

[4337-15-P]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

25 CFR Part 140

[178A2100DD/AAKC001030/A0A501010.999900 253G]

RIN 1076-AF30

**Traders with Indians**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Advance notice of proposed rulemaking; solicitation of comments.

**SUMMARY:** The Department of the Interior (Department) is considering whether to propose an administrative rule that would comprehensively update 25 CFR part 140 (Licensed Indian Traders) in an effort to modernize the implementation of the Indian Trader statutes consistent with the Federal policies of Tribal self-determination and self-governance. The current regulations were promulgated in 1957 and have not been comprehensively updated since 1965. The purpose of this advance notice of proposed rulemaking (ANPRM) is to solicit public comments on whether and how the Department should update 25 CFR part 140, including how the Indian Trader regulations might be updated to govern who trades on Indian land and how the regulations can better promote Tribal self-determination regarding trade on Indian lands. In this ANPRM, the Department also announces dates and locations for Tribal consultations and public meetings to consider this issue.

**DATES:** Comments must be submitted on or before [INSERT DATE 120 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods:

-Federal rulemaking portal: <http://www.regulations.gov>. The rule is listed under the agency name “Bureau of Indian Affairs.” The rule has been assigned Docket ID: BIA-2016-0007.

-Mail or hand delivery: Elizabeth K. Appel, Director, Office of Regulatory Affairs & Collaborative Action, Indian Affairs, U.S. Department of the Interior, 1849 C St. NW, Mail Stop 3642-MIB, Washington, DC 20240.

Please see the SUPPLEMENTARY INFORMATION section of this document for information on Tribal consultation sessions.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs and Collaborative Action, Office of the Assistant Secretary – Indian Affairs; telephone (202) 273-4680, [elizabeth.appel@bia.gov](mailto:elizabeth.appel@bia.gov).

**SUPPLEMENTARY INFORMATION:**

**Public Comment**

The Department is considering whether to propose an administrative rule that would comprehensively update 25 CFR part 140 (Licensed Indian Traders) in an effort to modernize the implementation of the Indian Trader statutes consistent with the Federal policies of Tribal self-determination and self-governance. We are interested in hearing from federally recognized tribes. We also welcome comments and information from states and their agencies and from the public.

To be most useful, and most likely to inform decisions on the content of a potential administrative rule, comments should:

—Be specific;

- Be substantive;
- Explain the reasoning behind the comments; and
- Address the issues outlined in the ANPRM.

For the purpose of this ANPRM, we are seeking input solely on questions related to a potential administrative rule on whether and how the Department of the Interior should update 25 CFR part 140, including how the Indian Trader regulations might be updated to govern who trades on Indian land in a manner more consistent with Tribal self-governance and self-determination.

We are seeking comments solely on following questions:

1. Should the Federal government address trade occurring in Indian Country through an updated 25 CFR part 140, and why?
2. Are there certain components of the existing rule that should be kept, and if so, why?
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?
4. How do Tribes currently regulate trade in Indian Country and how might revisions to 25 CFR part 140 help Tribes regulate trade in Indian Country?
5. What types of trade should be regulated and what type of trader should be subject to regulation?
6. How might revisions to the regulations promote economic viability and sustainability in Indian Country?

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?

In addition to receiving comments through the Federal *eRulemaking* Portal, U.S. mail, courier services, and hand delivery (see ADDRESSES section above), we will conduct a series of in-person consultations with federally recognized Tribes, as listed below.

Before including your address, phone number, email address, or other personal information in your comment – including personal identifying information—please be aware that your comment may be made publically available at any time. While you may ask in your comment that we withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

**Tribal Consultations**

The Department of the Interior will be hosting consultation sessions with Indian Tribes on this ANPRM. We will accept both oral and written communications at these consultation sessions.

The following table lists dates and tentative locations for the consultations. Specifics on the venue for each location will be provided in a subsequent Federal Register notice.

<b>Date</b>	<b>Time (Local Time Zone)</b>	<b>Location</b>
Thursday, February 23, 2017	8:30 a.m. – 12:00 p.m.	Seattle area
Tuesday, February 28, 2017	8:30 a.m. – 12:00 p.m.	Southeastern U.S.
Thursday, March 2, 2017	8:30 a.m. – 12:00 p.m.	Southern California
Tuesday, March 7, 2017	8:30 a.m. – 12:00 p.m.	Billings, Montana
Thursday, March 9, 2017	8:30 a.m. – 12:00 p.m.	Rapid City, South Dakota
Tuesday, March 14, 2017	8:30 a.m. – 12:00 p.m.	Prior Lake, Minnesota
Thursday, March 16, 2017	8:30 a.m. – 12:00 p.m.	Northeastern U.S.

**Background**

The Department is considering whether to propose a rule that would comprehensively update 25 CFR part 140 (Licensed Indian Traders) to modernize the implementation of the Indian Trader statutes consistent with the Federal policies of Tribal self-government and self-determination. The current Indian Trader regulations were promulgated in 1957, revised in 1965, and modified in 1984 in a piecemeal fashion. The current regulations largely reflect policies that ignore Tribal self-determination and the growth of Tribal economies.

Congress granted the Department broad and comprehensive authority to regulate trade in Indian Country by determining the proper persons to be “Indian traders.” *See* 25 U.S.C. 261 *et. seq.*; *see also* 25 U.S.C. 9. The Department would seek to implement these responsibilities in a manner that reflects the current Nation-to-Nation relationship with Tribes should the Department propose a rule that updates 25 CFR part 140. The Department recognizes that many Tribes have enacted comprehensive laws concerning economic activity occurring on Tribal lands and that Tribal courts often retain jurisdiction over Indian traders. This ANPRM solicits information regarding current Tribal regulatory activity over trade occurring within Indian Country.

Additionally, the Department recognizes that dual taxation on Tribal lands can undermine the Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments. Dual taxation of traders and activities conducted by traders and purchasers can impede a Tribe’s ability to attract investment to Indian lands where such investment and participation are critical to the vitality of Tribal economies. Tribal communities continue to struggle with unmet needs, such as in their schools and housing, as well as economic development, to name a few. Moreover, beyond the operation of their governments, Tribes continually pursue funding for infrastructure, roads, dams, irrigation systems and water delivery.

Thus, the Department solicits information under this ANPRM about how revisions to the regulations could promote economic viability and sustainability in Indian Country.

### **Description of the Information Requested**

We are particularly interested in receiving comments on the following questions relating to revisions of the 25 CFR part 140 we may develop concerning trade occurring in Indian Country:

**1. Should the Federal government address trade occurring in Indian Country through an updated 25 CFR part 140, and why?**

We are seeking views on whether there is a need in Indian Country for the Federal government to revise 25 CFR part 140. As mentioned, Congress granted the Department broad authority to regulate trade in Indian Country. Specifically, under 25 U.S.C. 261, *Power to appoint traders with Indians*, the Department of the Interior (previously the Commissioner of Indian Affairs) has authority to make rules specifying the kind and quantity of goods that may be sold to Indians and the prices at which such goods shall be sold. Under 25 U.S.C. 262, *Persons permitted to trade with Indians*, the Department has the authority to establish rules and regulations governing trade on Indian reservations for the protection of the Indians.

The Department acknowledges the comprehensive Federal regulation of Indian traders in some areas of Indian Country, but also notes that many Tribes currently regulate trade occurring within their jurisdictions under Tribal laws and authority, often without Federal involvement. The Department also acknowledges its trust responsibility to Tribes and solicits information on whether there is a need for updated regulations addressing a modern approach to the Federal role concerning trade occurring in Indian Country.

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

Should the Department conclude that there is a need for revisions to the existing rule, the Department seeks comments as to which parts, if any, of the existing rule should be kept. For instance, where the Department has issued licenses, should there be a grandfathering clause for currently valid licenses that the Department has issued under part 140?

Alternatively, if commenters believe there is a need to update 25 CFR part 140, and that no components of the existing rule should be kept, the Department requests information as to why this should be so. Additionally, the Department seeks views and proposals on what an entirely new proposed rule may look like. For instance, if the Department should no longer issue licenses, what do commenters envision Federal involvement to be?

**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?**

If there is a need to update 25 CFR part 140, we solicit information and suggestions on how revisions to the existing rule can ensure that there are reputable actors in Indian Country. Further, the Department requests information and suggestions on revisions to the existing rule to ensure that violations of Federal or Tribal law are properly addressed. The Department acknowledges that many Tribes have comprehensive schemes in place regulating traders conducting business within their jurisdiction.

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

As mentioned, the Department recognizes that many Tribes have enacted comprehensive laws concerning economic activity occurring on Tribal lands and that many Tribal courts retain jurisdiction over Indian traders. For example, the Department is aware that some Tribes have required disclosure of violations of business licenses and of enforcement actions taken by a Federal, Tribal, or State entity for trade-related activity. Tribes have also required the disclosure of any pending lawsuits involving the person and the business, and disclosure of tax liens against the business and other unsatisfied judgments. Other items that Tribes have required include a Federal employer identification number, a State registration number, insurance or bonding information, copies of all licenses (state, county, city or Tribal) currently held by the business, and affiliation with any other businesses.

With this in mind, the Department requests information on how Tribes currently regulate trade within their jurisdiction. The Department requests specific information and suggestions, including language on how the Federal government can bolster those Tribes that currently comprehensively regulate trade, as well as those Tribes that do not do so presently.

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

The Department has received numerous proposals from various Tribes pertaining to Indian Trader regulation. Many of these proposals suggest that trade regulated under part 140 should include not only commercial activities, but also mineral and energy development and any form of natural-resources extraction or agriculture.

Currently, section 140.5(a)(1) of the existing rule has the following definitions:

(5) *Contract* means any agreement made or under negotiation with any Indian for the purchase, transportation or delivery of goods or supplies.

(6) *Trading* means buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services.

(7) *Commercial trading* means any trading transaction where an employee engages in the business of buying or selling services or items which he/she is trading.

The Department seeks comments on whether the definitions of contract, trading, and commercial trading should be revised, or struck in their entirety, and why.

Additionally, the current definitions do not define the type of trader conducting business with an Indian Tribe. The draft proposals the Department has received recommend that the revised rule apply to any person conducting trade in Indian Country, including non-Indians. The Department solicits comments on whether an updated part 140 should define who the rule would apply to and whether or not this definition should broadly include any person conducting trade within Indian Country.

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

The Department is interested in receiving feedback on how revisions to the trade regulations could facilitate economic activity in Indian country and tribal economic self-sufficiency.

**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 such services?**

The Department recognizes that Tribes provide a range of services to Indians and non-Indians doing business within their Indian Country. The Department seeks comments identifying the types of services offered, such as law enforcement, food sanitation and health inspections, transportation and other infrastructure, etc. The Department also seeks information on whether and to what extent Tribes are able to rely on tax revenues to provide such services.

Dated: December 1, 2016

Lawrence S. Roberts,  
*Principal Deputy Assistant Secretary – Indian Affairs.*  
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