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OFFICE OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS
TRIBAL CONSULTATION ON
WHETHER/HOW TO REVISE
25 CFR 140 - TRADERS WITH INDIANS
Taken March 14, 2017
Commencing at 8:43 a.m.

REPORTED BY: DAWN WORKMAN BOUNDS, CSR, CLR

1 Proceedings taken March 14, 2017,
2 commencing at 8:43 a.m., at the Mystic Lake Casino,
3 2400 Mystic Lake Boulevard, Prior Lake, Minnesota, before
4 Dawn Workman Bounds, Certified Shorthand Reporter and
5 Notary Public of and for the State of Minnesota.

6 *****
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1 P R O C E E D I N G S

2 MS. APPEL: Welcome to the tribal
3 consultation on our Indian trader regulations. My name
4 is Liz Appel. I'm the director of the Office of
5 Regulatory Affairs and Collaborative Action for Indian
6 Affairs at the Department of the Interior.

7 And this is...

8 MR. PORTER: My name is Jim Porter. I'm
9 with the Office of the Solicitor.

10 MS. APPEL: And since we have a small group
11 today, why don't we just go around and introduce
12 ourselves.

13 MR. QUADE: Ron Quade, Tribal Secretary,
14 Sokaogon Chippewa Community.

15 MR. PEARMAN: My name is Seth Pearman,
16 P-E-A-R-M-A-N, and I'm the tribal attorney for the
17 Flandreau Saute-Sioux Tribe.

18 MS. JOHNSON: Kim Johnson, and I am the
19 tribal paralegal for the Flandreau Saute-Sioux Tribe.

20 MS. APPEL: Thank you.

21 So we're meeting today to discuss the
22 possibility of updating our licensed Indian trader
23 regulations. You probably saw on December 8th of last
24 year we published an Advanced Notice of Proposed Rule
25 Making, which we call an ANPRM. And in that we asked to

1 get input on whether to update 25 CFR Part 140, which is
2 the regulation addressing licensed Indian traders.

3 And this ANPRM was really a response to
4 proposals and inquiries the department has been receiving
5 over the past year from tribes and tribal organizations
6 requesting that we revise and update Part 140. So we are
7 at the very early stages. We haven't drafted any
8 revisions because we first want to hear from tribes on
9 whether to leave the rule as it is, repeal it, or revise
10 it; and we're also interested in anyone else's comments.

11 And if the answer is that we should revise
12 the regulations, what would those revisions look like?
13 And our public comment period is open until April 10th, I
14 believe.

15 So just a little bit of background. Part
16 140 governs trade occurring on Indian reservations, and
17 the regulation is -- Indian reservations -- reservations,
18 not regulations. So Part 140, the regulation, is based
19 on the lesser known Indian trader statutes, and the most
20 recent of those statutes was passed in 1903, and they
21 sought to protect tribes from unlawful traders on the
22 reservations.

23 The regulations currently envision a
24 framework where BIA would issue licenses to anyone who
25 wants to do business on a reservation, and the department

1 recognizes that tribes fully regulate businesses
2 operating within their boundaries currently. And this is
3 just a testament to how old the Part 140 regulations are.
4 They were first published in 1957, revised in 1965, and
5 modified in 1984 in a piecemeal fashion. So it's about
6 time that we take a look at them.

7 So our goals in looking at whether and how
8 to revise Part 140 are to modernize the implementation of
9 the Indian trader statutes in a way that's consistent
10 with federal policies of tribal self-determination and
11 self-government that supports current tribal business
12 practices and strengthens tribal economies across the
13 country.

14 And while we don't know -- we have a new
15 administration, we don't know what the specific
16 priorities of the new administration are for Indian
17 Country yet, but we do anticipate that taking a look at
18 this rule will align with the president's priorities for
19 economic development.

20 So you received in your packet in the
21 handouts a list of questions that we'd like you input on.
22 These are the same questions that are in the ANPRM. And
23 we'll be going through each on the questions today, but
24 briefly they address whether we should revise Part 140 in
25 full or in part and why. Federal involvement in business

1 practices and the extent to which BIA should be involved
2 in those practices. How to make sure traders in Indian
3 Country are reputable and accountable. And what type of
4 trade and who should be regulated.

5 We're also interested in learning how
6 tribes currently regulate trade occurring within their
7 jurisdictions and how revisions to this regulation could
8 promote economic viability in Indian Country and address
9 taxation issues.

10 So I mentioned we're accepting written
11 comments until April 10th. We're here today to listen
12 and get your thoughts on how to modernize the regulations
13 and promote tribal self-determination and economic
14 development.

15 So with that, I'll just open it to any
16 comments and -- general comments. And then if you don't
17 know, go through the questions and see if that prompts
18 any other thoughts.

19 Does anyone have any comments they'd like
20 to make?

21 Okay. So I know it's hard to -- this is a
22 complicated -- complicated issue, and it's sometimes hard
23 to come up on the fly with some comments. So just a
24 reminder that we are accepting written comments until
25 April 10th, so I'll go through some of the questions and

1 the background -- oh, great.

2 MR. QUADE: Like we were talking about
3 outside here, my tribe's main area of concern is the dual
4 taxation possibilities available...

5 THE REPORTER: I can't hear what you're
6 saying. I'm sorry. Can --

7 MS. APPEL: Do you have a --

8 THE REPORTER: Can you go to a mic?

9 MR. PORTER: There's a mic right beside you
10 there.

11 MR. QUADE: Okay.

12 THE REPORTER: Thank you.

13 MR. QUADE: Dual taxation --

14 THE REPORTER: Turn it on.

15 MS. APPEL: I think it's on.

16 THE REPORTER: Is it?

17 MR. QUADE: Dual taxation within the
18 tribe's boundaries we'll be looking at here.

19 MR. PORTER: So clearly that's been
20 important to a lot of the groups that we've met with. I
21 don't know how much of this discussion is in your
22 material, but we feel like there's a lot of problematic
23 case law to overcome if we want to address dual taxation
24 by means of these regulations.

25 So part of -- part of our hope is that

1 we'll get creative ideas that will help us address those
2 issues when we get good comments. So got some smart
3 people in the room. I mean, I don't know how much you
4 guys have thought about specifics to try and bring the
5 issue of dual taxation into the trader reg statutes,
6 which are not -- not obviously relevant to the dual
7 taxation problem.

8 MR. PEARMAN: Good morning. I'm here on
9 behalf of the Flandreau Saute-Sioux tribe, and we
10 appreciate the Secretary of Interior of BIA's
11 consultation today, and we look forward to some
12 meaningful conversation about Indian trader statutes.

13 As you discussed earlier, you know, these
14 were passed as a protectionism measure for tribes, you
15 know, 100-plus years ago. Since then tribes have really
16 come into being sophisticated governments that have
17 massive industry within their reservations. And I think
18 that the -- the revision of this statute is incredibly
19 timely.

20 As it is now, it's ineffective on our
21 reservation. It's not used, I don't think. And
22 obviously we're within the Aberdeen area office, but we
23 don't use the statute at all. I mean, it's --

24 MR. PORTER: Can I jump in?

25 Do any of you know of any tribes that are

1 having tribe -- traders licenses issued for them?

2 MR. PEARMAN: I don't.

3 MR. PORTER: Okay.

4 MR. PEARMAN: In fact, I've had
5 conversations with our area office stating that, you
6 know, we have a large construction and renovation project
7 on our casino, and I'd asked whether or not I could have
8 a traders license issued for our construction manager,
9 and we haven't had any movement on that.

10 But I think that if we formalize that with
11 this in mind, that perhaps our area office will issue an
12 Indian traders license, but I just don't think it's been
13 done for quite some time.

14 We're also very concerned about the -- the
15 actual regulation of trade, and really trade within our
16 reservation is regulated through business ordinances and
17 codes, in addition to our tax office, which issues
18 licenses to vendors. On the Flandreau reservation at
19 least, the majority of the business is done by the tribe.
20 You know, we don't have a lot of tribal businesses that
21 are owned by tribal members and things like that.

22 So it's really the tribe who is the
23 economic driver there. And, you know, it's different
24 throughout every reservation obviously, but I think that
25 the regulations could be drafted in a way that was

1 beneficial to each tribe.

2 I would also state that I think the -- you
3 know, we've had great success with our 638 contracts and
4 those types of mechanisms that would take the -- I know
5 that the general position of the Bureau of Indian Affairs
6 is they need health service. And utilizing those
7 contractual methods to actually run the programs
8 ourselves, we've had great success with that. We've been
9 operating under those contracts for decades. And I think
10 that a mechanism that would allow tribes and their
11 business departments to implement Indian trader licenses
12 in accordance with some federal guidelines, I think would
13 be beneficial to all of us, including timeliness of
14 getting licenses issued.

15 MR. PORTER: So you -- the tribe is
16 issuing -- or has fully developed their need for
17 regulating business on the reservation.

18 What is it you perceive would be the
19 additional contribution of having a traders license for
20 your contractor?

21 MR. PEARMAN: I think there are various
22 reasons where it would be beneficial. One would be that
23 the actual -- that the -- the licensee would, one, be
24 vetted through a process that could actually benefit all
25 tribes. I know that we set some -- some guidelines that

1 stated that, you know, you'll have to prepare a -- or
2 you'll send in a yearly audit, and you'll have to ensure
3 that you're not -- what's the list for Sam -- is it a
4 department?

5 MR. PORTER: I don't know.

6 MR. PEARMAN: There's a federal list that
7 people who can't participate in federal contracting
8 anymore if they've violated some laws. I can't remember
9 exactly what it's called, but I think it's on Sam.gov.

10 But some traditional vetting I think would
11 be beneficial so that the businesses that are truly
12 participating, commerce on the reservations are actually
13 doing good work. I think it'd also be worthwhile -- I
14 mean, we've had various litigation throughout the years
15 for vendors who -- and companies who actually weren't
16 doing good business on the tribe -- or on the
17 reservation.

18 And I think that having a mechanism that we
19 could utilize and say, you know what, you don't have a
20 traders license, you don't follow the general criteria
21 that are useful to the tribe in vetting out these
22 companies; then you therefore are in violation of
23 state -- or excuse me -- of tribal and federal law. And
24 there may be some teeth to these statutes that would
25 allow us to remedy existing situations that have been

1 tough for the tribe.

2 Also, with the -- you know, the Indian
3 commerce clause, it would make sense for the government
4 to continue to regulate commerce within Indian Country
5 and for us to therefore preempt state taxation so that we
6 can use our sophisticated tribal codes to actually
7 implement and benefit from the taxes that we are, you
8 know, paying and implementing into our tribal programming
9 that benefits tribal members themselves.

10 That was a mouthful.

11 MR. PORTER: Well, that's why you're here.

12 MR. QUADE: That was well said.

13 MR. PEARMAN: Thank you.

14 MS. APPEL: Thank you for that input.

15 And that -- that -- you touched on several
16 of the questions, I think; but the one that strikes me
17 the most, what you last said about the taxation sort of
18 relates to our last question, which is what services do
19 tribes currently provide to individuals or entities doing
20 business in Indian Country, and what role do tax revenues
21 play in providing those services.

22 So we're interested in hearing more about
23 what types of infrastructure tribes currently possess and
24 what role tax revenues play in building and maintaining
25 that infrastructure. We know that tribes provide a wide

1 range of services and infrastructure to Indians and
2 non-Indians doing businesses in Indian Country, so we're
3 interested in what types of services you offer, whether
4 it's law enforcement, health inspection, transportation,
5 or other infrastructure. And are you able to rely on tax
6 revenues to provide those services and infrastructure.

7 MR. QUADE: The Sokaogon Chippewa Community
8 in Northern Wisconsin is a very, very small reservation.
9 Tax revenue is zero. It's -- we don't have it. We don't
10 have the business on the reservation. We don't have the
11 population. Just the geographic area where we live
12 doesn't allow us to tax, for us anyway. It would be more
13 of a burden than an advantage for us.

14 MR. PORTER: What would?

15 MR. QUADE: The taxation on additional
16 businesses. We just don't have -- we don't have the
17 people for that.

18 MR. PEARMAN: I'll come a little closer
19 over here, but...

20 The Flandreau Saute-Sioux Tribe is
21 operating a tax ordinance that's I believe the 60s or
22 70s. We revised that tax ordinance quite frequently so
23 it can encounter new -- or changes in the business
24 environment and things like that.

25 In the state of South Dakota, the majority

1 of the tribes do contracting with the State. So they
2 agree on a certain amount of percentages with the state,
3 and a certain percentage of that given back to the tribe.

4 We do not do that. We implement and
5 collect our own sales taxes, and it's been fairly easy
6 for us because we have -- like I said, a majority of the
7 businesses are tribally owned, so it's beneficial for us
8 in that manner.

9 The tax revenues that we collect are
10 pivotal to our existing programming, and they directly
11 benefit tribal membership. It's -- we have substantial
12 actual litigation within the state right now. And during
13 that discovery process, we have identified all of the
14 areas in which we help not only the tribe, but visitors
15 to the reservation and the surrounding community; and the
16 results and the discovery has been overwhelming and has
17 shown that we provide tons of services.

18 Not only do we write checks to our local --
19 to our local fire department for fire trucks, we provide
20 just a plethora of things that are really beneficial to
21 the community as a whole. The tribe is a smaller,
22 land-based, you know, around 6,500 acres. So it's -- we
23 don't have an existing boundary, but we do the best we
24 can with the tax dollars that we have and the limited 638
25 contracting funds to really implement successful

1 programming.

2 MR. PORTER: To me one of the challenges is
3 going to be the fact that there's so many different
4 tribal sizes, schemes, structures. We've got two tribes
5 here, and here we've got tremendous difference in what
6 trader regulations would accomplish and how to structure
7 them.

8 So just from the mechanical aspect of how
9 to structure and revise modern useful regulatory scheme,
10 that to me seems like a big challenge. How do we make
11 this work for Navajo and Flandreau and Sokaogon Chippewa
12 and -- you know, when the reservation's in California.

13 I'm imagining a -- like a menu of options
14 that tribes -- folks can adopt on a reservation, but --

15 THE REPORTER: You need to get by the mic.

16 MR. PORTER: I'm sorry.

17 THE REPORTER: That's okay.

18 MR. PORTER: I'm imagining a menu of
19 options within the regulatory scheme that tribes then
20 could choose to adopt.

21 MR. PEARMAN: I think that makes sense.
22 When you look at like the Hearth Act and some other major
23 legislation that was passed from the Federal Government
24 to Indian Country, that's exactly what the Hearth Act
25 does; it, you know, provides a tribe the opportunity to

1 execute leases and do some other things within Indian
2 Country with less Bureau of Indian Affairs intervention.

3 And actually the -- you know, Flandreau
4 hasn't implemented the Hearth Act yet, but it's on
5 its radar, and it would like to implement soon. But I
6 believe that the tribes that hadn't been implemented
7 that -- have found very successful results.

8 So it would make sense that if the statutes
9 and regulations are written in a way that, you know, so
10 long as, you know, the tribal business corporation code
11 or the tribal tax ordinance has these certain
12 requirements, that, you know, the tribe could really
13 implement and do this themselves.

14 What I did like -- or what I do like about
15 the process is that there's still the opportunity for the
16 Federal Government to take action against somebody who
17 would be violating tribal law and the Indian Trader
18 Statute as they're written now, and I think that would be
19 beneficial to Indian Country, too, and give the tribe
20 some real authority to say, you know, this is -- this
21 kind of company has breached contracts, this company has,
22 you know, caused damage to its natural resources.
23 It's -- you know, there's a lot of things that bad
24 business practices can do to negatively impact the tribe
25 and its membership.

1 MS. APPEL: Thank you for that.

2 So let's -- let's go through the other
3 questions and see if that prompts any thoughts.

4 Starting with the first one: Should the
5 Federal Government address trade occurring in Indian
6 Country through an updated Part 140 and why?

7 We talked about this a little bit already.
8 Congress granted the department broad authority to
9 regulate trade in Indian Country and specifically the
10 Indian trader statutes provide the department with the
11 authority to make rules specifying the kind and quantity
12 of goods that may be sold to Indians and the prices at
13 which such goods shall be sold. And that's at Section
14 261.

15 And one of the sheets in your handout has
16 some excerpts from the Indian trader statutes if you want
17 to use that as a reference.

18 Section 262 allows the department to
19 establish rules and regulations governing who is a proper
20 person to engage in trade on Indian reservations for the
21 protection of Indians.

22 So we know that many tribes currently
23 regulate trades that occur within their jurisdictions
24 under tribal law and authority without federal
25 involvement. And we also acknowledge that we have a

1 trust responsibility to tribes.

2 Are there any other thoughts on how we can
3 update these regulations in a way that recognizes those
4 facts? We heard about the Hearth Act model with the
5 opportunity for federal enforcement.

6 Are there any other thoughts on that?

7 MR. PEARMAN: I'd also like to note that,
8 you know, the -- the implementation of gaming on the
9 tribes has -- you know, within Indian Country has allowed
10 tribes to license and really take a strong look at its
11 vendors and things like that in accordance with some
12 federal standards, including management agreements and
13 things that would be run through the Bureau of Indian
14 Affairs and the NIGC.

15 So I think that's another mechanism that
16 kind of shows there's less -- excuse me -- there's more
17 intervention in that type of model; but, you know,
18 really it's -- it's still one and the same. Those people
19 are still being vetted by a process. The process is in
20 place to -- you know, to protect the tribe from poor
21 business, and it's been useful to the tribes I think.

22 MS. APPEL: Great. Thank you.

23 The second question we have is are there
24 certain components of the existing rule that should be
25 kept? And if so, why?

1 So if you look through the current
2 regulation that's also in your packet, there are some
3 varied provisions in there; some that appear to have been
4 superseded by law, such as I think there's a provision on
5 gambling and on liquor. So should any of the existing
6 sections of the existing rule be kept? And this may be
7 just something to flag for you to think about for your
8 written comments. Because we wouldn't want to
9 comprehensively overhaul or repeal and then later
10 determine that there was something helpful in Part 140.

11 And in cases where the department has
12 issued Indian trader licenses, should there be some kind
13 of grandfathering clause for any valid license --
14 licenses that have been issued and are currently in
15 effect?

16 If no sections of the current Part 140 the
17 way it is now should be kept, we'd like some information
18 on why you think that is and what would an entirely new
19 rule look like. So if BIA would no longer issue licenses
20 under the rule, what would the federal involvement be;
21 what would the scope of it be; and what would that look
22 like?

23 MR. PEARMAN: Does the BIA have any
24 instances where the Indian trader licensing is being
25 utilized in the United States?

1 MR. PORTER: I know of one, one instance
2 where a tribe is getting trader licenses from the BIA for
3 businesses on the reservation.

4 MR. PORTER: The third question the ANPRM
5 poses is how can revisions to existing -- to the existing
6 rule ensure that persons who conduct trade are reputable
7 and that there are mechanisms in place to address traders
8 who violate federal or tribal law?

9 So recognizing that tribes often have
10 comprehensive schemes in place regulating traders
11 already, how could the rule ensure that there are
12 reputable traders in Indian Country and ensure that
13 violations of federal or tribal law are properly
14 addressed?

15 MR. PORTER: I think you spoke to this
16 earlier with the...

17 MR. QUADE: I think Seth spoke to this
18 earlier with -- it seems as simple as putting together a
19 vetted list that is available to the tribes.

20 That's what you're saying, right?

21 MR. PEARMAN: Yeah.

22 And just some -- some typical due diligence
23 procedures, too, of what every business will need to have
24 to obtain an Indian trader's license, too.

25 MS. APPEL: Great. Thank you.

1 Any other thoughts that you have on that
2 for the written comments would be appreciated.

3 MR. PORTER: To me there's three -- three
4 components of this discussion that we've had. The actual
5 trader regulation, which is largely what we've talked
6 about here, how we might extend this revision to cover
7 dual taxation and help with that problem.

8 The third one that we haven't discussed
9 explicitly here today is using this as a mechanism for
10 clarifying tribal court jurisdiction over businesses on
11 the reservation. To me, that kind of fits into that --
12 that specific question of how we self-govern in the
13 tribes, obtain relief against bad -- bad traders.

14 So either in discussion here or as you
15 think about it and submit in written comments, the
16 mechanism for enhancing the clarity of tribal court
17 jurisdiction. We all know the Supreme Court case
18 currently weighing on -- that they 4-4 tied in Dollar
19 General, right, that exact problem. And maybe this is
20 a -- gives us an opportunity to clarify that as well.

21 MR. PEARMAN: I think that when you talk
22 about tribal court jurisdiction, there are really a
23 couple of things that need to be kept in mind. One is
24 that when you're working with financial institutions or
25 you're issuing bonds or things like that, the majority of

1 those institutions will prefer that you are choosing
2 jurisdiction outside of the tribal jurisdiction, you
3 know, to include state and federal courts.

4 And then I think that basic contracting
5 with the tribes and with businesses you end up about half
6 and half, I guess, with businesses that are willing to --
7 to purposefully avail themselves of tribal courts and
8 some that just simply won't.

9 So pushing the statutes into a method that
10 says, you know, only tribal courts would -- would be the
11 applicable without some venue options I think would be
12 challenging for the tribes and might eliminate some
13 financing opportunities. So that would definitely need
14 to be taken into consideration, but that could be easily
15 done with just a small sense that said -- you know, or as
16 the tribe otherwise agrees to by contract.

17 MS. APPEL: Thank you.

18 So the fourth question, how do tribes
19 currently regulate trade and how might revisions help
20 regulate trade in Indian Country sounds a little
21 repetitive, but what we're trying to get at here is some
22 information from you-all and suggestions about how you
23 regulate trade currently and in recognition that there --
24 that tribes are not monolithic, and there are different
25 levels of regulation. How can the Federal Government

1 bolster those tribes that currently regulate trade, and
2 as well as those tribes that don't have any trade
3 regulations in place now?

4 And then what types of trade should be
5 regulated, and what types of traders should be subject to
6 regulation?

7 We received proposals from various tribes
8 and tribal organizations, and some suggested that trade
9 should include not only commercial activities, but also
10 mineral and energy development and any form of natural
11 resource extraction or agricultural. So we're looking at
12 what the scope of this should be.

13 Do you have thoughts on that?

14 MR. QUADE: I think that what we're talking
15 about here today, we're talking about reservations; and
16 we're thinking inside the lines of the reservation. I
17 think we can't forget the boundaries and outlying areas.
18 What affects those areas also affects us. Most of the
19 time we're landlocked, most of our reservations. So I
20 haven't heard that brought up yet, regulation regarding
21 outlying areas, you know, not just reservation lands.

22 MR. PEARMAN: I think you also have to look
23 at when you -- when we're trying to encapsulate all
24 reservations, too, we need to take a look at not only the
25 businesses that do direct contracting or business with

1 the tribes themselves, but also with tribal members. I
2 think that would be beneficial to -- to really put
3 something in place so that, you know, any operator of
4 business that is coming on the reservation that are
5 actual tribal membership would also be subject to
6 regulations.

7 MR. QUADE: I just want to go back to the
8 tribal court thing.

9 I'll be honest, our tribal court system
10 isn't that strong. We're taking steps right now to
11 strengthen our tribal court. We have problems, you know,
12 making the people within our reservation abide by our
13 laws through our tribal courts.

14 But something that Seth had spoke about
15 earlier with the tribal courts, I think if we're not
16 holding these vendors and people that are going to apply
17 for an Indian traders license accountable in tribal
18 courts, it's not going to mean much. There has to be
19 repercussions of somebody that violates an Indian trader
20 license in tribal court. It has to mean something there
21 first I think.

22 MR. PORTER: What do you mean by mean
23 something?

24 MR. QUADE: Currently, it doesn't seem like
25 penalties or sanctions or whatever is handed down from a

1 tribal court is really taken with that much credibility,
2 or I don't see a push to make people follow, you know,
3 fines or, you know, whatever sanctions are put against
4 them.

5 MR. PORTER: So even where the tribal court
6 has had a hearing and issued a ruling against, for
7 instance, a vendor, the ability of the court to -- or the
8 tribe to collect on the judgment is weak. Is that --

9 MR. QUADE: Absolutely. Yes.

10 MR. PEARMAN: Yeah, I'd definitely echo
11 that to say that, you know, we've -- we've been in tribal
12 court and had cases that we've litigated for years and
13 years, and we -- we won in our court of appeals.

14 And now after that point, we'd have to jump
15 into some other state courts or the federal court to even
16 have the honor to start to remedy the situation.

17 And it's -- it's --

18 MR. QUADE: It's costly as well.

19 MR. PORTER: Sure.

20 MR. PEARMAN: Absolutely.

21 MR. QUADE: Why go through the process to
22 start all over again?

23 MR. PEARMAN: So I would say within the
24 business realm, litigation is really the only option the
25 tribes have to -- to remedy bad business or breach of

1 contract and things like that, and it's cost prohibitive.
2 I mean, it's very expensive to have an outside law firm
3 come in and represent you to run through tribal court and
4 then have your jurisdiction immediately challenged into
5 district court and then be back in tribal court.

6 And by that time, you know, five years down
7 the line, the company could be insolvent, so there's no
8 remedy for the tribe then.

9 MR. QUADE: Which has happened to us. That
10 exact thing has happened to a company that disappeared,
11 so we're out.

12 MS. APPEL: And do you have any thoughts
13 on -- because listening, it sounds like we're talking
14 mostly about commercial business.

15 Are you also including natural resource
16 extraction or people who -- you know, coal companies or
17 grazing on your land, do you consider them to be within
18 the scope of traders; or you are thinking more just the
19 business/commercial side?

20 MR. QUADE: Everything. Everything under
21 the umbrella, it seems like -- I mean, we're in a casino
22 having this discussion. People like to suggest or assume
23 that most of our revenues do come from gaming. A lot do,
24 but that's just a starting point for other businesses.

25 MR. PEARMAN: Flandreau doesn't do a ton of

1 mineral extraction, if any; but the -- it does lease
2 out -- quite a bit of its land is a lot of farmland. And
3 I think that throwing into the lease agreement that you
4 will obtain a Indian traders license wouldn't be that
5 burdensome; and it, again, adds that second layer of
6 protection for the tribe.

7 MR. PORTER: Flandreau is one of the tribes
8 that put together the -- the wind energy consortium,
9 right?

10 Is anything being developed yet?

11 MR. PEARMAN: They worked pretty
12 tirelessly. It's the -- I believe it's the Wind Power
13 Development Authority, something like that. And
14 they've -- I believe they've had a lot of challenges
15 because most of the infrastructure in South Dakota is
16 owned by local cooperatives, so I think it's challenging
17 for them to connect to the grid, but that'd be another --
18 a method that -- you know, energy production we'd
19 definitely be taking a look at, too.

20 I think when -- when all of this is said
21 and done, if there are requirements and codes or
22 ordinances that need to be put in place, that the
23 Department of Interior should work on some model codes.
24 I think that'd be really beneficial to the tribes to
25 ensure that we're complying with the federal

1 requirements.

2 MS. APPEL: And the last part of that
3 question number 5 that I wanted to point out is whether
4 the rules should define the type of trader, as in the
5 proposals that we've received would apply to any person
6 conducting trade in Indian Country, including
7 non-Indians.

8 So do you see any reason for distinguishing
9 the type of trader in any revised Indian trader
10 regulations?

11 MR. PEARMAN: Within the regulations
12 itself, it says trading means buying, selling, bartering,
13 renting, leasing, permitting, or -- and any other
14 transaction involving the acquisition of property or
15 services.

16 That's pretty all-encompassing as it is, so
17 I think that it would really encapsulate any and all
18 trade that happens within the reservation.

19 MS. APPEL: So you would keep it that
20 broad?

21 MR. PEARMAN: Well, I think so. I mean,
22 that's -- even a small contract that -- that is initially
23 started could lead into something larger, and the
24 magnitude of that would be a lot larger, so...

25 MS. APPEL: Okay. Moving on to question 6.

1 How might revisions to the regulations
2 promote economic viability and sustainability in Indian
3 Country?

4 And how could the rule facilitate economic
5 activity and tribal economic self-sufficiency?

6 MR. PEARMAN: I know that some of the
7 companies we've worked with - and not necessarily by our
8 tribe, but some of them have taken some hits while
9 working with tribes or in Indian Country that makes them
10 somewhat reluctant to participate again.

11 I've encountered some companies like that.
12 They say, well, you know, we've worked with, you know,
13 Tribe A; and we had a bad experience there, so we might
14 not even participate again. So we'll say, you know,
15 obviously we have codes that are on our website; you
16 know, you can take a look at those.

17 And then having a -- having sustainability
18 in the economics of any area are going to directly --
19 excuse me -- are going to directly benefit trade and
20 commerce. There's no company that wants unreliable law
21 or courts or anything like that because it's -- it's
22 something they can't count on, and they won't make those
23 business decisions.

24 So I think stability that would come from
25 this would promote economic activity within the tribes.

1 And as we discussed, if we can keep out of court to
2 defend the tribe against bad practices and businesses,
3 then we can really use that money that we're spending on
4 litigation to further develop the economics of the tribe.

5 MR. QUADE: I guess my own expectation
6 would be not that we would be -- we wouldn't have to go
7 into court. Eventually in a dispute you go to court.
8 But that the -- the outcome would be far more predictable
9 and quickly arrived at, which means that, you know, maybe
10 you negotiate a settlement, or you accomplish what you
11 need before getting to full litigation.

12 But if you've got a regulatory scheme that
13 spells out precisely where the liability lies, right? I
14 mean, I'm totally in agreement with what you're saying;
15 the most certain outcomes are, the happier business is.

16 MS. APPEL: And I think you're referring
17 back to how you have to resort to litigation to collect
18 on judgments; is that right?

19 MR. PEARMAN: Right. I'd also include
20 that, you know, any considerations and regulations made
21 should also include provisions and protect sovereign
22 immunity that's enjoyed by the tribes because that's
23 pivotal to -- one of the defenses that we have in these
24 type of situations is that, you know, even if we do waive
25 sovereign immunity, it's in clever and limited fashion

1 that is -- that protects the tribe and its other
2 ancillary businesses that may not be involved in specific
3 contracts or other business arrangements.

4 MR. PORTER: Have you experienced any
5 reluctance from business partners, potential partners to
6 enter contracts with the sovereign?

7 MR. PEARMAN: Absolutely. I mean, it's --
8 it's something that when I draft a contract, I put in
9 every contract just letting them even know that, you
10 know, that the tribe enjoys sovereign immunity so that
11 they're aware of it and so that they're not taken aback
12 by it in the future.

13 Some companies choose not to do business
14 with the tribe, and some companies choose not to do
15 business based on not wanting to accept our taxation
16 scheme or our taxation laws, so -- and at that point, we
17 just say, well, we'll see you then; you know, we'll find
18 somebody else who can provide these services to us.

19 MR. QUADE: Ditto.

20 MS. APPEL: We already discussed the last
21 question.

22 So I'll just open it up for any other
23 thoughts; or do you have any questions for us?

24 MR. PORTER: I do know, just looking at 7,
25 there -- the -- in a majority of the communities that

1 tribes exist, they provide a bulk of the services to all
2 individuals living within that area. I mean, it's --
3 it's pivotal to use the, you know, tax revenues and
4 business opportunity and economics created by the tribe
5 to directly benefit its members and the community. So
6 it's pretty pivotal that we have certain economic
7 practices.

8 MR. PEARMAN: Do you have anything?

9 MS. JOHNSON: No, you're hitting it.

10 MS. APPEL: Are there any other thoughts?

11 MR. QUADE: Something I'd like to add,
12 going back to the geography of things.

13 Unless you're doing a real big project -
14 you know, a huge project - as far as people that we're
15 able to do business with, they're mostly local entities.
16 So any concern about what additional regulations might
17 limit that group of people that we're able to pull from
18 and do business with, because we are very limited where
19 we live there.

20 So I don't think a bigger -- I don't want
21 to put everybody in the same -- same bucket here. I
22 think more consultation needs to be done. I wish more
23 people would have shown up today, but I think we need to
24 have more talks about this.

25 MR. PORTER: Off the record.

1 (Off the record 9:31-9:31.)

2 MR. PEARMAN: I think with this
3 administration, too, it's -- it seemed that
4 overregulation is something that is not favorable, and I
5 think that's true. And with these ordinances as well, we
6 can -- if the tribes have the option to adopt portions
7 that are that are beneficial and actually fit within --
8 within their body of law, that makes sense to me.

9 I would really hate, like -- like he was
10 saying -- that I would hate to have some expansive
11 regulation that would force all tribes into, you know, a
12 certain method of practice that isn't feasible for them,
13 so...

14 MR. QUADE: Most of our business
15 relationships are built on long-standing friendships, and
16 this something we need to protect. These are the people
17 that we do business with every day, you know, on a local
18 level. So I'm concerned with additional regulations, it
19 endanger that relationship.

20 MS. APPEL: So it would be great in your
21 written comments if you could provide any ideas about
22 how -- how we could have an option or craft a whole rule
23 to protect that kind of business relationship and make it
24 as minimally burdensome as possible.

25 MR. QUADE: What is currently being

1 proposed?

2 MS. APPEL: So that is the interesting --
3 the interesting thing.

4 MR. QUADE: Because I think --

5 MS. APPEL: Yeah, we don't have a set
6 proposal. That -- we're really in information gathering
7 mode now trying to get ideas from you-all as to what this
8 should look like. Because we didn't want to presuppose
9 and come out with a draft that looked entirely different
10 from what an Indian tribe would want, and then the focus
11 would be on why the proposal was wrong, rather than...

12 We're trying to get some initial direction,
13 since this is such an, I guess, archaic regulation,
14 archaic statutes, that we want -- we want some -- wanted
15 to get some direction before putting pen to paper.

16 So it's a great opportunity to help -- help
17 get -- so that's a great segue into the next step. If we
18 move forward with revising these regulations would be to
19 likely go to a proposed rule, and that proposed rule
20 could be anything in a menu of options, from repealing to
21 comprehensively revising to surgical revisions.

22 But that proposed rule would be published
23 in the federal register, and then we would go through
24 another round of tribal consultations for input. But we
25 want -- we want to get input now before coming up with a

1 proposed rule.

2 Any other thoughts?

3 MR. QUADE: That's it.

4 MR. PEARMAN: No.

5 MS. APPEL: Okay. Please remember April
6 10th, if you can provide your written comments. Probably
7 the easiest way is by e-mail to consultation at BIA.gov.

8 And we hope to see your written comments
9 then. Thank you so much for braving the cold and coming
10 out today.

11 MR. PORTER: Thank you for being here.

12 MS. APPEL: We've got some good input, even
13 though we had a small crowd. We appreciate it. Thank
14 you very much.

15 (Proceedings adjourned 9:36 a.m.)

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