

In The Matter Of:
U.S. DEPARTMENT OF THE INTERIOR
BIA INDIAN TRADER REGULATIONS

TRIBAL CONSULTATION
March 2, 2017

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U.S. DEPARTMENT OF THE INTERIOR
BIA INDIAN TRADER REGULATIONS TRIBAL CONSULTATION
HARRAH'S RESORT SOUTHERN CALIFORNIA
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VALLEY CENTER, CALIFORNIA 92082
THURSDAY, MARCH 2, 2017

REPORTED BY:
ALETHA LOFTFIELD
CSR NO. 13767

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U.S. Department of the Interior BIA
Indian Trader Regulations Tribal
Consultation, taken at 777 Harrah S
Rincon Way, Valley Center, California
92082, commencing at 8:50 a.m.,
Thursday, March 2nd, 2017, before
Aletha Loftfield, CSR No. 13767, a
Certified Shorthand Reporter in and for
the State of California.

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1 CHAIRMAN BO MANZEHI: What you have is that
2 most tribes in general, the Tribal Councils, have no
3 idea what you're talking about when you're talking about
4 the Indian Trader license. And the requirements, we
5 do -- you will run into -- now looking into it, when you
6 have a project you're trying to do and you come across
7 the possibility of dual taxation by the State denied, I
8 think what we need to do is partner with BIA to become a
9 partner -- not a dictator, but a partner -- and
10 addressing these issues and clearly understanding and
11 enforcing tribal sovereignty.

12 The tribe will actually oppose the taxes. We
13 in California are working on a bill right now where
14 the -- the Tobacco Code, where the tribe has complete
15 authority because the Attorney General's office signed
16 off and the Governor's office is on board with us.

17 The tribe will issue -- this is the kind of
18 leadership the BIA should put toward this particular
19 Indian Trader license: The tribe will issue any
20 permits, licenses for selling tobacco products on the
21 reservation. The tribe will collect the taxes, all
22 taxes. The tribe will set up a registry. That's a
23 requirement where you have to -- well, the tribe creates
24 their own registry. So you can be on a registry of the
25 State or the tribes. But the tribes are also --

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1 (Reporter interruption.)

2 CHAIRMAN BO MANZEHI: I get excited about this.
3 Taxations and tribal sovereignty gets me going.

4 So that's kind of what we're talking about here
5 today is the tribes' sovereign authority to impose the
6 taxes that pose license requirements. But we're
7 stepping in and taking the place of the Indian Traders
8 license requirements.

9 But I think you want to keep BIA involved. I
10 think you want to do it as a partnership. And when you
11 develop that kind of language, this could be a
12 partnership effort.

13 The BIA will be there, Federal government, and
14 the tribe will be -- the tribe taking the lead. I think
15 that's the way you start dealing with some of the dual
16 taxation problems that we face in California. We
17 support the regulation changes. Again, dual taxation, I
18 think, is the biggest issue we're dealing with, and the
19 tribe's authority to the enter into commitments in
20 reference to the Taxation Code.

21 And I hope you guys have good comments today.
22 And thank you very much for coming. Thank you.

23 ELIZABETH APPEL: Thank you, Chairman Manzehi.
24 And thank you for welcoming us to your beautiful
25 facility.

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1 CHAIRMAN MANZEHI: I thought BIA would buy the
2 doughnuts. I got to get going to a Council meeting.

3 ELIZABETH APPEL: Thank you so much.

4 Well, thank you for coming today. My name is
5 Liz Appel. I am with the Office of Regulatory Affairs
6 and Collaborative Action, and I report to the Assistant
7 Secretary for Indian Affairs.

8 REBEKAH KRISPINSKY: Good morning. My name is
9 Rebekah Krispinsky, and I'm with the Solicitor's office
10 in the Division of Indian Affairs, and I am an assistant
11 solicitor in the Branch of Tribal Government and
12 (unintelligible).

13 ELIZABETH APPEL: Welcome to our tribal
14 consultation on the Indian Trader Regulations. And
15 since we have a small group here, why don't we just go
16 around and introduce ourselves for the court reporter.

17 MARCY HERNANDEZ: Hi. Good morning. My name
18 is Marcy Hernandez from the Pechanga Office of General
19 Counsel.

20 STEVE BODMER: Steve Bodmer, B-o-d-m-e-r,
21 General Counsel of Pechanga.

22 ADAM EVENTOV: I am Adam Eventov,
23 E-v-e-n-t-o-v, with San Manuel.

24 ELIZABETH APPEL: Thank you.

25 So what I'll do is give a little bit of an

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1 introduction, and then we're going to open it up for a
2 discussion.

3 So on December 8th of 2016, the Department
4 published an Advanced Notice of Proposed Rule Making, or
5 ANPRM, and that was to solicit input on whether we
6 should update the Indian Trader Regulations that are at
7 25 CFR part 140.

8 And this ANPRM was really a response to
9 proposals and inquires that the Department has been
10 getting over the past year or so from tribes and tribal
11 organizations, requesting that we revise part 140.

12 And so right now we're at the very early stages
13 of looking at this regulation, and we haven't drafted
14 any revisions yet because we want to hear from you, from
15 the tribes, on whether we should leave the rule as it
16 is, repeal it, or revise it. And if the answer is to
17 revise it, what should those revisions it look like.

18 So as you know, part 140 governs trade that
19 occurs on Indian reservations, and it's based on the
20 lesser-known Indian Trader statutes. And some of the
21 key provisions of those statutes were included in your
22 handouts.

23 The most recent of the statutes was passed in
24 1903, and they sought to protect tribes from unlawful
25 traders on their reservations. So part 140, the

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1 Department promulgated those back in 1957, and revised
2 them then in 1965, and modified them again in 1984, just
3 piecemeal provisions of that regulation. So the statute
4 itself is very old, and the regulations have not been
5 updated for decades.

6 So the reservations currently envision a
7 framework where BIA issues licenses to anyone who wants
8 to do business on a reservation, but we recognize that
9 tribes now have their own licensing and other ways of
10 regulating businesses that are operating within their
11 boundaries.

12 So our goals for looking at the regulations are
13 whether we can revise them to modernize how the Indian
14 Trader statutes are implemented so that they're
15 consistent with Federal policies of tribal
16 self-determination of governments so that they support
17 current tribal business practices and strengthen tribal
18 economies across the country.

19 And we have -- recently we've had a new
20 Secretary of the Interior, Ryan Zinke, confirmed. We
21 don't yet know what his specific priorities will be. We
22 do know that he is very supportive of tribal
23 sovereignty. And we know that the new administration is
24 very pro economic development. So with those two
25 priorities in mind, taking a look at these Indian Trader

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1 Regulations aligns with those priorities. So we hope to
2 move forward with addressing the regulations in one way
3 or another.

4 So you received a handout that includes a list
5 of questions that we'd like your input on, and these are
6 the same questions that were in the ANPRM. So we'll be
7 going through each of the questions today. Generally
8 they address whether we should revise the current
9 regulations in full or in part and, if so, why. And the
10 questions are also about the extent to which the Federal
11 government should be involved and business practices
12 that happen within the tribes' boundaries, how to make
13 sure traders in Indian Country are reputable and
14 accountable, and what type of trade and who should be
15 regulated. We're also interested in learning how your
16 tribes are currently regulating trade within your
17 jurisdictions, and how revisions to these regulations
18 could promote economic viability in Indian Country and
19 address taxation issues. We're also accepting written
20 comments until April 10th, 2017. And your handout in
21 the ANPRM provides directions for submitting those
22 comments.

23 And before I open it up, I also wanted to
24 mention you may have heard about the Executive Order
25 issued by the President requiring that two regulations

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1 be repealed for each new regulation that is passed.

2 So just in case you're wondering how this
3 regulation would fall into that if we pursue revisions
4 to this regulation, OMB has issued some interim
5 guidance, saying that that requirement, that Executive
6 Order, only applies to regulations that are quote,
7 "significant." And whether a regulation is significant
8 is determined by another Executive Order, 12866. And
9 there's certain monetary or policy thresholds that a
10 regulation has to meet for it to be deemed significant.

11 And it's too early in this process to know if
12 this regulation -- revision to this regulation would be
13 significant. So we don't know yet if this would be
14 subject to the two-for-one requirement. But this is
15 something that we'll be keeping in mind as we move
16 forward with any revisions, or if this is a candidate
17 for repeal. So we'll make sure that whichever way will
18 comply with the OMB requirements.

19 So we can go question by question, but I first
20 wanted to open it up to see if anyone has some opening
21 or overview comments that they want to make.

22 STEVE BODMER: I'm fine.

23 ELIZABETH APPEL: Okay. So the first question
24 in the ANPRM is:

25 "Should the Federal government address

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1 trade occurring in Indian Country
2 through an updated 25 CFR part 140, and
3 why?"

4 We know that Congress granted the Department
5 broad authority to regulate trade in Indian Country.
6 The statutes provide the Department with the authority
7 to make rules, specifying the kind and quantity of goods
8 that may be sold to Indians and the price at which such
9 goods shall be sold, and to establish rules and
10 regulations that would include a proper person to engage
11 and trade on an Indian reservation for protection of the
12 Indians. And that's at 25 U.S.C. 261 and 262.

13 We know that many tribes currently regulate
14 trade under tribal laws and authority without Federal
15 involvement, and we acknowledge our trust responsibility
16 to tribes.

17 So how can we update these regulations in a way
18 that recognizes these facts? If anyone has any thoughts
19 they'd like to share now and -- of course, if you don't,
20 that's fine too. We're accepting written comments until
21 April.

22 Do we have any thoughts on that?

23 ADAM EVENTOV: We will be reviewing and
24 submitting our comments.

25 STEVE BODMER: Yes. Just not really

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1 necessarily on the record, but, I mean, we're
2 planning -- you know, this is an exploratory -- as we're
3 beginning our review of this issue. And we've got
4 issues outlying that would populate and develop in
5 advance of April 10th. So not anything for this
6 meeting, but we're, you know, on my end, we're not
7 prepared to start laying down all of our concerns today.

8 ELIZABETH APPEL: So maybe what I'll do is go
9 through the questions. And maybe some of the questions
10 will spark some thoughts that you can take notes on for
11 your written comments or if they spark something that
12 you want to mention today.

13 STEVE BODMER: Any insight coming from you all
14 is very helpful in understanding the motivation and the
15 likelihood of how this moves forward.

16 ELIZABETH APPEL: Yeah. So it's hard to say
17 the likelihood of how it's going to move forward, but we
18 recognize that the current rule is outdated. And I
19 mean, the fact that it hasn't been touched since 1984 or
20 '5, whenever it was, that alone says that we need to
21 take a look at it.

22 But there are definitely provisions in there
23 that appear to be sorely outdated and possibly not even
24 legally appropriate anymore. And the one that comes to
25 mind is the alcoholic beverages one.

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1 All right. So we'll move on and go through --
2 and just stop me if you want to comment at any point.

3 So the second question from the ANPRM is
4 whether:

5 "There are certain components of the
6 existing rule that should be kept, and
7 if so, why?"

8 So the rule does have several different
9 sections throughout. For example, regarding the
10 forfeiture of goods, how to apply for a license, and
11 then sections on drugs and gambling and intoxicating
12 liquors, as I mentioned. So are there any of those that
13 it would be appropriate to keep?

14 And as far as any licenses, business licenses
15 that the Department has issued under this regulation,
16 should there be a grandfathering clause for currently
17 valid licenses that have already been issued under this
18 regulation?

19 And if no sections should be kept, we would
20 like information on why. And if we're going to scrap
21 this rule and do an entirely new rule, what would that
22 look like?

23 And if BIA no longer issues licenses under the
24 rule, then what would a Federal involvement in trading
25 look like?

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1 So moving on to the third question:

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

7 So going back to the statutory language that
8 section 262 provides the Interior should establish
9 regulations governing who's the proper person to engage
10 in trading on Indian reservations, that we recognize
11 that many tribes already have comprehensive schemes in
12 place regulating traders conducting business.

13 So how could the rule ensure that there are
14 reputable traders in Indian Country, as required by the
15 statute, and ensure that violations of Federal or Tribal
16 law are properly addressed?

17 And then the 4th question:

18 "How to tribes currently regulate trade
19 in Indian Country and how might
20 revisions to 25 CFR part 140 help
21 tribes regulate trade in Indian
22 Country?"

23 So we'd like specific information and
24 suggestions, including language on how the Federal
25 government can bolster those tribes that currently

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1 already have comprehensive regulations of trade as well
2 as tribes that may not currently regulate trade within
3 their borders.

4 And then the 5th question:

5 "What types of trade should be
6 regulated and what types of traders
7 should be subject to regulation?"

8 So we've received proposals from various tribes
9 and tribal organizations, as I mentioned on the current
10 Indian Trader Regulations, and some of the proposal
11 suggest that the trade regulated under the regulations
12 should include not just commercial activities, but also
13 mineral and energy development and any form of natural
14 resources extraction or agriculture.

15 So the current regulations have definitions for
16 contract and trading and commercial trading. And we are
17 interested in whether if we even keep those terms,
18 whether those should encompass just commercial
19 activities or also the broader mineral and energy
20 development in agriculture.

21 And then should the rule define the type of
22 trader that conducts business with an Indian tribe?

23 So should it apply to any person that conducts
24 trade in Indian Country, including non-Indians, or
25 should it be narrower in scope in some way?

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1 And then the 6th question:

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

5 So basically we're looking at how can this rule
6 be modernized to facilitate economic activity in Indian
7 Country and promote tribal economic self-sufficiency.

8 STEVE BODMER: On that one, I'll make a
9 comment.

10 ELIZABETH APPEL: Great.

11 STEVE BODMER: This is Steve Bodmer with regard
12 to issue No. 6:

13 "How might revisions to regulations
14 promote economic viability and
15 sustainability in Indian Country?"

16 One of the clear goals that our comments would
17 be reflecting are issues of taxation and kind of in
18 combination with No. 7 of the services that tribes
19 provide on reservation for anyone transacting business
20 there, such as -- using Pechanga as an example, we have
21 fire department, medical services, maintenance crews
22 fixing roads, things of that nature that we believe are
23 not unlike why a state would tax folks.

24 And we think that there is -- there's a
25 reasonable connection there that because these services

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1 are provided -- and there's numerous other ones that
2 will be identifying beyond just what I've listed, but
3 that we think there's a connection there that makes
4 sense that tribes should be able to keep the tax
5 revenues in many situations with regard to folks
6 transacting business on the reservation. And as our
7 comments will likely reflect, that tax should extend to
8 enticing businesses to the reservation in possessory
9 interest tax, things of that nature, because, in fact,
10 we are now providing the services that the City or the
11 County and surrounding community are no longer
12 providing.

13 So that's one area that we're hoping that we
14 can get some real discussion in going through this
15 regulation change.

16 ELIZABETH APPEL: Just to clarify, right now
17 the State and possibly locality are taxing the
18 businesses that are doing business within the tribes'
19 borders. So the State's getting the tax income while
20 the tribe is providing the services to the business?

21 STEVE BODMER: Right. So -- and I don't want
22 to throw a broad blanket over all the taxes. There
23 are certain -- like sales tax for food that's created on
24 the reservation that we charge tribal tax for; however,
25 as we start to advance businesses and invest more in the

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1 retail areas, we've seen an increase in notices from the
2 counties and the Tax Assessor saying: We want a list of
3 any nontribal business on your reservation and we want
4 to understand what property they have on there because
5 they want possessory interest tax, and we handle that
6 the way we handle it. But I think the Leonard case
7 was -- in the 2nd Circuit sparked an interest for all
8 counties and all localities.

9 Certainly this came right on the heels of that
10 case, where the 2nd Circuit agreed that tribes' interest
11 was less than the cities in collecting the property
12 taxes from slot machines that are on the reservation
13 that were leased, as opposed to purchased. That's a
14 short summary of a very complex case. So as soon as
15 that came out, I think it sparked local communities
16 looking for more tax revenues saying: How can I be a
17 part of that? So that's something that we want to
18 discuss, make sure that we have a great understanding as
19 we're making the infrastructure investment and
20 attracting businesses to generate revenue on the
21 reservation, since a large part of that is being able to
22 collect those taxes.

23 And as Chairman Manzehi had mentioned earlier
24 with regard to dual taxation, you can take away all the
25 business and say, okay, you going to pay City and County

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1 taxes along with Tribal taxes. So that's one of the
2 issues that I think 6 starts to talk about in ways that
3 revisions of these regulations can promote economic
4 viability and sustainability. And that goes for tribes
5 in more remote areas as well as tribes in more populated
6 areas.

7 ELIZABETH APPEL: Thank you.

8 Did anyone else want to add to that before we
9 move on?

10 So 7, as you said, closely related to the
11 question 6:

12 "What services do tribes currently
13 provide to individuals or entities
14 doing business in Indian Country and
15 what role do tax revenues play in
16 providing such services?"

17 And with this question, we're also interested
18 in what type of infrastructure tribes currently have and
19 what role tax revenues play in building and maintaining
20 such infrastructure, which has been touched upon.

21 We know that tribes provide a range of services
22 and infrastructure to Indians and non-Indians doing
23 business within their borders. So we heard that tribes
24 provide fire, medical services, road construction.
25 We're interested in hearing other services that tribes

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1 may offer like food sanitation, health inspections, law
2 enforcement, other infrastructure, what types of
3 infrastructure tribes maintain, and whether tribes are
4 able to rely on tax revenues to provide those services
5 and infrastructure.

6 So with regard to taxation, getting a little
7 bit into the background of it, when considering whether
8 a state can tax certain nonreservation goods or
9 services, courts conduct a fact-specific inquiry that
10 weighs the respective interest of the State, Tribe, and
11 Federal government. And this is often called the
12 "Bracker balancing," after the Supreme Court case that
13 first applied the test.

14 So we're interested in whether the rule should
15 explicitly address that Bracker balancing and how the
16 rule could emphasize Federal involvement in activity in
17 Indian Country as relevant to the Bracker inquiry.

18 And I probably should have let Rebekah address
19 that part because she understands it much better than I
20 do.

21 REBEKAH KRISPINSKY: I think it would be
22 helpful to hear. This might be something that's easier
23 to address in written comments than to kind of sit here
24 and try to hash it out.

25 But, yeah, just to the extent, you know, you

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1 and the tribes you represent have thought about, you
2 know, how this Federal -- how any sort of a Federal
3 scheme, whether it's continuing to have a role in
4 licensing, or maybe a more limited version of licensing,
5 or some form of partnership that Chairman Manzehi was
6 talking about, how that Federal system would be looked
7 at with respect to the Bracker balancing that the courts
8 look to in sort of figuring out, you know, what the
9 different interests are between all the different
10 entities and sort of how those affect the scheme that's
11 at place, and you should really be able to oppose taxes.

12 So, yeah, we do realize that that might be
13 something that's easier to address in writing and would
14 appreciate any written comments on that particular
15 aspect of it because that's something we've been looking
16 at pretty closely and just trying to grapple with how a
17 new system or, you know, potential revisions to the
18 regulations might impact that analysis.

19 ELIZABETH APPEL: So that brings us to the end
20 of the questions that were listed in the ANPRM.

21 Does anyone have any additional comments they
22 want to make, or are you stewing in preparation for
23 written comments?

24 Okay. Well, with that, I guess we'll close the
25 consultation session.

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1 Thank you for coming out. We really appreciate
2 your comments, and we look very much forward to your
3 written comments. And I hope you all have safe trips
4 back home. Thank you.

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6 (Tribal Consultation Concluded.)

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I, Aletha Loftfield, Certified Shorthand Reporter licensed in the State of California, License No. 13767, hereby certify:

I reported stenographically the meeting in the time and place therein named, and that the foregoing transcript is a full, true, and correct transcription of my shorthand notes taken during the meeting on March 2, 2017.

Dated at San Diego, California, on March 16, 2017.



Aletha Loftfield, CSR No. 13767

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