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REGULATION OF INDIAN TRADERS: A HISTORICAL PERSPECTIVE

Mario Gonzalez*

I. Colonial and Imperial Regulation

In General

"Trade was one of the inevitable activities that arose from contact between Indians and whites, two distinct races, engaged in unlike activities and possessed of different types of goods."¹ To a large degree, the English colonies owed their successful foundation to the fur trade they carried on with the Indians.² In fact, trade at New Plymouth, the first permanent settlement in New England, began with the first meeting between the Pilgrims and Indians.³

By the time the Pilgrims landed, however, the Dutch and French were already engaged in the trade. Furs, especially beaver, became valuable because of the demand created by the European markets.⁴ The early colonists learned that they could acquire furs from the Indians in exchange for relatively inexpensive items such as ornaments, kettles, knives, axes, guns, powder, shot, and liquor.⁵ The colonists would then sell the furs overseas and reap huge profits. In this way, the Pilgrims were able to pay the debts they owed to the London merchants who financed their venture to America.⁶

Regulation of Firearms and Liquor

Although the fur trade proved to be advantageous to the early New England colonists,⁷ it also had its disadvantages. Firearms and liquor, both of which had a direct bearing on the general welfare of the colonists, proved to be the two items the Indians desired most. Allowing the Indians firearms obviously was dangerous because the Indians greatly outnumbered the colonists and could easily annihilate them in a war. Selling liquor became dangerous when unscrupulous colonists would use it to intoxicate Indians in order to cheat them out of their furs. The Indians would subsequently seek revenge on any nearby non-Indians, including settlers.

The Pilgrims prohibited their members from trading firearms and liquor to the Indians and were able to maintain tight control by vesting the entire trade in a group of eight to fifteen leaders.

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They could not, however, prohibit the Dutch and French from trading such items. To complicate matters, English fishermen were leaving that trade for quicker profits in the fur trade and the Pilgrims could do little to enforce their regulations against them.⁶ Enforcement of regulations was practically nonexistent in the wilds of early New England. These conditions prompted King James to issue a proclamation in 1622 prohibiting the sale of firearms to Indians.⁹ However, this proclamation, as well as a similar one issued in 1630, proved to be as futile as the regulations issued by the Pilgrims.¹⁰

The Puritans of the Massachusetts Bay Colony regulated their fur trade a little differently. They reserved the trade to both merchants and settlers for seven years to help build churches and pay the salaries of ministers.¹¹ From 1632 to 1634, the settlers were required to pay a tax of twelve pence for every pound of beaver fur they traded.¹² In 1636, the General Court¹³ authorized the trade to be given out to individuals for a yearly rental.¹⁴ Five years later, "to prevent great disorder in the beaver trade," the General Court appointed three commissioners to regulate the trade.¹⁵ The commissioners were to select one man from each town to be a member of the commission and each member was given the exclusive privilege of trading with the Indians, while all others were restrained. In return for the privilege, the traders were to give the colony one-twentieth of all the furs they received. Apparently, it was hoped that under this method the trade would be in the hands of responsible citizens.¹⁶

In 1643, the New England Confederation was organized.¹⁷ The colonies planned to organize a huge corporation to enable them to compete with the Dutch and French and to prevent abuses in the sale of firearms and liquor to the Indians. Massachusetts and Connecticut approved the project, but Plymouth disapproved and New Haven did not reply.¹⁸

After 1644, Massachusetts continued the system of allowing commissioners the exclusive privilege of trading. But unauthorized traders continued to sell liquor and firearms to the Indians, prompting the General Court to state that "[w]hereas the trade in furs . . . doth properly belong to the commonwealth, & not to particular persons, who without liberty of this Court do trafficke with the Indians,"¹⁹ no persons should be allowed to trade except those authorized by the court. The General Court decided to assign out the fur trade again and appointed a committee "to contract with such able and honest persons as shall tender themselves to prosecute the Indian trade for the best benefit of the country

and suppressing all irregularities therein."²⁰ No further regulation of the fur trade was made in Massachusetts until 1676, the year of King Philip's War, when all traffic with the Indians was ordered to cease.²¹

Massachusetts' records indicate no prohibition against the sale of firearms and ammunition to the Indians until the Pequot War of 1627.²² That law was repealed as soon as the danger was over.²³ Again in 1641, the General Court expressly prohibited the sale of guns, powder, shot, and lead to the Indians.²⁴ Apparently, the General Court was alarmed by the large numbers of weapons the Indians had acquired. That law was repealed in 1669, however, when the white population grew so large that the authorities soon had little fear of another Indian war.²⁵

In 1633, Massachusetts unsuccessfully attempted to prohibit the sale of liquor to the Indians.²⁶ Finally, in 1637 the General Court appointed a dealer to sell liquor to the Indians on the rationale that it was better to sell moderate quantities through licensed dealers than to allow them to get plentiful supplies from settlers and traders.²⁷ Traders, however, were allowed to obtain licenses in 1641.²⁸ And in 1644, Indians were permitted to purchase wine from licensed dealers.²⁹ Thus, by 1654, the General Court noted that the Indians were constantly intoxicated and blamed the traders who "regard their own profit."³⁰ Thereafter, the General Court restricted the sale of all liquor to Indians except by a few specified persons, and then only allowed the Indians to buy one pint at a time.³¹ But even this limited restriction was unsuccessful and the General Court ordered an absolute prohibition in 1657.³² The court stated that "for the better execution of this order, all trucking houses erected, not allowed by this Court, shalbe forthewith demolished."³³

Encroachment on Indian Lands

The failure of regulating the fur trade was apparent to the colonies as well as the Crown. The corruption, especially the dealings of unscrupulous traders—described by many as the scum of the earth—continually aroused the resentment of the Indians.³⁴ The universal means of regulation that developed in all colonies was the licensing system because it was the best way to keep the trade open to all qualified persons and at the same time provide some protection against traders of bad character.³⁵ However, another problem developed as the beaver, an animal not highly reproductive and nonmigrant, was destroyed and the traders moved west to new areas. Aside from the resentment resulting from being the

dupes of unscrupulous traders, the Indians began to resent the encroachment of white settlers on their hunting grounds.³⁶

From the very beginning of the fur trade, many Indians went deeply in debt for liquor they purchased on credit from traders.³⁷ When a trader saw no prospect of getting furs in payment, he would many times demand a mortgage on Indian land.³⁸ "The Indians, eternally improvident, seldom secured independence of the fur men and never redeemed their mortgages."³⁹ Many abuses occurred in the transfer of land, and colonial laws eventually declared null and void all bargains made with the Indians that did not have governmental approval.⁴⁰ These laws not only sought to prevent fraudulent purchases, but also sought to preserve the rights of the Crown by prohibiting the extinguishment of Indian title in favor of individuals. The preamble to a December 18, 1739, South Carolina statute illustrates this concern:

The practice of purchasing lands from the Indians may prove of very dangerous consequences to the peace and safety of this Province, such purchases being generally obtained from Indians by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians towards the inhabitants of this Province . . . and . . . such practices tend to the manifest prejudice of his Majesty's just right and title to the soil of his Province, vested in his Majesty by the surrender of the late Lords Proprietors.⁴¹

Individuals among the colonists were not the only ones guilty of encroaching on Indian lands. In 1658, for example, one trader petitioned the General Court of Massachusetts for 44 pounds owed him by a Pawtucket Indian, and *the court* awarded him a 500-acre farm in satisfaction of the debt.⁴² In addition, the colonial governments themselves were acquiring Indian land.

The Move Toward Imperialization of Indian Trade

The Imperial Board of Trade⁴³ was slow to realize the causes of Indian resentment. The Board had relied on "presents" as a method of ensuring tribal allegiance to the Crown.⁴⁴ The Board eventually realized that the solution to ending Indian resentment was to remove the two major causes: abuses of traders and encroachment on Indian lands.⁴⁵

The Board's realization of these causes can be seen as early as 1753 when it sent instructions to the Governor of New York to

prohibit purchases of Indian land by individuals.⁴⁶ The Board was too late in implementing a new policy, however, because most of the Indian tribes sided with the French in the Imperial War that broke out in 1754.⁴⁷

On April 15, 1755, the first step was taken to remove Indian affairs from colonial control. The colonies were divided into northern and southern districts and superintendents were appointed for each.⁴⁸ The superintendents were in effect ambassadors to the Indians and their duties consisted of observing events, negotiating treaties, and generally keeping peace between Indians and the border settlers.⁴⁹ Although they exerted some control over the fur trade, it remained primarily in the hands of the colonies. The main reason the Board permitted the colonies to retain control was probably because their good will was essential during the war. Therefore, nothing substantially was done to imperialize the control of the trade until 1763.

Although the Board of Trade had been working toward imperialization of Indian affairs, news from America in 1763 compelled King George III to issue his famed Proclamation of October 7, 1763.⁵⁰ Pontiac threatened disaster to the whole back country.⁵¹ The proclamation did three things: (1) it established the boundaries and the government of the colonies, (2) it offered specific encouragement in newly acquired areas, and (3) it established a new policy of Indian affairs. It was the latter that was foremost in the minds of the Board of Trade in 1763. The proclamation, among other important things, gave the first official delineation and definition of "Indian country" in America.⁵² The proclamation, however, did not provide for organization of the fur trade. The Board of Trade had been gathering information upon which to build an adequate set of regulations. The urgency of the proclamation, however, precluded the Board from developing such regulations, as it had not obtained sufficient information when the need for the proclamation arose.⁵³

Prior to the proclamation of 1763, the colonies were debating the imperialization of the fur trade. The imperialists wanted to create a complete imperial machinery for the regulation of the trade and the anti-imperialists preferred to leave control in the hands of the colonies.⁵⁴ All the proclamation could do when it was issued was assert the principle of freedom of trade, demand that all traders obtain a license from their respective governors, and give security that they would follow future regulations.⁵⁵ The proclamation did little to remove the abuses and confusion in the fur trade created by colonial control.

When the first reports from the newly created superintendencies arrived, the Board of Trade formulated, and on July 10, 1764, proposed a plan for "the regulation of Indian Affairs both commercial and political throughout all North America, upon one general system, under the direction of Officers appointed by the Crown, so as to set aside all local interfering of particular Provinces, which has been one great cause of the distracted state of Indian affairs in general."⁵⁶ The plan was never officially adopted, although the two superintendents used it as a guide to conduct Indian affairs.⁵⁷ Although the Board of Trade argued that "no one general plan of Commerce & Policy is or can be applicable to all the different Nations of Indians of different interest and different situations,"⁵⁸ the main reason the Board probably did not adopt the plan was its expense, which it felt might "exceed the value of the object to which it applies."⁵⁹ The plan was officially abandoned in 1768 and control of Indian trade remained in the colonies.⁶⁰

The Board of Trade probably did not push too hard for the adoption of the plan in the belief that the colonies would finally take it upon themselves to better regulate the trade. The colonies did nothing, however, and the Indians became restless. Imperialization of the trade, therefore, seemed imperative and Parliament made one last attempt. By the Quebec Act of 1774,⁶¹ the western areas were placed under the government of Quebec. The Board of Trade had hoped that the Quebec government could provide the necessary regulation of the trade that the colonies could not.⁶² But the Quebec Act came too late. The American Revolution was just beginning and the Act was never implemented.

II. *Regulation Under the Articles of Confederation*

Throughout the Revolution, the British managed to retain the allegiance of most of the Indian tribes. The colonies, with good reason, worried that the British would incite the Indians against them and each colony sent its own commissioners to make peace with the Indians. The Continental Congress realized that Indian affairs could not be adequately dealt with in such a manner. Thus, with a report from the Committee on Indian affairs, Congress inaugurated a federal Indian policy on July 12, 1775.⁶³ The Congress created three departments of Indian affairs—northern, southern, and middle. Commissioners were placed at the head of each department; five for the southern and three for each of the others.⁶⁴ Their duties were "to treat with the Indians in order to preserve peace and friendship with the said Indians and to prevent

their taking any part in the present commotions."⁶⁵ The duties of the commissioners were not too different from the colonial superintendents.

Like many other issues, the new government had to resolve the issue of whether the states or the national government would handle Indian affairs. The imperial plan to unify the management of Indian affairs had left its mark on some of the delegates. For example, Benjamin Franklin had offered a unification plan in Albany in 1754,⁶⁶ and included his plan in a draft, which he proposed to the Congress on July 21, 1775.⁶⁷ Franklin's draft offered two articles: (1) No colony could engage in offensive war against the Indians without the consent of Congress, and (2) A perpetual alliance both offensive and defensive was to be made with the Six Nations.⁶⁸ A boundary line was to be drawn between all the tribes and the colonies, and Indian land was to be protected against encroachment by settlers.⁶⁹ Furthermore, agents were to reside among the tribes to prevent injustices in the trade and to distribute presents given by Congress.⁷⁰ John Dickinson, a Pennsylvanian who drafted the Articles of Confederation, included Franklin's plan by granting the new government the power of "Regulating the Trade, and managing all Affairs with the Indians."⁷¹

Some states, especially South Carolina, which wanted to handle its own Indian affairs, opposed Franklin's plan. Finally, an amended draft was agreed to by the Congress. This omitted much of Franklin's plan and simply provided that "The United States Assembled shall have the sole and exclusive right and power of . . . regulating trade, and managing all affairs with the Indians, not members of any of the States."⁷² But, even this statement did not satisfy some of the advocates of state control. After two alternative amendments were rejected, the provision finally agreed upon appeared as Article IX in the ratified document. It asserted that, "The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, *provided* that the legislative right of any State within its own limits be not infringed or violated."⁷³ The scope of the power of Congress was not clear because of the proviso. James Madison made fun of it in Number 42 of *The Federalist* as "obscure and contradictory" and as "absolutely incomprehensible."⁷⁴ If nothing else, the principle that the management of Indian affairs and the regulation of trade are vested in Congress and not the states was established.

The Revolution drew to a close and the Peace of Paris was sign-

ed with Britain on September 3, 1783. However, the Peace of Paris did not bring peace with the Indians. Congress appointed a committee to study the situation and the committee recommended, on April 21, 1783, that all offensive movements against Indians be suspended.⁷⁵ Furthermore, four agents were to be appointed and dispatched in the eastern, northern, western, and southern portions of the newly created United States to negotiate peace.⁷⁶ Because of the urgency of establishing peace, the committee further recommended that a special committee be appointed to start negotiations until the agents could be designated.⁷⁷

Congress also took action against the steady encroachment on Indian lands. Congress issued a proclamation on September 22, 1783, to prohibit settlers from settling on lands inhabited or claimed by Indians outside of state jurisdiction without the express authority and direction of Congress.⁷⁸

On October 15, 1783, the Committee on Indian Affairs proposed a policy for dealing with the Indians of the northern and middle departments.⁷⁹ A line defining Indian country had to be drawn. The committee recommended that the line be "convenient to the respective tribes, and commensurate to the public wants."⁸⁰ The land to be obtained from the Indians was to be without any considerable expenditure. The committee justified this by arguing that the Indians were on the losing side in the war and could, with justice, be treated as conquered nations. Their lands could thus be taken from them by the right of conquest.⁸¹ A further justification proposed by the committee was that the Indians owed reparations to the United States. Reparations could thus be paid by requiring the Indians to agree to the boundaries that would be proposed.⁸² The committee did, however, recommend to Congress that should the Indians be dissatisfied with the line, some compensation should be given to them rather than risk another Indian war.⁸³ The committee also recommended that a group be appointed to draw up an ordinance for regulating the Indian trade. The purpose of the ordinance was to prevent fraud, violence, and injustice toward the Indians by requiring traders to give security that they would follow the regulations.⁸⁴ A committee appointed to consider Indian affairs in the south submitted an almost identical report to Congress on May 28, 1784.⁸⁵

Several treaties were subsequently negotiated between the Indians and Congress to carry out the recommendations of the committee.⁸⁶ The United States, in these first treaties, thought it was dealing with conquered tribes and nations. Congress gave small compensation for the ceded lands. When the Indians found out that they were being treated as conquered nations, they ob-

jected, claiming it was the United States, and not the Indians, who wanted peace.⁸⁷ In addition, the northwest Indians were disgusted with the whole policy of the United States, especially because the United States seemed powerless to hold back the onslaughts of advancing whites onto their lands. By 1786, they were ready to repudiate all agreements made with the United States since the close of the war.⁸⁸

In the south, things were worse. A special committee again reported to Congress and recommended that precise boundary lines between Indians and non-Indians be made and that the Indians be authorized to evict unlawful intruders who might cross over onto their side of the line.⁸⁹ After troubles with North Carolina and Georgia, both of which objected to the composition of the board of commissioners, a series of treaties were negotiated between the United States and the Cherokees, Choctaws, and Chickasaws at Hopewell in 1785 and 1786.⁹⁰ These treaties contained provisions for the regulation of Indian traders.⁹¹

The United States began to realize, however, that if it were to survive as a nation, it was imperative that peace be maintained with the Indians. Consequently, a new policy in Indian affairs to do justice toward the Indians and protect their rights and property against traders, settlers, and speculators was established. On August 7, 1786, Congress enacted an Ordinance for the Regulation of Indian Affairs.⁹² Two Departments of Indian Affairs were established by the ordinance—the northern, north of the Ohio River and west of the Hudson River, and the southern, south of the Ohio River.⁹³ As head of each department, a superintendent was appointed to be under the control of and reporting to the Secretary of War.⁹⁴ The superintendent of the northern district was authorized to appoint two deputies to reside in such places to best facilitate the regulation of the Indian trade and the superintendents and the deputies were authorized to grant licenses to trade.⁹⁵ The superintendents were prohibited from engaging in the trade themselves and were required to take an oath and post a bond for the faithful discharge of their duties.⁹⁶ Only citizens of the United States were permitted to reside among the Indians or to trade with them.⁹⁷ A license was required of all traders which was good for one year.⁹⁸ In addition, the traders had to pay an annual fee of fifty dollars and give a three thousand dollar bond for strict observance of the laws and regulations.⁹⁹

Despite the regulations, Indian affairs got out of hand. In February of 1787, Congress issued another ordinance reiterating the United States' determination that "justice and public faith shall be the basis of all their transactions with the Indians... and

that . . . they will reject every temporary advantage obtained at the expense of these important national principles."¹⁰⁰ The superintendents were to cultivate the trade and allow no traders to engage in the trade without the proper license.¹⁰¹ They were also to investigate the character and conduct of traders.¹⁰² To aid in enforcement, the commanding officers of the frontier posts were instructed to render such assistance as was necessary and as the state of their commands would allow.¹⁰³ The ordinance proved to be another futile gesture on the part of Congress. But again, in the Northwest Ordinance of July 13, 1787, Congress voiced its position: "The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent . . . laws founded to justice and humanity shall from time to time be made for preventing wrongs being done to them . . ." ¹⁰⁴ As usual, the utterances of Congress fell on deaf ears.

In August of 1787, a congressional committee on southern Indian affairs sought a resolution to the problem. It insisted on the authority of Congress over independent Indian tribes and condemned the acts of the states.¹⁰⁵ In addition, Henry Knox, Secretary of War under the Confederation, reported to Congress in July, 1788, of direct violations of the Treaty of Hopewell by North Carolina against the Cherokees.¹⁰⁶ He recommended that Congress issue another proclamation warning the settlers to depart from Cherokee lands and to move in troops if the settlers disobeyed. The proclamation was issued September 1, 1788.¹⁰⁷

History tells us that control of Indian affairs was eventually established in the federal government. Peace was essential on the frontiers to enable the new government to get established. Therefore, the new government had to face reality and deal with the Indians by practical measures, rather than on the theory of the right of conquest. Henry Knox realized that agreements based on the right of conquest did not work and that such a policy would continually endanger the peace on the frontiers. He urged a return to the British and colonial practice of purchasing the right to the soil because it was the only method the Indians would agree to peacefully. He argued that claims by the United States based on the principle of conquest meant continuous warfare. He therefore recommended that lands ceded by the northwest Indians be compensated for and that future cessions be acquired by purchase.¹⁰⁸ Thus, in treaties signed at Fort Harmar on January 9, 1789, between the United States and the Six Nations, lands granted to the United States were paid for, even though compensation was small.¹⁰⁹

III. Regulation Under the United States Constitution

In General

In the summer of 1787, the statesmen who gathered in Philadelphia did so to correct weaknesses in the Articles of Confederation. One problem discussed was Indian affairs. A number of states had entered into treaties and wars with the Indians since the Articles were adopted. Some statesmen believed that congressional control over Indian affairs should be clarified, but when the Committee of Detail presented its draft of the Constitution on August 6, no provision was made for dealing with Indians. Madison then proposed, on August 28, that Congress have power "to regulate affairs with the Indians, as well within as without the limits of the United States."¹¹⁰ His proposal was referred to the Committee of Detail and the committee trimmed Madison's proposal and added to the clause granting Congress the power "to regulate commerce with the foreign nations, and among the several states," the words "and with the Indians, within the limits of any state, not subject to the laws thereof."¹¹¹ Some statesmen opposed this statement and the clause was again reduced to the simple phrase "and with the Indian tribes."¹¹² The Constitutional Convention agreed to the phrase and, along with the treaty-making power,¹¹³ it has since been the primary legal basis for federal regulation and administration of Indian affairs. In construing the clause in *United States v. Holliday*, the Supreme Court stated:

If commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, is absolute, without reference to the locality of the tribe, or of the member of the tribe with whom it is carried on.¹¹⁴

The first Act of Congress under the Constitution defining substantive rights and duties in regard to Indian tribes was made pursuant to the commerce clause. The Act of July 22, 1790, entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes,"¹¹⁵ dealt with, *inter alia*, the conduct of licensed traders. The first three sections provided that trade or intercourse with the Indian tribes should be limited to persons licensed by the federal government; that licenses might be revoked for violation of

regulations (prescribed by the President), and that persons trading without licenses should forfeit all merchandise in their possession.¹¹⁶ A second Indian trade and intercourse act of March 1, 1793, made minor changes in the first.¹¹⁷ Section 6 dealt with horse thieves and horse traders, and Section 7 prohibited employees in Indian affairs from having "any interest or concern in any trade with the Indians." Section 13 specified that Indians within the jurisdiction of any of the individual states would not be subject to trade restrictions.

The Act of May 19, 1796, constituted the third trade and intercourse act.¹¹⁸ It is substantially the same as the prior acts with minor modifications.¹¹⁹ The fourth trade and intercourse act of March 3, 1799, was substantially the same as the 1796 act.¹²⁰ On March 30, 1802, a permanent trade and intercourse act was adopted.¹²¹ Until 1802, laws with reference to both private and government¹²² trading posts were, by their terms, temporary.

In 1806, the office of Superintendent of Indian Trade was established.¹²³ The superintendent was appointed by the President, part of his duties being "to purchase and take charge of all goods intended for trade with the Indian nations . . . and to transmit the same to such places as he shall be directed by the President."¹²⁴ After the abolition of the office of Superintendent of Indian Trade in 1822, Secretary of War Calhoun created the Bureau of Indian Affairs by order of March 11, 1824,¹²⁵ and placed at its head Thomas McKenney, who had formerly been Superintendent of Indian Trade.¹²⁶ On June 30, 1834, Congress passed the final trade and intercourse act.¹²⁷ The act was substantially the same as the 1802 act. Sections 2 through 5 dealt with licensing traders and imposed a more detailed system of control over traders than had previously been in force. These controls, in large part, constitute the present law on the subject. The purpose of the act with respect to the control of traders is set forth in the following language by the House committee report:

The Indian trade, as heretofore, will continue to be carried on by licensed traders. The Indians do not meet the traders on equal terms, and no doubt have much reason to complain of fraud and imposition. Some further provision seems necessary for their protection. Heretofore, it has been considered that every person (whatever might be his character) was entitled to a license on offering his bond. It has been the source of much complaint with the Indians. Power is now given to refuse licenses to persons of bad character, and for a more general reason, "that it would be improper to permit

such persons to reside in the Indian country;" and to revoke licenses for the same reasons. The committee are aware that this is granting an extensive power to the agents, and which may be liable to abuse; yet, when it is recollected that the distance from the government at which the traders reside, will prevent a previous consultation with the head of the department; that what is necessary to be done should be done promptly; that the agents act under an official responsibility; that they are required to assign the reasons of their conduct to the War Department; that an appeal is given to the party injured; and that the dismissal of the agent would be the consequence of a wanton act of injustice, the rights of the traders will be found as well secured as is comparable with the security of the Indians.

The report of the commissioners, appended to this report, contains a detailed statement of the exorbitant prices demanded by the Indian traders. As a remedy in part, they recommend, first, a substitution of goods for money in the payment of annuities. This suggestion has been adopted so far as to authorize addition to the direct benefit, it will furnish them with something like a standard of the value of goods, and enable them to deal on more equal terms with the Indian traders.¹²⁸

The act also defined "Indian country" for the purpose of the act.¹²⁹ Congress has generally not seen fit to regulate Indian traders outside of Indian country.¹³⁰

By the act of August 15, 1876, the Commissioner of Indian Affairs was vested with sole authority to license Indian traders and make rules and regulations.¹³¹ In 1882, the requirements for a license to trade were extended to include all but "an Indian of the full-blood."¹³² The act of March 3, 1901,¹³³ as amended by the act of March 3, 1903¹³⁴ provided that a person desiring to trade with Indians on any Indian reservation must satisfy the Commissioner of Indian Affairs that he is a proper person to engage in such trade.¹³⁵ In addition, Congress has, from time to time, enacted appropriation or regulatory acts in connection with Indian trade.¹³⁶

Present Law

Licenses

The sole power and authority to appoint traders to Indian tribes continues to be vested in the Commissioner of Indian Affairs.¹³⁷ Only persons who prove to the satisfaction of the Commissioner

that they are "proper persons" may secure a license to trade.¹³⁸ The procedure for applying for a license is set forth in Section 251.9 of Title 25 of the Code of Federal Regulations.¹³⁹ Any person, other than a full-blood Indian, who attempts to reside on a reservation as a trader without a license forfeits all merchandise in his possession and is liable to a penalty of \$500.¹⁴⁰ Persons employed in Indian Affairs cannot obtain a license.¹⁴¹ The power to close down unlicensed stores is vested in the Commissioner. If a trader does not have a license, the superintendent of the reservation must report this fact to the Commissioner who, in turn, can direct the superintendent to close the store.¹⁴²

Regulation of Premises

A trader must have a legal right to the land where his trading post is located before a license will be granted.¹⁴³ The period of the license corresponds to the period of the lease on restricted Indian land.¹⁴⁴ Where the trader owns his own land, the period is fixed by the Commissioner of Indian Affairs, but cannot exceed twenty-five years.¹⁴⁵ Licenses can be renewed at the expiration of the license period.¹⁴⁶ Trade must be restricted to the premises stated in the license.¹⁴⁷ No appointed trader can sell, share, convey, in whole or in part, his right to trade.¹⁴⁸ Furthermore, a trader cannot sublet or rent buildings he occupies without the approval of the Commissioner.¹⁴⁹ Gambling is also prohibited on the premises.¹⁵⁰ At one time it was illegal for a trader to operate his trading post on Sunday.¹⁵¹

Regulation of Prices and Credit

The superintendent of the reservation must inspect traders' prices to see that they are fair and reasonable.¹⁵² The trader cannot trade for annuities or gratuities furnished to the Indians by the government.¹⁵³ Also, trade in antiquities is prohibited.¹⁵⁴ The trader offers credit to Indians at his own risk.¹⁵⁵ Any payments he makes to his Indian customers must be in cash.¹⁵⁶

Regulation of Merchandise

When, in his opinion, the public interest requires it, the President is authorized to prohibit the introduction of goods, or any particular article, into the country of any tribe.¹⁵⁷ Arms and ammunition, restricted since colonial times, cannot be sold by any trader without approval of the superintendent of the reservation.¹⁵⁸ Traders are prohibited from selling tobacco to minor Indians under the age of 18.¹⁵⁹ Selling liquor unlawfully is grounds for revocation of a trader's license.¹⁶⁰ Traders are also prohibited from

selling drugs such as opium, chloral, cocaine, peyote, mescal bean, hashish, Indian hemp, or marijuana.¹⁶¹ A trader is also prohibited from introducing or selling infectious plants on reservations.¹⁶² State officers are allowed to enforce state laws and regulations regarding infectious plants against traders with the approval of the superintendent of the reservation.¹⁶³

Limitations of Present Law

In the eighteenth and most of the nineteenth century, "Indian country" was merely one side of a line acknowledged by England and the colonies, and later the United States, as territory belonging to the Indians for their occupancy. With the passage of time, confusion arose as to what territory was Indian country. Some courts held that portions of Indian reservations were not Indian country. In *Rider v. LaClair*, for example, the court held that merchants who did business on fee patented land in the town of Wapato on the Yakima Reservation were not required to be licensed by the Commissioner of Indian Affairs: "The extinction of the Indian title seems to be the test for determining the character of land within or adjacent to an Indian reservation." . . . "A trader or seller of merchandise upon eliminated land is not a trader within the Indian country, requiring a license . . ."¹⁶⁴

The confusion of what territory was Indian country prompted Congress to enact a definition in 1945.¹⁶⁵ Prior to the 1948 definition, Bureau of Indian Affairs' administrators began a policy of *not* requiring traders on fee lands to obtain a license.¹⁶⁶ Between 1948 and 1972, the Bureau continued the policy.¹⁶⁷

On April 3, 1972, the Commissioner of Indian Affairs issued a memorandum to all area directors which stated:

[A]ll persons operating businesses, or in any manner engaging in trade with Indians within the Indian Country, as defined by 18 U.S.C. § 1151, shall be subject to and comply with 25 U.S.C. §§ 261, 262, 263, 264, and 25 C.F.R. 251 and 252. The effect of this being that all businesses and traders within Indian Country, whether on trust land or fee land, are subject to the law and regulations set out therein.¹⁶⁸

The memorandum means that all traders on any Indian reservation must now obtain a federal license to trade with Indians and otherwise comply with laws regulating Indian traders.

Implementation of Present Law

In recent times, attempts have been made to either repeal the

relevant statutes and regulations relating to Indian traders¹⁶⁹ or to "allow" Indian tribes to adopt their own laws and regulations.¹⁷⁰ However, recent investigations indicate that the present regulations are inadequate and are not being adequately enforced by the Commissioner of Indian Affairs.¹⁷¹ This is especially true on large reservations, such as the Navajo Reservation, where trading posts are located in remote areas. In such situations, it is not difficult to imagine the power one trader is able to exert over a whole community of Indians:

The trading post has evolved into a multi-purpose concern—the reservation trader of today is not merely a general merchant, but has a variety of roles which he is able to manipulate to his personal benefit. He is banker and creditor, pawnbroker, and special claims agent for the Railroad Retirement Board. He purchases Navajo wool, livestock, rugs; has the only telephone for miles around; operates the only gas station; and acts as interpreter for the Navajo in both mail and phone communications with the Anglo world.

Governmental agencies, including the Welfare Department, utilize the trader as an intermediary to contact or confirm facts about Navajo families. He acts, too, as agent between employer and employee in migrant or railroad work. Occasionally, the traders will take it upon themselves to act as law enforcement officers. The trader has, because of these many roles, the power to control the Navajo people in "his" community.¹⁷²

Because of the diverse roles of modern traders, many are able to keep their clientele in a state of economic bondage:

Subsisting on a meager and unpredictable income, the Navajo easily become indebted to the trader, who through a policy known as "credit saturation," encourages his customers to buy goods on book credit up to the amount of known future income. However, once this limit is reached, the trader promptly refuses any further credit, regardless of need.

As it is common for many Navajos to receive their checks or other income in care of the local trading post (many traders are also postmasters), the trader has an accurate method of estimating an individual's income. By withholding the check upon arrival, he can force his clientele to charge at the store, thereby assuring himself of a large portion, if not all, of the check.¹⁷³

The Commissioner of Indian Affairs could have regulated such traders pursuant to Section 261 of Title 25 of the United States Code, which provides that the Commissioner "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."¹⁷⁴ The Commissioner has in the past, however, interpreted this statement of the law as "discretionary" and has never attempted to regulate the prices or kind and quantity of goods sold to Indians.¹⁷⁵ As a result, several Indians on the Navajo Reservation, in 1971, brought a class action suit to require the Secretary of the Interior, Commissioner of Indian Affairs, and Area Director to adopt and enforce rules and regulations governing traders doing business on the Navajo Reservation.¹⁷⁶ The Ninth Circuit Court of Appeals held that the United States District Court had jurisdiction over the action and the regulation of persons trading with Indians is not wholly within the discretion of the Commissioner of Indian Affairs. In essence, the court decided that Congress had *directed* the Commissioner, rather than vesting him with a discretion, to control or govern the business of trading with the Indians on Indian reservations by the promulgation and enforcement of appropriate rules and regulations.

But, despite the case of *Rockbridge v. Lincoln* and an excellent report submitted to the Federal Trade Commission in June of 1973 by the Los Angeles Regional Office of the Commission, regarding abuses of traders on the Navajo Reservation, with recommendations,¹⁷⁷ the Commissioner of Indian Affairs has done very little to update and enforce the statutes and regulations relating to traders on Indian reservations other than the Navajo, Hopi, and Zuni reservations.

Many Indian tribes have adopted ordinances to regulate traders within their reservations.¹⁷⁸ Moreover, the Interior Department has consistently taken the position that tribes, especially those organized under the Indian Reorganization Act of 1934¹⁷⁹ have the authority to regulate traders.¹⁸⁰ This may explain why the Bureau of Indian Affairs has been so lax in enforcing the existing regulations, but it certainly is no justification for shunning its responsibility because a substantial number of reservation traders are non-Indians over whom many tribes do not exercise jurisdiction. Thus, tribal regulations oftentimes fail to extend where they are needed most, *i.e.*, over non-Indians.¹⁸¹

Conclusion

The regulation of trade between Indians and non-Indians has been with us since colonial times. Laws and regulations then were necessary for the protection of the settlers, not the Indians. Today, however, the converse is true. Many of the present day traders on the various reservations in the United States are more unscrupulous than their counterparts of the eighteenth and nineteenth centuries.¹⁸²

Recently, the resolution of two problems regarding the regulation of reservation traders has come about. First, the Bureau of Indian Affairs has finally changed its policy regarding the licensing of traders on fee patented lands. As the majority of traders on some reservations are non-Indians operating on fee lands, the existing regulations will now extend to where they are needed the most.

Second, the case of *Rockbridge v. Lincoln*¹⁸³ should now force the Bureau of Indian Affairs to fulfill its obligation to regulate. Recent developments since the *Rockbridge* case are perhaps best summarized in a memorandum to the Acting Deputy Commissioner of Indian Affairs from E.F. Suarez, Sr., Chief, Division of Law Enforcement Services, dated September 6, 1977, as follows:

Trial on the merits of that case was delayed for several years while the BIA and the plaintiffs negotiated on new regulations. At the request of the BIA, the Federal Trade Commission joined the BIA in conducting hearings on the subject at several locations on the Navajo Reservation in August, 1972. Findings based on those hearings were published in a staff report to the FTC in June, 1973. The report contained many specific recommendations for the revision of the existing regulations. The BIA drafted revised regulations based on those recommendations and submitted them to the court in the *Rockbridge* case in March, 1974. After lengthy negotiations among representatives of the BIA, the Solicitor's Office, the plaintiffs, the Navajo, Hopi, and Zuni Tribes and the United Indian Traders Association, a complete revision of the regulations governing traders on the Navajo, Hopi and Zuni Reservations was promulgated on August 29, 1975.

Those regulations became fully effective on January 1, 1976. There have been some subsequent minor revisions primarily dealing with bonding requirements. A few other minor revisions are currently under consideration by the Navajo Area Office. A reservation business regulation office was

established in Window Rock in 1976 to enforce the regulations. Its staff includes one supervisory auditor, two auditors, one auditor technician and a typist. Budget for the office is approximately \$100,000 a year. Approximately \$20,000 of that comes from license and permit fees. The rest comes from BIA law enforcement funds. Once the office was established the plaintiffs dropped the *Rockbridge* suit.¹⁸⁴

In regard to the present status of regulations on other reservations, Suarez states:

In 1975 a survey was conducted to determine the status of trader regulation on reservations other than Hopi, Zuni or Navajo. That study revealed that only a small fraction of the total businesses located on reservations are licensed. Procedures for managing trader regulation vary from reservation to reservation. There was widespread feeling among BIA and tribal personnel responding that the regulations are unenforceable. There was strong support for legislation permitting tribes to assume all responsibility for trader regulation. Such legislation has been introduced but Congress has not acted on it.

Many licenses and permits that are issued are the result of action on the part of the licensee for the purpose of establishing exemption from state taxation.¹⁸⁵

Suarez noted that problems in enforcement on other reservations exist partly because "[e]nforcement on a national basis is difficult because of the wide variation in economic conditions on reservations throughout the country," and, "No funds are specifically appropriated for enforcement of these statutes."¹⁸⁶

Nevertheless, the Bureau of Indian Affairs has a responsibility and must adopt sufficient regulations on other reservations controlling prices, quality of goods, etc., which are so badly needed.¹⁸⁷ Reservation business regulation offices should also be established on other reservations where trader abuses exist and the BIA should fund these offices. The BIA should not abrogate its responsibility to regulate traders to tribes unless the tribes desire to assume this responsibility.

For tribes that desire to take control of the regulation of reservation traders, the BIA should allow them to do so under the new federal policy of self-determination.¹⁸⁸ But, self-determination should be meaningful. Tribes should be allowed full latitude in regulating traders, including the control over non-Indian traders and the imposition and collection of taxes.

APPENDIX 1A

5-6828
FEBRUARY 1977

TRADER LICENSE APPLICATION

25 CFR § 251.9(a)

NAME OF APPLICANT AND TRADE NAME, IF ANY: _____
APPLICANT IS (Circle one): Proprietorship Partnership Corporation
IF APPLICANT IS A CORPORATION, LIST THE NAMES OF THE MEMBERS
OF THE BOARD OF DIRECTORS. IF APPLICANT IS A PARTNERSHIP, LIST
THE NAMES OF ALL PARTNERS: _____

ADDRESS OF APPLICANT _____
SITE OF PROPOSED BUSINESS: _____
LIST THE CLASSES OF GOODS AND SERVICES TO BE SOLD: _____

CAPITAL TO BE BORROWED (Debt Investment) \$ _____
CAPITAL OWNED (Equity Investment) \$ _____
TOTAL CAPITAL TO BE INVESTED (Total Investment) \$ _____
PROVIDE THE FOLLOWING INFORMATION CONCERNING ANY LOANS
TO BE MADE TO FINANCE THE PROPOSED BUSINESS:

NAME OF LENDER _____
AMOUNT OF LOAN DATE DUE RATE OF INTEREST

NAME OF ANY ENDORSER OR SURETY
ATTACH TO THIS APPLICATION A COPY OF ANY CONTRACT OR
TRADE AGREEMENT WITH CREDITORS OR FINANCING INDIVIDUALS
OR INSTITUTIONS, INCLUDING ANY STIPULATIONS WHEREBY FINAN-
CING FEES ARE TO BE PAID. REDUCE ANY ORAL AGREEMENTS ON
THESE MATTERS TO WRITING AND ATTACH THEM TO THIS APPLICA-
TION.

ALSO ATTACH SCHEDULES "A" AND "B", AS REQUIRED.
I CERTIFY, that all of the statements made in this application are true, complete,
and correct to the best of my knowledge and belief and are made in good faith.

APPLICANT'S SIGNATURE (Sign in ink) _____ DATE SIGNED
(If applicant is a corporation,
an authorized officer must sign)

NAME OF CORPORATION _____

SCHEDULE A
THIS SCHEDULE MUST BE COMPLETED BY THE FOLLOWING PERSONS:

- 1. A PERSON APPLYING AS PROPRIETOR
- 2. EACH PARTNER WHO IS LIABLE FOR THE DEBTS OF A PARTNER-
SHIP THAT IS APPLYING FOR A LICENSE
- 3. THE PROPOSED BUSINESS MANAGER

NAME OF PERSON COMPLETING THIS SCHEDULE _____
CIRCLE ONE: Proprietor Partner Business Manager

DESCRIBE YOUR PRIOR BUSINESS EXPERIENCE. (Attach additional sheets if necessary.)

WHERE HAVE YOU LIVED AND WORKED DURING THE PAST FIVE YEARS? (List most recent address first.)

FROM TO ADDRESS OCCUPATION EMPLOYER'S ADDRESS

REFERENCES—List three persons who are *NOT* related to you and who have definite knowledge of your qualifications and fitness to manage the proposed business. Do not list the names of supervisors on jobs held within the last five years.

FULL NAME PRESENT ADDRESS BUSINESS/OCCUPATION

LIST THE NAME AND ADDRESS OF ANY BUSINESS YOU HAVE OWNED DURING THE PAST TEN YEARS.

HAVE YOU...	Yes	No
within the last five years been fired from any job for any reason?	_____	_____
within the last five years quit a job after being notified that you would be fired?	_____	_____
ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for any offense against the law? (You may omit (1)traffic violations for which you paid a fine of \$50 or less; and (2)any offense committed before your 21st birthday that was finally adjudicated in a juvenile court or under a Youth Offender law.)	_____	_____

IF YOUR ANSWER TO ANY QUESTION IN THIS SCHEDULE IS "YES", GIVE DETAILS ON AN ADDITIONAL SHEET ATTACHED TO THIS SCHEDULE.

I CERTIFY, that all of the statements made in this schedule are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

SIGNATURE (Sign in ink)

DATE SIGNED

SCHEDULE B

THIS SCHEDULE MUST BE COMPLETED BY ALL CORPORATE APPLICANTS. LIST THE NAME AND ADDRESS OF EACH RETAIL OUTLET OWNED OR OPERATED BY THE APPLICANT IN THE PAST TEN YEARS:___

HAS ANY LICENSE TO DO BUSINESS HELD BY THE CORPORATION BEEN REVOKED WITHIN THE LAST TEN YEARS? Yes No
IF THE ANSWER IS YES, GIVE DETAILS CONCERNING EACH REVOCATION ON AN ADDITIONAL SHEET ATTACHED TO THIS SCHEDULE. ATTACH FINANCIAL STATEMENTS FOR THE CORPORATION PREPARED IN ACCORDANCE WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES COVERING THE PAST FIVE YEARS.

I CERTIFY that all of the statements made in this application are true, complete and correct to the best of my knowledge and belief and are made in good faith.

SIGNATURE OF AUTHORIZED OFFICER OF THE TITLE
APPLICANT CORPORATION

NAME OF CORPORATION DATE SIGNED

APPENDIX 1B

5-6829
FEBRUARY 1977

INFORMATION CONCERNING APPLICANT FOR INDIAN TRADER'S
LICENSE OR FOR POSITION AS EMPLOYEE OF INDIAN TRADER

Name of Person Completing Form
What is your address?: _____
What is your occupation? _____
How long have you known applicant? _____
Are you related to the applicant? _____
Is the applicant a fit person to be an Indian trader (or to be employed by an Indian Trader in case of an applicant for that position)? _____

STATE THE FACTUAL BASIS AND THE REASONS FOR YOUR ANSWER TO THE PREVIOUS QUESTION:

Signature Date

APPENDIX 1C

5-6830
FEBRUARY 1977

APPLICATION FOR RENEWAL OF TRADER LICENSE
[25CFR § 251.12]

We/I _____
apply for a renewal of our/my reservation business license _____
_____ years.

Attached is evidence of any clearance or tribal council approval required by tribal or Federal regulations including evidence of my/our right to use the land. We/I agree during the renewal period of the license to observe all Federal and tribal statutes, regulations and ordinances applicable to this business.

Signature of Applicant

NOTE: Application must be submitted not less than thirty (30) days prior to the expiration of the existing license.

NOTES

1. F. COHEN, FEDERAL INDIAN LAW 9 (1942) [hereinafter cited as COHEN].
2. MOLONEY, THE FUR TRADE IN NEW ENGLAND 1620-1676 (1967), at 17 [hereinafter cited as MOLONEY].
3. *Id.* at 20.
4. "The beaver was the staple of the New England fur trade. Beaver fur was preferred over that of other animals in the European markets because of its beauty, its size, its durability, warmth, and weight. The fashion in Europe of wearing beaver hats caused a large demand for the fur, and traders, sure of a ready market for this valuable product, were quick to urge the Indians to bring them all the beaver skins they could get." See MOLONEY, *supra* note 2, at 14-15.
5. *Id.* at 15.
6. *Id.* at 95.
7. *Id.* "During the entire colonial period, the regulation of the trade was left to the individual colonies. It is beyond the scope of this paper to trace the historical development of each colony, therefore, an attempt has been made to trace primarily the historical development of Massachusetts only.
8. *Id.* at 24, 108. See GOVERNOR WILLIAM BRADFORD'S LETTER BOOK 35-36.
9. MOLONEY, *supra* note 2, at 103.
10. The Pilgrims did, on at least one occasion, enforce the proclamation of 1622 when they sent Miles Standish to arrest a trader named Thomas Morton for trading firearms to the Indians. *Id.* at 24.
11. *Id.* at 96.
12. *Id.*
13. The General Court was the legislative body for the Colony whose members were appointed by the Governor. See The Charter of Massachusetts Bay—1629, in 1 OLD SOUTH LEAFLETS (1896), No. 7, at 10-11.
14. MOLONEY, *supra* note 2, at 96.
15. *Id.* at 97.
16. *Id.*
17. *Id.*
18. *Id.* at 98.
19. *Id.* at 100.
20. *Id.*
21. *Id.*
22. *Id.* at 103.
23. *Id.*
24. *Id.*
25. *Id.* at 103-104.
26. *Id.* at 104.
27. *Id.* at 105.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 105-106.
33. *Id.*
34. F. PRUCHA, AMERICAN INDIAN POLICY 10 (1962).

35. See ALDEN, SOUTHERN COLONIAL FRONTIER 19 (1964).
36. PRUCHA, *supra* note 34, at 10.
37. See MOLONEY, *supra* note 2, at 73.
38. *Id.* at 58.
39. *Id.*
40. See, e.g., 4 PA. STAT. AT LARGE 154 -56; 3 S.C. STAT. AT LARGE 526; 1 Acts and Resolves of the Province of Massachusetts Bay 471.
41. S.C. STAT. AT LARGE 525-26.
42. MOLONEY, *supra* note 2, at 75.
43. The Board of Trade is an administrative department of government in England which deals with matters relating to trade and foreign plantations.
44. PRUCHA, *supra* note 34, at 9
45. *Id.* at 10.
46. *Id.* at 12. (All governors of the colonies were forbidden, under the threat of royal displeasure and removal from office, to issue grants of any Indian lands on December 2, 1761.)
47. The portion of the war that was fought in America is commonly known as the "French and Indian War."
48. See COHEN, *supra* note 1, at 10. See also ALDEN, *supra* note 35, especially ch. IX, 139-55, which gives a good discussion of the office of the superintendent.
49. *Id.*
50. The proclamation is printed in A. SHORTT & A. DOUGHTY, DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA 163-68 (1918).
51. Word of "Pontiac's Conspiracy" reached the Board of Trade in August. Events happening prior to the time Pontiac made war were as follows, according to a letter written by Sir William Johnson to the Board on July 1: (1) Detroit was under a blockade, (2) a detachment on the way to Detroit from Niagara was defeated, (3) Fort Sandusky with its garrison was destroyed, (4) communications were cut off from Fort Pitt, and (5) the whole Frontier was in panic. See PRUCHA, *supra* note 3452, at 17.
52. SHORTT & DOUGHTY, *supra* note 52, at 167.
53. PRUCHA, *supra* note 34, at 21.
54. *Id.*
55. *Id.*
56. Lords of Trade to Sir William Johnson, July 10, 1764, 7 NEW YORK COLONIAL DOCUMENTS 637-41
57. PRUCHA, *supra* note 34, at 23.
58. *Id.*
59. *Id.*
60. *Id.*
61. See SHORTT & DOUGHTY, *supra* note 52, at 570-76.
62. PRUCHA, *supra* note 34, at 24.
63. See 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 (1904-1937), at 174-77 [hereinafter cited as JOURNALS].
64. *Id.* at 175.
65. *Id.*
66. See 3 SMYTH, THE WRITINGS OF BENJAMIN FRANKLIN 217-18 (1905-1907).
67. 2 JOURNALS, *supra* note 63, at 197-98.
68. *Id.*
69. *Id.* at 98.
70. *Id.*
71. 5 JOURNALS, at 546-54.
72. *Id.* at 674-89.
73. 9 JOURNALS, at 844-85.
74. THE FEDERALIST No. 42 (A. Hamilton).
75. 24 JOURNALS, *supra* note 63, at 264.
76. *Id.*
77. *Id.*
78. 25 JOURNALS, at 602.
79. *Id.* at 680-94.

80. *Id.* at 682. What the committee meant by public wants was “the faith of the United States stands pledged to grant portions of the uncultivated lands as a bounty to their army, and in reward of their courage and fidelity”

81. *Id.* at 683.

82. *Id.*

83. *Id.*

84. *Id.* at 690.

85. 27 JOURNALS, at 453-64.

86. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15; Treaty with the Shawnee, Jan. 31, 1786, 7 Stat. 26.

87. See MOHR, FEDERAL INDIAN RELATIONS, 1774-1778 (1933), at 93-139.

88. *Id.*

89. 28 JOURNALS, *supra* note 63, at 119.

90. Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21; Treaty with the Chickasaw, Jan. 10, 1786, 7 Stat. 24.

91. For example, the treaty with the Cherokee provided: “Article IX. For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such a manner as they think proper.”

“Article X. Until the pleasure of Congress be known, respecting the ninth article all traders, citizens of the United States, shall have liberty to go to any of the tribes or towns of the Cherokees to trade with them, and they shall be protected in their persons and property, and kindly treated.” The other two treaties had identical provisions.

92. 31 JOURNALS, *supra* note 63, at 490-93.

93. *Id.* at 491.

94. *Id.*

95. *Id.*

96. *Id.* at 492-93.

97. *Id.* at 491-94.

98. *Id.* at 492.

99. *Id.*

100. 32 JOURNALS, at 66-69.

101. *Id.* at 68.

102. *Id.*

103. *Id.* at 69.

104. 7 Stat. 125.

105. 33 JOURNALS, *supra* note 63, at 45562.

106. 34 JOURNALS, at 342-44.

107. *Id.* at 476-79.

108. MOHR, FEDERAL INDIAN RELATIONS, 1774-1788 (1933), at 132.

109. 7 Stat. 32.

110. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911-1937), at 321.

111. *Id.* at 367.

112. *Id.* at 499.

113. U.S. CONST. art. II, § 2(2).

114. 70 U.S. (3 Wall.) 407, 418 (1865).

115. 1 Stat. 137, ch. 33.

116. *Id.* at 138.

117. 1 Stat. 329, ch. 19.

118. 1 Stat. 469, ch. 30.

119. *Id.*

120. 1 Stat. 743, ch. 46. Also important in 1796 was the Act of Apr. 18, which authorized the President to establish governmentally owned and operated trading posts along the far-flung western and southern frontiers or in Indian country within the limits of the United States. 1 Stat. 452. This act was a temporary measure reenacted every two or three years until the abolishment of the government-owned trading houses. Trade for profit was not contemplated under this act and goods were sold to the Indians at cost. The trader

in charge of a trading post was an agent of the United States, paid by the government and under oath to refrain directly or indirectly from personal business or commercial relations with any Indian or Indian tribe.

The Act of May 6, 1822, closed the government-operated trading posts. 3 Stat. 679. Accounts were rendered, and the system of governmental ownership and operation was permanently abandoned. Indian trade again became exclusively a private business under governmental supervision and license. The reason the government posts were closed is because "in relation to the general (trading) establishment . . . it has been a losing institution, owing, it is presumable, to adventitious circumstances, originating in our late belligerent state [War of 1812], and not growing out of any defect in the organization or government of the trade. From the first operation of this traffic up to December, 1809, it sustained a loss Since that period the trade has been more successful, it having yielded a profit . . . after covering a loss . . . which accrued in consequence of the capture of several trading posts by the enemy during the late war." ANNALS OF CONGRESS, 15th Cong., 1st Sess. 1817-18 Pt. I, p. 801.

121. 2 Stat. 139, ch. 13. The first four trade and intercourse acts were all temporary measures.

122. See note 120 *supra*.

123. 2 Stat. 402, ch. 47, 48.

124. *Id.* § 2.

125. H. DOC. NO. 146, 19th Cong. 1st Sess. 6.

126. The Secretary of War promulgated regulations governing traders in 1837 and 1847. In 1849 the responsibility for Indian affairs was transferred to the Department of the Interior. Memorandum to the Acting Deputy Commissioner of Indian Affairs from E.F. Suarez, Sr., Sept. 6, 1977, at 1.

127. 4 Stat. 729, ch. 161.

128. COHEN, *supra* note 1, at 73.

129. 4 Stat. 729, ch. 161. ("all land west of Mississippi river, not within Missouri, Louisiana, Arkansas Territory, and United States land east of Mississippi river, and not within any state where Indian title has been extinguished").

130. See *United States v. Taylor*, 33 F.2d 608 (1929); *Rider v. LaClair*, 138 P. 3 (1914); *United States v. Certain Property*, 25 P. 517, 518-19 (1871). Regulation of traders in Indian country, however, is preempted by Congress as against the states. Thus, recently in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Supreme Court held that Congress has so broadly occupied the field of trading with Indians on reservations that no room remained for state laws imposing additional burdens on traders.

131. 19 Stat. 176, 200, ch. 259, 260; 25 U.S.C. § 261 (1876). For congressional debate preceding the passage of Section 261, see 4 CONG. REC. 3906-26 (June 20, 1876). Report of the Conference Committee to the House of Representatives in regards to Section 261, 4 CONG. REC. 5477 (Aug. 11, 1876) Regulations based on § 261 were promulgated in 1884. Additional regulations were promulgated in 1894 and 1895. Memorandum to the Acting Deputy Commissioner of Indian Affairs from E.F. Suarez, Sr., Sept. 6, 1977, at 1.

132. 22 Stat. 179, ch. 358, 360; Rev. Stat. § 2133; 25 U.S.C. § 262 (1903).

133. 31 Stat. 1058, ch. 831, 832, 1066, ch. 8321; 25 U.S.C. § 264 (1882).

134. 32 Stat. 982, 1009, ch. 993, 994; 25 U.S.C. § 262 (1903).

135. See also 25 C.F.R. § 251.1 (1928). Regulations under 25 U.S.C. § 262 were first promulgated in 1904. They were subsequently revised in 1927. Memorandum to the Acting Deputy Commissioner of Indian Affairs from E.F. Suarez, Sr., Sept. 6, 1977, at 1.

136. For acts appropriating funds for detecting and punishing violators of the trade and intercourse acts, See 27 Stat. 572, ch. 207, 208; 28 Stat. 910, ch. 188, 189; 30 Stat. 11, ch. 2; 30 Stat. 597, ch. 545, 546; 30 Stat. 1074, ch. 423, 424; 31 Stat. 280, ch. 784, 785; 31 Stat. 1133, ch. 852, 853. See also Article IX of the Treaty of May 7, 1864, 13 Stat. 693, 695.

137. 25 U.S.C. § 262 (1903); 25 C.F.R. § 251.1 (1928). Special regulations for the Navajo, Hopi, and Zuni reservations appear in 25 C.F.R. 252.1 *et. seq.* In 1933 the United Indian Traders Association, an organization whose membership is located mostly in Arizona and New Mexico, recommended a thorough revision of existing regulations to suit their needs and conditions. After lengthy negotiations with the BIA Staff, special regulations were promulgated for the Navajo, Hopi, and Zuni in 1937. The following year those

regulations were extended to include all the pueblos. These regulations were revised in 1957. Recent regulations were promulgated on Aug. 29, 1975 and became effective on Jan. 1, 1976. Memorandum to the Acting Deputy Commissioner of Indian Affairs from E.F. Suarez, Sr., Sept. 6, 1977, at 2.

A license to trade is not required in Alaska. The Act of June 30, 1834 (4 Stat. 729) was not extended, *ex proprio vigore*, to that Territory upon its cession to the United States. *See Water v. Campbell*, 29 Fed. Cas. (1876) No. 17264; *Kie v. United States*, 27 F. 351 (1886); *In re Sah Quah*, 31 F. 327 (1886); 16 ATTY GEN. OP. 141 (1878). Subsequent legislation has, however, extended the traders regulations to all reservations in the United States. See note 187 *infra*.

138. See notes 134 and 135 *supra*.

139. 25 C.F.R. § 251.9 (1965) provides: "§ 251.9 Application for license. (a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

"(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or credit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendent.

"(c) When a license or permit to trade is issued under the regulation in this Part 251, a fee of \$5.00, payable when the license is issued, shall be levied against the license."

140. 25 U.S.C. § 264 (1882); 25 C.F.R. § 251.3 (1928).

141. 25 C.F.R. § 251.5 (1928). Government employees are permitted to purchase small articles for use in the home. *See* 25 C.F.R. § 251.6 (1928). *See also* 18 U.S.C. § 437 (1948) which may prohibit traders from being United States Postmasters, and in the case of the Navajo Indians, a special claims agent for the Railroad Retirement Board, a federal lab, or agency.

142. 25 C.F.R. § 251.13 (1957).

143. 25 C.F.R. § 251.11 (1965).

144. *Id.*

145. *Id.*

146. 25 C.F.R. § 251.12 (1957).

147. 25 C.F.R. § 251.14 (1957).

148. 25 C.F.R. § 251.15 (1957). One court did, however, approve an arrangement whereby a licensed trader formed a partnership and the nonlicensed partner secured a permit to live on the reservation to trade with Indians and to share the profits. *See Dunn v. Carter*, 30 Kan. 294, 1 P. 66 (1883).

149. *Id.*

150. 25 C.F.R. § 251.21 (1957).

151. This regulation was revoked Oct. 4, 1955, 20 R.R. 7364. Other recent changes in the regulations occurred in 1965, when "the requirement that licensed traders furnish a bond was eliminated, the license period was made to conform to the period of the lease or permit held by the trader on Indian land, and a \$5 fee for issuance of a license and a requirement for license of itinerant traders were added." Memorandum to the Commissioner of Indian Affairs from Associate Solicitor Earle D. Goss, July 14, 1971, at 1.

152. 25 C.F.R. § 251.22 (1957).

153. 25 C.F.R. § 251.16 (1957).

154. 25 C.F.R. § 251.25 (1957).

155. 25 C.F.R. § 251.23 (1957).
156. 25 C.F.R. § 251.24. (1957).
157. 25 U.S.C. § 263 (1834); 25 C.F.R. § 251.2 (1928).
158. 25 C.F.R. § 251.8 (1928).
159. 25 C.F.R. § 251.17 (1957).
160. 25 C.F.R. § 251.18 (1957). There are three primary statutes relating to the sale and possession of liquor in Indian country (the general definition of Indian country in 18 U.S.C. § 1151 is altered for purposes of liquor); 18 U.S.C. § 1154 which prohibits the sale of any "intoxicating liquor of any kind" to an Indian in Indian country and provides for a fine and jail term; 18 U.S.C. § 1156 which makes possession of alcohol in Indian country a federal offense, and 18 U.S.C. § 1161 which provides: "The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." *See generally* United States v. Mazurie, 419 U.S. 544 (1975).
161. 25 C.F.R. § 251.19 (1957).
162. 25 C.F.R. § 251.26 (1957).
163. *Id.* This regulation may be of questionable validity, at least to the extent that it attempts to apply state laws to traders who are Indians in non-Public Law 280 states. The general rule is that states have no jurisdiction over Indians in Indian country absent the consent of the Indians in accordance with 25 U.S.C. § 1326 (1970). *Kennerly v. District Court*, 400 U.S. 423 (1971).
164. 138 P. 3, 5-6 (1914). *See also* Memorandum to the Commissioner of Indian Affairs from Assistant Solicitor Frederic L. Kirgis, May 1, 1940, at 4-5.
165. 18 U.S.C. § 1151 (1970).
166. *See, e.g.*, Memorandum to Commissioner of Indian Affairs from Assistant Secretary Oscar L. Chapman, Aug. 31, 1945, at 1 (non-Indian on Fort Belknap Reservation operating on fee land not required to obtain license.)
167. *See, e.g.*, Memorandum from Commissioner of Indian Affairs to Assistant Secretary of Public Land Management, Oct. 23, 1957, regarding Indian traders on Pine Ridge Reservation, at 3 ("it is our recommendation that we adopt and announce as Departmental policy the practice we have been following, namely, that traders on fee-patented lands within Indian reservations will not be required to obtain licenses under Departmental regulations").
168. Memorandum to all Area Directors from the Commissioner of Indian Affairs, Apr. 3, 1972, at 1.
169. *See, e.g.*, Indian Resource Development Act of 1967 (S. 1816), 90th Cong., 1st Sess. (1967). Section 405 provided: "TRADERS' LICENSES.—The following statutes relating to traders' licenses are hereby repealed: section 5 of the Act of August 15, 1876 (19 Stat. 200; 25 U.S.C. 216); section 1 of the Act of March 3, 1901, and section 10 of the Act of March 3, 1903 (31 Stat. 1066, 32 Stat. 1009; 25 U.S.C. 262); Section 2132 of the Revised Statutes (25 U.S.C. 263), section 3 of the Act of June 30, 1834 (4 Stat. 729); section 2133 of the Revised Statutes (25 U.S.C. 264), section 4 of the Act of June 30, 1834 (4 Stat. 729)." In a letter to the Honorable Quentin N. Burdick (Senator from North Dakota) from Charles W. Harris, Division Chief of Government and General Research Division of the Library of Congress, May 9, 1972, Harris states that, "Repeal of the Secretary of Interior's authority to license traders was intended to clear the way for tribal exercise of their powers over leases, tribal assessment of fees on persons doing business on reservations, and expansion of Indian shopping potential as a safeguard against high pricing." Harris further states that the legislation failed to pass because it did not meet with the approval of the various Indian tribes: "At a special meeting in Washington, D.C. (Jan. 30 through Feb. 3, 1967), the original draft of the Bill was presented to Indian leaders for their consideration. After that meeting it was reported that Indian leaders rejected the Bill for the following reasons: 'They said, in effect, that the bill in its present form was continuation of a practice of attaching legislation detrimental to Indian objectives to legislation of the type needed by the Indian people. As a result of such a practice, Indians have had to accept such legislation because of

pressing needs for other legislation they said. They also asked that they be allowed more time to study the proposed bill more carefully." According to former BIA Commissioner Robert L. Bennett in a letter addressed to Mario Gonzalez dated Apr. 28, 1972, Section 405 was included in the bill because "(1) The granting of traders' licenses was more appropriately a function of tribal government and the belief that the tribal governments could properly carry out this function, (2) Eliminate conflict where the use of Indian land for trading purposes was subject to approval of the Indian land-owner whereas the right to do business was in the hands of the Commissioner of Indian Affairs, (3) The increased mobility of Indian people due to better roads and motor vehicles made them less dependent on the local trader, (4) Competition to the local trader was developing through tribal stores and those operated by Indian individuals, groups and associations, (5) Inability of the Bureau of Indian Affairs to obtain any funds to supervise tradings with Indians." "There may have been other reasons but the foregoing are some that I remember without recourse to the files."

170. See, e.g., S. 2033, 92d Cong. 1st Sess. (June 9, 1971); H.R. 8064, 92d Cong. 1st Sess. (May 4, 1971); H.R. 2379, 92d Cong. 1st Sess. (Jan. 26, 1971). These bills were apparently introduced in response to President Nixon's July 8, 1970, message to Congress. Section 2 of each bill in which tribes will be allowed to assume control over the regulation of traders on their reservations is similar to tribal regulation of liquor on reservations under 18 U.S.C. § 1161. See note 160 *supra*. Both S. 2033 and H.R. 8064 state, however, that "except that no business transaction, property or use of property shall be subject to taxation by virtue of this provision or by any tribe's laws or ordinances making Federal statutes relating to traders licenses inoperative on its particular reservation." This language appeared to limit the tax power of tribes even though case law held that they have such power. See *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). See also *Williams v. Lee*, 358 U.S. 217 (1959).

171. TRADERS ON THE NAVAJO RESERVATION: A REPORT ON THE ECONOMIC BONDAGE OF THE NAVAJO PEOPLE (Window Rock: 1969); THE TRADING POST SYSTEM ON THE NAVAJO RESERVATION: REPORT TO THE FEDERAL TRADE COMMISSION (Los Angeles Regional Office, June 1973).

172. TRADERS ON THE NAVAJO RESERVATION: A REPORT ON THE ECONOMIC BONDAGE OF THE NAVAJO PEOPLE, *supra*, at 4. See also at 10-19.

173. *Id.* at 5.

174. Act of Aug. 15, 1876, ch. 289, § 5, 19 Stat. 200, 25 U.S.C. § 261, 25 C.F.R. § 251.1 (1939).

175. *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); Memorandum from Commissioner of Indian Affairs to Assistant Secretary of Public Land Management, Oct. 23, 1957, at 2; Memorandum to the Commissioner of Indian Affairs from Assistant Secretary of the Interior Oscar L. Chapman, Aug. 31, 1945, at 1.

176. *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

177. THE TRADING POST SYSTEM ON THE NAVAJO RESERVATION: REPORT TO THE FEDERAL TRADE COMMISSION (Los Angeles Regional Office, June 1973).

178. See, e.g., Resolution of the Navajo Tribal Council, Mar. 20, 1948, which sets up comprehensive rules and regulations for traders on their reservations which were to become effective June 1, 1948.

179. Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 461 (1970).

180. Many tribes have limited their jurisdiction over non-Indians in their constitutions. See, e.g., Article V of the Oglala Sioux Tribal Constitution.

181. One case has held that tribes may assume jurisdiction over non-Indians on their reservations. However, for tribes whose constitutions limit such jurisdiction, a condition precedent to the issuance of a federal license could be the requirement that non-Indians consent to the jurisdiction of the tribal court and that they comply with tribal laws and regulations.

182. See text at notes 171-173, *supra*, and citations there.

183. 449 F.2d 567 (9th Cir. 1971).

184. Memorandum to the Acting Deputy Commissioner of Indian Affairs from E.F. Suarez, Sr., Chief, Division of Law Enforcement Services, Sept. 6, 1977, at 2-3.

185. *Id.* at 3.

186. *Id.* at 4.

187. Act of Mar. 3, 1903, 32 Stat. 982, § 10; INDIAN AFFAIRS, LAWS AND TREATIES (laws), Kappler at 25, extends the traders' regulations to all reservations in the United States. Thus, the BIA's responsibility appears to be nationwide.

188. 25 U.S.C. § 450 (1975). Under this statute, Indian tribes appear to have the authority to contract with the BIA for the regulation of Indian traders.