COALITION OF LARGE TRIBES
Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe
Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe
Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe • Walker River Paiute Tribe

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March 21, 2023

Bruce Summers
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Re.: Comments on Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 (October 3, 2022), Docket No. AMS-FTPP-21-0045

Dear Mr. Summers,

The Coalition of Large Tribes ("COLT") represents the interests of the more than 50 tribes with reservations encompassing 100,000 acres or more, spanning vast stretches of the American West. We are writing to urge you to clarify that the definition of "regulated entity" does not include federally recognized Indian tribes or the wholly owned business enterprises of those tribes and that it is not illegal discrimination for such entities or other regulated entities operating on Indian reservations to offer preferences to tribal members or to otherwise have practices and policies in place specifically to meet their needs.

COLT was established in April 2011 to provide a unified advocacy base for Native American tribes and nations governing large trust land bases and providing full service in the governing of their members and reservations. Since its establishment, COLT has been an active voice on Indian land, energy, and other areas important to large tribes. We appreciate the opportunity to comment on the proposed Rule, "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act" published in the Federal Register on October 3, 2022 (the "Proposed Rule") by the U.S. Department of Agriculture (USDA) Agricultural Marketing Service ("AMS"). We also participated virtually in the USDA consultation "Inclusive Competition and market inquiry under the Packers and stockyards' Act" which took place in hybrid virtual and in in-person format on Thursday, January 19, 2023.

Animal husbandry played a central role in the historic culture of many Indian nations and remains a critical lynch pin in many reservation economies, although Native Americans are responsible for only a small percentage of the total U.S. domestic production. In 2017, American Indian/Alaska Native–operated farms accounted for 0.9 percent of total U.S. agriculture sales, with $3.5 billion in total sales, and $2.1 billion in sales of livestock and livestock products. U.S.D.A. 2017 Census of Agriculture, American Indian/Alaska Native Producers,

https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_AmericanIndianAlaskaNative_Producers.pdf. "More than half (63 percent) of American Indian/Alaska Native-operated farms had sales and government payments of less than $5,000 per year." *Id*. Several tribes have established or are establishing meat packing operations to support this industry, including the Cherokee Nation of Oklahoma, Muscogee (Creek) Nation, Crow Creek Sioux Tribe, Poarch Band of Creek Indians, Osage Nation, and Quapaw Nation.

The Proposed Rule, as currently written, is silent as to its effect on tribes and tribal enterprises, defining a regulated entity as "a swine contractor or live poultry dealer as defined in § 2(a) of the Act (7 U.S.C. 182(8)) or a packer as defined in § 201 of the Act (7 U.S.C. 191)." Proposed Rule, to be codified 9 C.F.R. § 201.302. And it is our understanding from participating in tribal consultation sessions and meetings that your agency intends to take the position that these regulations do apply to tribes and tribal enterprises.

A. Clarifying that tribes and tribal enterprises are not covered entities would advance the purposes of the Proposed Rule.

Expressly excluding tribes and tribal entities would be consistent with the plain language of the statute and also demonstrate respects for these tribes as sovereign governments. Most importantly, such an exclusion would serve to advance the purposes of the Proposed Rule, which is motivated by a concern that "[t]he rise of concentrated and vertically integrated markets also gives rise to certain abuses that may take the form of deception [, [and] . . . racial and other exclusionary prejudices." Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 FR 60010, 60013 (Oct. 3, 2022).

The Proposed Rule, if applied to tribal enterprises, would actually serve to undermine precisely the purposes it was intended to serve. Tribal enterprises that operate stockyards and meat packing plants are generally small-scale operations that have been built expressly to serve the Native American community and its needs, and placing additional regulatory burdens on them would encourage greater market consolidation and make it more difficult for them to exercise the flexibility that they need to serve their community. Record keeping and other regulatory obligations are always more burdensome to small businesses that lack the legal and compliance departments of a large corporation, and isolated rural locations often struggle to hire and retain adequate office staff.

There is also a serious concern that the provisions in the Proposed Rule designed to combat discrimination could also inadvertently ban practices that tribal enterprises have developed to ensure that they are serving their own tribal community – practices necessary to protect and advance what the Proposed Rule terms "market vulnerable individuals." The most important of

these policies and practices are tribal and Indian preferences laws that require businesses to provide preferences in contracting and employment to members of the tribe. Most tribes mandate tribal preferences for all tribal enterprises and all businesses physically located on their reservations, and these laws serve to ensure that these businesses spread genuine economic opportunity to the local community. Tribal enterprises can also offer services and protections to tribal members, often elderly and speaking very little English, who still practice traditional animal husbandry.

These accommodations for tribal members are important and valued by the community, but could arguably be interpreted as "[o]ffering contract terms that are less favorable than those generally or ordinarily offered" or "[d]ifferential contract performance or enforcement" on the "based upon the covered producer's status as a market vulnerable individual." Proposed Rule at § 201.304. Even if a tribal business ultimately prevailed on a legal challenge, the language of this regulation and the absence of exceptions and exemptions could have a chilling effect on efforts to serve Native American producers, which is certainly not in keeping with the intentions underlying the Proposed Rule.

B. Excluding tribal enterprises in in keeping with the plain language of the Packers & Stockyards Act ("Act") and applicable precedent.

The Packers & Stockyards Act gives USDA jurisdiction over "person[s]," which is defined as "individuals, partnerships, corporations, and associations." COLT doesn't consider tribes as any of these and hence doesn't believe the tribe and its arms/instrumentalities are subject to regulatory oversight by the Packers & Stockyards Act. U.S.C. § 182(1). An entity that is not a "person" is not subject to the Proposed Rule. *Id.*; 7 U.S.C. 182(8); 7 U.S.C. 191. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court established a clear rule: A statute that uses the term "person" "does not include the sovereign" unless there is an "affirmative showing of statutory intent to the contrary." *Id.* at 780-81. "The presumption is, of course, not a hard and fast rule of exclusion, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id*. at 781 (quotation omitted). There is no indication here that Congress had any intent to regulate any public entities, much less Indian tribes, and under settled law, silence is an insufficient basis on which to apply a statute that would abrogate tribal rights of self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("[T]he proper inference from silence is that [sovereignty] remains intact"); *NLRB v. Pueblo of San Juan*, 276 F.3d (10th Cir. 2002) at 1192.

More generally, we would urge you to adopt the standard promulgated by Tenth Circuit where, "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization."

Dobbs v. Anthem Blue Cross and Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010); *see also EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (Age Discrimination in Employment Act does not apply to Indian tribes) *and Donovan v. Navajo Forest Prods. Indus*., 692 F.2d 709, 714 (10th Cir. 1982). "[I]f there [is] ambiguity . . . the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

Authority to the contrary is derived from a single sentence in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) which "is of uncertain significance, and possibly dictum, given the particulars of that case" and "is … in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." *San Manuel v. N.L.R.B*, 475 F.3d 1306, 1311 (D.C. Cir. 2007)(citations omitted); *see Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla*., 166 F.3d 1126 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Smart v. State Farm Ins. Co*., 868 F.2d 929 (7th Cir. 1989).

These principals apply equally when tribes engage in economic activity, which is often necessary because of their small tax base and isolated rural locations. The U.S. Supreme Court has determined in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991) decision, that tribes in their commercial activity with other entities are covered under the umbrella of the tribes' sovereignty and even when tribes entered into activities, executed off-reservation, they still enjoy sovereign immunity *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 U.S. 751 (1998).. *See Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule…that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional". Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles").

This commitment to tribal business and economic development is longstanding and bipartisan. In 1970, President Nixon stated in his historic Self-Determination Message that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 7 (1970). President Barack Obama expressly reaffirmed the federal government's commitment to "honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S.

law…by…promoting sustainable economic development…" Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

And from the 1970s to the present, the Legislative Branch has also continuously supported tribal government efforts to generate economic development. For example, in the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450-458bbb\ Congress committed to "supporting and assisting Indian tribes in the development of strong and stable governments, capable of administrating quality programs and *developing the economies of their respective communities,"* 25 U.S.C. § 450a(b) (emphasis added). *See also* the Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. § 3501-3506; and the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. § 4301-4307.

Excluding tribes and tribal enterprises from the definition of "regulated entities" is consistent with the language of the Act, federal case precedent, and the actual purpose of promoting minority communities and counteracting market power in the meat packing industry. And because Native American business make up such a small fraction of the total market, there is little danger that clarifying its non-application to tribes and tribal enterprises will significantly undermine the broader applicability of the regulation.

Thank you for your consideration.

Respectfully,

Hon. Marvin Weatherwax
Chairman, Coalition of Large Tribes
Member, Blackfeet Nation Tribal Business Council