



**OFFICE OF THE GOVERNOR**

The Chickasaw Nation  
Post Office Box 1548 • Ada, Oklahoma 74821  
(580) 436-2603 • Fax (580) 436-4287  
<http://www.chickasaw.net>

BILL ANOATUBBY  
GOVERNOR

April 6, 2017

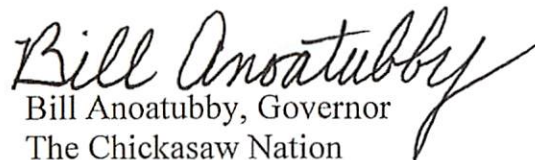
Ms. Elizabeth K. Appel, Director  
Indian Affairs – Office of Regulatory Affairs  
U.S. Department of the Interior  
1849 C Street N.W.  
Mail Stop 3642-MIB  
Washington, D.C. 20240

Dear Ms. Appel:

The Indian Trader statutes, 25 U.S.C. §§ 261-64, play an important role in protecting the fundamental exercise of tribal sovereignty over tribal economies. We commend the Administration's effort to undertake the task of modernizing and implementing regulations and look forward to submitting additional comments once the rule-making process is fully underway.

Please accept the included comments, prepared in response to the Department's advance notice of proposed rule-making, published at 81 FED. REG. 89,015 (Dec. 9, 2016). Thank you for your consideration.

Sincerely,

  
Bill Anoatubby, Governor  
The Chickasaw Nation

**The Chickasaw Nation's Comments to the  
Advance Notice of Proposed Rule-Making  
Relating to the Indian Trader Statute Regulations  
(81 Fed. Reg. 89,015, Dec. 9, 2016)**

On December 9, 2016, the Department of the Interior published advance notice in the Federal Register of a proposed rule-making intended to “modernize the implementation of the Indian Trader statutes consistent with the Federal policies of Tribal self-determination and self-governance. (See 81 Fed. Reg. 89,015.) These comments responds to that notice, with particular reference to the questions posed therein.

**1. Should the Federal government address trade occurring in Indian country through an updated 25 C.F.R., part 140, and why?**

Yes.

The United States Constitution, art. 1, § 8, cl. 3, vests Congress with authority over Indian country commerce exclusive of the states, and Supreme Court case law has construed this particular regulatory system as a fundamental bulwark against state interference with Indian country-based trade with American Indian tribes and their members.<sup>1</sup> More broadly, the Court has recognized this system, and the cases arising under it, as affirming a strong and ongoing federal interest in Indian country trade, which has provided a legal foundation critical to the support of tribal sovereignty in cases balancing government interests relative to state efforts to tax or otherwise regulate non-Indian activity within Indian country.<sup>2</sup> Withdrawal of the federal role in this area or any formal limitation on the implementation of the Indian Trader Statutes or associated regulations would risk destabilization of the already complex regulatory context of on-reservation commerce, thus undermining federal law protections of tribal self-governance and self-determination.

In short, the federal government has an important interest and role to play with respect to Indian country trade and commerce. As to how the government's role should be modernized and affirmed, please see our response to question 6.

**2. Are there certain components of the existing rule that should be kept, and if so, why?**

No comment at this time.

---

<sup>1</sup> *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (holding Indian Trader Statutes preempt state taxation of on-reservation retail sale of goods to tribal enterprise); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965) (holding Indian Trader Statutes preempt state sales and gross income tax “as applied to [licensed trader’s] income from trading with reservation Indians on the reservation”). *But cf.* *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (holding Indian Trader Statutes do not preempt all state regulation of licensed traders and rejecting facial challenge to state administrative recordkeeping and retailer licensure requirements).

<sup>2</sup> *Cf. White Mountain Apache v. Bracker*, 448 U.S. 136 (1980).

**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?**

As to assuring that “persons who conduct trade are reputable,” there is no such requirement in the Indian Trader Statutes; instead, the statutes indicate only that the Commissioner of Indian Affairs is satisfied that the applicant for an Indian Trader license “is a proper person to engage in such trade . . . .” 25 U.S.C. § 262.

Rather than imposing a burdensome or unduly restrictive standard or process for implementing that requirement, the regulations should implement a straightforward *presumption* that facilitates a timely and administratively streamlined approval processes. Presumptive approval could apply, for example, to any application:

- (a) supported by the tribal nation with which the applicant would conduct trade or within whose territory the applicant would conduct trade; and
- (b) submitted by and for a professionally licensed person or chartered business in good standing.

Approval and issuance should be automatic within a reasonable time of the applicant’s submission and publication of appropriate public notice, with approval and issuance prevented *only* upon the filing of an objection by an interested person. If an objection were filed, the relevant agency office could conduct an investigation, take responsive comments from the affected tribe and applicant, and make a timely determination. Grounds for objection should be defined exclusively by reference to provisions in the relevant tribal code, material misrepresentation in the application, the existence of a substantive and relevant criminal record, or other reasonable standard.

As to the relevant enforcement of tribal and federal law with respect to a licensee, gaming tribes typically implement licensing systems for purposes of vendors providing goods and services, and a meaningful issuance and oversight system need not be overly cumbersome or intrusive. For example, the terms of the license itself should simply specify the licensee’s being subject to federal and tribal law with respect to the conduct of trade, putting the licensee on notice as to the scope of such law, and the affected tribe should be provided a current list of all licensed traders. Thereafter, the tribe will have a direct interest in enforcement of its own laws, and the Department and agency office will likewise have an interest with respect to federal law.

**4. How do Tribes currently regulate trade in Indian Country and how might revisions to 25 C.F.R., part 140, help Tribes regulate trade in Indian country?**

With respect to trade within the Chickasaw Nation, our regulations focus on (a) general retail or service trade with the tribe itself; (b) liquor sales and service; and (c) vendors providing goods and/or services relating to our tribal government gaming enterprises. Each of these mechanisms include application and registration components, while the liquor and gaming

related matters also involve licensing and administrative oversight. Our regulation of vendors conducting general retail or service trade with the Chickasaw Nation include implementation of Chickasaw and other American Indian preferences, consent to tribal law and forum, and specific reporting requirements. Our regulation of liquor and gaming related sales, goods, and services also include background checks and, with respect to gaming vendors, active oversight by the Chickasaw Nation Office of the Gaming Commissioner in accord with our gaming compact with the State of Oklahoma, applicable National Indian Gaming Commission standards, and our own internal control standards.

As to how part 140 could be revised to help American Indian tribes regulate Indian country commerce, please see the answer provided to question 6. Additionally, we recommend the federal trustee make resources available to support tribal institution building consistent with tribal directed oversight and management of commerce within tribal jurisdictions. Such resources should certainly include grants and other direct financial support, but additionally useful resources would come in the form of trainings, information clearinghouses as to how tribes throughout Indian country support and regulate tribe within their respective jurisdictions, model codes, and other technical resources that facilitate the deepening of tribal expertise that can be applied in a culturally appropriate manner by the affected tribe, itself.

**5. What types of trade should be regulated and what type of trader should be subject to regulation?**

For purposes of clarifying preemptive scope, it should be made clear that this regulatory system applies to any and all “trade”—which term should include, at a minimum, any and all provision of goods or services or ongoing transactions or relations for purposes of providing goods or services—with American Indian tribes or their citizens or members where the transaction or relation is based or performed within Indian country. Any such declaration of scope should be accompanied by the requirement that the regulations themselves be construed in accord with the same intent indicated in the Federal Register notice to which these comments respond, i.e., “implementation of the Indian Trader statutes consistent with the Federal policies of Tribal self-determination and self-governance”—the point being that the intent of such scope is to limit state intrusion and support tribal self-governance, *not* to perpetuate the archaic and paternalistic mode of the existing regulatory system (e.g., see answer to question 6).

**6. How might revisions to the regulations promote economic viability and sustainability in Indian Country?**

The current statute and regulations are based on an archaic and paternalistic mode of federal Indian affairs management. Given that this particular regulatory system is inconsistently—and, frankly, infrequently—implemented throughout Indian country, it does not presently appear to *impede* tribal commerce. However, such inconsistency and infrequency can suggest a quiet federal abandonment of the field, which risks weakening the preemption of state regulation. Allowing an opportunity for increased state regulation of Indian country commerce would be antithetical to tribal sovereignty, to needed and sustainable tribal economic growth, and to the manifest federal interest in tribal self-determination and self-sufficiency.

With this in mind, any revision to the existing regulations should:

- (a) Reaffirm federal law's preemption of state regulation – Using language such as the Department used in its revisions to, for example, 25 C.F.R. part 162 (e.g., “[s]ubject only to applicable federal law . . .”) in new regulations relating to the provision of goods or services or any other transaction of commerce with American Indian tribes or their citizens or members within Indian country would reduce ambiguity as to the regulatory environment applicable to American Indian commerce. Likewise, incorporating declarations such as the Department used in its promulgation of the HEARTH Act regulations, 80 Fed. Reg. 36,560 (Jun. 25, 2015) (e.g., “the Federal government has a strong interest in promoting economic development, self-determination, and tribal sovereignty”), and making clear that the new regulations were expressly intended to support and implement such interest would reaffirm the existing bulwark against the risk of complicating and undermining state regulation.
- (b) Encourage tribal administration of regulatory and oversight systems – The best implementation of any Indian Trader regulatory system would be through direct tribal implementation. The recent HEARTH Act, Pub. L. 112-151, 126 Stat. 1150, codified at 25 U.S.C. § 415, suggests an appropriate model for tribal assumption of federal oversight programs, though the function could also be the subject of a self-governance compact pursuant to Pub. L. 93-638, 88 Stat. 2203 (Jan. 4, 1974), which should include funding for purposes of program implementation. Fundamentally, if the Department is interested in implementing the Indian Trader system in a manner consistent with federal policies supporting tribal self-determination and sovereignty, the only appropriate path would be to encourage and empower American Indian tribes to implement the system within their respective jurisdictions and Indian country.

As for additional specific improvements, we recommend that the Department develop a plan working with a tribal advisory committee. Indian country is diverse in terms of cultures, needs, experiences, and economic development priorities. Each tribe, in developing its own economy, will have developed its own expertise and perspectives on appropriate regulatory and oversight mechanisms for the persons and businesses working with them and their respective citizens and members, and this provides the Department with a rich and informed source for input to any federal rule-making process. Accordingly, we recommend the Department form a tribal advisory committee for purposes of developing more robustly informed input on the modernization of this important regulatory system.

**7. What services do Tribes currently provide to individuals or entities doing business in Indian Country and what role do tax revenues play in providing those services?**

As a general matter, the Chickasaw Nation throughout our jurisdiction—typically in partnership with other government units—provides law enforcement and emergency services

through the Chickasaw Lighthorse Police Department, Chickasaw Nation Emergency Management Department, and Chickasaw Nation Search and Rescue Department. With respect to businesses located or otherwise operating within our facilities, we typically provide electrical, water, and wastewater utility services through our Chickasaw Tribal Utility Authority. Finally, the Chickasaw Nation Roads Program is extensively involved in the construction and maintenance of areal transportation infrastructure and, working in partnership with local municipalities and other stakeholders, the Chickasaw Nation water planning efforts facilitate and coordinate the repair, maintenance, and enhancement of areal water supplies, treatment and delivery, and wastewater systems. The Chickasaw Nation does not exercise its inherent sovereign power to tax activities within its jurisdiction, relying instead on revenues from its governmental economic development initiatives, cost-share partnerships, and federal programmatic funding to implement these public and commerce support services.