

# Seneca Nation of Indians

**President** - Todd Gates  
**Clerk** - Lenith K. Waterman

12837 ROUTE 438  
CATTARAUGUS TERRITORY  
SENECA NATION  
IRVING, NY 14081

Tel. (716) 532-4900  
FAX (716) 532-6272



**Treasurer** - Maurice A. John, Sr.

90 OHI:YO' WAY  
ALLEGANY TERRITORY  
SENECA NATION  
SALAMANCA, NY 14779

Tel. (716) 945-1790  
FAX (716) 945-0150

## PRESIDENT'S OFFICE

August 30, 2017

VIA E-MAIL ([consultation@bia.gov](mailto:consultation@bia.gov))

Attn: Revise Indian Trader Rule  
Office of Regulatory Affairs & Collaborative Action  
Office of the Assistant Secretary – Indian Affairs  
1849 C Street NW  
Mail Stop 4660-MIB  
Washington, DC 20240

### **Re: Revising 25 C.F.R. Part 140 (Licensed Indian Traders)**

On behalf of the Seneca Nation (“Nation”), we write to provide comments in response to the Department of the Interior’s July 28, 2017 Letter to Tribal Leaders seeking input on the need to update the “Licensed Indian Traders” regulations codified at 25 C.F.R. Part 140. As we understand it, the purpose of the letter and listening sessions were to obtain comments and economic data regarding the specific impact that revising the Trader regulations would have on the economic stimulus, jobs, and prosperity to Native Nations and the surrounding communities. Three specific questions were posed in the letter and provided below are our views regarding the Seneca Nation’s unique treaty rights, economic development impact on its surrounding communities, and how the Nation could benefit from revised regulatory requirements.

The Indian Trader statute and regulations are outdated and remnants of long gone paternalistic Federal policies towards Native Nations. The underlying law was enacted in 1834 and the regulations were last updated in 1965. They are in drastic need of modernization to reflect the current Federal policy of self-determination and self-governance by Native Nations and to protect treaty rights of nations such as the Seneca Nation. The Indian Trader statutes and regulations were originally developed to regulate and license non-Indians who participate in trade and commerce in Indian Country. Native Nation governments perform this function now. However, in recent decades, some court decisions have resulted in a system of dual taxation

whereby some courts have found that State and local municipalities may continue to exercise jurisdiction over non-Indians when they participate in trade and commerce in Indian Country. This de facto system of dual taxation where both the Native Nation and State or local governments have jurisdiction over non-Indians is ad hoc and inconsistent throughout the country. It has had a chilling effect on economic development on tribal lands and resulted in the loss of critical revenue for Native governments. These court decisions are a result of the Federal government failing to provide clarity that Native Nations exercise sole authority over non-Indians in the course of trade and commerce in Indian Country. Providing clarification of this authority through the modernization of the Indian Trader regulations is an important step towards the further development of tribal economies.

1. The Seneca Nation possesses unique treaty rights to the “free use and enjoyment” of its lands, which are guaranteed free from all taxes.

The Seneca Nation is a sovereign Nation with over 8,300 citizens. We are the largest of six Nations comprising the Haudenosaunee Confederacy and are a democratic Nation that predates the United States Constitution. The Nation’s lands currently consist of the Cattaraugus, Allegany, Oil Spring, Niagara Falls, and Buffalo Creek Territories. Since our earliest interaction with the United States and its predecessors there was always specific acknowledgement that Seneca Nation lands are our own lands and neither a part of the United States or New York State. Each Native Nation is unique with its own relationship with the United States and unlike some other Nations, we do not view the United States as our “guardian” nor does the United States hold our land in trust for our benefit. Our lands are held in restricted fee status.

The Seneca Nation exercises control over all people and activities that occur on our lands and we possess specific treaty rights that require the United States to protect our economic interests. Unlike many other Nations, the issue of taxation has been a part of the Seneca Nation’s relationship with the United States since 1784 when treaty-making between the two nations began. The Seneca Nation’s entitlement to free use and enjoyment of our lands was recognized and confirmed in the 1794 Treaty of Canandaigua,

acknowledge [sic] all the land within the aforementioned boundaries, to be the property of the Seneca [sic] nation; and the United States will never claim the same, nor disturb the Seneca [sic] nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the *free use and enjoyment* thereof.<sup>1</sup>

Our treaty agreements between New York, Massachusetts, and the United States in 1838 and 1842, secured language within Article IX of the 1842 Treaty that specifically stated that we were not taxable by the Federal or State governments,

The parties to this compact mutually agree to solicit the influence of the Government of the United States to *protect* such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession *from all taxes*, and assessments for roads, highways, or any other

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<sup>1</sup> Canandaigua Treaty, art. III, 7 Stat. 44 (Nov. 11, 1794) (emphasis added).

purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.<sup>2</sup>

In accordance with this treaty right, the United States has a responsibility to ensure that the State of New York is not taxing persons or activities on Nation land. By entering into a nation-to-nation treaty agreement with the Seneca Nation, the United States has a duty to stand by the Nation in fending off the State's attempts to intrude on Nation economic development initiatives on its Territories. Revising the Indian Trader regulations is a way for the United States to uphold its treaty responsibilities to prevent dual taxation of activities arising on Nation lands.

2. The Seneca Nation contributes significantly to the economies of the surrounding non-Indian communities.

The Seneca Nation is one of the largest employers in Western New York. We employ more than 5,800 people between our casinos, government programs and various economic enterprises. Of those employees, more than 70% are non-Seneca. Our most significant economic generators are our three casinos located on our Allegany, Niagara Falls, and Buffalo Creek Territories. Over the past 14 years, the Nation has directly contributed more than \$1.2 billion to the State of New York. Of this money, more than \$300 million has been distributed to local municipalities in Western New York. And, the Seneca Nation has become a significant user and payer of certain government services from local municipalities, including sewer, garbage, water and utilities. Our casinos generate millions of dollars in revenues on an annual basis for local vendors who provide services and commodities to them.

In addition, the Seneca Nation has invested more than \$1 billion into capital and infrastructure projects on or near our lands. These projects have generated hundreds of jobs and millions of dollars in revenues for local companies. Because the Nation wants to be a good neighbor, we also contribute millions of dollars a year to local charities, schools, and other organizations that benefit both the Seneca and non-Seneca communities.

Lastly, because the vast majority of our employees are non-Seneca, they usually do not reside on our lands, but live in the local non-Seneca communities where they spend money earned from Seneca Nation enterprises on housing, health care, food and other living costs. Additionally, because the Seneca Nation is unable to attract a diversity of businesses onto Nation lands, all of our employees and Nation members spend monies at local businesses in the surrounding communities, such as car dealerships, department stores, electronics stores, grocery stores, and other stores that provide the essentials for a comfortable lifestyle. During the recent recession, monies generated from Seneca Nation enterprises were an important factor for preventing many local non-Seneca business from closing. So, the Seneca Nation has become a critical economic engine in Western New York, and we could be doing even more if the federal government would clarify the tax regime on tribal lands.

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<sup>2</sup> Treaty with the Seneca Nation (Buffalo Creek Compromise Treaty), art. IX, 7 Stat. 586 (May 20, 1842) (emphasis added).

3. Providing clarity and certainty that Native Nation Governments have the sole taxing authority over all activities and persons located on tribal lands would allow Native Nations to better attract non-Indian investors or enterprises and create more job opportunities for both Indians and non-Indians.

Native Nations possess the sovereign power to tax or not tax and U.S. Supreme Court precedent has affirmed this sovereign power as “an essential attribute of Indian sovereignty,” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). As such, it is clear that Native Nations possess the authority to tax and impose fees over persons and activities located on tribal lands, regardless of a person’s race. However, courts have called into question whether State and local governments are also able to tax non-Indian persons and activities even when located on tribal lands. When non-Indians engage in trade and commerce on tribal lands, courts apply a “flexible preemption analysis,” or balancing test, which weighs federal and Native Nation interests against those of the State. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). At times, States have been permitted to tax certain economic activities of non-Indians on tribal lands, even when the financial burden of imposing the tax falls on the Native Nation. *See Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989). Such court decisions have caused a chilling effect with regard to non-Indian investment on tribal lands, and we believe that the federal government should take steps to confirm the sole taxing authority of Native Nation governments.

Generally speaking, the Seneca Nation does not impose taxes and does not have a tax system. All the profits earned from the Nation’s economic enterprises are used to provide government services and infrastructure, or reinvested into more economic development opportunities. These services and infrastructure benefit everyone who resides, works or otherwise comes onto Nation lands. Unlike State governments, the Nation does not tax individuals in order to provide services and infrastructure. Economic development and enterprises are better solutions to fund the needs of the Seneca Nation. We believe it is best for the economy to allow all persons to spend their incomes on essentials for a comfortable life, with the hope that such monies will be primarily spent locally. At times, the Nation has imposed fees, but such fees are usually targeted towards commercial enterprises located on Nation lands, and are used to offset the cost of providing necessary government services and infrastructure that the commercial enterprises benefit from.

The bulk of employees at commercial enterprises on Seneca lands are non-Seneca. Over 70% of the Nation’s casino, government, and other business enterprise employees are non-Native. With limited retail options on the Seneca Territories, these non-Seneca employees do not reinvest their earnings in the communities they work in, and many Senecas are forced to leave the Territories because there are not sufficient local business options to meet their retail needs. Lost opportunities to diversify businesses on the Nation’s lands directly impacts the Nation’s bottom line and in turn, hinders the Seneca Government’s ability to invest in its infrastructure, to provide critical services to all citizens, resulting in fewer job opportunities for non-Senecas in the surrounding communities.

Due to the uncertainty with respect to the application of State and local taxes on Nation lands, many potential investors and non-Indian entrepreneurs are dissuaded from starting businesses on Nation territories because they lack clarity as to whether they will need to pay

State and local taxes in addition to any fee imposed by the Seneca Nation. The threat of dual taxation by the State of New York puts the Nation at a competitive disadvantage and hurts its ability to economically develop its Territories. The Nation has had several instances where franchise restaurants declined to locate on Nation lands because of the legal uncertainty of dual taxation, resulting in questions as to whether the Nation and State governments would both be able to tax or impose fees on the companies. Rather than entering the uncertain legal environment and risking potential litigation if called into question by the State for declining to pay State taxes, these companies have opted not to invest in businesses located on Nation lands. To the extent franchises have agreed to develop businesses on the Nation's land, the franchises choose to pay State taxes out of extreme caution. The Seneca Nation cannot use its land as collateral and this puts the Nation at a severe disadvantage.

Many Senecas and non-Senecas in the City of Salamanca pay State taxes out of confusion. This practice of non-Indian entrepreneurs paying State taxes results in the city, individuals and franchises either being subjected to dual taxation, the Nation forgoing implementation of its own fee, or the additional costs being transferred to the customer or citizen. All three situations result in a chilling effect on the economic activities on Nation lands and deprive the Nation of the ability to recoup its own fees in lieu of the State taxes that non-Seneca businesses choose to pay and that could be used to support the Nation's essential government services and infrastructure.

Additionally, whereas State and local governments have the authority and tools to provide tax credits or breaks in order to attract businesses to certain geographical areas for targeted economic development purposes, the Seneca Nation is disadvantaged because it is without the same tax incentive powers because of the threat of dual taxation. The Nation does not tax the businesses within the boundaries of its Territories or impose a fee on non-Indian patrons in order to generate revenue for the benefit of the Nation's governmental functions. Even if it desired to impose fees on non-Natives, the legal uncertainty with respect to the dual taxation regime prevents the Nation from doing so at this time, or else it would be at risk of patrons leaving its Territories or subject to costly litigation risks. Economic sovereignty is essential to the Seneca Nation and the rest of Indian Country's ability to be self-determining and self-sufficient. Until clarity is provided by the federal government, the Nation and many other Native Nations will be unable to leverage tax policy tools to build strong and healthy economies. The Seneca Nation and other Native Nations are sovereign governments and deserve to be treated as such, with the deference to regulate fees and taxes within the boundaries of its Territories, and without other governments overreaching and trying to levy their own taxes on activities or persons on Nation lands.

For these reasons, the Nation would benefit from the Interior Department pursuing revisions to the Indian Trader regulations that clarify that Native Nation governments have the sole authority over all persons, regardless of race, who participate in trade or commerce on Nation lands. This is especially true with respect to nations like the Seneca Nation, which have specific treaty rights to the free use and enjoyment of their lands, free from taxation by other governments. Much of the current regulations are inconsistent with the Federal government's policy of Native Nation self-determination and sovereignty, and revisions to the regulations should defer to Native Nation governments and their sovereign authority over all activities occurring on their lands.

This letter constitutes the initial views of the Seneca Nation to assist the Department in developing beneficial revisions to the Indian Trader regulations. The Nation looks forward to working on a government-to-government basis to provide additional input as the Department moves forward with modernizing the Indian Trader regulations.

Nya:weh,

A handwritten signature in black ink, appearing to read "Todd Gates". The signature is fluid and cursive, with a prominent initial "T" and a long, sweeping underline.

Todd Gates, President  
SENECA NATION OF INDIANS