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**IN THE MATTER OF:**

**FEDERAL CONSULTATION WITH TRIBES  
REGARDING WHETHER/HOW TO REVISE 25 CFR 140  
TRADERS WITH INDIANS**

**THURSDAY, FEBRUARY 23, 2017  
8:55 A.M.**

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**APPEARANCES**

PANEL MEMBERS PRESENT:

TANA FITZPATRICK

Senior Counselor to the Assistant Secretary  
Department of the Interior

JAMES W. PORTER

Attorney-Advisor  
Office of the Solicitor  
Department of the Interior

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**THURSDAY, FEBRUARY 23, 2017**  
**8:55 A.M.**

**MR. CLADOOSBY:** Good morning. Welcome to Swinomish. Welcome to those that have come back to visit us again. I'm going to ask one of my council members, Smekele, Leon John, to say an opening prayer for us. So, if you could just all stand and pray in your own way.

**MR. JOHN:** Thank you, Father, for gathering us together here today. We invite the Holy Spirit to be with us this week as we talk about these important issues in --in our -- in our homelands. And, Lord, we pray that you would send the Holy Spirit to be with us and guide us and -- and be with us as we -- we have our side conversations and, Lord Jesus, we just pray that you would guide us and protect us as we travel home, and further we pray that you will put your hand upon our families that are -- that we left at home and keep them safe. Lord, we just praise you, and thank you

1 for all -- all the gifts you've given us. For this  
2 we pray in the name of our savior, Jesus Christ.  
3 Amen.

4 **MR. CLADOOSBY:** Amen. Alrighty. I would  
5 just go ahead and hand the mike around here so we  
6 can go ahead and introduce ourselves.

7 **MS. LAMACHI:** I'm Kris Lamachi.

8 **MS. KARNOSTA:** Deborah Karnosta.

9 **MS. THOMPSON:** Chloe Thompson, Suquamish  
10 Tribe.

11 **MS. CUSHMAN:** Leslie Cushman, Puyallup  
12 Tribe, Marine View Ventures.

13 **MR. SCHREINER:** Nate Schreiner, Squaxin  
14 Island legal department.

15 **MS. SIMONSEN:** Melissa Simonsen, Swinomish  
16 Tribe.

17 **MS. PEARSON:** Wendy Pearson, attorney for  
18 Swinomish Tribe.

19 **MS. SAGE:** Rachel Sage, Swinomish Tribe.

20 **MR. MONTAGUE:** Dave Montague, local  
21 citizen.

22 **MS. JUNEAU:** Good morning, my name is  
23 Bonnie Juneau from Tulalip Tribes.

24 **MS. KOOP:** Lisa Koop, attorney for the  
25 Tulalip Tribes.

1           **MR. GOBIN:** Glen Gobin, Tulalip Tribal  
2 Council.

3           **MR. SHELDON:** Mel Sheldon, Tulalip.

4           **MR. WASHINES:** Asa Washines, Yakima  
5 Nation.

6           **MS. KENT:** Patrice Kent, Yakima Nation,  
7 Office of Legal Counsel.

8           **MR. STROUD:** James Stroud, attorney, Lummi  
9 Nation.

10          **MR. BALLEW:** Tim Ballew, Lummi Nation.

11          **MR. JOHNSON:** Victor Johnson, Lummi  
12 Nation.

13          **MR. DOSSETT:** John Dossett, attorney,  
14 National Congress of American Indians.

15          **MS. EASTWOOD:** Leslie Eastwood, GM, Samish  
16 Indian Nation.

17          **MR. LECUYER:** And I'm Steve LeCuyer, I'm  
18 Swinomish Tribe legal director.

19          **MR. PORTER:** Hi. It's Jim Porter, I'm an  
20 attorney with the Department of the Interior.

21          **MS. FITZPATRICK:** Good morning, everyone.  
22 My name is Tana Fitzpatrick. I'm Senior Counselor  
23 to the Assistant Secretary of Indian affairs, in the  
24 Department of Interior. And thank you so much to  
25 Swinomish for hosting us today.

1 Today is a tribal consultation between the  
2 Federal government and the Indian tribes, and so I'm  
3 very thankful that we have good representation here  
4 from -- from you all. And it's beautiful, I'm glad  
5 you all found your way up here, so I'm thankful for  
6 that also.

7 If you guys might remember we came out in  
8 December with then Deputy Secretary Mike Connor. We  
9 announced the ANPRM, Advance Notice of Proposed Rule  
10 Making. And that's what some of the handouts are  
11 out there. Today is our first Tribal Consultation  
12 on this issue. The ANPRM is a direct response to  
13 several requests and some proposals we received over  
14 the past couple of years on amending the Indian  
15 Trader Regulation.

16 They are -- we are in the very early  
17 stages of possibly considering a proposed rule. As  
18 you might be able to -- if you looked up the ANPRM  
19 report it's -- several questions are laid out. Were  
20 soliciting input today and at our other  
21 consultations. And it's based on the current part  
22 25, part 140, which is the current Indian Trader  
23 Regulations that govern trade on Indian  
24 Reservations.

25 They are based on a lesser known Indian

1 Trader statutes, which have a long, deep history  
2 themselves, and the most recent of those statutes  
3 was passed in 1903, like, if you need any context on  
4 how old that is, the actual statutes are. And the  
5 statutes sought to protect tribes from unlawful  
6 traders on the reservation. So, the regulations  
7 stem from those initial statutes.

8           The current Department revisions a  
9 framework where the BIA actively issues licenses for  
10 anyone who -- and any business who wants to operate  
11 within Indian reservations. The Department  
12 recognizes that tribes fully regulate businesses  
13 operating within their boundaries. The regulations  
14 that are currently on the books were initially  
15 promulgated in 1957, and were revised a couple of  
16 times throughout the years, I think in 1965 and  
17 sometime in early 1980s.

18           The last time that there was an attempt to  
19 -- to amend the regulations was almost 30 years ago.  
20 And that didn't end up panning out. So, it's been  
21 quite sometime since the Department has taken a look  
22 at possibly amending these regulations. But if  
23 there is any amendment, you know, we're here to  
24 consider whether they should be repealed in their  
25 entirety, whether they should be amended in part or

1 not amended at all. We're really seeking input from  
2 Indian Country on whether or not these should be  
3 touched and how or what -- what should occur, and  
4 what any tribe's thoughts are.

5 Any amendments, though, would seek to  
6 modernize Indian Trader statutes in a way that  
7 supports Indian Country in their regulation of  
8 businesses. That also supports current tribal  
9 business practices, as well as strengthens tribal  
10 economies throughout Indian Country.

11 At this point, as everyone knows, there's  
12 a transition and we're under a new administration.  
13 We do not know what those current priorities are,  
14 but -- or what the specify priorities are, but what  
15 we can probably -- probably anticipate is that they  
16 will align with the President's priority for  
17 economic development.

18 And, so, today, and at all of our -- at  
19 our consultations we have the list of questions.  
20 There's also a handout that we provided that -- that  
21 more summarizes the questions that we're seeking  
22 input on. But we would like to get input on whether  
23 or not Part 140 should revised in full or in part  
24 and why, what the Federal involvement should be in  
25 business practices. How to make sure traders in

1 Indian Country are reputable and accountable, and  
2 what type of trade, and who should be regulated.

3 So, were we're also interested in learning  
4 how tribes currently trade within their  
5 jurisdictions and how revisions to this regulation  
6 could promote economic viability in Indian Country,  
7 and address taxation issues.

8 I'd also like to note that we're accepting  
9 written comments until April 10th, 2017. And so  
10 we're here today to listen, get your thoughts on how  
11 we can modernize the -- these regulations to promote  
12 tribal self-determination and self-governance. One  
13 must note when making comments we would ask that you  
14 provide your name so -- we have a court reporter  
15 here today. And so to provide your name to help  
16 him. Okay.

17 **MR. CLADOOSBY:** Let's give Tana and Jim a  
18 welcome to the Northwest. Thank you, guys. Thank  
19 you for coming out here. So, I'll go ahead and kick  
20 this off.

21 And Brian Cladoosby, C-l-a-d-o-o-s-b-y,  
22 I'm the president of the National Congress of  
23 American Indians, and chairman of the Swinomish  
24 Tribe. And I'll be making my first comments on  
25 behalf of the NCAI. Then I will sit down and let

1 other leaders speak, then later I will be up to  
2 speak on behalf of the Swinomish perspective on  
3 this.

4           So, once again, as you said, on December  
5 8th we had a meeting here with Mr. Connor, I  
6 believe. And some of you might have been with us  
7 here that evening to get an opportunity to discuss  
8 this issue before the consultation started. So, it  
9 was very valuable for us to be able to sit down and  
10 talk with him about this. And, so, I will just go  
11 ahead and go through my comments here that -- that  
12 we have.

13           And so, you know, we look forward to  
14 working with this Administration on looking at the  
15 regulations that hinder economic growth in Indian  
16 Country. And, Lord willing, DOI will work with us  
17 to look at some of that low hanging fruit, some of  
18 those barriers that we have been encountering when  
19 it comes to economic development in Indian Country.

20           And as many of you know there was really  
21 no Marshall Plan for Indian Country, like we've seen  
22 after World War II with our friends in Germany and  
23 Europe and Japan. And that was unfortunate that  
24 there wasn't really no viable economic development  
25 plan per se for Indian Country. And, you know, we

1 applaud DOI for their goal the last eight years of  
2 bringing in over a half a million acres of land into  
3 trust, which will support economic development,  
4 housing and other infrastructure needs that the  
5 tribes have.

6           So, my hands go up to all the leaders that  
7 are here from the Northwest, because this is very,  
8 very, very important to all of us. And I believe  
9 these regulations, the genesis of them, I believe go  
10 back to George Washington, believe it or not.  
11 George Washington. Now, Ebony was not born in 1957,  
12 the last time that these regulations were amended.  
13 So, if you weren't born in 1957, I mean it's been  
14 long overdo.

15           And we've been, for the last couple of  
16 years, encouraging DOI to update the Indian Trader  
17 Regulations, and I jokingly refer to them as the  
18 Indian Trader Joe's regulations, for those that know  
19 and shop at Trader Joe's. Got to have a little bit  
20 of humor into -- into the notes there.

21           But, first, I just want to share you what  
22 the -- the Indian Trader statute provides very broad  
23 authority to any person desiring to trade with the  
24 Indians on Indian Reservation shall do so under such  
25 rules and regulations as the Department of Interior

1 may prescribe. The regulations should be updated  
2 for the modern era, for today's tribal governments,  
3 who are fully capable of governing our own affairs.

4 And NCAI has proposed a framework, and it  
5 has three parts. First, the licensing function  
6 should be delegated to tribal governments. We are  
7 far more capable of handling local business  
8 licenses, licensing on tribal lands, and it is very  
9 important to have a business licensing structure  
10 that can promote local businesses. And also deal  
11 with unscrupulous or fraudulent business operators  
12 who should be prevented from preying on consumers.

13 For tribes who may wish to rely on Federal  
14 licensing, they can be permitted that option. So, I  
15 just want to give you an example of Swinomish here.  
16 We are a Tribe that has adopted our own business  
17 licensing and regulatory codes. We have a general  
18 business licensing code, as well as specific codes  
19 regulating fireworks, liquor, tobacco, hotel,  
20 daycare professionals and professional services.

21 And I just want to thank those of you that  
22 helped us over the last 12 years. And I've been  
23 involved in the last six years on our dental health  
24 aide therapist bill that the Governor signed  
25 yesterday in Olympia. And the reason I bring that

1 up is that we were the first Tribe in the lower 48  
2 to break away from the State, and then requiring our  
3 dental -- our dental assistants, our dental health  
4 aide therapists and our dental hygienists from being  
5 required to get a -- a license from the State.

6 Swinomish has its own dental board. We  
7 have professionals outside of Swinomish that serve  
8 on that board from the University of Washington and  
9 other places, and we license our own dental  
10 practitioners right now. And, so, it's a great  
11 example of how a government best knows the needs of  
12 our community and can taylor our licensing codes to  
13 their needs.

14 So, second, there should be a presumption  
15 that tribal courts have jurisdiction over all  
16 parties conducting business on the reservation.  
17 It's very important. We don't intend for this to  
18 apply to average consumers who buy gas at our tribal  
19 gas station. It is intended for licensed businesses  
20 on reservation.

21 If -- many of you attorneys may or may not  
22 have followed the Dollar General versus Mississippi  
23 Choctaw case. When the Supreme Court could not  
24 decide if a tribal court should have jurisdiction  
25 when a store manager sexually assaulted a young

1 tribal member working as an intern on a reservation  
2 for Dollar General. A clear presumption of tribal  
3 court jurisdiction in the regulations would enable  
4 us to protect the most vulnerable in our  
5 communities. This should be a low hurdle, as  
6 there's already a provision for consent to  
7 jurisdiction under the Trader regulations for the  
8 Hopi and the Zuni tribes.

9 Here at Swinomish we're very proud of our  
10 independence, separated not by constitution, we are  
11 amending our constitution to make sure that it's in  
12 the our next constitution, that would be there would  
13 be a clear line of separation between the judicial  
14 and the executive branch of the Swinomish Tribe.

15 And, so, Lord willing, in the next three  
16 or four months Swinomish will have that constitution  
17 amended and passed, and it will show a clear  
18 separation of powers between our tribal Senate and  
19 between our court system. And, of course, we've  
20 also developed our own arbitration court -- code,  
21 which we use for the resolution of contract  
22 disputes.

23 Third, taxation. It is important to note  
24 that our proposal is limited to businesses on tribal  
25 trust lands. We do not intend to try to regulate or

1 tax business transactions between non-Indians on  
2 non-Indian fee land. The law doesn't support it and  
3 in practice it wouldn't work.

4 And, so, from a local perspective, the  
5 County's attorney wrote a letter -- we have two  
6 refineries right here on our reservation lands that  
7 were stolen from us in 1873. And the County has  
8 wrote a letter saying that Swinomish's goal to have  
9 these regulations amended is to take the \$10,000,000  
10 in taxes that occur at the refinery that go into the  
11 local pockets. And we tried to assure them that  
12 this is not what we are trying to achieve with what  
13 we are doing today. And we tried to explain to them  
14 that this is trust land activity and not fee land  
15 activity that we're talking about. Very important.

16 But we do intend to address the chilling  
17 effect of dual taxation on tribal lands. When the  
18 state or local government is taxing a transaction on  
19 tribal lands that prevents the tribe from collecting  
20 its own taxes. State governments provide few  
21 services on Indian reservations, but impose taxes on  
22 severance of national resources.

23 And the most criminal across the nation,  
24 if you don't know, is the Three Affiliated Tribes in  
25 North Dakota. They went the classic Beverly

1 Hillbillies scenario there, where they went from not  
2 having anything to some of them really becoming very  
3 wealthy on the oil that was pumped out of their  
4 ground on their lands.

5           They had to have businesses come in to do  
6 that, because they didn't have the infrastructure.  
7 And when that company came in, and when they were  
8 pumping that oil out of their ground on their  
9 reservation, the State of North Dakota was able to  
10 implement a tax on every gallon of oil that was  
11 sucked out of their land. And the Three Affiliated  
12 Tribes lost one billion dollars to date, one billion  
13 in tax revenue, to the State of North Dakota, which  
14 I believe is criminal.

15           That tax money should have stayed in the  
16 pockets and in the budgets of the Three Affiliate  
17 Tribes. And situations like this need to be  
18 addressed. That is not right when a state can take  
19 that money, put it in their trust fund in North  
20 Dakota and the Three Affiliated Tribes show clearly  
21 that that State has hardly put pennies out of that  
22 billion dollars back into the Tribe to help deal  
23 with contamination from the fracking, to help deal  
24 with their road situation and infrastructure. And  
25 so that's just a good example of where we have taxes

1 on severance of our natural resources.

2           Also retail sales. And increasingly on  
3 properties, such as wind generation facilities. And  
4 I believe the Sioux tribes right now are in the --  
5 I'm not sure if they've started generation. But  
6 really soon they'll be, like, one of the largest  
7 wind-generating operations in the nation. I believe  
8 six or seven Sioux tribes got doing to do this  
9 venture. And, so, once again, if they are taxed by  
10 outside governments that should not be allowed to  
11 happen.

12           And, of course, tribal governments face a  
13 losing proposition when forced to collect state  
14 taxes. If we impose a tribal government tax, then  
15 the resulting dual taxation drives business away, or  
16 tribes collect no taxes and suffer inadequate roads,  
17 schools, police, courts and healthcare. To add  
18 insult to injury, reservation economies are  
19 funneling millions of tax dollars into treasuries of  
20 state and local governments who spend the funds  
21 outside of Indian Country.

22           Again, just a quick example at Swinomish.  
23 We provide a wide range of services to police,  
24 courts, roads, public works, health, sanitation  
25 services and others. And, with some limited

1 exceptions, we cannot rely on tax revenues like  
2 State, County and local government do to generate  
3 funds for these essential governmental services.

4 Our hands are also tied when it comes to  
5 economic development on our own lands. Cities and  
6 counties can finance infrastructure projects with  
7 projected tax revenues from economic development,  
8 but dual taxation prohibits us from exercising this  
9 basic government function. As a result, we have  
10 lands on Swinomish Reservation that we would like to  
11 develop, but are sitting vacant. In fact, you  
12 passed some of them as you came here today.

13 This dilemma is fundamentally unfair to  
14 tribal governments, undermines the constitution's  
15 promise of respect for tribal sovereignty, and keeps  
16 indian reservations, the most underserved  
17 communities in the nation, impoverished.

18 Both NCAI and Swinomish will submit  
19 comments in April. And we stand ready to work with  
20 you in developing a regulatory structure that will  
21 benefit everyone. We are still very early in the  
22 process, but we think it is worthwhile to continue  
23 to move this process forward, and start drafting a  
24 new and updated regulations.

25 Again, I thank you all for being here, and

1 especially to our DOI trustees for taking up  
2 consideration of these important regulations. Thank  
3 you very much.

4 **MS. FITZPATRICK:** Thank you Chairman  
5 Cladoosby -- or President Cladoosby. Are there any  
6 other comments that you would like to share? Come  
7 on down.

8 **MR. BALLEW:** Timothy Ballew, Chairman for  
9 the Lummi Nation. I would like to raise our hands  
10 to the Swinomish people, President Cladoosby. I  
11 thank you for opening the building and the floor for  
12 this meeting. And Senator Smoke thank you for being  
13 here and providing the opening invocation.

14 As I -- I don't know if this relates to  
15 the trader regulations, but I did enjoy in my  
16 childhood coming down here every Sunday to visit  
17 with my great grandparents. My mom was a member of  
18 the Swinomish Tribe, a proud member who was --  
19 always made time to keep that family connection  
20 between us, Lummi and Swinomish. And I have a lot  
21 of fond memories of fishing, selling fireworks, and  
22 doing all the things that the Coast Salish people do  
23 with other families, with my folks here in Swin.

24 I suppose that is relevant for this issue,  
25 because that is a characteristic of the tribal

1 economy with the peoples of this area. And it's a  
2 statement that all of the tribal nations have had  
3 some sort of economy that has kept their communities  
4 together. For the Coast Salish people, in a large  
5 way, that is a fishing economy.

6 We've had a way of trade and commerce that  
7 allowed our people to thrive since time in memorial  
8 on these lands. And we've done it in a way that has  
9 allowed us to be self-determined and self-reliant.  
10 And it has continually been -- it's been eroded by  
11 the overextension of local newer governments  
12 imposing authority that they do not have on tribal  
13 territories. And this is leading to the problem of  
14 dual taxation.

15 The taxing of other governments in tribal  
16 territories is preventing tribal nations to rebuild  
17 their -- their nations since the signing of the  
18 treaty. I believe it was 1876 was the establishment  
19 of -- of the regulation in question today. And  
20 though I do apologize, there's six questions, the  
21 testimony from our Tribe today will only address the  
22 first one, should -- should the Federal government  
23 address trade occurring in Indian Country through an  
24 updated -- updated regulation?

25 Absolutely. Absolutely, yes. Because

1 there is a need to build and rebuild the tribal  
2 economies to allow tribal nations not just to better  
3 regulate the trade and commerce occurring in Indian  
4 Country, but to help promote and develop the  
5 economies and governmental services that our  
6 communities need to provide to our people. As we  
7 know that there is a growing disparity between the  
8 essential governmental services that our nations can  
9 provide to our people.

10 We desperately need our resources, not  
11 just for healthcare, education, and the management  
12 of our natural resources, like fisheries, but also  
13 to be able to provide better infrastructure in our  
14 tribal properties to develop more industry other  
15 than these great gaming facilities that -- that many  
16 of the tribes benefit from.

17 We need the next policy shift to better  
18 develop our economies so that we can provide people  
19 to our -- jobs to our people, and that the tribal  
20 governments can generate revenues to provide better  
21 services to the people and develop the lands that  
22 are being -- develop the lands that are lying  
23 dormant and unable to use because there is no sense  
24 in putting our resources into lands and properties  
25 that we could use for economic development if some

1 other jurisdiction is going to tax the activity that  
2 occurs there. There is a desperate need for a policy  
3 shift. And this can -- and -- and this --  
4 addressing this regulation could be a small step  
5 towards that.

6 I want to thank the members of the trustee  
7 for coming out to hear the concerns of all the  
8 Indian Nations and we'll be providing written  
9 statements for all seven of the questions by April  
10 10th.

11 **MS. FITZPATRICK:** Thank you, Chairman  
12 Ballew. Next up? All right. We have a speaker.

13 **MR. GOBIN:** Glen Gobin, Tulalip tribes.  
14 Thank you for the opportunity to stand up and hear  
15 our concerns on the proposed regulations. First  
16 off, I want to say that Tulalip is not in support of  
17 repealing the Indian Traders License. We use this,  
18 and it is an important tool. Also when you consider  
19 other legal decisions that have been made regarding  
20 taxation and Wayne Bucek received taxes under the  
21 Bracker analysis.

22 And so under the Bracker analysis it  
23 determines -- it asks you about weighing whose  
24 interest is greater, tribes, Federal interests  
25 versus the state. And so, this is a tool for

1 greater Federal interest in having that, these are  
2 the Indian Traders License as well.

3 And so we're not in favor of repealing  
4 that. That does not mean there could not be some  
5 other mechanism that comes forward that keeps this  
6 intact, but allows some flexibility. Throughout  
7 history the Federal government and Federal laws that  
8 have come down, it talks about building strong  
9 tribal governments, promoting self-determination.

10 And -- and encouraging the growth of a  
11 tribe and ensuring that economic growth. All of  
12 these things are in place, and there are Federal  
13 policies that in place, but yet oftentimes there are  
14 other regulations that come down that either support  
15 that or become stumbling blocks for the enforcement  
16 of that.

17 And so we believe that there could be  
18 their -- the Indian Traders License could be amended  
19 in a way that allows flexibility. Because not every  
20 tribe is the same as in their course of development.  
21 And not every tribe has the same resources and the  
22 same abilities. A mechanism that allows a tribe to  
23 pick and choose when they want to have the Federal  
24 government involvement, or an ordinance maybe that  
25 they pass that has Federal oversight of the

1 ordinance for approval, that delegates that back to  
2 the tribe to regulate.

3 We also have our own business license  
4 division at Tulalip. We license everybody that  
5 comes in. Within our contracts it usually talks  
6 about applicable licenses and things and Federal  
7 laws. Well, under Federal law, the Indian Traders  
8 License applies. And so we use that as a tool to  
9 regulate who's coming on to the reservation.

10 And sometimes when you have those  
11 companies that come in, or those traders that come  
12 in, that they perform in an insufficient manner or  
13 maybe not in the best way for whoever is on the  
14 reservation. You can use this as a tool that they  
15 were not licensed, and they -- they can be removed.  
16 And so we've used that in both ways.

17 And, so, the -- there could be some other  
18 clarity in there as well. So, when it talks about  
19 traders doing trade in Indian Country, we believe  
20 that also means when you're leasing land to a  
21 business that's coming on to the reservation that is  
22 trade as well. Whether that's another native or a  
23 non-native that comes on, there needs to be some  
24 clarification to the -- to have that more clearly  
25 spelled out so it's not subject to interpretation.

1 And so that's another form of transaction.

2 But all in all, we'll be submitting  
3 written comments to a number of the questions that  
4 you have proposed here. But wanted to stand and to  
5 share a little bit of our concerns with a total  
6 repeal of the Indian Traders License and how it  
7 still might be used as we go forward in a more  
8 flexible manner depending on the types. Thank you.

9 **MS. FITZPATRICK:** Thank you for those  
10 comments. Anyone else next up.

11 **MR. WASHINES:** Good morning, my name is  
12 Asa Washines. And -- and so today, you know,  
13 standing up here listening to what's been going on.  
14 And this issue has been ongoing for some time for  
15 Indian Country. And, you know, it's like anything  
16 else, we -- we seem to -- some housekeeping though  
17 rules and regulations that affect Indian Country.

18 And so I think this is long overdue. To  
19 what extent, you know, I hope it's more beneficial  
20 to Indian Country than what's been provided to this  
21 point. It's one of those things that, you know,  
22 that -- that is relation of the potential need to  
23 help economic growth, not just for Indian Country  
24 but for the U.S. in general. And I think there's a  
25 lot of opportunities with the current Administration

1 to really do a lot of help in -- in serving not just  
2 Indian Country, but everyone else.

3 And so -- and, you know, there's --  
4 there's examples up to this point that -- that we  
5 made for Indian Country, especially in gaming.  
6 Gaming not only serves the tribe, but the local  
7 communities, you know. And to do that type of self-  
8 regulation, do the -- and then, you know, there's --  
9 there's examples of where they're doing it already.

10 For example, there's vendors that have to  
11 be licensed to work in Indian gaming. And -- and so  
12 there's a process already established to be a vendor  
13 to do Indian gaming, thorough backgrounds, and so --  
14 and there's fees involved in those. And then, so,  
15 you know, it's not reinventing the wheel, it's just  
16 giving more authority to the tribes to -- to be  
17 self-regulated.

18 And then, again, with the -- what was  
19 mentioned before about all taxation. For -- for  
20 Yakima -- especially Yakima, and with the recent  
21 passage of retrocession. Yakima now provides  
22 additional services that we don't have a -- a tax  
23 base to be funding those services. Currently right  
24 now, you know, in Yakima we're having issues with  
25 the Washington State Patrol, you know, and -- and

1 they're -- and they're absent on the reservation.

2 And so now it's the Yakima Nation Tribal Police  
3 doing enforcement on Highway 97, the State highway.

4 And so without the ability to create our own tax  
5 base, we can't increase public safety services.

6           And so these are some things that we're  
7 talking about. Not only on the reservation but,  
8 like, Yakima and some -- you know -- and, again, all  
9 tribes is different. Yakima has interests off  
10 reservation that is in various stages. We have  
11 trust land down along the Columbia River in our  
12 usual and customaries.

13           And so these current regulations need to  
14 be updated to reflect off-reservation land status as  
15 well. And so -- and then additionally I -- the  
16 Yakima Nation does not, like other tribes, have --  
17 have our own department of revenue. We have our own  
18 business licensing process. And we have been doing  
19 this for sometime now. And we keep expanding those  
20 services, but it's really hard to enforce on those  
21 non-tribal businesses on reservation.

22           And so we've been attempting to. Some  
23 non-tribal businesses have agreed. And they do  
24 concur with tribal jurisdiction, but it's those  
25 other non-tribal entities that -- that are on the

1 reservation that are providing goods and services,  
2 but there is no benefit of that to the government.  
3 You know, and, you know, we're like any other  
4 government, county, municipal, state, all that money  
5 is going back to the State and those services  
6 provided back to the Reservation aren't there.

7           And so there is ways we can improve that  
8 process. And -- and the way I see it is, you know,  
9 there's this argument that counties and states and  
10 municipals are going to lose out on -- on that  
11 money, but I think it's more of an investment back  
12 to the community. We are there. We have credence.

13           We provide local services. If you were to  
14 give money back we can improve the roads. You know,  
15 we know where the problems are at, you know, so give  
16 us -- instead of the County, which, you know, they  
17 kind of selectively -- I think they selectively  
18 choose roads that they knew. If we're to create a -  
19 - through taxing we could create our own, you know.  
20 We could highlight those areas.

21           And so, you know, I think there's just  
22 misconception, misunderstanding that, you know,  
23 we're going to take all the money away. Like, no,  
24 we're going to take that money and invest it back to  
25 the community, because we live in the community. We

1 know what's best for the community, which is also  
2 the reservation. And there is a lot of  
3 misconceptions out there about this.

4 And, so, as -- as -- as we move forward I  
5 thank you for the opportunity to update this  
6 regulation. To what extent, it varies from tribe to  
7 tribe, but Yakima Nation just feels that is -- we  
8 have a lot of timber resources, natural resources,  
9 and then how that goes through the entire process of  
10 being trust income. You know, there's -- I -- I  
11 think there's a lot of benefits to updating these  
12 regulations.

13 And so I'm just here to kind of explain  
14 that. We will be making a more formal statement  
15 regarding the questions. But we do -- we are in  
16 favor of updating these regulations. So, that being  
17 said, I think that's it. Thank you.

18 **MS. FITZPATRICK:** Thank you very much for  
19 those comments. All right. Next up. The floor is  
20 open.

21 **MR. DOSSETT:** Good morning. My name is  
22 John Dossett. I'm an attorney with the National  
23 Congress of American Indians. Thanks very much to  
24 Swinomish Tribe for having us here and to everyone  
25 from the Northwest tribes.

1 This -- the Indian Trader laws are really  
2 old. So, I thought I'd put my comments in the  
3 historical context. One thing that I've heard, you  
4 know, some of the folks at Interior say when we  
5 first proposed this idea is that the Indian Trader  
6 statutes are paternalistic, and we shouldn't go back  
7 to these old paternalistic laws.

8 So, we dug into the history of the Indian  
9 Trader laws. And there was an era before  
10 paternalism when tribes in the United States were  
11 fighting each other with guns. It was an era of,  
12 you know, war in the United States. And that's  
13 really why the United States went away from the  
14 Articles of Confederation and towards a strong  
15 Federal government and centralized control over  
16 commerce with Indian tribes.

17 It was unscrupulous traders and fraudulent  
18 trade with tribes led to a lot of violent conflict  
19 in the 1780s and 1790s. Trade was really -- this  
20 was when the fur trade was still a big part of the  
21 United States economy and the world economy. And  
22 the United States had a very significant sovereign  
23 interest in regulating trade with the tribes. It  
24 was -- at least at that time it wasn't seen as a  
25 paternalistic thing, it was more of a necessity for

1 intergovernmental trade, one with another.

2           So, the origin of these statutes at least  
3 we think historically, although they may have been  
4 implemented in a paternalistic way later on, they  
5 didn't start out that way. And in fact that's the  
6 reason for the Indian Commerce clause in the United  
7 States Constitution is to give the United States the  
8 ability to regulate trade with the Indian nations.

9           The other thing I wanted to address is the  
10 -- the source of authority. There's two -- you  
11 know, there's two parts to the Indian Trader  
12 Statutes that are probably significant; one is 261  
13 that talks about the Federal appointment of traders.  
14 We think that one is basically obsolete. The Unites  
15 States hasn't appointed Federal traders to the  
16 Indian tribes since 1817. That was the old factory  
17 system, that used to be a very old system where --  
18 this is back when the British had traders and the  
19 French had traders, and they were appointing  
20 governmental traders to the Indians. That hasn't  
21 really been done since 1817.

22           Since then they went to this licensing  
23 system where basically anyone could apply for a  
24 license to trade with the Indians. And so that --  
25 that came a little -- that's -- that's 262. Section

1 262 has very broad authority for the United States  
2 to -- to write regulations however it would like.  
3 As long as it's a proper person to engage in such  
4 trade, the Department of Interior may prescribe such  
5 rules and regulations as necessary to -- for the  
6 protection of Indians.

7           The legislative history of this statute is  
8 also interesting, dating to 1834. Let me read just  
9 a little bit of that. In 1834 this -- the  
10 legislative history said the regulation of trade and  
11 intercourse among the tribes should be liberal and  
12 uniform. Such regulations must be made either by  
13 the United States or by the tribes. They will be  
14 more satisfactory if made by them, than if made by  
15 us, and it must be our desire to do nothing for them  
16 which they can do for themselves.

17           This was the legislative history on the  
18 statute 150 years ago contemplated the idea that the  
19 tribes themselves should be regulating traders on  
20 the -- on the reservation. And at that time the  
21 United States didn't want to pay for it. But at  
22 least -- now, I think you can see in the origin of  
23 the statute this idea of delegating the authority to  
24 the tribe is there from the beginning.

25           On the licensing, the -- the Tulalip

1 Tribe's made the comments about keeping the system  
2 in place for those tribes who are using the Federal  
3 Licensing System. That seems very important. And  
4 we clearly want to support that. And then, like they  
5 said, to create the flexibility for tribes who want  
6 to go to the system, it should be voluntary. Our  
7 thought was that the only requirement in the statute  
8 said to be a proper person to -- as long as the  
9 Department of Interior is satisfied it's the proper  
10 person to engage in such trade.

11           There would have to be some sort of a  
12 maybe minimum standards in the tribal regulation.  
13 At least we were thinking that the tribe would have  
14 to have some system of recording the names of  
15 traders, the actual names, rather than assumed names  
16 of businesses. There would probably be publication  
17 of the tribal business codes so that everybody can  
18 be on notice, and then some sort of system or  
19 process for taking a license away if the person  
20 violated the tribal business code. That way the  
21 Department of Interior could be assured that these  
22 are proper persons to engage in such trade and that  
23 would meet the requirements of the statute.

24           The second part of the proposal is the  
25 consent to tribal court jurisdiction. President

1 Cladoosby mentioned the Dollar General case. This  
2 was debated in the Supreme Court just last year.  
3 And I was there at the argument. It was -- the  
4 confusion at the Supreme Court was astounding on  
5 this legal question. And I think it would be a  
6 great benefit to the law generally if the Department  
7 of Interior came forward with a set of regulations  
8 to clarify the law in this area. The Supreme Court  
9 wound up splitting 4/4. They couldn't decide  
10 whether or not tribes have jurisdiction over a  
11 business, a store manager on reservation who  
12 sexually assaulted a minor.

13           It was not a criminal lawsuit, a civil  
14 lawsuit. And an enormous amount of work and effort  
15 went into trying to figure out what the law is on  
16 that question. And if the United States -- if the  
17 Department of Interior would put forth a clear rule  
18 it would save a great deal of grief. However, our  
19 thought is that that would just be a presumption.  
20 That if the parties wanted to contract choice of  
21 forum clauses, they would be able to do that. But  
22 there would be this presumption that there would be  
23 tribal jurisdiction in the absence of a contract  
24 otherwise.

25           Finally, on the tax issue. I think over

1 time tribes have had difficulty getting benefit out  
2 of the Bracker balancing test. If you read the  
3 Bracker decision carefully, it -- it basically says  
4 in the absence of a clear rule on taxes in Indian  
5 Country we're going to create this balancing test,  
6 balance tribal interests and Federal interests  
7 versus the state interests.

8           It's a fact-specific analysis on every  
9 case-by-case basis. That's proving to be very  
10 difficult to implement, because every time an  
11 incident comes up or a question about whether or not  
12 the state tax applies to a business on a reservation  
13 it has to be litigated. And, of course, businesses  
14 don't like to start out their business scheme with  
15 litigation. So, it tends to keep businesses from  
16 wanting to go to the reservation in the first place,  
17 because they have to -- the first thing they have to  
18 do is litigate the tax test.

19           It also has been, I think, unworkable in -  
20 - well, for that reason, I guess that's the main  
21 reason it was unworkable. Oh, the other reason is  
22 if you look at the decisions, it seems like tribes  
23 always lose. I mean the state interests always --  
24 is usually decided by a Federal court judge who  
25 isn't very familiar with tribal interests, so they

1 say the state interests are important, and they  
2 outweigh the tribal interests. So, tribes don't win  
3 very often under the Bracker balancing test.

4           Finally, I guess, for all the reasons  
5 people have already mentioned about the needs to  
6 preempt state taxes on reservation, perhaps one of  
7 the most important is the ability to finance  
8 development in infrastructure on the reservation. I  
9 know that the tribes in Nevada have had much more  
10 success in getting tax exempt financing for  
11 infrastructure development because they have a  
12 steady source. The State law in Nevada preempts  
13 State taxes where the tribe has a tax in place.  
14 They've had that in place in since 1983 in Nevada.  
15 It works very well for the Nevada tribes.

16           And they're -- they're able to finance --  
17 for example, Reno Sparks they build a health center  
18 with tax exempt financing, that was backed --  
19 pledged by the revenue they received from tribal  
20 taxes. That tool would become available to tribes  
21 all over the country if a similar rule was put in  
22 place by the Department of Interior.

23           I guess finally I would say that the  
24 National Congress of American Indians has passed a  
25 resolution. We'll be sending to you -- that to you

1 in the comments that supports action to amend the  
2 regulations. And we'll be sending comments in by  
3 April 10th. Thank you very much.

4 **MS. FITZPATRICK:** Thank you for those  
5 comments. All right. Anyone else? Ready for your  
6 comments.

7 **MR. CLADOOSBY:** You're going to get off --  
8 out of here early. Once again, Brian Cladoosby,  
9 chairman of the Swinomish Tribe. I think, you know,  
10 once again, the -- these regulations need to be  
11 amended to reflect 21st century tribal governments.

12 As you know, when we do business on our  
13 reservation with someone coming in from the outside,  
14 and Swinomish right now currently has four big  
15 leases, landhold leases, with businesses outside of  
16 Indian Country that have come in and did housing  
17 developments, they did a logging operation, there's  
18 a boatyard operation on our reservation. And I guess  
19 -- I better not say that. We -- I got to be very  
20 careful. We do not go through Indian Trader  
21 Regulations to get a license from the Secretary of  
22 the Interior for these individuals to do business in  
23 Swinomish.

24 And I'm not sure how many tribes here have  
25 gotten an Indian Trader license from the Secretary

1 of the Interior to do business on your reservation.  
2 I might be wrong in my statistic, John, but I  
3 believe we were up to, like, 99 percent of the  
4 tribes in the nation, my last talking point, I can't  
5 remember. It was a very small percentage of tribes  
6 that actually still go through the Secretary of the  
7 Interior to get a license for individuals to come on  
8 their reservation and do business.

9           So, that's one of the big reasons these  
10 regulations need to be amended, because the majority  
11 of the tribes are not going to the Secretary of the  
12 Interior or the Department of Interior, or the BIA  
13 to get a license for someone to come on their  
14 reservation and do business. The majority of us  
15 license. We do it. So, you know, that's, I think,  
16 one of the biggest things that we need to look at  
17 amending, taking that provision out and just  
18 recognizing.

19           And, once again, it -- it doesn't need to  
20 be a cookie cutter. I don't think we need to throw  
21 everybody out. If there's that one percent, or a  
22 handful, that still do that type of regulation to  
23 the Department of Interior, I think we should still  
24 allow them to do it, if they so choose. So, I think  
25 we need to make it very clear that the tribes that

1 have the capability of issuing business license to  
2 do trade on reservations should be afforded that  
3 opportunity. So, thank you.

4 **MS. FITZPATRICK:** Thank you, Chairman  
5 Cladoosby.

6 **MR. GOBIN:** I'm Glen Gobin, again,  
7 Tulalip. I just wanted to make one thing clear.  
8 Tribes do not go and get Indian Trader's license.  
9 It's the businesses that are required to get the  
10 Indian Trader's license. So, tribes do not do this.

11 And, so, any provision would be there --  
12 that we look to would be if a plan were put in place  
13 by a tribe, we would -- and an ordinance put in  
14 place, and approved by the secretary, we would  
15 approve the Indian Trader's license for those  
16 businesses that come on the reservation, still  
17 having that Federal connection. Thank you.

18 **MR. CLADOOSBY:** Thank you.

19 **MS. FITZPATRICK:** Thank you. Okay. We're  
20 getting close to 9:50, 10:00. There's -- I don't  
21 anticipate we'll be going till noon, but I  
22 definitely want to make sure that everyone's had an  
23 opportunity to provide their oral comments. Of  
24 course, the written comments are open and will be  
25 accepted till April 10th.

1 And I don't want to speak for Jim, but I  
2 did drive us here, and so if anybody wanted to talk  
3 to us off-line, then that's always an option as well  
4 after.

5 **MR. PORTER:** I saw a lot of people. We  
6 can have a discussion, is that right, if there's  
7 discussion to be had.

8 **MR. CLADOOSBY:** So, we have a \$50 slot  
9 card for the best joke. Comedy hour now. Well,  
10 thank you, guys.

11 **AUDIENCE MEMBER:** You've got a bunch of  
12 lawyers in the room. We've got jokes.

13 **MR. CLADOOSBY:** The late Barbara Lane  
14 shared that joke with me. It is funny. You would  
15 not think Barbara Lane had a humor, but she told me  
16 two of the funniest jokes that I've ever heard. And  
17 it was pretty good. It was pretty good. So, I  
18 thank you guys for traveling out.

19 **AUDIENCE MEMBER:** Are you going to tell  
20 the Barbara Lane joke? You should tell it to us.

21 **MR. CLADOOSBY:** Tell the Barabara Lane  
22 joke?

23 **AUDIENCE MEMBER:** Yeah. You told it to  
24 elders and they laughed. The attorneys might laugh.

25 **MR. CLADOOSBY:** So, she actually told me

1 two jokes. She went to a Coast Salish gathering  
2 with us. We were having a Coast Salish gathering at  
3 Tulalip. And up in Cowichan territory up in Duncan  
4 she up to me and told me a joke, and says you need  
5 to go share that with everybody. And there was  
6 probably 200 people in the room.

7 And then the next year we're at Tulalip.  
8 And she came up to me and she told me another joke  
9 she said, but you can't say that one, you'll offend  
10 the attorneys and others. And so I didn't.

11 But the first one is a cute one. In  
12 closing this will be a good going-away joke. So,  
13 she told me she says, there was a little boy, eight  
14 or nine years old. And at the dinner table he goes  
15 up to his mom and says, "Mom, how old are you?"

16 And she says, "Oh, son, that's a question  
17 you never ask a lady."

18 He goes, "Okay. Well, how much do you  
19 weigh?"

20 And she said, "Son, that's the next --  
21 that's the second question you never ask a lady."

22 He goes, "oh, okay."

23 So, the next day he goes to school and he  
24 tells his friend. And his friend says, "Well, when  
25 you go home just look in her wallet, she's got an

1 ID, it will tell you everything you need to know."

2 So, he goes home after school, looks in her wallet

3 and sees it. And at the dinner table he says, "Mom,

4 I know how old you are. You're 33."

5 She says, "Yeah, that's right." "And I

6 know how much you weigh. You weigh 145 pounds."

7 And she says, "Yeah. You're right."

8 And he says, "And I know why daddy

9 divorced you."

10 She's, like, "what?" "I know why daddy

11 divorced you. You got an F in sex."

12 Barbara Lane. And she said I had to go

13 tell that joke. And before I said it, I said "Do

14 you guys want to hear a joke?" And two people, my

15 wife is going like this. And those of you that know

16 that my Aunt Neah here, she -- they were both in the

17 crowd, both going like this, don't do it.

18 But, you know, well, an elder told me I

19 had to do this. So, there you have it.

20 **AUDIENCE MEMBER:** Is that -- is that in

21 the official court record?

22 **MR. CLADOOSBY:** It is. Oh, that's -- were

23 you going. Oh, my goodness. We forgot to ask him

24 to end the recording. Oh, my goodness. Well, maybe

25 we can delete that from the official record.

1 Hey, John, don't tell Jackie I did that.  
2 Okay? All right. So, I better, who's -- help me  
3 out, you guys. All right. Is that it? Any -- any  
4 closing comments? Okay. Everybody had the  
5 opportunity. So, once again, let's give Tana and  
6 Jim a round for coming out, our court reporter for  
7 coming up and doing his work, and thank you all for  
8 coming and travel safely back to you homelands.

9 **(Whereupon, the tribal Consultation was**  
10 **concluded at 9:55 a.m.)**

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1 CERTIFICATE

2  
3 I, John A. Portesan, do hereby certify that  
4 I reported all proceedings adduced in the foregoing matter  
5 and that the foregoing transcript pages constitutes a  
6 full, true and accurate record of said proceedings to the  
7 best of my ability.

8  
9 I further certify that I am neither related  
10 to counsel or any party to the proceedings nor have any  
11 interest in the outcome of the proceedings.

12  
13 IN WITNESS HEREOF, I have hereunto set my  
14 hand this 21st day of March, 2017.

15  
16 *John A. Portesan*

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DECLARATION

Transcript of: Meeting Date: 02/23/17

Regarding: BIA Indian Trading Regulations

Transcriber: Portesan

\_\_\_\_\_

I declare under penalty of perjury the following to be true:

I have read my transcript and the same is true and accurate save and except for any corrections as made by me on the Correction Page herein.

Signed at \_\_\_\_\_,

on the \_\_\_\_\_ day of \_\_\_\_\_, 2017.

Print Name \_\_\_\_\_

Signature \_\_\_\_\_

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<b>140</b> 3:3	<b>48</b> 13:1	<b>activity</b>	<b>agreed</b> 27:23
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<b>145</b> 42:6	8	22:1	9:19 10:11
<b>150</b> 32:18	<b>8:55</b> 3:6	<b>actual</b> 7:4	<b>aide</b> 12:24
<b>1780s</b> 30:19	<b>8th</b> 10:5	33:15	13:4
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31:21	<b>9:50</b> 39:20	<b>add</b> 17:17	38:24
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38:10	<b>appointed</b>	34:4	<b>Barabara</b>
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