U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
INDIAN TRADER REGULATIONS TRIBAL CONSULTATION

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MS. TANA FITZPATRICK: Good morning, everyone. My name is Tana Fitzpatrick, and I am the counselor to the Assistant Secretary of Indian Affairs from the Department of Interior.

Do you want to introduce yourself?

MR. JAMES PORTER: My name is Jim Porter. I'm an attorney with the Division of Indian Affairs, Office of the Solicitor.

MS. TANA FITZPATRICK: Thank you all for joining us here today for our tribal consultation on the ANPRM for the 25 CFR Part 140 Licensed Indian Traders.

The purpose of the consultation stems from our December 8th, 2016 published ANPRM on receiving input on whether to update the 25, the Part 140, the Licensed Indian Traders.

We published ANPRM as a direct response to comments and proposals received from tribes, and tribal organizations are requesting the department to revise that part. We are in the very early stages. We haven't drafted any responses because we want to first hear from tribes, and so we've been going throughout the country hosting these tribal
consultations to receive input on whether or not the rule should be left as is, should it be repealed, should it be omitted or what parts should be amended. And if it should be revised, what should those revisions look like.

So briefly the background on Part 140 is that it governs trade occurring on Indian reservations. It's based on lesser-known Indian trader statutes, which the most recent revision to that statute was in 1903, so those statutes themselves are very, very old. Those specific statutes sought to protect tribes from unlawful traders trading on the reservations. So Part 140, the regulations, currently envisions a framework where the BIA issues licenses to any person wanting to conduct business or do business on a reservation.

The Department recognizes that tribes fully regulate businesses operating within their boundaries, and so today we're looking at whether or not Part 140 should be revised in order to modernize the implementation of the Indian trader statutes in a way that is consistent with the federal policies of tribal self-determination and governance and supports tribal business practices that currently occur and also strengthen tribal economies across
the country.

As we all know, we're under an administration, and we don't know what the specific priorities just yet are for Indian Country under that administration, under our current administration, but we anticipate that they will align with the President's priorities for economic development.

So today we have several handouts that are outside, but the handouts include a specific list of questions we'd like your input on. Those questions are taken directly from the ANPRM that was published. And briefly those questions address, again, whether the part should be revised in full or in part and why, current federal -- or what federal involvement should be in business practices occurring in Indian Country, how to make sure traders in Indian Country are reputable and accountable and what type of trade should be included and who should be regulated.

The Department is also interested in learning how tribes currently regulate trade occurring in Indian Country and how the revisions to this regulation could promote economic viability in Indian Country and address taxation issues.

So we are currently accepting written comments
as well. The deadline for comments is April 10th. And we are here today just to listen and get your thoughts on how to modernize these regulations to promote tribal self-determination and economic development. And for any commenters, we ask that you note your name for the court reporter. That's it. So if anyone has any comments, feel free to -- I don't know if we even need to use our microphones, but if not, we can just kind of have a discussion as well.

So while we're waiting for any comments, I'll just briefly go over the questions that we have out there on our one pager and also in the ANPRM. The first question is: Should the Federal Government address trade occurring in Indian Country through an updated 25 CFR Part 140 and why?

The second question is: Are there certain components of the existing rule that should be kept? And if so, why? And for instance where the Department has issued licenses, should there be a grandfathering clause for current valid licenses that the Department has issued under Part 140.

Third: 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?

Fourth: 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? And there we'd like specific information and suggestions on how the Federal Government can bolster those tribes that currently comprehensively regulate trade, as well as those tribes that do not presently do so.

Five: What types of trade should be regulated and what type of trader should be subject to regulation?

And six: How might revisions to the regulations promote economic viability and sustainability in Indian Country?

And the last question is: 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? And what types of infrastructure do tribes currently possess and what role do tax revenues play in building and maintaining such infrastructure?

MS. DANI DAUGHERTY: This is Dani Daugherty talking. Do you want NCAI to elaborate on what they handed out?
MR. JAMES PORTER: That's fine with me.

MS. DANI DAUGHERTY: Put you on the spot.

MR. JAMES PORTER: Does NCAI want to elaborate on what it's handed out?

MS. DANI DAUGHERTY: Exactly.

MR. JULIAN NAVA: I'm Julian Nava. I'm a staff attorney with the National Congress of American Indians. I would ask to go last. I know that, you know, this forum is meant for tribal leaders who work in the communities, so I'm just here to provide support. We did provide a one-pager which is our, I guess, perspective on what we've been working on over the last few years, so ...

MR. GARY MARSHALL: My name is Gary Marshall. I'm with the Standing Rock Sioux Tribe, Standing Rock Tax Department. We have an individual coming, and our nation has a position on that, an official written position and I guess verbal position. So that's the only thing, we're waiting for them to come. They're on their way. Once they get here, we'll start with our statements.

MR. JAMES PORTER: Thank you.

MS. TANA FITZPATRICK: Would you all be okay with Julian providing his comments while we wait from NCAI? Or does anyone else have some comments?
UNIDENTIFIED SPEAKER: For us that would be fine because we are similar in what he's saying, you know, obviously because we are dealing with some of those same issues. Because we line two states, North and South Dakota, so for us it's unique that we have to deal with the State of South Dakota if we're going to do any sales or any kind of tax agreements, and then we also have to deal with North Dakota on that because we align two states. So for us what he's saying (unintelligible) for tribes to do is something that's very important to us on Standing Rock because we would not have to have this little (unintelligible) to do this, you know, ourselves. And that's what we're doing now, just kind of (unintelligible). We have no choice because we need to move forward in this. And hopefully that will put us in a position that one day we would have that federal authority to be able to go ahead and go into our own, with federal authority, federal statute that would say we can do the taxation. Currently we do the business licensing on Standing Rock. So we've been putting these things in place. So I guess that's why we're waiting for the other two. They have the official statement and have a position paper on it.
MS. TANA FITZPATRICK: Okay, thank you.

MS. HEATHER DAWN THOMPSON: Good morning. My name is Heather Dawn Thompson and I represent TEC, the Tribal E-Commerce Coalition and the United Tribes of North Dakota, which is the inter-tribal association of the five tribes in North Dakota but not obviously individually, not individual tribes. And then I'm also here on behalf of the Fort Belknap Tribe of Montana.

So I just wanted to put a little asterisk. I think that a lot of my tribes and clients were not sure if this was going to be proceeding under the new administration and so perhaps haven't been as engaged in the conversation but now that it seems like it is moving forward are extremely interested. So I didn't want sort of their lack of, you know, presence here to be an indicator of their lack of interest in this regulation. It could not be further from the truth. By example, the five -- chairman of the five North Dakota tribes went to D.C. last week and met with new representatives of the administration, as well as the new leadership in Congress. And while they didn't use the verbiage "Indian Trader Statute," the double taxation, it was the single most important issue, period, that they
raised in every single meeting with both the Senate, the House and the Administration. They put forward that this is, the double taxation issue and the confusion and jurisdiction with state governments they put forward as the single largest impediment to economic development on the reservations.

And specifically what they had shared with the new Trump tribal liaison was that they were hopeful that Mr. Trump, President Trump would think bigger about economic development and infrastructure in Indian Country. And Chairman Fox from the MHA Nation specifically said, you know, we are concerned that the focus here is going to be on like throwing us a bone for infrastructure, Here's, you know, a new energy project or, Here's a new development project of some sort, and it's going to miss the big boat, the big picture, which is this conversation. But it doesn't matter how many little infrastructure or little economic development projects you give us, if you don't fix the structure we're never going to be able to help ourselves; we're never going to be able to pull ourselves up by our boot straps.

And this was the conversation, exactly what we're talking about today, that we are in constant litigation with states. We are in constant
negotiation and litigation over taxes, over regulation, over who says what.

And the entire point of the reservations, we lost everything else, the entire point of the reservations and particularly of trust land was that it was for us, that this land is being saved in trust for the Native communities, for the tribal nations, for Native Americans as individuals, and that's sort of the last passion of our ability to be our own tribes, be our own nations and protect ourselves. And as long as the states continue to have this constant daily encroachment, we will never ever be able to move forward.

And so it's incumbent upon -- I'm obviously paraphrasing but this is essentially what he was saying. It's incumbent upon the Federal Government to do what is supposed to be designed and reserve these trust lands, reserve these nations for tribal nations and stop the state encroachments. So that was from the MHA president who was serving as the chair for the five tribal chairmen during these conversations.

And MHA has actually prepared a four- or five-page paper, you may have seen it already, on double taxation. So that one doesn't directly
answer these questions line by line but is the overall general conversation. And then -- and again, I know I'm not going through the questions, but I'm giving you sort of a background on the perspective.

Then from the perspective of the Tribal E-Commerce Coalition, so those are while not always the most favored industry, an important one for a lot of tribes. Those are the tribes that tend to have online lending and are trying to expand their expertise that they've developed in E-commerce in this area into other areas for Indian Country. Their vision is, particularly for the rural land-based tribes, one of the best ways to do economic development is on-line through E-commerce, whether that would be selling arts and crafts, whether that would be through tourism, through the financial industries. And they have developed -- there's about 40 tribes that do online lending, and they've developed some level of expertise in E-commerce and how to set those up and they want to expand them. There are several tribes in the Great Plains Region, probably between five and ten that are in this field.

So from their perspective, taking out sort of
the controversial aspects of this particular industry, just the commerce perspective, they are in constant litigation with the states over who has the authority to regulate and tax commerce that is emanating from the reservation. So we're hopeful that in your regulations you will not only do brick-and-mortar conversation but also E-commerce conversation, because particularly for the rural large land-based tribes, a lot of the tribes believe that that's the future and the most effective way to develop their economies.

So if we don't have control over regulating the commerce that emanates electronically from the reservation and the taxation of that, simply because the nexus or the impetus is going off reservation to sell, then that makes all of those businesses useless.

So I wanted to really encourage you and request that you are as aggressive in the regulatory scheme for bricks and mortar and E-commerce based economic development.

So those are just some basic thoughts that I wanted to share with you this morning and to let you know that all of those entities, you know, sent me here and they were like, "Get them that
information." They're definitely going to be responding. There's definitely going to be much more detail in it.

Several of us are actually flying out for the RES one on Monday. And we'll be much more comprehensive in this, but the biggest thing I wanted to share is to express how important this is to the tribes, so all five tribes in North Dakota, top priority, number one priority when we were in D.C. last week., the tech coalition, so all of the tribes that do E-commerce, and then the Fort Belknap Tribe which is, you know, very close with now Secretary Zinke, has been raising this issue with him constantly.

And, you know, the biggest concern obviously is that even though Congress is supposed to serve as the federal oversight for Indian Country and did so by initially passing these, this law, the trader law, they tend to be more state-centric and forget that they're not just representing their states but they are now in a Constitutional role as representatives of the Federal Constitution and the Constitutional relationship federal to tribal.

And so we are super excited about the federal regulatory process in this capacity as addressing
the initial goal of Congress, which is to make sure that tribes have control and the Federal Government has control over their own commerce, which is the way it was designed from the beginning.

MS. TANA FITZPATRICK: Thank you for those comments and we look forward to receiving the comments from all the entities and tribes.

MS. A. GAY KINGMAN: I'm going to read into the record our resolution. I am Gay Kingman, Executive Director of the Great Plains Tribal Chairman's Association.

What took you so long? We passed our resolution on February 7th, 2014. And I'm glad that we're getting to this now, but the Great Plains Tribal Chairman's Association, which is 16 tribes in the Great Plains Region, passed a resolution 2-7-14 to revise the Federal Indian Traders License Regulations to promote and protect Indian commerce and intertribal trade.

And this is long but I'm going to read it, and I'll give it to you. The Great Plains Tribal Chairman's Association is composed of the elected chairs and presidents or their duly appointed representatives of the 16 sovereign Indian tribes and nations recognized by treaties with the United
States that are within the Great Plains Region of
the Bureau of Indian Affairs.

    The Great Plains Tribal Chairman's Association
was formed to promote the common interests of the
sovereign tribes and nations and their members of
the Great Plains Region which comprises the states
of North Dakota, South Dakota and Nebraska.

    Whereas, before the United States, Indian
tribes were sovereign independent nations.

    Whereas, in the treaty and supremacy clause,
the Constitution of the United States acknowledges
Indian nations and tribes as sovereigns, with
self-governing authority over our citizens and
territory.

    And whereas, in the commerce clause, the
Constitution authorizes Congress to regulate
commerce with the Indian tribes.

    And whereas, the Great Plains Tribal Chairman's
Association recognizes its responsibility to act to
advance the goals of the tribes and their members
and to promote improvements to the health, safety,
welfare, education, economic development and
preservation of the spiritual, cultural and natural
resources of its member tribes and nations.

    And whereas, the United States has obligated
itself both through treaties entered into with the
sovereign tribes and nations of the Great Plains
Region and through its own federal statutes, such as
the Snyder Act of 1921 as amended, the Indian
Self-Determination Act of 1976 as amended, and the
Indian Healthcare Improvement Act of 1976 as
amended.

And whereas, Indian tribes are governments that
pre-date the United States, and through the Indian
commerce, treaty and apportionment clauses and the
14th Amendment, the United States recognizes the
status of Indian tribes as sovereigns and the status
of American Indians as tribal citizens.

And whereas, the United States entered into the
1851 Fort Laramie Treaty and the Treaty of 1868 with
our Lakota Indian nations and other tribes to
promote peace, friendship and commerce, with the
1851 Treaty recognizing the original territory.

And whereas, the United States destroyed
traditional tribal economies by killing the buffalo
herds and taking Indian lands.

And whereas, today Indian nations and tribes
are working to create jobs, revitalize tribal
economies, promote strong tribal governments and
economic self-sufficiency.
And whereas, it is the policy of the United States to promote Indian self-determination, including the overriding goals of promoting tribal economic development and self-sufficiency among Indian nations and tribes.

And whereas, the integrity of Indian commerce and trade is critical to the economic development of Indian nations and tribes, and intertribal trade is a fundamental aspect of tribal economic development.

And whereas, since 1776 the United States has regulated Indian traders engaging in commerce with Indian nations and tribes, and Congress has maintained Federal Indian Traders Statutes since then.

And whereas, under the Indian Self-Determination Policy, the President and Congress have determined the Indian nations and tribes should perform government duties and responsibilities on Indian lands and that the Federal Government must contract with Indian nations and tribes and delegate authority to perform historical federal functions.

And whereas, the Supreme Court has held that under the Indian self-determination policy and to promote tribal self-government, the comprehensive
Federal Indian Traders License statutes and regulations preempt state taxation and regulation that would interfere with tribal economic development in Warren Trading Post (1965) and Central Arizona Machinery (1980).

And whereas, the Supreme Court has held that the federal and tribal government interests in Indian self-determination, economic development and tribal self-sufficiency preempt state taxation and regulation of tribal economic ventures that generate reservation value, New Mexico versus Mescalero Apache Tribe (1984) and California versus Cabazon Tribe Band of Mission Indians (1987).

And now therefore be it resolved that pursuant to the Indian self-determination policy, the Secretary should revise the Federal Indian Traders License regulations to provide for contracts with and delegations of authority to Indian nations and tribes to implement the Federal Indian Traders License regulations to promote and protect Indian commerce and intertribal trade.

And be it further resolved that Indian nations and tribes should receive contracts to perform the background checks, reviews and develop Federal Traders License applications to present to the
Secretary for issuance.

And be it further resolved that the Secretary should update the Federal Indian Traders License regulations to require those engaged in Indian commerce to comply with reasonable tribal business regulatory, consumer protection and tax measures.

And be it further resolved that in the revised regulations, the Secretary should provide that the policy of the United States is to promote Indian self-determination, economic development, Indian commerce and intertribal trade and economic self-sufficiency.

Be it further resolved that it is the policy of the United States to remove all the barriers to Indian economic development, Indian commerce and intertribal trade and economic self-sufficiency.

And be it finally resolved that the Secretary should expressly provide that in furtherance of these policies, state regulations and taxation of Indian commerce and intertribal trade are preempted by federal law and policy and tribal government interests in self-government, economic development and self-sufficiency.

Be it finally resolved that this resolution shall be the policy of the Great Plains Tribal
Chairman's Association.

And it was certified and signed by Chairman Tex Hall at the time. That was back in 2014. And we will probably update this for the, before the 10th deadline. But we have requested these policies be updated back then, and I'm glad we're getting to it now.

Thank you.

MS. TANA FITZPATRICK: Thank you.

MR. GARY MARSHALL: Quick question: When you guys have been traveling to Indian Country, has the attendance been larger than this, or how has it been so far?

MS. TANA FITZPATRICK: It's been -- it's kind of ebbed and flowed. When we were at NCIA mid-year, that room was packed and standing room only. Well, I'm not saying it was only for this because there was another presentation, too, but there was a lot of people in there. I anticipate RES will have hopefully a lot of people since, you know, that's kind of what that conference is about.

I was at Billings on Tuesday and there was only two people that came. And a couple of other locations had about that amount of people. But Jim and I were also at Swinomish in Washington and there
was about 20 people that came. So it's been kind of back and forth.

MR. GARY MARSHALL: I guess from myself personally, I don't see it's a lack of people wanting to do this. It's just sometimes people don't think of the possibility about how it would really happen. We can take a look at the 2010 Tribal Law & Order Act which was probably something that everybody said we could never change and we see that law changed now.

We've got Director (unintelligible) up there in Bismarck with some discussion about Standing Rock again, so I guess that was for us saying that yes, we would like to see these changes we've been talking about for a long time. Obviously we at Standing Rock know that our infrastructure is overtaxed, overburdened because of the simple fact that we don't have a tax scheme that allows us to tax everybody. And with that, you know, we fall short (unintelligible).

We have a problem with alcohol sales. In the state law in North Dakota and South Dakota it's called an alcohol distributor's tax. So it's off the reservation before it comes in. So once it arrives here we have a problem but we have no way of
solving it, even though we are the ones purchasing the product.

So these are issues that other tribes I know have faced, and we've had discussions with them at various times about how this law needs to change because of the fact that we are facing those burdens. If it's a call for law enforcement, it's usually our Standing Rock Law Enforcement who shows up. If it's a call for an ambulance, it's our ambulance. We have no non-Indian ambulances serving Standing Rock. We have one sheriff in Sioux County in North Dakota, and we have two or three in South Dakota. But the majority of the time it's the BIA responding; it's our EPA that's responding to environmental concerns; you know, it's our water personnel responding because they have the MR&I systems, they have the sanitation system, the lagoons, those are all managed by tribes in cooperation with the IHS. So it's always our burden in our structure.

And the good thing about Standing Rock, we have many non-Indians, but when we did enter into agreement for a brief period with the State of North Dakota, who supported -- the county commissioners, you know, all supported this because they understood
that, you know, they relied upon the Standing Rock Sioux Tribe to provide those services. Their kids are attending, you know, Standing Rock schools which are funded by the BIA and they go to the IHS. They use the bus system. They use the roads.

During the storms -- (unintelligible). He's also on tribal council but he's also a member of the (unintelligible). I'm thankful and many people were thankful for the fact that he came out. And he isn't with the road but he does work and understand roads. So he got out there. A lot of times you'll hear that from the people at Standing Rock (unintelligible) thank God we have our own roads because it's really not maintained by the state. It's a small percentage. So it relies upon ours.

And we had a whole month of terrible storms, constant storms. The only way I could get through that was by bulldozer, and (unintelligible). That's the same way for many of us. We had to rely upon them. Do we have the money? We need equipment. And if we had that authority to be able to tax straight across from all the businesses, that would be great.

I think there was a discussion about the internet, and somebody was saying something, "How
could the tribes do this?" An example, we at
Standing Rock talked about this with the State of
North Dakota, meeting with them and they passed
legislation that would support a joint agreement.
And the physical note that came out on the Senate
and House force was that it was going to cost
$1.5 million to create that because of the software,
which was the agreement between (unintelligible),
which was about 24 states. At that time Standing
Rock did step up and say, "We have the solution to
what there is -- your problem. There is no
problem." So in that discussion we came up with an
identifier, which instead of having just a straight
across tax in the State of North Dakota,
(unintelligible) including Standing Rock they came
up with 5.25. That discussion (unintelligible) it
was explained that in that compact between those
states that worked that way, this would be the
identifier for Standing Rock. And had we not done
that we would have never gone down that path. And
right now we have 15 businesses (unintelligible)
have under our jurisdiction because the other ones
would be (unintelligible).

After we finally got the first report showing
that we had approximately 285, 89- I think it was
businesses reporting from Amazon down, so you can see the numbers. You can subtract that on the internet, sales number coming inbound that we never received for many, many years, and that means that we didn't get that income. We couldn't build a pool for our kids. We couldn't build, you know, our facilities for our elderly.

So these are the things I think that most tribes are looking for is everything that's not coming to us even though it's being collected. And alcohol is one of them. Telecommunications is another one that doesn't come to us but it's collected. You know, it's the same way on Internet sales, unless we have an agreement or can come up with something, how would we get that revenue to come back to us? Because it does affect us. It does affect the tribe. And being able to strengthen tribal governments' positions, (unintelligible) what they can do with those, they need those resources available to them.

And I know -- I think we are kind of looking the same way as NCAI, you know, give us that federal authority, give us that federal preemption so that there's no question about the simple fact do we have the right to regulate commerce in Indian Country, do
we have the right to, you know, have our own tax
code in place and be able to assert it fully across
all of the businesses that are on Standing Rock, as
well as those who are providing Internet sales to
Standing Rock.

We know we can do it. We've showed that we can
do it. So now we're trying to do it, you know, but
we sure need to. It would be nice to have this by
federal law and preemption.

Currently at Standing Rock we do have a
business licensing division within the tax
department in our codes that does licensing
businesses. We did have, you know, and had some
that (unintelligible) as we want to regulate and
ensure commerce is done, you know, favorably to
those in Indian Country and Standing Rock.

So when these things aren't happening
throughout and people are (unintelligible), we say
further reason is we want to regulate and make sure
commerce is done, you know, favorably to those in
Indian Country and Standing Rock. So these things
are happening throughout and people that I have
worked with and dealt with.

When she mentioned MHA, it's the same way, they
have the problem. And we have other tribes with the
same problem. I guess when you talk to tribes in our (unintelligible) they say, "Wait, wait, actually being taxed prior to the alcohol products received?" I said, "Yes, they are." We don't have, you know, facilities. We don't have the programs. So by federal authority give the tribes that authority so that we can collect that.

And, you know, it's no different than any other federal (unintelligible). You know, if we have that imposed on there and (unintelligible) before it came to the state, then we know we got that money. It's not about permission. We know the sales that happen on reservations or near reservations are really high and have those problems, but the only way we can address it is we have the revenue. We're paying for it but we're not receiving that tax money.

So I guess the importance for us up there, it's really important for someone to give us that federal authority to be able to, one, regulate commerce businesses by allowing us to be the ones that do license our businesses under our code, for us also to be able to provide taxation to all business that are conducted on and in, those would be the internet sales. And obviously we had said we do need that ability to be able to do the alcohol that's
(unintelligible) and bring it back in there under federal authority so that we would be the ones that would be able to impose that tax on it, we would be able to address those problems.

Obviously we're very good at taking a look at what's on the outside. We'd love to have swimming pools for our kids. We'd love to have better facilities for our kids and education and law enforcement. All of those things that we currently do serve in those communities that, you know, are on Standing Rock, they benefit from the tribe doing these things. So now that's what we're hoping is that if we can get that additional revenue, that's what we'd like to do badly.

And I think this has been a great opportunity for us. I know it's been a long time coming because I did work with Chairman Hall when he was at MHA on different other issues, and this is an issue that's always been very important to us and continues. I think most of us had hoped it had come earlier than this, but it's great to see that it's still happening and I hope it does happen for us.

MS. HEATHER DAWN THOMPSON: So I was just re-reading through some of the questions that you had read this morning and I wanted to give a couple
specifics to each -- to some of these questions.

With regard to number 3, How can you ensure that there are good mechanisms in place for doing business with reputable individuals, and, you know, I just wanted to reiterate what Gay and Standing Rock had said. You know, I think the hope overall is that there will be federal preemption but deference to tribes for implementation, however that structure might look like, whether it be through a 638 type of thing or maybe something less formal like how state block grants works, you know, maybe like a tribal block grant where it just automatically goes to the tribes if they have the capacity and (unintelligible) to do their own regulation.

But I can only speak for my clients. The one thing I do think that would be super helpful, at least in the interim, that the Federal Government did sort of assume a stronger role in is the background checks on people we do business with. It's very expensive and a lot of the tribes that are just getting started can't always afford that. And I don't necessarily mean like the person you're buying water from or the Coca-Cola dealer but like the big investors and the big partners that you're
trying to do some of these big projects with. Some of the things we have seen have been really sophisticated information that we don't necessarily have access to or the capacity -- like different lawsuits that have been filed in different jurisdictions that might not show up or, you know, criminal histories that we may not necessarily have the access to. So I think that that is actually a role that is outlined in the statute and that would be really, really helpful. And I don't mean like every single person has to have a background check, but when the tribes need to, being able to turn to the BIA to request that would be super helpful.

Regarding number four, How do tribes currently regulate their trade, and this goes into the category of we're hoping that you'll figure out a good structure to defer to tribes to regulate when they're ready and if they opt into that.

Obviously a lot of tribes have their own regulations in place; they have their own statutory structures in place to regulate not only commerce as a whole but specific areas of commerce, whether it be (unintelligible) or online lending or whatnot, areas that need specific regulation have that in place.
But there's two components to that that I wanted to make sure were acknowledged or at least made room for in the regulations. One is intertribal oversight. So what I'm hopeful is that the regulation won't just say only this tribe can do this. Because for example a lot of tribes might not have the capacity individually but other tribes or sister tribes might and they've been contracting with them through governmental MOUs.

So for example the Rosebud Sioux Tribe has a really robust oversight for online lending. And so just like the Gaming Commission, they have a Commercial Lending Commission. And so rather than repeat that model at other tribes, when there's limited resources a lot of the other tribes have an intergovernmental MOU and Rosebud serves as their governmental regulatory body. So I want to make sure that any regulations take into consideration intertribal regulation, intertribal working groups, intertribal commerce. So that's one part of it.

The second part of it is contracting out for those services. And this is an area of constant litigation and one that has, we've been losing in the courts, where the states say, "Okay, you're no longer a tribal business; you're no longer a tribal
regulation; you're no longer a tribal entity because
you hired a non-tribal person to do this for you."

And this is insanity. I mean, could you imagine if
a state government lost its (unintelligible) or lost
its ability to regulate because they hired a private
contractor? I mean, the entire Federal Government
is run on private contractors and it doesn't change
the governmental nature of the purpose, the
regulation, the business, et cetera.

So I can't emphasize the importance of this
enough. There has to be something in these
regulations that say, you know, If this is a tribal
decision, if this is a tribal hiring, if this is a
tribal -- it doesn't matter if you're an enrolled
member or not. I see this in litigation all the
time, "Oh, this person is not an enrolled member of
the tribe and therefore this isn't a tribal entity,"
which is craziness.

So whether or not they're all on the
reservation, whether or not everybody is a tribal
member is not the relevant factor; that the trade
comes from the tribal sovereign decision to hire
this business, to hire this person. They might be
based in Los Angeles because that's the most
efficient way to run this component of the business
for the tribe. But making sure that this regulation emanates not only from the location of the reservation but from the decision of the tribe, regardless of where that regulation or that entity happens to be, just like with any other government.

Five: What types of trade should be regulated? And I think most tribes would say everything. Like we just said, it shouldn't be trade-specific based. It should be location based and tribal based, so everything obviously on the reservation and everything that comes from the tribe, whether it be located on or off the reservation, and not make it item specific. And that comes into place not only from an E-commerce standpoint but from the standpoint that we just talked about, you might have certain businesses that you contract with off the reservation or you might actually locate tribal offices off the reservation. For example, Oglala has several offices here in Rapid City that are governmental offices, and they have several offices that are commerce-based offices.

I think a basic recognition that tribes currently at least don't have a tax base and so their governmental revenue comes from participation in the private marketplace, and that in no way
diminishes the fact that this is still a governmental activity. This is creating governmental revenue. But the way that it has been designed that is the only way or one of the primary ways that tribes can get their governmental revenue. And that doesn't diminish the governmental status just because they're participating in a private marketplace.

And then as Standing Rock was sort of talking in more depth about the tax portion of it, there's of course two aspects of this, tax and regulation. From a tax standpoint, as you know the states get really creative. And I think that the regulation has to be very encompassing, because they get creative about the impetus of tax and where that impetus of tax is they're going to get us somehow. So like as soon as it leaves the reservation they'll think, Oh, okay, now it's off the reservation, we've got you. We're going to put, you know, a tariff on anything that comes off the reservation of 50 percent. So you think we can't tax you? I mean, I'm not making this up. This will happen. And so this regulation has to essentially say we have federal premacy (phonetic), we have federal preemption over trade going into, trade coming off
and trade going through the reservation. Otherwise they're just going to get cute and just change the impetus of tax and this is going to be a totally useless endeavor.

And the same thing goes for regulation. You know, commerce that is emanating from the reservation, particularly that is governmentally owned falls under the regulation of that sovereign entity.

I think those are my main points is, you know, making sure that this is encompassing enough so that the state can't get cute. From both a regulatory and a tax standpoint, this has got to cover everything that is from the land base and not just whether it's on trust or fee land because then we get into the same cute little game all the time. It's got to be within the four corners of the reservation. And it's got to be everything that's on the reservation, everything that emanates from the reservation that goes off the reservation and everything that is tribal governmentally owned or controlled.

Like I said, because any one of the cases recently you can pull up and you can see the court and the state going through the arguments, "Not
Native, off the reservation, contracted out." The impetus of tax, like the (unintelligible) petroleum issue that (unintelligible) is going with, those oil pipelines are on trust land on the reservation but because it's going off the reservation the state is taxing them. So unless we are fully all encompassing they're just going to get cute, change the impetus of tax, decide if you're Indian or non-Indian as a variable, which is ridiculous, if you're contracted out or in-house.

So those will be in our comments, but we're really hopeful that you have a very broad vision of what this would have to look like to actually fix the trading and the commerce in Indian Country.

MS. TANA FITZPATRICK: Thank you.

MS. A. GAY KINGMAN: This is Gay Kingman.

I just wanted to respond to a couple points Heather mentioned. But just as the tribal government sets up their codes, their business codes and everything, there has to be some sort of security and protection for the tribal government in the way that -- we all know and have heard stories about fake people or even individuals that have claimed to be government. The sovereignty rests with the tribe and the responsibility rests with the
tribe. But we've had, and the common word that's used since President Trump came in is alternative people that have set up fake businesses but they claim to be under the tribe. So there's got to be some sort of I guess protection against these fake businesses that claim tribal sovereignty and they don't have it.

And then it also leads to our tribal courts, we see our tribal courts going now more and more into what we call blue collar crime considerations. It used to be that we didn't have that but today we do. So somehow our tribal courts need to be involved in whatever commerce or tax or whatever so our tribal courts are equipped to deal with these new areas.

I know on Cheyenne River we had a case that came up, and I think the court handled it very well. But our courts really need to be equipped with better services on this because if we're going into taxation and all of these areas, our courts also need to be improved.

MS. TANA FITZPATRICK: Thank you.

MR. RANDALL WHITE: My name is Randall White. I'm under the North Dakota Tax Commission. Also I served as a former councilman for (unintelligible) North Dakota. Also had a large term.
I guess the concern I have is for many of the years that I've been coming here giving testimony to the issues, a lot of times North and South Dakota and plus also federal agencies never return with answers. I guess to me a lot of times they put it on a shelf and we never hear back from you guys. So I hope today that we hear (unintelligible) tribal chairman's (unintelligible), two thousand I think fourteen. I mean, we're waiting for answers. So I hope that we don't have to wait long. And I hope you guys are pursuing -- North and South Dakota a lot of times they put it on a shelf and it's like deaf ears. So I just wanted to share that concern because for 20 years I've been going to these. It's kind of like everybody sits it on a shelf and we never hear back from you guys. So that's one concern I have from Standing Rock. My name is Randall White, Sr.

So I hope we get our answers soon and not have to wait many years. Because I know I testified in education for 11 years and that stood on a shelf for 11 years. And I think a lot of our kids outgrow education. So that's a concern I have.

So I just wanted to share those concerns that come from Standing Rock. Thank you.
MS. TANA FITZPATRICK: Thank you.

MR. JAMES PORTER: Thank you.


I think some of the comments that were made are something that we've heard for many years and many decades throughout Indian Country as I travel around working with different groups. And it's really nice to see in this discussion with so many people, including meeting with different people within Interior, in 2009 we were out there.

(Unintelligible).

Can't hear me?

THE COURT REPORTER: It is very hard to understand.

MR. GARY MARSHALL: So all of these discussions come in different areas, like tribal law and order and discussion of what she's mentioning on some of the things on dual taxation. I think that's one of the reasons that we hear throughout Indian Country, you know, including when you have oil or coal discovery, mining going on, transportation, is the fact that you see certain laws applying. (Unintelligible) petroleum is one that's used up in our area for those who have oil production saying
that they have that right to impose it.

So you have the tribes who do say, Yes, give us that federal preemption, give us that federal authority so that we know that that is a supremacy clause that would say (unintelligible) Constitution that we have that right to be able to do the taxation ourselves without question, without the states coming in.

A good example for us on Standing Rock is that we were in a tax agreement with the State of North Dakota. Part of the thing that the State of North Dakota can do by (unintelligible) authority is they can exempt out entities within a tribe, which they do and they have. So they don't pay a tax because they feel that they don't have to.

We on Standing Rock, by law we exempt our entities which includes gaming facilities. The problem with that is the State says, "The State don't recognize it," so they want to get into argument. So that kind of prevented us from continuing, so we're now doing it by ourselves. So we're going to be dealing with these businesses who are Indian owned within our jurisdiction but we'd like to do it straight across. And that's part of the problem that it has, without the Internet sales
that are coming in, the taxation by default in the system that they have reporting on those 24 states automatically go to the State of North Dakota now. So for us to be able to have a federal preemption by Internet sales for those jurisdictions like in Standing Rock, that would be great. We've seen that (unintelligible). Those revenues do drop down from what we were getting over the time while we were in agreement to about a third of what they're getting now because of the simple fact because obviously the money that has been mentioned, tribal courts, our tribal courts have been burdened recently. It's been very tough for us to create new programs because we don't have that revenue. And we know that the money is there and we should be getting it.

We are the one that does face these daily impacts in Indian Country because of the laws currently as they are. So that's why we're hoping that by federal preemption those tribes who want to can choose to, or if they want to participate in state agreements, they can participate in state agreements. But without that for us at Standing Rock it's very tough for us to be able to regulate.

We try to push these issues. And I would hope that if we get that, that would be one of the areas
that we would identify so that we can put that money back into the school, back into law enforcement, back into programs that would help our tribal courts or housing. We don't have housing as much as we need. We don't have that kind of money. So we would hope that taxation for us, as long as (unintelligible) for businesses, would give us that ability to do it. Federal preemption, that would be something that would be great for Indian Country for those tribes who chose and wanted to do it, or those that felt they wanted to stay in the state agreement, then they could do that. But giving us the ability to make those choices are very important, as well as the federal law that would support that ability for us to do it.

MR. JULIAN NAVA: Okay, I guess it will be my turn. Good morning. My name is Julian Nava. I'm a staff attorney with the National Congress of American Indians.

And I just wanted to thank the tribal leaders and everyone here on behalf of the local tribes for attending this important consultation. And I believe that I've met a few of you, but if I haven't I look forward to meeting you here today or throughout our endeavors in Indian Country.
But thanks so much to the Department for taking up this critically important issue. And it's been an issue that NCAI has been working on for a couple years now. And I just wanted to provide a couple of highlights about our focus or our priorities in the general sense about how these regulations need to be updated.

So according to a couple of the notes that I have, you know, and like everyone has said, these regulations haven't been updated since I believe 1903. And the last attempt was made during the 1960s. And even in the papers that we were handed out today, Part 140 has not been updated since 1965 and largely reflects the policies that ignore tribal self-determination and the growth of tribal economies, and so I think that's where obviously our focus is. And these statutes provide a broad authority regarding Indian trader regulations on reservation land, and so it's our consensus that these definitely need to be updated.

And as part of our proposal, and we'll be providing comments before April 10th, but as part of our proposal it works in three components or three large sections that we believe are important in dealing with these issues.
And first, the licensing function should be delegated to tribal governments. Tribes are far more capable of handling local business licensing on tribal lands. And it is very important to have a business licensing structure that can promote local businesses and also deal with unscrupulous or fraudulent business operators, like has already been mentioned today, who should be prevented from preying on consumers. For tribes who may wish to continue to use federal licensing, they should be permitted to obviously have that option.

The second component, and this was also mentioned, is that there should be a presumption that tribal courts have jurisdiction over all parties that conduct business on the reservation. Tribes don't intend for this to apply to the average consumer who comes to the reservation to buy gas at a tribal gas station, but what it is intended for is licensed businesses operating businesses on the reservation. And we saw this problem last year in the Dollar General Supreme Court Case in which the Supreme Court could not decide if a tribal court should have jurisdiction when a store manager sexually assaulted a young tribal member working as an intern there.
A clear presumption of tribal court jurisdiction in these regulations would enable tribes to protect their citizens. This should be easily done as there is already a provision for the consent to jurisdiction under the current regulations for both the Hopi and the Zuni tribes. And in there it's regarding double taxation.

It is important to note that our proposal is limited to businesses on tribal trust lands. We do not intend to try to regulate or tax business transactions between non-Indians on non-Indian fee land. The law certainly doesn't support it and in practice we don't believe it would work. But we do intend to address or want to address the problem of dual taxation on tribal lands. When the state or local government is taxing the transaction on tribal lands, that prevents tribes from collecting its own taxes.

State governments provide few services on Indian reservations but they impose taxes on severance of natural resources, retail sales and increasingly on property such as the wind generation facilities.

Tribal governments face a losing proposition when forced to collect state taxes. If tribes
impose a state government tax, then the resulting
dual taxation drives businesses away or tribes
collect no taxes and suffer inadequate roads,
schools, police, courts and healthcare.

And to add insult to injury, reservation
economies are funding millions of tax dollars into
treasures of state and local governments who spend
those funds outside of Indian Country. This dilemma
is fundamentally unfair to tribal governments,
undermines the Constitution's promise of respect for
tribal sovereignty and keeps Indian reservations the
most underserved communities in the nation.

As I previously stated, NCAI will be providing
comments. And as an organization and working with
tribal governments throughout the country, as well
as the administration, we stand ready to work with
you all in developing a regulatory structure that
will benefit everyone. We are still very early in
the process, as we all know, but we think it is
worthwhile to continue to move this process forward
and start drafting new and updated regulations.

So on behalf of the National Congress of
American Indians, I want to thank you all for being
here and especially the Department for taking up
consideration of these new regulations.
Thank you.

MS. TANA FITZPATRICK: Thank you.

MS. HEATHER DAWN THOMPSON: I just wanted to add one additional detail in there. When you're choosing the language to refer to tribes, something to keep in mind, and we want to make sure that it includes, because this is another area of litigation, subsidiary entities. So a lot of times when you see regulations and statutes, it's very comprehensive when it comes to state governments, you know that it covers counties, you know that it covers local governments, you know that it covers the electric company owned by the state, but a lot of regulations don't include that for tribes and so it's always a difficulty.

There are both -- you know, there are both subsidiary entities and subsidiary governments. And what I mean by that is subsidiary entities, we all know a lot of tribes have tribal corporations, and sometimes the language is not written so that the non-tribal people understand that tribal corporations, if they're wholly owned by the tribe, still count as a tribal entity, as well as tribal offices, you know, the office of -- the tax office, the property office. So making sure that tribal
corporations as well as tribal governmental offices are included in definitions.

And then in addition, many tribes are actually moving towards more localized governance structures and more localized economic development structures. So for example the Navajo Nation has chapters, and they have devolved chapters the ability to not only govern themselves locally but also engage in economic development. So it would be the equivalent of Oglala has a similar structure. Tulalip has local cities. Oglala has districts and community governments and they have devolved to them the ability to own their own tribal corporations as well. And I think Standing Rock is starting to have these conversations, too, right? Yeah, they have the districts and they're starting to have these conversations as well.

So that is a really difficult issue, too. So making sure that it includes that so that the Navajo chapters aren't like constantly litigating. If the Navajo Nation has devolved and given them both governance and economic development authority, that needs to be included in the definition. Any essentially just like a state, any sort of local subsidiaries, they're not going to be called
counties and cities, they're going to be called chapters and districts and communities, but that those also be included in the definition because a lot of them, particularly the large land base that have so much area to cover, are starting to incur more local economic development and so you're seeing a lot of commerce and corporations at the more localized levels but they're still owned by tribal governments, just local tribal governments.

MS. TANA FITZPATRICK: Thank you.

MR. MARK VAN NORMAN: Man, it shows, federal traders' licenses, we're not sure that it's Indian commerce but it's really Indian commerce.

I'm Mark Van Norman. I serve as Counsel to the Great Plains Tribal Chairman's Association. And we have our executive director and long-time diplomat for Indian Country, Gay Kingman here, and Joleen Abourezk from Great Plains.

We've worked for a long time to say we ought to revamp the Federal Indian Traders' License regulations. And here's why: The Federal Indian Traders' license regulations, statutes and regulations are very important in Indian law because it was the start of the relationship between the United States and Indian nations. The first Federal
Traders' License Statutes were actually colonial. And in 1775 they had the Continental Congress act on Federal Traders' licenses prior to the Declaration of Independence.

Indian commerce was very important, so in the first treaties -- you have the first treaty, 1778 Treaty with the Delaware Nation, it says the United States will secure well-regulated trade with the Delaware Nation. And it should be recognized that that's a bilateral relationship. So those are the early precedents prior to the Constitution.

And so in the Articles of Confederation we had kind of a little bit muddled Indian affairs power because it said, you know, the Continental Congress would have authority to treat with tribes and then it said not members of any state. So it was a little confused, and they sought to clarify that in the Constitution to say that there's a clear plenary federal power over Indian affairs and that plenary power should be understood to be vis-a-vis the states because the Constitution is the allocation of power between the United States and the states. So it should be recognized that the commerce clause is referencing Indian tribes as governments and that it's a bilateral relationship.
So these trade statutes were, continue to be very important. And if you look at some of the maps about United States territorial acquisition, it's kind of instructive because, you know, part of the Declaration of Independence was saying, Well, we object to the 1763 proclamation that kept the area west of the Appalachians as Indian reserve, and they cite that as an issue. Well, through the Revolutionary War, the United States won a claim versus England for the northwest territory, and trade out there was going to be very important, and so you have probably a very early pronouncement on Indian policy as a Northwest Ordinance of 1787, Upmost good faith shall always be shown towards the Indians and our property and liberty will never be invaded except in just wars and laws will be passed for the benefit of Indians, to protect Indians.

Well, you know, you look at those things and those are things that we always rely on in Indian law, but then you see that, Well, what would be the effect of that because that was under the Articles of Confederation. Well, President Washington made sure to get that reenacted in 1789 because that was a very important thing for the new United States because the states had seated their claims in the
west of the Federal Government. So the Federal
Government was now coming in as the claimant to that
land, claiming sovereignty to the land and having to
work with Indian tribes because tribes were
recognized to have prior rights. And, you know, you
have -- the plan of the Northwest Ordinance is for
the territorial government and then statehood for
five states. And within that framework they're
saying, We're going to treat tribes with good faith
and we're going to deal justly with tribes on our
lands. So Washington got that reenacted in
August 1789, and it formed the basis for the plan
for territories to become states for the rest of the
states.

So at the same time they were dealing with the
Creek Nation, and the Creek Nation was down south in
the area around Georgia. You know, it wasn't clear,
you know, what was going to happen down there, and
Alabama. And they wanted to conciliate with the
Creeks, so they had a trade provision in the first
treaty under the Constitution, the 1790 Creek Nation
Treaty.

And Spain was still in Florida, and Spain was
holding Louisiana, Province of Louisiana at that
time. You know, England still wasn't clear about
the northwest, the whole northwest and Canada. So there were a lot of other international things going on. The United States wanted to secure the trade.

So Jefferson comes forward and he has a plan to do trading houses and he wants to have a direct relationship between the United States and Indian nations and oust these foreign citizens, foreign nationals and the foreign countries from the trade. So the trade was very important.

I don't think we can really understand, you know, the economic impact from where we're at today, but, you know, you had John Jacob Astor starting his fortune back then. So it was very big. It was very important. These were important pieces of legislation at the start of the country. And so that's reflected in some of the treaties that go forward.

So I'm from the Cheyenne River Sioux Tribe and we have, you know, a Treaty of 1815, a treaty with the Teton, and that's readjusting the situation after the 1812 war.

But we also have an 1825 treaty and a series of treaties out here, and the O'Fallon treaties, and they are saying that, you know, we ought to have lasting peace and friendship and that we ought to
have trade with the United States and the President will designate the places of trade and the tribes for their part will provide protection to the traders and their property.

And, you know, I think those treaties should be understood to say they're acknowledging Indian nations as sovereigns because the hallmark of sovereignty is the power of peace and war and if they're settling peace, you know, it implies there could have been war. They're also about regulating commerce and partnership between the United States and Indian nations, and it would be a continuing partnership.

So I think when you think about these regulations and bringing them forward in the modern period, it's not only the Federal Indian Trader Statutes, it's also these treaties that provide you background and authority in this area.

And the thing that's important to us is that we come through this period, you know, even as they're doing the removal policy, they say in 1834 they're updating the Federal Trader Statutes and in the Senate report it says that, you know, tribes have a right to self-government and it generally extends to persons and activities within their territory, with
some exceptions akin to international law, so some
of this about citizens of the United States and
citizens of Indian nations, but there's always an
idea that the tribes retain their original natural
rights of self-government.

And then as we come forward, you know, we see
that the later treaties are 1851, you know, that's
laying out the territory of tribes and the United
States wants to have free passage across Indian land
so that there can be settlement for Oregon. It lays
out the tribes' treaties. It recognizes the tribes
as sovereigns.

You know, we come to the 1868 Treaty, there
again very explicitly the United States is saying,
We want an end to war. We pledge our honor to keep
the peace. And it's very explicit recognition that
the Sioux Nation, sovereign authority. And there
was a war going on at that time.

So one of the provisions that the United States
wants to secure through the 1868 Treaty is the idea
that the reservation is the permanent home. And so
for the Sioux Nation it was western South Dakota
from the low water mark on the east bank of the
Missouri and took in the Missouri because, you know,
we've lived along the rivers in the winters and we
went west, you know, following the buffalo during the summers.

So that idea of a permanent home is telling our Indian nations that we're going to have a permanent and livable home, so naturally we need commerce; naturally we still, you know, had commerce. I mean, the reason it's Pierre, South Dakota is because it's named after Pierre Chouteau, for an American fur company, and they had Fort Pierre there. And they had other forts there, Fort Lookout along the Missouri River, and they traded with the tribes. And the United States was aware of this. You know, Lewis and Clark say, when they came up the river they say, There's already a trade so that the most distant nations receive goods that are traded from the Mississippi up all the way through the Missouri River valley over to the Pacific Northwest. And there was substantial Native American trade networks.

Naturally as we come to the point of the 1868 Treaty, the tribes are thinking about how are they going to get jobs. And so they come to the government and they say, "We want our people to be in these posts when you're going to hire people." So that was sort of an initiation of, you know, the
federal self-determination policy in terms of contracting, in terms of understanding that tribes were going to be involved in the provision of goods and services under the treaty. Naturally the tribes wanted to continue to maintain their trade and commerce on traditional economies. So the federal traders licenses were important all throughout this time and if you look at the history of it.

And then it comes up to the '50s and they kind of fall into disuse. And I started out as a tribal attorney about 30 years ago, and we talked to the BIA superintendent about, "Well, what about the Federal Indian Trader Statutes and how come you're not enforcing them? They enforce them down at Navajo and Hopi and they've updated the regulations for Navajo and Hopi." And they said, "Well, we haven't enforced them up here in the Great Plains because you all are doing your own tribal business licenses so we defer to you as tribes to run your business licenses and there's no need for us to interfere with your situation, that you're taking on this function and that's appropriate in terms of self-government." Well, you know, that's good, except the framework for dealing with the courts is, you know, if you go up to the Supreme Court, you
know, you have an hour argument for a case and it's a half hour on each side and you can't really get into, you know, a lot of detail on historical background, so the court sometimes loses sight of what the history is. And the court sometimes has said that, We tread lightly in the face of statutory silence because we have a respect for tribal sovereignty and tribal self-government, and those are some of the Marshall cases. You know, in other areas they say, "Well, the statute is silent so we're going to allow the state to come in and impose a dual tax." And it kind of moves away from looking at the reservation as a permanent home and a homeland with an integral right to self-government, and it kind of strips away our self-government in a way that's contrary to the treaties and statutes.

You know, we have the Northwest Ordinance. Well, that was carried forth with different territorial acts. And out here, you know, we had -- it's kind of interesting to see the different territories that were extended out here. Even the Wisconsin territory was up to the mid channel of the Missouri River up north. You know, it was Nebraska territory before it was Dakota territory.

And when we had the 1851 Treaty it was laying
out our territory. In 1854 you have the Kansas/Nebraska Act and they say, "We're going to rigidly adhere to the treaty. We're going to faithfully execute the treaties."

When you come forward into the Dakota Act they say the territory is not going to have anything to do with Indian lands; they're going to recognize that Congress still has Indian affairs power in the Territorial Act and they say, "We're not going to tax the property of the United States."

And going back to the Louisiana Purchase Treaty, you know, Jefferson says, "We're going to deal with Indian nations through treaties based on mutual consent. And through all the territorial acts they have to bring it forward that the United States has the authority for the primary disposal of the soil. So in other words it wasn't the states that had the right to dispose of federal property, it was the United States. And the importance of that is the United States was recognizing that Indian nations had prior right and title."

So if you watch these statutes coming forward, they kind of provide these principles. And this is reflected in the North and South Dakota Enabling Act that the state has no claim or interest in the lands
of Indian tribes or Indians. The state recognizes that Congress has continuing jurisdiction for Indian affairs. The state will not tax the property of the United States, which includes Indian trust property, and the state recognizes that that includes lands that may be acquired in the future for federal purposes.

So these are all part of the background. And the traders' statute should be understood, you know, against the treaties and these early statutes that really have this allocation of authority that we already have treaties out here, that these are our permanent homes, that the Federal Government has authority and continuing congressional authority and that it's not the states that are going to come in and be involved in Indian affairs.

So the problem that we have is these more modern cases coming forward and not really knowing what to do after the 1924 Citizenship Act. Well, our people out here were involved in securing the 1924 Citizenship Act.

Henry Standing Bear was one of our leaders from the Oglala Sioux Tribe, and he was active and was pressing for citizenship. And the reason why people were pressing for citizenship was because they kept
having these surplus land acts to take land from the tribes when tribes didn't have a right to vote. So Henry Standing Bear says, We want to have citizenship because we want to have a say, you know, in how our people are going to be treated by the United States. But they wanted to reserve their tribal citizenship, so they were not giving up their tribal citizenship at that time.

And there's a proviso in the Citizenship Act that says that nothing in the Citizenship Act impairs the right of an Indian to tribal or other property and it will have no impact on that relationship between our tribal citizens and our Indian lands. And the importance of that is that's our homeland. So they were wanting to preserve the status quo for self-government, for our lands as our reserved lands. And out here these are our reserved lands from our original lands, and those are recognized by the treaty in 1851 and carried forward in the 1868 Treaty.

Well, you know, we come up and we get into these cases that are what should happen when you have, you know, a logging company at White Mountain Apache and it's Fort Apache Tribal Timber Company and the state wants to impose motor fuel tax on
their trucks that are operating on BIA roads and 
they say, "Well, we're going to have to have a 
three-part balancing test. We're going to have to 
have federal and tribal interests balanced against 
state interests." Well, that turned out good in 
that case because they preempted the tax and they 
recognized federal and tribal interests. But the 
problem with that kind of balancing test is, you 
know, if you don't say more it's just inherently ad 
hoc, so it's not real support for Indian 
self-determination.

And the statutes are really, even though 
they're looked at, like the Indian Reorganization is 
looked at and the policy is to revitalize Indian 
economic development and promote self-government, 
it's not viewed as having enough expressed statement 
of preemptive force. So in the absence of a clear 
statement by the United States, the courts are 
saying, We're going to have this three-part 
balancing test that you're not going to be able to 
resolve in terms of economic planning prior to doing 
anything. I mean, it's kind of a court thing that 
you have to resolve later on. So it's very 
unworkable as far as economic development. And it's 
very unworkable in terms of self-government because
the tribes are supposed to retain their original self-government over their permanent homelands. That's protected by treaty.

So we're really in a situation where the United States by not saying what the policy is more clearly has allowed encroachment of state authority into tribal homelands that undercuts tribal authority to tax, tribal authority to regulate commerce, and undercuts our treaty rights.

So we believe that if you look at the background of the treaties, if you look at the Federal Traders licenses in light of the statutes, that there can be a clear statement that the United States supports Indian self-determination, and that means economic development and self-sufficiency.

And we'd like to look at the Reagan policy right now because it seems to be somewhat in line with the current administration's thinking. And the statement says they're going to remove obstacles to economic development and that's important to self-sufficiency. Well, one of the reasons why that statement was important, that's the background for Cabazon. That's the background for saying that the tribes did have authority to do gaming. And one of the things that they say in the decision is, "Look,
the President told the tribes they have to get out
there and generate some economy." And here they're
trying to do it. You know, they can't have the
state encroaching and frustrating their efforts to
develop their economy.

So if you guys revamp these traders' license
regulations and you have a clear statement that
we're out here for self-determination, we're out
here for economy, we're out here for economic
self-sufficiency and dual state tax burdens
frustrate the federal policy so they're preempted
and they're preempted because you guys are looking
to tribes to have more economic development so that
the tribes can do more things and provide more
adjunct partnership, you know, in some of our
intergovernmental endeavors and when the state comes
in and takes that money, it's your primary area
because these are reserved Indian homelands. This
is part of the bargain of having the rest of the
land available to the state.

The state agreed to that bargain through the
Enabling Acts but here they've forgotten that even
though it's in their constitution and they want to
come out to Indian lands and exercise authority over
Indian lands. And if you say, Well, it's not Indian
lands because it's just activities on Indian lands, well, that's kind of somewhat disingenuous from a policy point of view because obviously you hold lands as a homeland to have activities upon those lands.

So we're thinking and, you know, we'll provide written comments before you close, but we're thinking that some of the confusion of the Indian case law is based on the idea that the United States has been silent on the question of preemption. And if we can have a clear statement from the President, from the Secretary, and there have been a lot of clear statements but it has to be very clear, that we're here to promote self-determination, we're here to promote economic development, and dual state taxation frustrates the federal purpose, frustrates the federal undertakings, frustrates the treaties. So when you look for authority to do this regulation, you should look for authority to some of the treaties and not just the Federal Traders Statutes because they work hand in hand.

You know, I also think that it's important that -- you know, the Supreme Court has looked at tribes in kind of a particular, kind of a silo kind of way; we're each kind of our own silos. They look
at our Sioux tribes and they say, "Well, you're not a member of the Standing Rock Sioux Tribe. You're a member of the Cheyenne River Sioux Tribe so you don't have much interest in things at Standing Rock so we're not going to preempt state taxes concerning you working for the tribal government at Standing Rock because you're from Cheyenne River." And it's kind of nonsense because we're all together through the Sioux Nation Treaty and we've always been all together and the United States divided us up through a statute that was intended to take out the middle of the reservation to provide a path from Sioux Falls to Pierre to Rapid City for the railroad, and the railroad got a lot of land afterwards.

We're not divided in any way in our thinking. You know, we're at -- at an administrative level we have our own tribal governments on our reservation. We also have provisions calling for a Sioux Nation Council and we frequently meet among the Sioux Nation.

So some of these things are kind of, they need to be brought back to the treaty and the original understandings of the Indian nations because they've kind of got caught up in court rhetoric and it looks that way from the Supreme Court but they're only
spending a half hour on the case so they don't know. I mean, you go up and listen to some of those cases and you see, "Wow, do things really operate on those Indian reservations." They have no idea. But the Secretary of the Interior does. The Secretary of the Interior is from Montana, you know, out there working with tribes. I understand maybe he was a colleague with somebody from Fort Peck when he was in the navy. You know, he seems to have a good understanding.

People that really get involved and the congressional folks that get involved, they have a better understanding that tribes are governments; we're trying to make the most of our homelands and provide a better life for our people, and we need some authority to regulate commerce and to tax commercial activity so that we have, you know, some basis for, you know, our governments.

We also need an opportunity for economic development to trade from one reservation to another, so not only between Standing Rock and Cheyenne River but if we have cattle, maybe we can sell them out to, you know, out west to some of the tribes in California that maybe have a lot of hospitality. If we have, you know, some of our
tribes doing mineral development, you know, maybe they sell to other tribes.

Different tribes can do, provide different goods. We had -- the Sisseton Wahpeton Sioux Tribe was doing garbage bags. And they had a tough time with their garbage bags, and they lost some of their federal contracts. So the other tribes said, "Hey, you know, we can buy from you." And if we do have value that's generated in Indian Country, from your point of view it's not reservation-generated value, it's Indian Country value and it should be recognized in the regs that you're promoting Indian Country economic development for the tribes. And if we can reestablish this kind of original trading network, well that's what tribes did before the United States. You know, if we do it today, that means that some of our tribes that have Indian gaming and have revenues or Indian gaming and are buying $8 to $10 million in goods and services can buy some of that, you know, from other tribes. And if there's a little bit of an incentive because our products developed here are not subject to state taxation, they should carry that, you know, preemption of state taxation throughout the Indian Country trade network and that would help facilitate
some of these relationships between tribes.

So these are, you know, some policy updates that are within your authority because you have very broad authority under Section 2 and Section 9, you know, for Indian affairs. You also have the background of the treaties and you have these Federal Traders licenses that the Supreme Court has said, you know, that the very existence of them preempts state taxation.

So we need to do something that's updating these. And if you brought forward some of the provisions like you have for Hopi and Navajo into the other regulations and said, you know, people ought to be suitable; goods ought to be merchantable; there ought to be protection for public health and sanitation, you know, et cetera, there ought to be some enforcement mechanism. And in light of Indian self-determination similar to what they say in Executive Order 13175, we're going to defer to the tribes in the first instance to develop their own laws and standards and regulations for licensing businesses and Indian commerce within their area of Indian Country and we're going to promote them to develop Indian Country value and we don't have to enforce all of our system if the tribe
is enforcing their system and the business traders are adhering to it.

Now, we get into this kind of situation, non-Indian folks read the news and they read the case law and stuff and they say, "Well, Indian tribes have no jurisdiction to enforce criminal laws in Indian Country so I'm driving across the Pine Ridge Reservation and I'm going to go 85 miles an hour but when the tribal cop stops me I don't want to pay the ticket because you don't have jurisdiction over me." Well, not exactly. I mean, tribes have authority and can enforce that through civil law. You know, we can go through court. We can have a big federal court case go up about whether we have authority to do traffic tickets. We sure as heck are not going to allow somebody to routinely drive through at 85 miles an hour and be scoff laws as far as tickets. So the other thing we can do is next time, you know, the guy comes through, if he wants to go to court and wants to fight the ticket and doesn't want to take the ticket, doesn't want to slow down, you know, we can hold him and we can turn him over to, you know, the next county over, Fall River County and say, Hey, you guys take care of this guy. He's a danger on
the roads and he's creating a public danger. So
there can be -- it doesn't have to be that the tribe
is always going to take every case to the Supreme
Court.

So if we're doing this business licensing and
people are saying, Hey, we're not going to follow
your business license because we don't believe in
your business license and we're free to do whatever
we want on your reservation without reference to
you, well then we can refer it and we can refer it
to the Secretary and say, This person is not
complying with tribal laws and there ought to be
federal enforcement, you know, to pick up the slack.
And you ought to be working in partnership with us
to promote Indian self-determination and economic
development and to watch out for things.

And that would be kind of the situation that
would happen in the grazing situation. You know,
generally the Bureau is going to defer to the tribe
and allocation of grazing units and, you know, we
have all these regulations in place, but ultimately
if we have somebody that's trespassing cattle, if
somebody is using the wrong brand, if somebody
steals cattle, then we're going to get involved with
the Federal Government and the Federal Government is
going to support the tribe in terms of enforcing that regulatory system.

So if we could reinvigorate these Federal Indian traders licenses, they go back to the beginning of the country, maybe even prior to the country, so they're very venerable; they're very closely tied to Congress' Indian commerce power and they give us an opportunity to recognize that the tribes have always been partners with the United States and the trade and that tribal authority is recognized in the treaties; we have our Indian self-determination policy; you recognize our authority as partners.

But if the people involved in commerce are doing things, dumping hazardous waste or whatever, then we call upon you and you help us out. And so we could set up that kind of situation. That would really be a benefit to the tribes and it would really restore the original meaning and understanding of these treaties and state-enabling acts and the system the way it's supposed to and give guidance to the courts so that they don't feel that they have to come up with a three-part balancing test that nobody else can figure out either.
So we appreciate you coming out. And it's a long way but we've been thinking about this for a little while.

Gay, did you want to --

MS. A. GAY KINGMAN: I spoke earlier.

MR. MARK VAN NORMAN: Oh, you spoke earlier. And I'll just say that our tribes are behind it.

Did you speak on behalf of Standing Rock?

UNIDENTIFIED SPEAKER: Gary did.

MR. MARK VAN NORMAN: And Oglala is interested in this. Cheyenne River is interested in this. The MHA Nation is interested. So everybody will be submitting comments. And we hope you can carry it forward with the new administration because we think it fits in with the idea that regulations ought to be useful. You know, you're streamlining your federal regulations and promoting, you know, the governments that are closer to the people handling their own affairs and promoting Indian self-determination. So I think that's going to be the policy of the administration.

And we appreciate your efforts to come out here.

MR. JAMES PORTER: Thank you.
MR. MARK VAN NORMAN: Thank you.

MS. TANA FITZPATRICK: Thank you very much.

Okay, so we've been going for about two hours now. I'm going to call for just a five- to ten-minute break and then we can convene with any other comments or close up or however we want to do that.

(Recess taken from 10:30 a.m. to 10:55 a.m.)

MS. TANA FITZPATRICK: Okay, we'll go ahead and reconvene. I'd like to turn it over to any other comments that we might have. If not, then we can do some closing comments.

MS. HEATHER DAWN THOMPSON: Mark raised a couple things I just wanted to build on and support and reiterate. One was the intertribal trade issue. You know, we were talking about generally making sure that commerce going outside your boundaries was covered and protected in this area as well, but I wanted to reiterate the intertribal component of it. This is one of the biggest difficulties. I think all of us are working on projects where we are trying to facilitate the traditional intertribal trade routes. I know that in particular the tribes that I work with are trying to pull together sort of a fish, buffalo, wild rice sort of food trade, and
one of the biggest issues is that the states essentially try and seize jurisdiction as soon as you leave the reservation even though you're going directly to another reservation, and so taking sort of that into account, you know, if you're bonded or whatnot, if you're going directly from one reservation to the next or one Indian Country to the next, that that is sort of included in the vision of what intertribal and tribal trade looks like.

The second component of it, and this is sort of against my own personal financial best interests, but Indian first, so in my private practice half of my clients of course are tribal but the other half are investors. And Jim and I were visiting a little bit about this during the break.

You know, one of the reasons I'm able to live at home and work for my tribes in private practice is because it costs the investor so much to hire attorneys on the other half of my practice because they have to waste so much money hiring us to go through all these different iterations, like Mark was saying, of the different, weighing of the different case law, whether or not different regs are going to be applicable, whether or not different taxes are going to be applicable. And just from a
pure business investor standpoint, it's a nightmare. That is how half of us in private practice make our money because they just have to waste it on us in order to try and figure out what it's going to be.

And there's so much uncertainty in it. And as you guys know, from a business perspective if something is a higher cost, you can take that into account and you might be able to continue moving forward with your business anyways, but what you can't move forward on business with is uncertainty. You know, is your rent going to be five bucks this month or is it going to be $500? Is it going to be 75 and then 1,500? Is it going to be the state that's regulating who you're paying your taxes to or is it going to be the tribe or are you going to have both? Is this going to change next month? And you just cannot do business in that sort of regulatory and tax environment when the answer to every single question is, "It depends; it depends; it depends."

Where is the impetus? Are you starting off or are you coming on? Are you going off or are you going on? Is it on Indian land or trust land? Is it on fee land? I mean, I'm almost embarrassed to have these conversations with non-natives that are not familiar with doing business in Indian Country.
They think it's absolutely insane. And it is -- this is the single biggest impediment to bringing in our capital and investment partners for Indian Country. And unless we can fix this, nothing else will matter because there's going to be no capital coming in.

There's an entire industry of lawyers and an entire industry of consultants for banks that make a ton of money just trying to convince people to do business with Indian Country and help them understand what this patchwork of regulation and taxation looks like that has evolved over like, as Mark was saying, over the last 100, 150 years through the court system because the Federal Government hasn't spoken up and taken this phase over. And so from a pure economic standpoint, we are never going to see that economic development unless we can simplify this and the answer isn't always "It depends."

I know it's hard because a lot of the investors aren't necessarily engaged in tribal consultation so we don't always hear that voice. So at RES next week I am going to try to encourage some of the investors, the non-native, non-Indian Country investors to file some comments as well. But as a
person that gets hired by them all the time, I can easily tell you this is by far their biggest expense, the biggest impediment. And seven times out of ten the decision after going through "This depends," you know, the diagram thing, is that they just don't do business because there's too much uncertainty and it's too expensive with all of the different taxation and regulatory framework involved with that. So I just wanted to add that.

Thank you.

MS. TANA FITZPATRICK: Thank you.

Any other comments?

MR. JAMES PORTER: Anybody else?

(No response)

MR. JAMES PORTER: No? Okay.

MR. MARK VAN NORMAN: Well, Heather came back for a second bite of the apple so I thought I would.

MS. HEATHER DAWN THOMPSON: That was my fourth or fifth actually.

MR. MARK VAN NORMAN: You know, in our area we really have a feeling that we're standing on the treaties, that our leaders and our grandfathers and our relatives when the United States came out in their time, you know, were the parties to the
treaties and that we carry forward, you know, their legacy by defending the treaties. And I think there's kind of -- you know, it's kind of funny, there's a continuity. It seems like a long time when you're talking about years. And if you talk about -- boy, if you talk about 1960 and the Cuban missile crisis, I mean I guess that's kind of current history, but if you talk about --

MR. JAMES PORTER: No, it's not.

MR. MARK VAN NORMAN: Maybe not. It was the year before I was born.

But if you talk about 1860, you know, it seems like another whole universe. But my mom was -- she's 84. She didn't live with me when I was dating my wife fortunately, but she does now. She has kind of a different outlook on time because she's 84. And she took care of her grandmother when she was a girl in high school, and her grandmother was her grandfather's second wife, and so he was a little bit older. He was born in 1860. So my mother's grandfather was born in 1860. So his dad was a French and Cree Indian fur trader with the American fur company (unintelligible), and he testified against the Homestead Act in 1860 because he said, "Hey, these are Indian lands out here. You can't
have people coming out here and homesteading these lands, you know, because we have treaty rights that are recognized under the 1851 Treaty," right? So people for a long time have been engaged.

And, you know, we have these problems with these surplus land cases, and we have a whole lot of these surplus land cases. And we've had our people like from Cheyenne River went out to Congress in 1904 and said, "Don't pass an opening act for Cheyenne River because we're not ready to open our lands for settlement." So we didn't have the 1904 Surplus Land Act.

And the 1908 Act was a different kind of act because in the 1904 Act the United States came out and they said for a sum certain we're going to buy this land. Well, in 1908 they didn't want to do that anymore because the land was not really selling all that well, as well as they thought for settlement because, you know, the land out here is not as productive as it is back east.

So they came out and they did a different statute in 1908 and it was people, when they bought a particular tract, then the tribe -- that would go to the United States and then the tribe would get paid on a tract-by-tract basis. So we kept our
reservation boundaries in the Solem vs. Bartlett
diminishment case, and the court said the 1908
statute was different than the 1904 statute.

So this history of people being involved, you
know, goes back a long way, and that's why we're
very interested in the historical. And I think
today we have the president of the Oglala Sioux
Tribe going over to the national archives to view
the 1851 and 1868 treaties.

So probably a little bit like the Navajo Nation
like some of our other, you know, western nations,
we're still feeling very strongly because that the
treaties are the law of the land. And there's a lot
of these statutes that went along that recognized
the treaties.

And, you know, you have to think the Kansas/
Nebraska Act, you know, faithfully execute, rigidly
adhere to the treaties. You know, even in 1871 and
the treating making.

In 1889 when we have not only the State
Enabling Act but we have an act of March 2nd, 1889
that divided the Great Sioux Reservation, but it
retains the part of the treaty that's not amended by
the act. So the treaty is carried forward by the
act.
So even in reference to the Indian Re-Organization Act, you know, we had a provision in the 1889 Act that said we were going to have a wagon and a, was it -- is it a horse? I'm not -- ox and farm implements and whatnot for each person as they come of age. And that was carried forward. So as they -- even though they ended allotment, they didn't end the sort of agricultural benefit that was coming, and they called it a Sioux benefit.

So the tribes have worked hard. When we did the Cheyenne River Oahe Act, the tribe said, "Hey, we're going to have to have a vote on this and we're going to have to have three-quarters consent to this act because we can't see our treaty lands without three-quarters consent." And Congress agreed.

So out here we stand on the treaties. And the treaties are good law, not only as far as we're concerned but also as far as federal law. So I think when you do this, if you're able to do this amendment to the federal traders statutes, it's important to look at these treaty provisions.

And these treaties have never been aggregated. You know, that we're carrying forward these treaty provisions.

And there's trade provisions in the treaties
that can also be relied on to provide a little bit more framework so that when you do have the partnership with the tribes under the Self-Determination Act you're not looking to the provision that says, The commissioner shall have the sole power to appoint Indian traders; you're looking to the broader perspective that the tribes are the partners in trade.

And so under self-determination we're effectuating the treaties by relying on our partners to carry out that business in the first instance. And I think that gives you more background when you talk to lawyers over at DOJ who are not versed in Indian affairs.

So I'm sort of having a feeling that there's that kind of dialogue a little bit behind this so it makes it more difficult to undertake for you. But I think if they look at more of the historical materials that they'll see that there's good support for your effort.

So we appreciate all of your hard work and traveling the country to get out here and meet with us all.

So thanks very much.

MS. TANA FITZPATRICK: Thank you.
MS. A. GAY KINGMAN: Can you tell us what your plans are? I know the next place is Shakopee, but what's the outline after that, the schedule? Will it be posted on the federal -- on your website?

MS. TANA FITZPATRICK: The -- so actually we're going to RES on Monday. And then Tuesday is Prior Lake. And then next Thursday is the last consultation at Seneca, New York.

And all of the notes from the consultations are posted on line. And at this point we're -- we don't have a plan about what's going to happen once we receive all of the comments, but those comments are due on April 10th. And so we'll be taking a look at those.

As you all know -- maybe you don't know, but Secretary Zinke was just confirmed last week, and so a lot of the priorities are going to start coming forward for Interior and also for Indian Country out of Interior. So we'll see.

MR. JAMES PORTER: I'm sure you were hoping for more of an answer than that, and it's just that's where we are now. This is the initial.

This has been a great meeting. It's really helpful to hear how important these issues are because the meetings that I had been to before this
hadn't made that clear at all.

MS. TANA FITZPATRICK: Any other comments?

(No response)

MS. TANA FITZPATRICK: Well, if there are no other comments, then I just want to echo what Jim just said that this has been a very helpful consultation. We've seen a lot of great input. And I'm personally but also the Department is looking forward to the comments that we'll receive by April 10th. That will definitely help inform, if the Department does move forward with a regulation, how that will look like in incorporating those comments into any formulation of regulation.

And so thank you all for having us. And that's it.

* * * * *

(The proceedings concluded at 11:15 a.m., March 9, 2017.)
STATE OF SOUTH DAKOTA  
COUNTY OF PENNINGTON  

I, CINDY K. PFINGSTON, hereby certify that
the foregoing pages numbered from 1 to 86, inclusive,
constitute a full, true and accurate record of the
proceedings had in the above matter, all done to the best
of my skill and ability.

DATED this 10th day of April, 2017.

_________________________________
CINDY K. PFINGSTON
Registered Professional Reporter

My commission expires:
February 4, 2022
comprehensive... [1] 48/10
comprehensively [1] 6/7
comprises [1] 16/6
39/17 39/23
concerned [2] 10/12 83/18
concerning [1] 67/5
conceptual [1] 53/19
concluded [1] 86/17
conducted [1] 28/23
Confederation [2] 51/12 52/22
conference [1] 21/21
confirmed [1] 85/16
confused [1] 51/17
Congress [15] 7/7 9/23 14/16
15/1 16/16 18/12 18/17 43/18
47/22 51/2 51/14 60/8 61/2
81/8 83/15
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consensus [1] 44/19
consent [4] 46/5 60/14 83/13
83/15
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consistent [1] 3/22
constant [6] 10/24 10/25
11/12 13/3 24/17 32/22
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53/21 65/23
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14/23
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47/20 52/1 58/5 77/8
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61/2 81/14
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58/2
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69/7
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controversial [1] 13/1
convene [1] 75/5
conversation [6] 9/14 10/17
10/23 12/2 13/7 13/8
49/17 77/24
convinced [1] 78/9
cooperation [1] 23/19