



NATIONAL CONGRESS OF AMERICAN INDIANS

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Re: Docket ID: BIA–2016–0007, Supplemental Comments on ANPRM for 25 CFR Part 140

The National Congress of American Indians submits these comments to the Department of the Interior (DOI) in response to its Advance Notice of Proposed Rule Making issued December 9, 2016. These comments are intended to supplement NCAI's previous comments submitted in April 2017. NCAI greatly appreciates the opportunity to submit comments and DOI's consultation efforts with tribal leaders. In general, NCAI supports DOI's effort to modernize the regulations at 25 C.F.R. Part 140 which implement the Indian Trader Statutes, 25 U.S.C. § 261 *et seq.* As the trustee to Indian tribes, please accept the following supplemental comments.

I. Federal Preemption Discussion

In a recent consultation with DOI, the Acting Assistant Secretary-Indian Affairs (AS-IA) John Tahsuda asked how modernizing the Indian Trader regulations would affect current Supreme Court precedent. We would like to take a brief moment to discuss this important question.

i. Supremacy Clause

First, we note that the concept of federal preemption is rooted in the Supremacy Clause. Article Six of the Constitution establishes that Federal law is “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any States to the Contrary notwithstanding.” U.S. CONST. Art. VI, cl. 2.

Furthermore, the Supreme Court has described the Supremacy Clause as “‘secur[ing]’ federal rights by according them priority whenever they come into conflict with state law.” *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979). As such, how federal preemption occurs is a matter left to the courts to determine.

In doing so, courts usually begin any preemption analysis assuming “that the historic police powers of the State [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of the Congress.” *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *See also Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611

(1926); and *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749 (1942). The result is that any preemption analysis is therefore dependent upon an analysis of congressional intent, and/or purpose. In analyzing congressional intent, the Supreme Court has divided its preemption analysis into three categories: express preemption, field preemption and conflict preemption. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). Each of these preemption types addresses different sets of circumstances and is discussed briefly below.

ii. Express Preemption

Express preemption is where the Federal statute explicitly preempts state law through, for example, “inserting specific pre-emptive language into any of its enactments governing” a specific area of law. *English v. General Elec. Co.*, 496 U.S. 72, 80 (1990). For instance, Section 5 of the Indian Reorganization Act (IRA) states, “Title to any lands or rights acquired pursuant to [the IRA] . . . shall be taken in the name of the United States in trust . . . , and such lands or rights shall be exempt from State and local taxation.” This express statutory language clearly exempts state and local taxation on lands and rights acquired in trust for Indian tribes under the IRA, and it also creates a presumption that all lands and rights generally held in trust for Indian tribes are exempt from such taxes.

However, in addition to statutes, courts also look to applicable agency regulations since “[t]he phrase ‘Laws of the United States’ encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.” *City of New York v. FCC*, 486 U.S. 57, 63 (1988). In fact, the Supreme Court has found that “a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation” and hence render unenforceable state or local laws. *Louisiana Public Service Comm'n v. FCC*, 476 U. S. 355, 368-369 (1986).

To this point, when Section 5 of the IRA is complimented by 25 C.F.R. § 162.7, which states that, “[S]ubject only to applicable Federal law,” permanent improvements on leased land, activities under a lease conducted on the leased land, and leasehold or possessory interests are not “subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State,” the congressional purpose and intent is clear, particularly with respect to taxes on leased land acquired under the IRA.

Taken as a whole, the express preemption in Section 5 of the IRA continues to see success when challenged in Federal District Court. See, e.g., *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1159 (9th Cir. 2013)(Holding that “*Mescalero [Apache Tribe v. Jones*, 411 U.S. 145 (1973)] sets forth the simple rule that § 465 preempts state and local taxes on permanent improvements built on non-reservation land owned by the United States and held in trust for the Indian tribe.”). With respect to the regulations at 25 C.F.R. § 162.7, the *Chehalis* court stated “[b]ecause this regulation ‘merely clarifies and confirms’ what § 465 ‘already conveys,’ we need not reach the applicability of this regulation.” *Id.* at 1157, n.6.

iii. Implied Preemption

If an express preemption cannot be found, then the court looks to whether preemption is implied. Implied preemption can be found in one of two ways: field preemption or conflict preemption. For field preemption to apply, the state law must exist in a field of law Congress intended federal law to

occupy exclusively. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In other words, after analyzing the applicable constitutional authority, statutes and regulations, it is determined that federal laws and regulations so thoroughly occupy the field at issue that it leaves no room for state law to apply. The Indian Trader Statutes have seen some significant success in this area. See, e.g., *Cent. Mach. Co. v. Ariz. Tax. Comm'n (Central Machinery)*, 448 U.S. 160, 166 (1980)(Holding that “Congress ‘has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject’”); see also, *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 690 (1965)(stating that “[t]hese . . . all-inclusive regulations and the statutes authorizing them would seem, in themselves, sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.”). That being said, modernized regulations, properly promulgated, that assert tribal tax jurisdiction, tribal court jurisdiction, and defer to tribal authority to regulate such conduct would be extremely helpful as discussed further below.

Conflict preemption may apply in one of two ways: either where “compliance with both federal and state regulations is a physical impossibility,” (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).) or where the exercise of state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). A recent example of conflict preemption is where the Supreme Court held, with respect to generic drugs, that federal law preempts any state law that would require a manufacturer to make changes in a drug label to provide more warnings since generic drug manufacturers are not permitted to make label changes under federal regulations. *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2579-82 (2011)(stating that “[t]he question for ‘impossibility’ is whether the private party could independently do under federal law what state law requires of it.”)(citing *Wyeth v. Levine*, 555 U.S. 555, 573 (2009)).

iv. Special Preemption Analysis in Indian Country

With respect to preemption and tax jurisprudence in Indian Country, absent an express preemption such as that found in *Mescalero* as discussed above, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 146 (1980), laid out the relevant analysis as a balancing test between the relevant federal, tribal and state interests. In its *Bracker* decision, the Supreme Court stated:

The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law. . . . We have thus rejected the proposition that, in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.

White Mt. Apache v. Bracker, 448 U.S. 136, 143 (1980)(citations omitted). This is essentially a Tribal implied preemption analysis that factors in Tribal inherent regulatory interests, while also looking to the purpose and intent of federal statutes and regulations meant to protect, foster and preserve tribal interests. This analysis also gives more deference to State regulatory jurisdiction than a traditional preemption analysis in a non-Indian context would allow. See, e.g., *Id.* at 144 (stating “any applicable regulatory interest of the State must be given weight, . . . and “‘automatic exemptions’ as a matter of constitutional law” are unusual)(citing *Moe v. Salish & Kootenai Tribes*,

425 U.S. 463, 481, n. 17. (1976)); see also. So while similar to the traditional preemption tests described above, the *Bracker* balancing test provides a heightened threshold for Tribes seeking to preempt state regulatory jurisdiction over activities on their lands. For this reason, it is vital that DOI take every opportunity to clarify the federal interests in support for Tribal self-governance and self-determination where it retains the statutory authority to do so.

Unfortunately, the modernization of implementing regulations, such as the BIA Leasing regulation amendments discussed briefly above, are a new initiative that has yet to reach all statutory regulations overseen by the BIA. As a result, the *Bracker* analysis with respect to Indian tax matters has yielded extremely inconsistent results.

For example, in *Bracker*, the Supreme Court found that federal regulation of Indian timber is “comprehensive” and Arizona’s taxes could not be applied to a non-Indian company working under a contract with a tribal corporation. However, nine years later in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court upheld the imposition of state severance taxes on a non-Indian company extracting oil and gas on Jicarilla tribal trust lands. Yet federal regulation of both trust resources, timber and minerals, is comprehensive, and in both cases resource revenues constituted the largest source of tribal government revenue. The difference may have been the lack of accompanying regulations that clearly expressed the United States’ interest, particularly with respect to exempting state and local taxes.

This uncertainty forces tribes to structure their economies in the manner most likely to limit the ability of the state to enforce its tax, rather than in the manner that makes the best business sense. For their part, non-Indian investors and partners are rarely willing to endure the expense and delay of obtaining certainty on taxation in Indian country. Tax rulings can be obtained from many state taxing agencies, but they are fact-specific and dependent on case law underpinnings that are notoriously unreliable, or on the terms of negotiated state-tribal compacts with expiration dates that may not afford the investor sufficient security over the life of the project. Even when a tribe ultimately prevails, litigation is often necessary to establish state tax exemption whenever a non-tribal partner or investor is involved. Numerous inefficiencies result from this, including the direct cost and delay caused by extended litigation, as well as the chilling effect on both outside and tribal investment. See, Croman, K. S. & Taylor, J. B., *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOPNA 2016-1. http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf

That being said, modernized Indian Trader regulations, which explicitly affirm tribal tax jurisdiction have the potential to bolster the strong field preemption foundation discussed above with respect to the Indian Trader Statutes, arguably to the point of an express preemption, or – in other words – a clear statement under federal law that state and local sales taxes and use excise taxes are preempted. This is true particularly when considering federal regulations, properly promulgated, are given the force of Federal law as contemplated under the Supremacy Clause.

Further, if the Indian Trader Statutes, and their implementing regulations, are clearly promulgated in a manner that ties their authority directly to the Indian Commerce Clause, U.S. CONST. Art. 1 Sec. 8 Cl. 3., a strong express preemption becomes more probable. Also, Tribes typically exercise commerce on lands leased under the newly amended Part 162 regulations, adding another layer of potential protection for Tribes to assert in protecting their interests. And finally, since a *Bracker* analysis applies absent an express preemption, a collective federal law and tribal inherent sovereignty approach, bolstered by modernized Indian Trader regulations and the Constitution's Indian Commerce Clause as contemplated above, arguably negates the need to engage in a *Bracker* balancing test altogether. At worst, it serves to solidify a strong field preemption analysis under the current *Bracker* framework by shoring up areas of federal regulations that are outdated and do not contemplate modern commerce in Indian country.

II. DOI Has a Duty to Update the Indian Trader Regulations

Further, since the *Bracker* balancing test applies only in the absence of a clear expression of federal law on state taxation on tribal lands, our proposal is for the Trump Administration to fill the void using the authority provided to DOI via Congress and the Indian Commerce Clause in 25 U.S.C. § 261 *et seq.*, as well as the authorities vested under 25 U.S.C. §§ 2 and 9 as discussed below.

The Indian Trader Statutes, 25 U.S.C. § 261, states:

[T]he Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and 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.

Section 262, enacted 27 years thereafter, broadens DOI's authority and discretion, and authorizes the "Commissioner of Indian Affairs" (the modern day equivalent of the Commissioner of Indian Affairs is the AS-IA) to make rules and regulations to protect Indian tribes during commerce with proper persons on an Indian reservation. Together, Sections 261 and 262 grant broad discretion to DOI, the AS-IA specifically, and exemplify Congress' intent that the federal government occupy the field with respect to commerce on Indian reservations, leaving no room for state interference.

Section 261 was enacted in 1876, over 140 years ago. Section 262 was added in 1903. The Indian Trader Statutes are indeed antiquated, but far from disregarded. As recent as August 2015, the United States cited the Indian Trader Statutes in its motion to intervene in *Tulalip Tribes and the Consolidated Borough of Quil Ceda Village v. State of Washington*, case no: 2:15-cv-00940 at 3-4 (Wash. Distr. Ct. 2015), stating:

The leasing of Village trust lands, and activities on those lands, continue to be regulated by provisions of a federally approved tribal code and tribal ordinances. Pursuant to the Indian Trader Statutes, 25 U.S.C. § 261 *et seq.*, and their implementing regulations, all non-Indian businesses at Quil Ceda hold a federal Indian trader's license issued by the United States Bureau of Indian Affairs, which is obtained only after submitting to a federal background check, including personal and corporate financial status, capital to finance the business, prior business experience,

and criminal and licensing history. The United States Bureau of Indian Affairs and Tulalip, among others, entered into a memorandum of agreement to memorialize procedures for reviewing and acting upon applications for Indian trader's licenses at a portion of the Village site to provide certainty that potential subtenants will be able to obtain Indian trader's licenses prior to negotiating subleases.

Also, the United States listed the Indian Trader Statutes as one of a number of statutes that collectively speak to its protectable interests in its motion to intervene. *See Id.* at 7-8 (Stating "the Ninth Circuit has also recognized that government agencies have significant protectable interests in cases involving the application of laws that the agencies are tasked with administering and enforcing."). This matter is still unresolved, but its pleadings are evident of the current reach and effect of the Indian Trader Statutes.

Also in *Central Machinery*, as discussed briefly already, the Supreme Court held that through the Indian Trader Statutes, "Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject'", stating further that "[u]ntil Congress repeals or amends the Indian trader statutes, . . . we must give them 'a sweep as broad as [their] language.'" *Central Machinery*, 448 U.S. at 166 (citing *Warren Trading Post*, 380 U.S. at 691; citing also *United States v. Price*, 383 U.S. 787, 801 (1966)). In that matter, the Court determined that the Indian Trader Statutes apply even where the persons selling goods do not have a place of business on the reservation, and even where the persons selling goods are not licensed under the Indian Trader Statutes. *Id.* at 165. In doing so, the Court reasoned, "[o]ne of the fundamental purposes of these statutes and regulations—to protect Indians from becoming victims of fraud in dealings with persons selling goods—would be easily circumvented if a seller could avoid federal regulation simply by failing to adopt a permanent place of business on a reservation or by failing to obtain a federal license." *Id.*

Again, in *Warren Trading Post*, 380 U.S. at 690, the Supreme Court stated, with respect to the Indian Trader Statutes, "[t]hese . . . all-inclusive regulations and the statutes authorizing them would seem, in themselves, sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." Based on this rationale, in striking down the gross receipts sales tax levied by the State of Arizona, the Court said:

The state tax on gross income would put financial burdens on . . . the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

Id. at 691. The Indian Trader Statutes are indeed old statutes with outdated regulations, but they still retain the force of law. For this reason, if appropriately modernized, the regulations implementing the Indian Trader Statutes have the potential to provide great trust protections for Tribes.

In doing so, the broad statutory authority conferred upon the AS-IA, which includes the right to determine the prices of goods, and to make any other rules and regulations deemed necessary to protect the Indians, would be given new light. Such rules should include provisions that confirm jurisdiction based tax sourcing laws, and not citizen based tax sourcing laws (i.e., eliminating the

confusing and unworkable non-Indian/Indian distinction); and which confirm tribal court jurisdiction over all commercial activities occurring in Indian country, while leaving appropriate flexibility to allow for choice of law provisions to designate alternative forums.

Such new regulations would be consistent with modern federal Indian law principles and past positions asserted by DOI. In fact, the lack of updated regulations in this area arguably creates a duty on the part of the Federal government to modernize its Indian Trader regulations since, unfortunately, the current Indian Trader regulations do not speak to modern commerce conducted on Tribal lands. For instance, had modernized regulations that clearly support tribal court jurisdiction been in place as early as several years ago, the recent case *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. ____ (2016) may have resulted in stronger, clearer precedent favorable to Indian tribes. The costs associated with similar cases where a clear statement from DOI on federal interests would have been beneficial, and involving commerce within Indian country, are probably enormous.

Further, we assert that revising the Indian Trader regulations will be a modest exercise of regulatory affairs. The Indian Commerce Clause is an enumerated Congressional authority, Indian country is land traditionally reserved to federal authority to preserve tribal self-government, and Congress has specifically delegated authority to regulate commerce with Indians on reservations to DOI under 25 U.S.C. § 261 *et seq.*

In addition, updated Indian Trader regulations would not require that the federal government approve licenses or tribal regulations. Our preference is that DOI would set federal standards for tribal regulations, which could be exceeded at the Tribe's behest and not require federal approval. It would be too easy for some future Administration to ignore proposed tribal regulations, or refuse to approve them. Federal standards provide the same "federal hook" but are more respectful of tribal self-determination, and avoid the delays and administration of DOI approval of each tribal code.

An analogy might be to the recent Indian Civil Rights Act amendments that expand tribal criminal jurisdiction. There, tribes can exercise inherent jurisdiction to impose longer sentences or prosecute non-Indian DV offenders if their tribal codes meet certain requirements. Those tribal codes do not need to be approved; they must only meet certain requirements to be effective.

As a legal matter, federal approval does not add to the preemption analysis. The fact that there was federal approval of the tribal tax ordinances in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), did not mean much to the Court in its analysis of the particular state taxes at issue there. 447 U.S. 134, 156. Instead, for preemption, and as discussed in more detail above, the courts look to relevant federal statutes and/or regulations, and whether they include a clear expression of Congressional intent to preempt state regulatory authority. With respect to the Indian Trader Statutes, the statutory authority is appropriately broad at 25 U.S.C. § 261 *et seq.*, and reviewing courts have held so. However, the regulations could speak clearer in this regard.

That being said, 25 U.S.C. §§ 261 and 262 are strong sources of statutory authority that fully authorize regulatory preemption of state taxes as applied to trade with Indians within Indian

country; specifically 25 U.S.C. § 262, which states “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.” In sum, since DOI has the authority to do so; and since not doing so has arguably causes Tribes great financial hardship and lost opportunities through contributing to unfavorable courtroom precedent; DOI has a duty to modernize its Indian Trader regulations. In fact, the failure to update the Indian Trader regulations in the past has even led to litigation brought by Tribes asserting that their interests were not appropriately protected by earlier versions of the Part 140 regulations. *See, e.g., Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

III. DOI Must Modernize the Indian Trader Regulations in a Manner Consistent with Federal Principles of Self-Governance

NCAI asserts that DOI must modernize the Indian Trader regulations at 25 C.F.R. § 140 *et seq.* in a manner that acknowledges Tribal business licensing authority, including appropriate deference to tribal courts, and in a manner that speaks clearly to tribal tax jurisdiction within Indian country, mirroring the language in the revised Part 162 and Part 169 regulations. *See* BIA Leasing Regulations, 25 C.F.R. at § 162.017; and BIA Right of Way Regulations, 25 C.F.R. at § 169.11.

To help DOI in this effort, NCAI offers the following example of what this might look like:

Proposed Amendments to 25 CFR 140: October 30, 2017

Note: A grandfather clause would be provided for existing licenses. Definitions would be provided for “Indian land,” and “trade” would be defined to include not only sales to Indians, but also sales from Indians to non-Indians, and any commercial transaction in markets created by Indian tribes on leased tribal lands. Also, we suggest that value creation be described as a function of the joint integration of resources by the multiple actors associated with an exchange, including a tribal landowner.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends 25 CFR Part 140 to read as follows:

PART 140 –REGULATION OF TRADE IN INDIAN COUNTRY

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§ 140.1 Which Persons are Authorized to Engage in Trade in Indian Country?

Any person or business desiring to trade with the Indians on any Indian reservation shall be permitted to do so under the laws of the tribal government. Tribal laws to regulate businesses operating on trust or restricted lands must be publicly available and must notice and an opportunity to be heard regarding consequences for any violations of tribal laws.

§ 140.2 Consent to Jurisdiction of Tribal Courts and Enforcement

As a condition to doing business in Indian country, each person or business engaging regularly in trade in goods or services in Indian country shall, in accordance with respective tribal laws, be subject to the jurisdiction of the tribal court for the purpose of the adjudication of any dispute, claim or obligation arising under tribal laws, consistent with due process and the following provisions:

- a) Parties may agree to alternative venues for dispute resolution through contract.
- b) Incidental transactions with American Indians as a part of a larger commercial enterprise will not trigger tribal court jurisdiction. Deliberate and knowing engagement in unique commercial transactions with Indians on a reservation is required.
- c) Tribal court jurisdiction is presumed for business activity on Indian lands.
- d) Tribal court jurisdiction is established for business activity on fee lands within a reservation when the parties enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements; or when conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
- e) The Bureau of Indian Affairs may take necessary actions to enforce tribal court decisions, including eviction, seizure, and prosecution of trespassers in Indian country.

§ 140.3 What is a tribe's jurisdiction over trade in Indian country?

Tribal jurisdiction regarding trade or business in Indian country includes but is not limited to:

- (a) The Indian tribe's jurisdiction over the land and any person or activity within the reservation;
- (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity on trust or restricted land;
- (c) The Indian tribe's authority to enforce tribal law of general or particular application;
- (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over nonmembers on Indian land.

§ 140.4 What taxes apply to trade under this part?

- (a) Trade and business activity on trust or restricted fee lands shall be subject to any taxation by the Indian tribe.
- (b) Trade and business activity on trust or restricted fee lands is not subject to any fee, tax, assessment, levy, or other charge (including but not limited to, business use, privilege, excise, and gross revenue taxes) imposed by any State or political subdivision of a State; provided however, this provision is subject to applicable federal and state law related to taxation of income of individual non-Indians. Fees for utility services are permitted.
- (c) Mineral and energy development and any form of natural resources extraction or agriculture on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge (e.g. severance or gross production tax) imposed by any State or any political subdivision of a state.
- (d) Tax Sourcing: Tribal laws determine tax sourcing of sales of all products or services on trust or restricted fee land within the following framework:

1. When the product is received by any purchaser at a business location on trust or restricted land, the sale is sourced exclusively to that business location and the tribal government.
 2. For delivery sales, the sale is sourced exclusively to the tribal government jurisdiction on trust or restricted land at the location indicated by instructions for delivery.
 3. When subsections (1) and (2) do not apply, these sourcing rules are to be interpreted in a manner consistent with the State Streamlined Sales and Use Tax Agreement and the federal trust responsibility, where the tribal government is treated as a state or territorial government.
- (e) Excise Taxes: sales or production of any product on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge (e.g. motor fuel, tobacco or alcohol excise tax) imposed by any State or any political subdivision of a state.
- (f) Personal Property Taxes: All forms of personal property located on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge imposed by any State or any political subdivision of a State.
- (g) Telecommunications: All forms of telecommunications located on trust or restricted lands are not subject to any fee, tax, assessment, levy or other charge imposed by any State or any political subdivision of a State.
- (h) Income Taxes: Income earned by any member of a federally recognized tribe who resides and is employed on trust or restricted land is not subject to any fee, tax, assessment, levy or any other charge imposed by a State or any political subdivision of a State.
- (i) Tribal-State Tax Agreements: The administration of tribal and state tax laws are frequently addressed through voluntary agreements between tribes and states. Such agreements are encouraged, but not required. As a practical matter agreements may be necessary for the administration of certain taxes, such as taxes on delivery sales.

Authority: Sec. 5, 19 Stat. 200, sec. 1, 31 Stat. 1066 as amended; 25 U.S.C. 261, 262; 94 Stat. 544; 25 U.S.C. 2 and 9, and 5 U.S.C. 301, unless otherwise noted. *Note: look up Statutes at Large. Also 18 USC 437 is repealed.* Cross References: For regulations pertaining to business practices on Navajo, Hopi and Zuni reservations, see part 141 of this chapter.

i. Current DOI Practice, as well as Federal Law and Policies Support Tribal Self-Governance within Modernized Indian Trader Regulations

In support of this approach, we submit that DOI already does much of this in practice. A large number of Indian tribes already issue business licenses to Indian and non-Indian businesses engaged in commerce on Indian reservations, and many businesses operate on leases approved by the BIA. The BIA does not require non-Indian businesses to be licensed under the Indian Trader Statutes unless the Tribe desires and/or requires such businesses to do so.

Also, partly, this practice was established in the courtroom, where Tribes consistently, and rightfully so, assert inherent regulatory jurisdiction and where courts have acknowledged that tribal civil regulatory authority is at its zenith within the reservation and on trust and restricted lands. *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 555 (1832); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); and *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

In addition, modern federal statutes are written in a manner that bolsters tribal governments, specifically with respect to self-governance and self-determination. (*See, e.g.,* the Indian Reorganization Act (IRA), 25 U.S.C. § 5801 *et seq.* (authorized tribes to acquire land, held in trust by the United States; to establish tribal constitutions, either ratified by the federal government or by tribes' own sovereign acts; to seek reservation proclamations; to establish tribal corporations, as separate economic development arms of the tribe, and more); the Indian Self-Determination and Education Assistance Act (ISDEA), 25 U.S.C. § 5301 at (a)(1) and (2) (Stating that ISDEA was based on congressional findings that “the prolonged federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities”; and that “the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.”); the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) (amends the Indian Long-Term Leasing Act, 25 U.S.C. § 415 *et seq.* to acknowledge tribes' authority to conduct their own lease approvals.); and the 2013 amendments to the Stafford Act, 42 U.S.C. § 5121 *et seq.* (Provided Indian Tribes the option to request a Presidential emergency or major disaster declaration independent of a state.)).

In some respects, DOI has successfully married these modern federal Indian law principles to current regulatory provisions. *See* the recently amended 25 C.F.R. Part 162 surface leasing regulations, and the recently amended BIA Right of Way regulations at 25 C.F.R. Part 169. However, the Indian Trader Statutes have not been updated to reflect the federal government's current policies toward Indian tribes. The end result is that the Indian Trader Statutes are seen as outdated and antiquated, when in fact their premise – that the federal government occupies the field of commerce on Indian reservations so thoroughly that state infringement in this area is preempted—is ironically more important now than ever.

Consistently, Tribes are concerned with dual taxation, failure of states to negotiate tax agreements, and failed business opportunities because of uncertain tax implications. Modernized Indian trader regulations could address each of these issues effectively and help provide Tribes with clear agency interpretations in future court proceedings centered on reservation commerce.

Furthermore, in addition to the Indian Trader Statutes, 25 U.S.C. §§ 2 and 9 provide broad statutory authority as well. Specifically, 25 U.S.C. § 2 confers upon the Secretary regulatory authority for the “management of all Indian affairs and of all matters arising out of Indian relations,” and 25 U.S.C. § 9 provides that the Secretary “may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs....”. The Supreme

Court has affirmed the broad authority granted to the Secretary by these statutes.¹

Simply put, 25 U.S.C. §§ 2 and 9 grant authority to the Secretary to adopt regulations that carry into effect any tribal right rooted in Federal law, including the right to regulate trade and taxation on federal Indian reservations set-aside for the purpose of tribal self-government. These statutes, when combined with the Indian Trader Statutes and the Indian Commerce Clause provide a strong foundation to modernize the Indian Trader regulations in a manner consistent with Tribal self-governance.

ii. *Current Federal Case law Supports Tribal Self-Governance within Modernized Indian Trader Regulations*

Also, reviewing courts have upheld the Secretary's exercise of rulemaking authority under 25 U.S.C. §§ 2 and 9. The Supreme Court has affirmed the broad authority granted to the Secretary by these statutes, stating "[i]n the area of Indian Affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Also, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 691 (1979), the Supreme Court noted its approval of regulations that were protective of off-reservation Indian fishing rights. Although there was no explicit delegation of authority to adopt fishing regulations in the Treaty reserving the right, the Supreme Court recognized that the Secretary's "general Indian powers" embodied in 25 U.S.C. §§ 2 and 9 gave him the authority to adopt regulations over Indian affairs.

Similarly, in *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987), the court held that 25 U.S.C. §§ 2 and 9, "construed in accordance with the special relationship between the United States and Indian tribes," provided necessary authority for the Secretary to regulate on-reservation hunting. Again, in *United States v. Eberhard*, 789 F.2d 1354 (9th Cir. 1986), the Ninth Circuit held that 25 U.S.C. §§ 2 and 9 authorized the Secretary of the Interior to regulate Indian fishing on the Hoopa Valley Indian Reservation, noting that "these statutory provisions give Interior sufficient authority to promulgate ... regulations ... [even] in the absence of specific legislation giving Interior authority to regulate Indian fishing." 789 F.2d at 1359-1360.² In fact many lower court cases support the exercise of Secretarial authority to promulgate regulations generally protecting Indian rights. See, e.g., *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994); *James v. United States Dep't of Health & Human Services*, 824 F.2d 1132 (D.C. Cir. 1987); *United States v. Michigan*, 623 F.2d 448 (6th Cir. 1980); *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966).

¹ *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)(citing 25 U.S.C. §§ 2 and 9)(Stating that "[i]n the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA.").

² See also *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 n. 19 (9th Cir. 1975) (noting that 25 U.S.C. § 2 alone may be sufficient to sustain Interior regulations administering Indian land given the nature of the "trust relationship" between the United States and the Indian tribes, which provides "the central framework for 'Indian relations'").

In addition, we can look to similar circumstances where federal courts have reviewed similar efforts from other agencies. In *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), the Court looked to whether the EPA acted unreasonably by delegating certain responsibilities under the Clean Air Act to Indian tribes before there was clear Congressional authority to do so. In that instance, the statute expressly provided for delegations to States, but not tribes. The Court, in upholding the EPA action, stated:

The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the States. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decisionmaking.

Nance v. EPA, 645 F.2d at 714. Similar to *Nance*, DOI has read the Indian Trader Statutes as intended for the benefit of the Indians and not meant to subordinate tribal interests in a manner inconsistent with the core pillars of tribal self-governance. Unlike *Nance* however, there is clear statutory authority to delegate business licensing to Indian tribes under the Indian Trader Statutes.

Also, in *Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir 1983), the Ninth Circuit reviewed whether the Secretary of the Interior erred in requiring tribal consent before issuing rights of way over tribal lands. In reviewing that matter, the Court applied the Indian canons of construction stating that since the Act was passed to protect Indian interests, “[i]t must therefore be liberally construed in favor of the Indians.” *Id.* at 552. In addition, the Court noted that “the construction of a statute rendered by the agency charged with its administration is ordinarily entitled to substantial deference.” *Id.* (citing *United States v. Rutherford*, 442 U.S. 544, 553 (1979); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Central Lincoln Peoples' Utility Dist. V. Johnson*, 673 F.2d 1076, 1078 (9th Cir. 1982); and *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982). With this in mind, the Court looked to whether the Secretary's interpretation of the underlying right of way statute was reasonable. *Id.* In doing so, the Court determined that:

Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to a state or local government. “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are ‘a separate people’ possessing ‘the power of regulating their internal and social relations. . . .’” *United States v. Mazurie*, 419 U.S. 544, 557 (1975). . . . Subdelegation of administrative authority to a sovereign entity is not *per se* improper. . . . Nor must such subdelegation rest on express statutory authority. *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 120-22 (1947); *Tabor v. Joint Bd. for Enrollment of Actuaries*, 185 U.S. App. D.C. 40 (D.C.Cir. 1977).

Southern Pacific Transp. Co. v. Watt, 700 F.2d at 556. Finally, the Court held that the Secretary's action “at issue is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands.” *Id.* In other words, Indian tribes, as sovereign

governments, are appropriately afforded more deference on matters that potentially affect their self-determination and self-governance.

NCAI submits that a delegation of authority under the Indian Trader Statutes to Indian tribes should receive no less deference than was afforded the agencies involved in the *Nance v. EPA* matter and the *Southern Pacific Transp. Co. v. Watt* matter. Also, the language at 25 U.S.C. § 262 authorizes the AS-IA to make any rules and regulations deemed necessary to regulate commerce between proper persons and Indian tribes within Indian country. This broad authority, when supplemented by the broad authority at 25 U.S.C. §§ 2 and 9, allow DOI to defer to the Tribe on who is a proper person to engage in commerce with, and under what licensing regime such businesses must operate within their sovereign lands.

In fact, such a delegation is fully in accord with the federal trust responsibility to Indian tribes as well as the deference to tribal self-governance where tribes retain independent regulatory authority over their own lands, peoples and resources.

For these reasons, NCAI encourages the BIA to act now to modernize the Part 140 regulations which implement the Indian Trader Statutes and, in doing so, to acknowledge tribal authority to regulate trade on reservations while speaking clearly to tribes' sovereign tax authority in much the same manner as the recently amended Part 162 and Part 169 regulations do.

I. Conclusion

For all the aforementioned reasons, NCAI urges DOI to move forward with a proposed rule updating the Indian Trader regulations. We assert that even publishing the rule will send a strong signal to state and local governments that Tribal civil regulatory authority is to be respected. NCAI member tribes often relate that states and local jurisdictions will not even entertain sales tax agreements in some instances because they do not respect tribal regulatory authority in this area. Even publication of a proposed rule may incentivize reluctant states to meet with Tribes for the purpose of negotiating critical tax agreements moving forward.

In closing we assert that the federal trust relationship, the Indian Commerce Clause, and the Indian Trader Statutes compel a regulatory framework for commerce in Indian country that clarifies the strong federal interests in such commerce, as well as the federal promotion of tribal self-determination and self-governance. For these reasons, NCAI fully supports DOI in its efforts to modernize its Indian Trader regulations. We thank you for the opportunity to comment and are happy to discuss this issue further with DOI if needed. For any questions or concerns, please contact NCAI General Counsel John Dossett at jdossett@ncai.org.

Sincerely,



Jefferson Keel
NCAI President