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Elizabeth Appel
Office of Regulatory Affairs &
Collaborative Action
U.S. Department of the Interior
1849 C Street, NW
MS 4141
Washington, DC 20240

Re: Proposed Rule on Federal Acknowledgment of American Indian Tribes

Dear Ms. Appel:

On behalf of our client, the National Association of Convenience Stores ("NACS"), I appreciate this opportunity to provide comments on the Bureau of Indian Affairs ("BIA") proposed rules on the tribal recognition process. NACS is an international trade association representing more than 2,200 retail and 1,600 supplier company members. The convenience store industry in the United States includes nearly 150,000 store locations and those locations are in every state and territory. The convenience store industry sells about 80 percent of the motor fuels purchased at retail in the United States every year and sells more than 60 percent of the packs of cigarettes. Both of these products are taxed at high rates by federal and state governments. In fact, in some jurisdictions, more than half of the price of a pack of cigarettes is simply taxes.

It is the sale of high-tax products by Native American tribes that prompts these comments. As described in these comments, the sale by tribes of motor fuels and tobacco products without collecting and remitting state taxes has caused decades of legal disputes, arrests, lost state revenues, and civil unrest. To exacerbate these problems by fundamentally changing the recognition process without dealing with ongoing legal problems would be irresponsible and contrary to law and good policy. These comments will provide some background on the legal and policy problems associated with these tax disputes, suggest some remedies to these problems, and discuss the proposed changes to the recognition process.

History of Tax Disputes with Tribes

Tax disputes between states and tribes have a long and troubling history. Since at least the 1970s, the U.S. Supreme Court has repeatedly had to address questions related to tax disputes between states and tribes. *See, e.g., Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005); *Dept. of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 65 (1994) ("Attea"); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of*

Oklahoma, 498 U.S. 505 (1991) ("*Potawatomi*"); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) ("*Colville*"); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The *Attea* case is particularly instructive. While the Supreme Court in that case upheld New York's right to impose tobacco taxes on tribal sales to non-members of the tribe, when the state tried to collect those taxes it led to protests that included burning tires and the closing of the New York Thruway. This was civil unrest. New York decided not to enforce its tax laws even though they had been upheld by the U.S. Supreme Court as a result of the unrest and legal disputes have continued in that state to this day. *See, e.g.*, Joan Gralla, *New York wins ruling in tribal cigarette tax clash*, REUTERS, May 9, 2011, www.reuters.com/article/2011/05/09/us-newyork-tobacco-idUSTRE74865R20110509.

Other states have had similar – though perhaps not as dramatic – experiences. Each of the cases noted above had a long history of disputes leading up to the Supreme Court decision and several of them have had long histories of continued legal disputes following the Supreme Court's ruling. The resources expended on these disputes has been huge and the taxes lost by states every year that have not yet found a satisfactory conclusion to these disputes runs into the billions of dollars.

The volume of tobacco tax evasion happening through reservation sales appears to be increasing. One study found that the volume increased by almost 50% between 2008 and 2011.[1] In New York State alone, NACS estimates that tribal tax evasion has generated annual losses of almost $600 million in economic activity (totaling billions of dollars in lost revenue for the State) and more than 6,500 jobs. Some convenience stores have been put out of business because of these tax abuses. Retailers located near reservations have lost around 80 percent of their tobacco sales revenue due to sales by tribal businesses that don't apply taxes. And, there are some major convenience store businesses that will not open a new store in areas near reservations because of the threat of lost sales to tribal businesses that evade taxes. These lost investments can stunt economic growth.

Unprecedented Scope of Tribal Sovereign Immunity

A major part of the problem spurring these legal disputes is the sovereign immunity enjoyed by tribes. Native American tribes actually enjoy broader legal sovereignty in U.S. courts than any other sovereign in the world. Several doctrines of law limit the immunity from suit other sovereigns have. For example, foreign nations' sovereignty is curtailed by the Foreign Sovereign Immunities Act. That law states that foreign nations are only protected from suit in U.S. courts when they act in their governmental capacity. But, when they act in a commercial capacity – such as through selling goods – they are subject to suit just like any other commercial actor.

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[1] Gyindon, G.E., Driezen, P., Chaloupka, F.J., and Fong, G.T., *Cigarette Tax Avoidance and Evasion: Findings from the International Tobacco Control Policy Evaluation Project*, Nov. 13, 2013, *available at* http://tobaccocontrol.bmj.com/content/early/2013/11/13/tobaccocontrol-2013-051074/T1.expansion.html.

The United States has waived its sovereign immunity from suit in multiple contexts. The Federal Tort Claims Act and the Tucker Act waive federal immunity in many tort and contract actions, respectively. The United States has also waived immunity from many types of patent infringement cases.

There are many exceptions to the immunity from suits that U.S. states enjoy as well. State officials, for example, can be sued based on claims that they acted illegally and are therefore stripped of their immunity from suit. States are also not immune from suits for discrimination. And, significantly, states can sue one another and the federal courts have jurisdiction over such suits.

But Native American tribes use their immunity against suits brought by states as a shield to prevent enforcement of tax laws that the U.S. Supreme Court has held are legal. States have complained that this situation leaves them without a remedy even when they have gone through the struggle of validating their legal right to properly imposed taxes. *See, e.g.*, *Potawatomi,* 498 U.S. at 514. There is no good reason for tribes to have immunity of greater scope than all other sovereigns. It frustrates the taxing power of U.S. states and has led to repeated conflict.

A Potential Solution

The BIA has the ability to solve this generations-old problem. BIA can simply make it a condition of recognition that a tribe consent to suit by states seeking to enforce taxes imposed on non-members of the tribe that buy things from tribal businesses. Alternatively, BIA can offer tribes a choice – seek recognition through the new procedures set forth in the proposed rule and waive immunity against state tax suits or seek recognition under the prior, more rigorous procedures. In our view, the clearest and most helpful solution is to have all tribes newly seeking recognition agree to let state tax enforcement suits go forward. That would eliminate the problems that have plagued many current tribes and states.

BIA's Proposed Rule

If BIA doesn't find a solution such as the one noted above, BIA's proposed rule will exacerbate tribal-state tax disputes and violate the Administrative Procedure Act ("APA"). The proposed rule dramatically relaxes the criteria that applicants for tribal status have had to meet for decades. These fundamental changes to standards that new applicants must meet include:

- Changing the definition of "historical" to mean "1900 or earlier" rather than "first sustained contact with non-Indians"
- Allowing applicants to demonstrate they have had political authority and constituted a distinct community since 1934 rather than "historical times"
- Allowing applicants to demonstrate they constitute a "distinct community" if 30 percent of members constitute such community rather than requiring a "predominant portion" of members to constitute a "distinct community"
- Allowing applicants previously denied recognition to reapply for recognition in spite of their past rejection

These changes are arbitrary and capricious and BIA has not articulated a rationale for making the changes. When an agency wishes to change pre-existing policy, "a reasoned explanation is needed for disregarding facts and circumstances" that underlay the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). BIA has not provided a "reasoned explanation." It has not shown that its prior rules were inconsistent with the power Congress granted to the agency to recognize new tribes. It has not shown there were sufficient problems with the prior rules to justify sweeping changes. And, BIA has not provided any reasoning demonstrating that its newly proposed rules actually address any shortcomings it perceived in its prior rules.

Take, for example, the change providing that applicants only need show their existence as a tribe dating back to 1900 rather than the first sustained contact with non-Indians (or, alternatively, to the formation of the United States). BIA asserts that all previous applicants that have shown their existence back to 1900 have been able to prove their existence "prior to that time." 79 Fed. Reg. at 30766. But, this does not say that each and every applicant that has ever shown its existence back to 1900 has been able to meet the previous standard of "historical." Even if that is what BIA intended to say, such a statement does not justify a change in the rule – in fact, it demonstrates that a change is unnecessary because it is likely that future applicants could meet the prior definition as easily as they could meet the new one. And, to the extent that they could not, such inability may well be very relevant to the BIA's inquiry.

BIA further attempts to justify this change by stating that it seeks to ease "administrative burdens" and provide "flexibility" for applicants. 79 Fed. Reg. at 30767. But conclusory assertions of administrative difficulty cannot justify such a change in regulations. *Defenders of Wildlife v. Salazar*, 842 F. Supp. 2d. 181, 186 (D.D.C. 2012) (holding that Department of Interior had "offered no rational explanation to justify" a proposed rule change when it asserted, without examples, that the preexisting rule "encumbered" Department personnel). Changes of the type that BIA proposes here must be reasoned and based on "reasonable extrapolations from some reliable evidence." *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006); *Ass'n of Private Colleges and Universities v. Duncan*, 870 F. Supp. 2d 133, 153-4 (D.D.C. 2012).

The change allowing applicants to show the existence of a distinct community since 1934 rather than "historical times" is similarly arbitrary and capricious because it is not supported by a sufficient rationale. BIA claims that because the federal government was antagonistic toward tribes prior to 1934, "it is logical to deduce that a tribe in existence when the [Indian Reorganization Act of 1934] was passed was in existence historically." 79 Fed. Reg. at 30768. But BIA has produced no evidence supporting this product of its "logic" which was invented entirely out of wholecloth. There is nothing supporting the idea that a community did not come into existence between historical times and 1934. In fact, BIA's past decisions have supported the fact that documentation of existence back to a particular year does not lend any credence to claims of existence prior to that year. *Evans v. Salazar*, No. 08-0372, 2011 WL 1219228, at *6 (W.D. Wash. Mar. 31, 2011) (upholding BIA decision that a tribal document from 1950, referencing only events in that year, did not prove the tribe existed prior to 1950). In short, BIA's experience or logic is not enough, it must produce some evidence to support what it is asserting about its past rule and its solution to the shortcoming it articulates. *McGregor Printing*

Corp. v. Kemp, 20 F.3d 1188, 1194 (D.C. Cir. 1994); *Tripoli*, 437 F. 3d at 83 (holding that an agency cannot rely on experience alone but must have some reliable evidence).

BIA also does not articulate a sufficient rationale for choosing 30 percent as the threshold of members of a tribe that constitute a distinct community. As justification, BIA refers to an amendment to the Indian Reorganization Act which allows tribal charters to be ratified or amended if 30 percent of those entitled to vote on the question are present. But these are entirely different and unrelated concepts. There are practical limitations on having a quorum for purposes of voting that animate parliamentary rules around the world. The Indian Reorganization Act recognizes this. But deciding whether a group of people are members of a tribe is entirely different than voting quorum requirements. Determining a community exists intuitively means that a "predominant portion" of people in that community see themselves as part of it. Indeed, that is BIA's existing rule. Reducing that portion to 30 percent does not make sense and cannot be justified based upon quorum requirements for a vote.

And, BIA fails to provide any explanation for allowing applicants who have been denied tribal status and lost an appeal on that question to federal court to reapply for tribal status. An agency's ruling is invalid when it provides no explanation for it. *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 35-36 (D.D.C. 2010). In fact, this aspect of BIA's rule may be unconstitutional. Based on the doctrine of separation of powers, the executive branch may not review the final judgment of a federal court. *See Plaut v. Spendthrift*, 514 U.S. 211, 218-19 (1995) (holding that Congress cannot allow executive branch officials to review decisions of federal courts).

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Each of these changes proposed by BIA lacks the factual basis and articulated rationale necessary to justify it. Those shortcomings mean the proposed rule runs afoul of the requirements of the Administrative Procedure Act. These shortcomings are exacerbated in light of the state tax conflicts that BIA ignores in its rulemaking. Addressing the tax problems would go a long way toward demonstrating that BIA has considered the practical difficulties that its rule changes may impact and that it has taken action to deal with those difficulties. We urge BIA to reconsider its approach and seize this opportunity to address tax disputes before they negatively affect more states and new tribes.

Sincerely,

Douglas S. Kantor