

Fort Belknap Indian Community



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Fort Belknap Indian Community
(Tribal Govt.)
Fort Belknap Indian Community
(Elected to administer the affairs of the community and
to represent the Assiniboine and the Gros Ventre
Tribes of the Fort Belknap Indian Reservation)

Elizabeth K. Appel
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RE: Written Comments to Docket ID: BIA-2016-0007 (Traders with Indians – Advance Notice of Proposed Rulemaking) and Dear Tribal Leader Letter of July 28, 2017

Dear Ms. Appel:

Please find below our written comments regarding the regulation for Traders with Indians, submitted by the government of the Ft. Belknap Indian Community.

OVERVIEW

The Secretary must exercise the **extensive and exclusive** authority granted in the statute. The regulations must be extensive and exclusive, clarifying federal preemption of all Indian commerce, with provision for full delegation to each tribe.

The regulations must firmly establish federal preemption over all tribal commerce, and then decisively and efficiently defer to tribes to opt in or out. The opt-out provision must be flexible and at the discretion of any tribe who feels they, in their own judgement, are ready to control their own commerce. Further, there must be a time limit, such as 60 days, within which if the DOI has not acted, tribal control over commerce is automatically approved.

In 1787 the U.S. Constitution assigned the power to “regulate Commerce ... with the Indian Tribes” exclusively to Congress. Article I, Section 8, Clause 3.

In 1876, Congress delegated that “**sole power and authority...to make such rules and regulations as he may deem just and proper...**” “**for the protection of said Indians,**” to the “Commissioner of Indian Affairs.” 25 U.S.C. §261, 262.

The Commissioner of Indian Affairs, unfortunately, has never properly implemented this law, this codification of the Constitutional clause. In the vacuum of federal clarification, a baffling patchwork of improper and possibly unconstitutional regulation of commerce with the Indian Tribes by the states and courts has developed.

The Constitution must be followed. The law must be properly implemented. These regulations much clarify that there is exclusive federal jurisdiction over all Indian trade per the Constitution and the statute.

THE FORT BELKNAP INDIAN RESERVATION

The Fort Belknap Indian Reservation is homeland to the Gros Ventre (Aaniiih) and the Assiniboine (Nakoda) Tribes, together the Fort Belknap Indian Community. Settled into this location after several forced moves by the federal government, the Fort Belknap Indian Reservation is geographically isolated, located just forty miles south of the Canadian border and twenty miles north of the Missouri River.

The Fort Belknap Indian Reservation encompasses an area consisting of 675,147 acres. The main industry is agriculture, consisting of small cattle ranches, raising alfalfa hay for feed and larger dry land farms. Fort Belknap has a tribal membership of approximately 8,000 enrolled members, with a median income of less than \$12,000 each according to recent statistics.

NO TRIBAL GOVERNMENTAL TAX REVENUE

As a government, we have all the responsibilities of any government, from education to trash collection. As a *tribal* government, however, we do not have the traditional forms of tax revenue to fund our governmental services.

Our land is predominately held “in trust” by the federal government and therefore not taxable. Regarding the non-trust land within our own nation that is taxable, the case law has awkwardly evolved to allow the state to tax it, even though it is within our boundaries. Our population base is too small, and unemployment and poverty rates too high to realistically implement an income tax. And with the lack of federal clarification of preemption, the case law has improperly evolved to allow the states to tax sales to non-natives on sales within our lands. Further, in Montana, the state does not have a sales tax. So any tribal sales tax would put us at a dramatic competitive advantage.

Therefore, with no traditional tax base, we are dependent upon two primary sources of government revenue, treaty based federal governmental appropriations, and competing in the private marketplace with our tribal government owned corporation.

ECONOMIC DEVELOPMENT ON ISOLATED RESERVATIONS

Like many isolated rural reservations, it is difficult to grow local based businesses sufficient to support the needs of our tribal members. As such, we created an economic development company, the Island Mountain Development Group (IMDG) in 2009. IMDG is dedicated to serving the Gros Ventre and Assiniboine Tribes by creating a self-sustaining, local economy through the creation of business opportunities, jobs, workplace training, positive role models, and resource development, and by generating income from outside the limitations of our reservation boundaries. Approximately 20% of Ft. Belknap's government revenue is now generated through our government-owned companies.

E-COMMERCE

Because our nation is so isolated, IMDG has utilized internet based e-commerce as one of the few industries that can truly thrive on such a rural reservation such as ours. E-Commerce has allowed us to expand our economic development to larger population bases and diversify beyond what is sustainable in this isolated location where the federal government has placed us. We have used our e-commerce generated income to support tribal revenue and to try and diversify our local economy:

- Snake Butte Construction
- Smokehouse Grille and Trading Post
- Little River Smokehouse
- Fort Belknap Tourism
- Spirit Box Technologies
- Smokehouse Coffee House
- and will be opening a grocery co-op this summer in an area of the Ft. Belknap Reservation that is a food desert.

Today more than 130 people are employed at by IMDG at Fort Belknap in the lending businesses alone, with more than \$1.4M annually in payroll paid to our local employees.

STRICT TRIBAL REGULATIONS

The Fort Belknap Indian Community has governmental regulations for its own trade and commerce. For example in just one industry alone, e-commerce based lending, our robust government regulations require: meaningful underwriting (including verifiable employment and bank account and demonstrated ability to repay); compliance with Ft. Belknap's own strict consumer protection requirements; and compliance with all federal laws.

However, the Community is in constant battle and litigation over respecting our jurisdiction, codes, and courts. As we are aware from our participation in inter-tribal associations such as the Tribal eCommerce Coalition (TeCC), in the e-commerce space, it is commonplace for tribes to wastes hundreds of thousands of dollars each year for attorney's fees to handle the constant battle of attempted state encroachment into our commerce and trade.

1. SHOULD THE FEDERAL GOVERNMENT ADDRESS TRADE OCCURRING IN INDIAN COUNTRY THROUGH AN UPDATED 25 CFR PART 140, AND WHY?

Yes. And, why? Because of, "It Depends." "It depends" are the two most profitable words for attorneys, and the most damaging to economic growth in Indian Country.

Since the Indian Trader Act was originally passed in 1876, in the vacuum of accurate federal regulations, litigation has filled the void with a ridiculous patchwork of case law that could not have done a better job at destroying tribal economies than if it had been by purposeful design.

What more is the federal trust responsibility if it is not intended to promote economic success in order to sustain tribal self-sufficiency? Instead, the current system has evolved to support dependency. Under no definition of trust responsibility is the goal to enforce poverty in perpetuity.

LACK OF FEDERAL CLARIFICATION = CONSTANT LITIGATION AND COMPLETE ECONOMIC OPPRESSION

Currently if you would like to trade with an Indian or a tribe you have to hire a lawyer to analyze a minimum of 50 different variables, and the case law, in order to determine which jurisdictions' regulations and taxes apply.

Depending on the answer to each of these questions the regulatory authority could be tribal, state, or federal, or a combination of any or all of the three. Depending on the answer to each of these questions, the taxing authority and which specific taxes and tax incentives apply could be tribal, state, or federal, or a combination of any or all of the three. Further, the answers are rarely clear, usually leading to extensive and costly litigation on at least one or more of the fifty questions. We have attached the list our attorneys must use in evaluating any one of our business deals:

"50 QUESTIONS OF ECONOMIC OPPRESSION"

Each of these questions must be researched and answered before you can determine whether tribal, state, and/or federal regulations or taxes apply for each project or business?

Ownership

1. Is the business owned by a Native American or a non-Native American?
2. Is the business owned by a Tribal government?
3. What percentage of the business is owned by each?

Use of Funds

4. If the business is owned by the tribal government, what exactly does the business use its profits for?

Place of Incorporation

5. Is the business incorporated under federal, state law or tribal law?

6. If owned by a Tribal government is it a federal Section 17 Corporation, state, or tribal corporation?

Location

7. Will the business will be located on or off the reservation? (*Colville*)
8. If on the reservation is the business located on trust land or fee land?
9. If off the reservation is the business located on off-reservation trust land or fee land?
10. Is the product manufactured on or off the reservation?
11. If the product is primarily manufactured off the reservation, is there “value added” to it on the reservation? (*Moe, Colville*)
12. Are your company’s email and data storage servers located on or off the reservation?

Government Services/Infrastructure

13. If the business is located on the reservation, does the federal, tribe or state government provide the government services (fire, police, roads, trash collection, roads, etc.)? (*Bracker*)
14. If more than one government provides services what percentage of government services does each government provide?
15. Which government provides electricity and communications infrastructure?
16. Does the tribal court or conflict resolution process look like what a westerner would be comfortable with?

Improvements

17. Have any “improvements” have been built on the lands? (*Chehalis*)
18. Are the improvements permanent or non-permanent?
19. Are the improvements built on trust land or fee land?
20. Were the improvements built by Natives or non-Natives?
21. Are the improvements owned by Natives or non-Natives?

Type of Business

22. What type of business it is?
23. Is the business one that would predominately be considered a “government function”?
24. Does the business involve a “treaty activity”?
25. Does the business involve fishing or hunting?
26. Does the business involve gaming?
27. If it involves gaming, is it directly or tangentially involved?
28. If it’s a building near gaming, does it actually physically touch the casino?
29. Does the business involve alcohol?
30. Does the business involve tobacco?
31. Is this an industry that is predominately regulated by the federal government?
32. Is it natural resource?
33. Is the natural resource being extracted by Natives or non-Natives? (*Cotton Petroleum*)

Type of Customer

34. Are sales being made to Indians or Non-Indians? (*Central Machinery*)
35. Is the sale on tribal land or non-tribal land?

36. Does the product stay exclusively within the reservation or does it leave the reservation?
37. If the product leaves the reservation is it tangible or e-commerce/service?
38. What percentage of the reservation population is below the poverty level?

Type of Employees

39. Are your employees Native American?
40. If so, what percentage of your employees are Native?
41. Are each of your Native employees enrolled with the tribe where the business is actually located?
42. If your employees are non-Native are they married to and/or supporting a Native family?
43. Do your employees live on or off the reservation?
44. Do your employees travel off the reservation for work?

Lease

45. Do you need to lease for the business?
46. If you need a lease is it for land or natural resources?
47. If the lease is for land, is it tribal trust land, or individually Native owned trust land?

Outsourcing

48. Do you outsource any of your work?
49. If you do outsource what percentage of the company's work?
50. What sort of daily control do you exert over the outsourced companies?

Tribal governments, reservation-based businesses, and their investment and business partners waste hundreds of millions of dollars annually on legal bills answering these questions and litigating them in court.

Capital and investors work with areas with the highest reward to risk ratio. The risk and uncertainty of 50+ variables just to determine the regulatory and tax implications is too expensive for most any business. Thus, the reason high risk businesses and high risk investors are often the only pool of capital and resources.

THE FEDERAL GOVERNMENT HAS AN AFFIRMATIVE OBLIGATION TO "PROTECT" TRIBAL COMMERCE AND TRADE

Tribal Commerce is Under Constant State Attack. In addition to the costs lost to litigation and to capital partners unwilling to navigate the increase risks of doing business in Indian Country, billions of dollars are lost annually in direct tax revenue diverted to state government tax overreach.

Without exception, every economic endeavor that has proved viable for tribes has come under aggressive state attack by either regulations or tax. Tobacco, gas, gaming and now online lending are just a few examples. The states angle to either tax or regulate the tribal industry out of business. Almost all the same self-serving, insincere arguments made over and over.

- Tribes are trying to skirt state laws.

- TRUTH: Tribes are implementing tribal law. State law is inapplicable.
- Tribes are avoiding state taxes.
 - TRUTH: Tribes are implementing tribal taxes. State taxes are inapplicable.
- The industry is unsavory, Tribes need to be protected.
 - TRUTH: Tribes can decide which industries and business they want to enter, just like any other sovereign.
- The business partners make all the money, Tribes get unfair business terms.
 - TRUTH: With “50 Questions of Economic Oppression” frightening capital, Tribes often have to accept less favorable business terms. It is the regulatory scheme that needs to be fixed.

States take every tribal tax opportunity away from Tribes they can. They play with the impetus of tax until they find a taxable entity doing business with the tribe. Just a few examples, the Oklahoma Tax Commission is in constant litigation with its tribes. The Three Affiliated Tribes in North Dakota have lost over \$1 billion dollar in revenue due to state tax overreach. The entire tribal tobacco industry has been crippled due to state tax overreach.

The Supreme Court Directed Federal Government to Protect Tribes from States – *Kagama*. The federal government has the “duty of protection,” to protect Tribes from their “deadliest enemies,” the states.

[Tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the **States where they are found are often their deadliest enemies**. From their very weakness and helplessness, so **largely due to the course of dealing of the federal government** with them, and the treaties in which it has been promised, there arises **the duty of protection, and with it the power**.

United States v. Kagama, 118 U.S. 375 (1886)

Montana Agreed to Federal Pre-Emption to Become a State – The Enabling Act. Further many states specifically waived and conceded their ability to this overreach in their “Enabling Act” which brought them into the Union as states. Montana, South Dakota, North Dakota and Washington certainly did:¹

¹ Sec 4. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. * * *

That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to ... all lands lying within said limits owned or held by any Indian or Indian tribes;

and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;

*** that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.

...States do agree and declare that they forever disclaim all right and title to ... all lands lying within said limits owned or held by any Indian or Indian tribes;

...and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;

...that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.

The Enabling Act, 25 U.S. Statutes at Large, c 180 p 676.

The Indian Trader Act Empowers the Secretary to Protect Tribal Commerce. The entire point of the Indian Trader Act is to empower the “Commissioner of Indian Affairs” to “protect” Indians within the realm of commerce. With the duty comes the power. *Kagama*.

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe **for the protection of said Indians.**

25 U.S. Code § 262 - Persons permitted to trade with Indians

The primary trader Tribes need protection from is “their deadliest enemy,” the states. The endless regulatory, tax (“prices”), encroachment and resulting endless litigation is the single biggest threat to the tribes. It is the *purpose* of this statute.

THE SECRETARY HAS BROAD AUTHORITY TO IMPLEMENT “EXTENSIVE AND EXCLUSIVE” REGULATIONS OF COMMERCE TO “PROTECT” INDIANS

Inherent Tribal Rights. Indian tribes are indigenous sovereign governments whose existence as distinct, self-governing political entities predates the formation of the United States government and the United States Constitution.

The Supreme Court has always recognized the political independence and self-governing status of Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (classifying tribes as “domestic dependent nations”); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that

But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

the tribes are “distinct independent political communities, retaining their original natural rights” and not dependent on federal law for their powers of self-government).

To this day, Native American Tribal governments continue to have all the “inherent powers of a limited sovereignty which [have] never been extinguished.” *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 60 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority...”); Powers of Indian Tribes, 55 Interior Dec. 14 (D.O.I.) (1934), 1934 WL 2186.

Therefore, a tribe retains all inherent attributes of sovereignty which have not been explicitly divested by Congress. *See Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-149 n.11 (1982); Felix Cohen’s Handbook of Federal Indian Law, § 6.02[1] (2005).

Specifically, tribal governments retain all inherent rights in the area of tribal trade, business, and economic development.

“The petitioner there asked us to abandon or at least narrow [a tribal sovereignty] doctrine because tribal businesses had become far removed from tribal self-governance and internal affairs. We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency.... The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.... In our interdependent and mobile society, however, tribal [sovereignty]...extends beyond what is needed to safeguard tribal self-governance....” *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

The Treaties Require the Secretary to Protect Tribal Commerce. Nothing in the treaties with Ft. Belknap, or other tribes, required us as tribal governments to give up our trading and commerce practices, nor to give up any authority over our commerce.

- **1866. Treaty: Agreement at Fort Berthold**
 - No delegation of trade or commerce to state governments. Solely a federal relationship.²
- **1868: Treaty: Treaty of Ft. Laramie**
 - No delegation of trade or commerce to state governments. Solely a federal relationship.³
- **1888: Act: Establishment of Ft. Belknap.**
 - No delegation of trade or commerce to state governments. Solely a federal relationship.⁴

² Agreement at Fort Berthold, 1866

³ Fort Laramie Treaty, 1868

⁴ Act of Congress on May 1, 1888, Stat., L., XXV, 113, 1888

Treaties “shall be the supreme law of the land,” and are the overarching framework for any congressional or Executive actions.

Article VI. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...”

There is nothing in the treaties with Ft. Belknap allowing for state government encroachment, to the contrary the reservations are clearly reserved for our nations alone.

The Constitution Reserves Indian Commerce to the Federal Government. The Constitution specifically delegates to Congress, the authority to regulate Tribal commerce.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article I, Section 8, Clause 3. Powers of Congress.

Any and all laws, regulations, state or federal actions, or case law, regarding Indian commerce or Indian traders all stem from the Indian Commerce Clause. The “Indian Trader Act” is essentially a codification of the Indian Commerce Clause. Congress has not abrogated these rights to States, to the contrary, Congress explicitly delegated this power to the Commissioner of Indian Affairs in the Indian Trader Statute.

Read Together the Secretary Must Protect Tribal Trade and Commerce. The governmental structure in the Constitution, the agreement in the treaties between the federal government and the tribal nations, and the agreement between the state governments and the federal governments, the specific statutory language, each outline that Indian lands were and “shall remain under the absolute jurisdiction and control of the Congress of the United States.” Enabling Act of 1889 (25 Stat. 676, chs. 180, 276–284, enacted February 22, 1889).

- **1787: Federal Constitution**
 - In the U.S. Constitution assigned the power to “regulate Commerce ... with the Indian Tribes” exclusively to Congress. Article I, Section 8, Clause 3.
- **1866. Treaty Agreement at Fort Berthold**
 - No delegation of trade or commerce to state governments. Solely a federal relationship.⁵
- **1868: Treaty of Ft. Laramie**
 - No delegation of trade or commerce to state governments. Solely a federal relationship.⁶
- **1876: Act - Indian Trader Statute**
 - Congress delegated that “sole power and authority to appoint traders...and to make such rules and regulations as he may deem just and proper...” and “for the protection of said Indians,” to the “Commissioner of Indian Affairs.”⁷

⁵ Agreement at Fort Berthold, 1866

⁶ Fort Laramie Treaty, 1868

- **1888: Act: Establishment of Ft. Belknap.**
 - No delegation of trade or commerce to state governments. Solely a federal relationship.⁸
- **1889: Act - The Enabling Act**
 - As a pre-requisite to becoming a state The Act admitting Montana, North Dakota, South Dakota, and Washington each state specifically and unequivocally that “Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States”⁹

The Secretary has Broad Statutory Authority to Design Federal Preemptive Regulations. The language in the Indian Trader Act is about as broad, discretionary and comprehensive as any language in any statute. It clearly delegates to the Commissioner of Indian Affairs the “duty” to protect is clearly and naturally accompanied by the “power” to protect, as was discussed in *Kagama*. Further it is the power to regulate trade broadly with “Indians,” it is not limited to any one sector or location.

The Commissioner of Indian Affairs shall have the **sole power and authority** to appoint traders to the Indian tribes and to **make such rules and regulations as he may deem just and proper** specifying **the kind and quantity of goods and the prices** at which such goods shall be sold **to the Indians**. (Aug. 15, 1876, ch. 289, § 5, 19 Stat. 200.)

25 U.S. Code § 261 Power to appoint traders with Indians.

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under **such rules and regulations** as the Commissioner of Indian Affairs may prescribe **for the protection of said Indians**. (Mar. 3, 1901, ch. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, ch. 994, § 10, 32 Stat. 1009.)

25 U.S. Code § 262 Persons permitted to trade with Indians

“Such rules and regulations.” The scope of what regulations the Secretary may promulgate covers any rule or regulation the Secretary “deem just and proper.” The scope is great.

“For the protection of said Indians.” The statute is not limited. It covers all transactions with any Indians. It does not have a limitation in the statute “trust land,” “Indian Country,” “Indian reservation,” or just “with Tribes.” It covers all trade with any Indian, “for the protection of said Indians.”

⁷ 25 U.S.C. §261, 262.

⁸ Act of Congress on May 1, 1888, Stat., L., XXV, 113, 1888

⁹ Enabling Act of 1889 (25 Stat. 676, chs. 180, 276–284, enacted February 22, 1889)

Modern Congressional Affirmation of Support and Protection for Tribal Trade and Commerce. Congress has continued to “explicitly” act to support Tribal commerce and self-sufficiency, and outline the federal responsibility, by repeating and bolstering the ideals set in the Indian Trader Act. Congress has taken numerous steps to enhance and support Tribal sovereign commerce and economic development. For example, Congress has clearly and unequivocally expressed its intent for the United States government to encourage and foster tribal commerce and economic development. In the comprehensive bill the Native American Business Development Act, Congress made its findings regarding tribal economic development and the role of the federal government and federal agencies in that nation-building pursuit very “explicit”:¹⁰

the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes;

the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian land;

the economic success and material well-being of Native American communities depends on the combined efforts of the Federal Government, tribal governments, the private sector, and individuals....;

Native American Business Development Act, 25 U.S.C. § 4301(a).

Any Statutory Ambiguities in the Indian Trader Act Must Be Interpreted in Favor of the Tribes. Furthermore, because of the unique trust relationship with Tribes, the Supreme Court has made clear that a basic canon of Indian law is that “ambiguities in federal law should be construed generously” in favor of the tribes. *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982). Therefore, if in reading the Indian Trader Act there are any ambiguities, each ambiguity should be read in favor of the Indians.

¹⁰ “Clause 3 of Section 8 of Article I of the United States Constitution recognizes the special relationship between the United States and Indian tribes; beginning in 1970, with the inauguration by the Nixon Administration of the Indian self-determination era, each President has reaffirmed the special government-to-government relationship between Indian tribes and the United States; *** consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights; Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws, including laws that provide for the exercise of administrative authorities; the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes; *** the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands...the economic success and material well-being of Native American communities depends on the combined efforts of the Federal Government, tribal governments, the private sector, and individuals....”

THE SOLUTION

The “Commissioner of Indian Affairs” must exercise the broad and flexible statutory authority granted in the Indian Trader Statutes, which is supported by inherent tribal sovereignty, the Constitution, the Treaties, Congressional intent, Supreme Court case law, and the federal trust responsibility, and draft regulations which are “exclusive and extensive” in order to confirm federal preemption of all trade with Indians, including over state regulations and taxes.

Indian Country is the only place in the world where jurisdiction over commerce is based on the race or citizenship of the participants and of the land owner.

In reality if the Indian Commerce Clause and the Indian Trader Act were properly implemented there would only need to be two questions asked:

The correct questions?

1. Is this commerce with a Native American or a tribal government?
2. Is this commerce with or emanating from Indian Country?

Jurisdiction over trade should be territorial/nation based, just like every other single governmental jurisdiction in the world. If you cross the border you are in that jurisdiction. If the government owns that business they have jurisdiction over it.

Second, after firmly establishing federal preemption over tribal commerce, the regulations must firmly defer to tribes. The tribal option provision must be flexible and at the discretion of any tribe who feels they, in their own judgement, are ready to control their own commerce. Further, there must be a time limit, such as 60 days, within which if the DOI has not acted, tribal control over commerce is automatically approved.

2. ARE THERE CERTAIN COMPONENTS OF THE EXISTING RULE THAT SHOULD BE KEPT, AND IF SO, WHY?

Probably not. The majority of it is insufficient, does not accurately reflect the comprehensive and exclusive intent of the statute, and is outdated and paternalistic. In addition, since there is a new requirement that old regulations must be discarded for new, it is likely a better use to discard the old regulation in its entirety and trade for new regulations.

However, the concepts behind the conflict of interest provisions for government employees working in Indian Country should be maintained. In addition, any licenses that were issued to businesses under the prior regulations should be grand-fathered and continue to be valid, subject to future regulation by the tribe.

3. HOW CAN REVISIONS TO THE EXISTING RULE ENSURE THAT PERSONS WHO CONDUCT TRADE ARE REPUTABLE AND THAT THERE ARE MECHANISMS IN PLACE TO ADDRESS TRADERS WHO VIOLATE FEDERAL OR TRIBAL LAW?

In general this is an outdated and paternalistic perspective. But the federal government still has a trust obligation to empower and strengthen tribal economies. What the federal government should provide is support and resources.

Not all tribes have the resources to conduct comprehensive background checks on business partners and investors. In order to “ensure that persons who conduct trade are reputable” the BIA should:

- (1) establish that it has extensive and exclusive authority over all traders with Indians (overcoming any *Bracker* test or similar balancing tests) in order to actually protect tribal sovereignty and economic development
- (2) delegate to tribes to implement authority over commerce
- (3) assist tribes, at their request, in establishing background check policies
- (4) provide, at the request of the tribe, comprehensive background check services which can be cost prohibitive for tribes

4. HOW DO TRIBES CURRENTLY REGULATE TRADE IN INDIAN COUNTRY AND HOW MIGHT REVISIONS TO 25 CFR PART 140 HELP TRIBES REGULATE TRADE IN INDIAN COUNTRY?

Tribes have developed sophisticated and robust regulatory schemes. However, they are almost wholly ignored or legally challenged by private industry and state governments. The 25 CFR Part 140 regulations should be written in a manner to prevent this. Revisions to 25 CFR 140 can, should, and will rectify this.

Not only do tribes regulate their own trade, they help each other regulate their own trade. Tribes with strong regulatory bodies are signing inter-governmental MOUs with one another to serve as each other’s governmental regulatory body, saving resources and building on expertise. Tribes also work together to regulate. For example, in the lending industry, tribes committed to robust regulation are joining forces to help create a national Tribal Lending Regulatory Commission to further regulate our trade.

Tribes are growing in sophistication and ingenuity over the regulation of their own trade. The “Commissioner of Indian Affairs” has a statutory obligation to protect tribal trade and commerce.

When a state government markets a tax incentive, it is considered savvy. When a tribal government markets a tax incentive, it is attacked in court as implementing unfair market practice, has its core sovereignty as a nation challenged, and incurs millions of dollars in legal fees.

When a state regulates an industry more favorably than another state, it's a competitive advantage. When a tribe regulates an industry more favorably than another state, the tribe is attacked in court, has its core sovereignty as a nation challenged, accused of fraud, and incurs millions of dollars in legal fees.

The federal government can help tribes regulate through federal preemption and tribal delegation, thus finally providing certainty to our regulations and taxes.

5. WHAT TYPES OF TRADE SHOULD BE REGULATED AND WHAT TYPE OF TRADER SHOULD BE SUBJECT TO REGULATION?

ALL TRADE. ALL TRADERS. ALL LOCATIONS.

ALL TRADE. The Constitution through the Indian Commerce Clause outlines *exclusive* and *extensive* federal jurisdiction over "commerce," not just some commerce, "with the Indian Tribes."

The statute, delegates *exclusive* and *extensive* federal jurisdiction as well, giving the Commissioner "the sole power and authority to appoint... to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices" 25 U.S.C. §261. Included in "all" trade is:

- all transactions
- all goods, services, property, natural resources, etc.
- all rights-of-way
- traditional subsistence trade
- traditional inter-tribal trade (which is the most traditional and most protected by treaty)
- bricks and mortar
- e-commerce
- all "prices" (including taxes)
- international trade import-export
- with/to and from Indian Country, including
 - trade and commerce with state actors
 - state regulations and taxes

If only certain industries, certain types of trade or certain commerce is covered by new regulations, then we are left with the exact same problem of the "50 Questions of Economic Oppression." It will just add additional complicated new questions.

The point new regulations is to finally streamline tribal commerce as was intended, protecting tribal sovereignty and finally releasing the regulatory shackles of poverty on tribes.

ALL TRADERS. All traders must be covered. Again, the Constitution through the Indian Commerce Clause outlines *exclusive* and *extensive* federal jurisdiction over "commerce," not just some commerce, "with the Indian Tribes." ‘

The statute delegates *exclusive* and *extensive* federal jurisdiction, to the exclusion of any state government, over all traders. All. The law gives the Commissioner “the sole power and authority to appoint traders to the Indian tribes....” 25 U.S.C. §261. Traders. Not “some” traders.

Further, “any person desiring to trade with the Indians on any Indian reservation shall...be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.” 25 U.S. Code § 262. Any person.

Included in all traders are:

- Native and non-native persons
- Individuals and companies
- Private and governmental actors (including state governments)
- Domestic and international entities

Again, if only certain traders are covered by new regulations, then we are left with the death sentence of uncertainty and simply add more questions to the “50 Questions of Economic Oppression.”

ALL LOCATIONS. The constitution is broad, “commerce...with the Indian Tribes.” The statute is broad, “traders to the Indian tribes,” “to the Indians,” (25 U.S. Code § 261), and “with the Indians on any Indian reservation” (25 U.S. Code § 262).

The constitution and statute are clear. They do not contain the ambiguities and exceptions that have developed in case law in the absence of accurate federal regulations. The statute empowers the Secretary to regulate trade to “to protect Indians.”

The statute does not impose any physical or location limitations on *where* the Indians must be located in order to receive federal protection. The regulations must interpret the statute under the cannons of construction in the light most favorable to Indians. Therefore the regulations must cover trade located where the Indians are conducting commerce:

- within the exterior boundaries of a reservation (regardless of who owns the plot of land)
- emanating from the reservation (regardless of whether in person or electronically)
- directly with Tribal governments (on or off the reservation)
- within areas where significant numbers or percentage of Indians are conducting trade, not restricted by who happens to be the land owner (including fee lands within reservations, traditional hunting and fishing grounds, traditional Alaska native villages, etc.)

It is well recognized in federal law that tribes may exercise civil regulatory and adjudicatory jurisdiction over Indians and non-Indians by agreement in contract, as with any jurisdiction. *Montana v. United States*. 450 U.S. 544, 565 (1981). Hundreds of Tribes around the country actively participate in commerce in every sector with hundreds of thousands of non-Indians each day, all of whom expressly participate in tribal commerce and trade.

6. HOW MIGHT REVISIONS TO THE REGULATION PROMOTE ECONOMIC VIABILITY AND SUSTAINABILITY IN INDIAN COUNTRY?

If these regulations reflect the plain language and true intent of the law, to ensure federal preemption over tribal commerce for the benefit and protection of Indians, we could finally eliminate the root of the problem to Indian Country economic oppression. Systemic tax and regulatory uncertainty and constant state encroachment.

CONCLUSION

In conclusion, treaties were signed with the solemn understanding that the federal government would protect the lands and rights "reserved" to our nations from encroachment, and the federal government has failed.

The Secretary has the duty and the power, the authority and the opportunity. The Secretary can do today what should have been done in 1876, properly implement the Indian Trader Statute. Had the Indian Trader statute been properly implemented in the beginning, properly protecting Indians in trade, Indian Country would not be stuck in the cycle of poverty that we see today. Mr. Secretary, set us free.

Respectfully,



Mark L. Azure, President
Fort Belknap Indian Community Council