,944,294,808
Institutional Sales	-432,380,800	-494,271,817
Total Final Demand	6,124,036,475	9,759,591,754