# CHAPTER 16

# INDIAN TRADE

TABLE OF CONTENTS



## SECTION. 1. HISTORY OF LEGISLATION.

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.

To supervise trade with the Indian tribes, and to discourage individual avarice under conditions which presented unlimited opportunities for corruption and extortion, colonial governments continuously from early pioneer days licensed traders dealing with the Indian tribes[1] and the Congress of the United States since its first session has frequently legislated[2] with respect to Indian trade by virtue of, its constitutional authority to regulate commerce with the Indian tribes.[3]

Provisions with respect to Indian trade were included in many treaties[4] between the Indian tribes and the United States.

By the Act of July 22, 1790,[5] the right to license traders was vested in the President or officers approved by him. All unauthorized persons[6] trading with the Indians were liable to forfeiture of their goods. By this act, Congress adopted the plan of leaving trading wholly to private enterprise and for a few years adhered exclusively to this policy. In 1796, however, the President. was authorized 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.[7]

Trade for profit was not contemplated under this act and goods were sold to the Indians at cost. The trader in charge 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.

In 1822,[8] however, trading posts were closed. Accounts were rendered, and the system of governmental ownership and operation permanently abandoned. Indian trade again became for the most part private business under governmental supervision and license.

Until 1802 laws with reference to both private trading and Government trading posts were, by their terms, temporary. A permanent act to regulate private trade was enacted on March 30, 1802.[9]

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[1] The irregularities and improper conduct of the traders received the attention of the General Court of the colony of Massachusetts in 1629. (Records of Mass.. p. 48.) A proclamation of George III set forth the claim of the Crown to regulate trade and licensed traders (American Archives. 4th Series. 1774–1775, vol. I, Col. 174). On congressional power over trade. see Chapter 5. sec. 3.

[2] Act of July 22. 1790. 1 Stat. 137; Act of March 1, 1793. 1 Stat. 329; Act of April 18, 1796. 1 Stat. 452: Act of May 19. 1796. 1 Stat. 469; Act of March 3. 1799, 1 Stat 743; Act of March 30. 1802. 2 Stat. 139; Act of April 21, 1806, 2 Stat. 402: Act of March 2. 1811. 2 Stat. 652; Act of June 30. 1834; 4 Stat. 729, R. S. §§ 2127-2138; Act of August 15 1876. 19 Stat.. 176, 200, 25 U. S. C. 261; Act of July 31. 1882. 22 Stat. 179. R. S. § 2133. 25 U. S. C. 264; Act of March 3. 1901. 31 Stat. 1058 1066, 25 U. S. C. 262; Act of March 3. 1903. 32 Stat. 982, 1009, 25 U. S. C. 262 : Act of May 29, 1908, 35 Stat 444.

[3] *United States* v. *Bridleman*, 7 Fed. 894 (D. C. Ore. 1881); *Green* v *Menominee* Tribe *of Indians in Wisconsin*, 233 U. s. 558 (1914); *Worcester* v. *Georgia*, 6 Pet. 515 (1832); *Buster* v. Wright, 135 Fed. 947 (C. C. A. 8. 1905); *United States* v. *Cisna*, 25 Fed. Cas. No. 14795 (C. C Ohio 1835); *United States* v. *Douglas*, 190 Fed. 482 (C. C. A 8, 1911) see Chapter 5. sec. 3.

[4] See Chapter 3. sec. 3B(2).

[5] 1 Stat. 137. By the provisions of this statute. any proper person could obtain a license for 2 years to trade with the Indians upon giving bond for faithful observance of governmental regulations. The Act of March 1. 1793. 1 Stat. 329. was a statute similar in its provisions with an additional prohibition against purchase of horses in Indian country without a special license.

The Act of May 19, 1796. 1 Stat. 469, defined, according to existing treaties, "Indian country" where trading licenses were required. For subsequent definitions see Chapter 1, sec. 3.

[6] A Provision relative to requiring licenses to trade with Indians was considered as interfering with a treaty of amity, commerce, and navigation between Great Britain and the United States. dated November 19, 1794, 8 Stat. 116. A Presidential proclamation of February 29. 1796, declared that trade regulations were not applicable to British subjects.

[7] Act of April 18. 1796, 1 Stat. 452. This act was a temporary measure succeeded by similar statutes enacted April 21, 1806. 2 Stat. 402; March 2, 1811. 2 Stat. 652; March 3. 1815, 3 Stat. 239; March 3. 1817. 3 Stat. 363; April 16. 1818. 3 Stat. 428; March 3. 1819. 3 Stat. 514; March 4. 1820. 3 Stat. 544; March. 3. 1821, 3 Stat. 641. The Act of April 18. 1796, 1 Stat. 452, after two or three rejections, was enacted upon the insistence of President Washington. He recognized trade as a force for the maintenance of peaceful Indian relations. The congressional debates on this statute reveal a blending of benevolent desire to protect the Indians from the cupidity and vicious avarice of more commercially experienced whites and Yankee shrewdness, anxious to prevent British and Canadian interests from reaping increasing profits from lucrative Indian trade. Furthermore, the vast outlay of capital required to establish even a portion of the needed posts, presented too large a venture for private capital. See Annals of Congress, 4th Cong., 1st sess., 1796-97, pp. 229. 230.

[8] Act of May 6. 1822. 3 Stat. 682.

> . . . 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.)

[9] 2 Stat. 139. Construed in *United States* v. *Douglas*. 190 Fed. 482 (C. C. A. 8. 1911); *United States* v. *Cisna*, 25 Fed. Cas. No. 14795 (C. C. Ohio 1835); *Worcester* v. *Georgia*, 6 Pet. 515 (1832); *United States* v. *Leathers*, 26 Fed. Cas. No. 15581 (D. C. Nev. 1879); *Bales* v. *Clark*, 95 U. S. 204. 206 (1877).

This statute[10] made it unlawful for any citizen or other person to reside in Indian towns or hunting camps as a trader or to carry on commercial intercourse with Indians without a license. Suitable trading sites, it was later provided, were to be designated by Indian agents.[11]

On June 30, 1834, Congress passed an act revising and repealing the former legislation on the subject and particularly defining the term "Indian country" for the purposes of that act.[12]

Congress has not seen fit to regulate Indian traders outside of "Indian country."[13] By the Act of August 15, 1876,[14] the Commissioner of Indian, Affairs was vested with sole authority to license traders to the Indian tribes and to make requisite rules and regulations. By the Act of July 31, 1882,[15] requirements for a license to trade were extended to include all but "an Indian of the full-blood." The Act of March 3, 1901,[16] as amended by the Act of March 3, 1903,[17] provides 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." In addition, from time, to time, Congress enacted appropriation or regulatory acts in connection with Indian trade.[18]

[10] This act was supplemented by the Act of April 29, 1816, 3 Stat. 332, so as to restrict issuance of trading licenses to citizens of the United States and to prohibit the transportation of foreign goods for purposes of Indian trade; the Act of May 6, 1822, 3 Stat. 682, amended administrative provisions of this act.

[11] Act of May 25, 1824, 4 Stat. 35.

[12] Act of June 30, 1834, 4 Stat. 729, On definitions of Indian country, see Chapter 1, sec. 3.

[13] Trade carried on from barges in streams adjacent to a reservation was held not to be trading in Indian country, *United States* v. *Taylor,* 33 F. 2d 608 (D. C. W. D. Wash. 1929), rev'd on other grounds, 44 F. 2d 531 (1930), cert. den. 283 U. S. 820 (1931).

In a state case privately owned land, within the limits of a reservation to which Indian title had been extinguished was not considered as Indian country, so that traders located thereon were not required to be licensed before trading with Indian tribes, *Rider v. LaClair,* 138 Pac. 3 (1914);

*United States* v. *Certain Property,* 25 Pac. 517, 518–519 (1871), also held that no license is required to trade with Indians outside of Indian country. The opinion in this case stated that no other class of ordinary federal legislation is so full of pains, penalties, and forfeitures as that which regulates trade with the Indians. Indian country is the place, and no other, to which all pains and penalties are applied.

[14] 19 Stat. 176, 200, 25 U. S. C. 261.

[15] 22 Stat. 179, R. S. § 2133, 25 U. S. C. 264.

[16] 31 Stat. 1058, 1066 (Osage Reservation), 25 U. S. C. 262.

[17] 32 Stat. 982, 1009, 25 U. S. C. 262. This act amended the proviso in the 1901 act so as to make it applicable to all reservations.

[18] Acts appropriating funds for detecting and punishing violators of the Intercourse Acts of Congress; Act of March 3, 1893, 27 Stat. 572; Act of March 2, 1895, 28 Stat. 910; Act of June 4, 1897, 30 Stat. 11; Act of July 1, 1898, 30 Stat. 597; Act of March 3, 1899, 30 Stat. (1074; Act of June 6, 1900, 31 Stat. 280; Act of March 3, 1901, 31 Stat. 1133. The Treaty of May 7, 1864, with the Chippewas of the Mississippi and the Pillager and Lake Winnebageshish bands of Chippewa Indians in Minnesota, 13 Stat. 693, 695, Art. IX, provided that "no * * * trader * * * shall be * * * licensed, * * * who shall not have a family residing with them * * * whose moral habits * * * shall be reported upon annually by a board of visitors; * * *." A similar provision is found in the Act of February 28, 1877, 19 Stat. 254, 256, Art. 7 (Sioux Nation and Northern Arapahoe and Cheyenne Indians).

## SECTION 2. PRESENT LAW

At the present time the Commissioner of Indian Affairs continues to exercise sole power and authority in the appointment of traders to the Indian tribes.[19] Under existing regulations,[20] any person who proves to the satisfaction of the Commissioner that he is a proper person may secure a trader's license.[21] Ordinarily the Commissioner will not issue a license without the approval of the tribal council. Bond with approved sureties[22] must accompany the application.[23] Any person other than an Indian of full blood[24] &ho attempts to reside in the Indian country[25] or on any Indian reservation as a trader without a license, or to introduce goods or trade therein, forfeits all merchandise offered for sale to the Indians or found in his possession and is liable to a penalty of $500. Licenses are granted for 1 year,[26] and, if at the end of that time the Commissioner is satisfied that all rules and regulations have been observed, a new license may be issued.[27] Introduction of liquor into the Indian country is statutory ground for the revocation of a trader's license.[28]

In order to prevent the acquisition of a share of the trade without approval of the Indian Service, Congress established the present rule that no appointed Indian trader could sell, share, or convey, in whole or in part, his right to trade with the Indians.[29] A sale of a license, being void, has been held not to

[19] Act of August 15, 1876, 19 Stat. 176, 200; Act of March 3, 1901, 31 Stat. 1058, 1066; Act of March 3, 1903, 32 Stat. 982, 1009; 25 U. S. C. 261–262.

[20] Regulations Governing Licensed Indian Traders, 25 C. F. R., pt. 276; Regulations Governing Traders on Navajo, Zuni, and Hopi Reservations, *ibid.,* pt. 277.

[21] See Act of August. 15, 1876, sec. 5, 19 Stat. 176, 200; Act of March 3, 1901; 31 Stat. 1058, 1066; Act of March 3, 1903, sec. 10, 32 Stat. 982, 1069; 25 U. S. C. 261, 262. The view was expressed in 2 Op. A, G. 402 (1830), that no citizen of the United States can obtain exemption from laws of United States by entering Indian Territory and becoming an Indian by adoption and thereby claim the privilege of trading without a license. In 16 Op. A. G. 403 (1879), it was stated that a trader at a military post in Indian country must be licensed and licenses cannot be issued by military authorities.

[22] The Act of July 26, 1866, sec. 4, 14 Stat. 255, 280, which required traders to give a bond to the United States in the sum of not less than $5,000 nor more than $10,000 was incorporated in sec. 2128, Revised Statutes, but omitted from the United States Code of 1926. Sec. 2128 was repealed by the Act of March 3, 1933, 47 Stat. 1428. The regulations require a bond in the sum of $10,000 with at least two approved sureties or a bond of a qualified surety company, 25 C. F. R. 276.10.

[23] 25 U. S. C. 264. The words "of the full blood" and the words "on any Indian reservation" were added to the Revised Statutes by the Act of July 31, 1882, 22 Stat. 179.

Sections 261 and 262 of title 25, United States Code, giving the Commissioner of Indian Affairs authority to regulate trade with Indians, and requiring any person desiring to trade with the Indians on any Indian reservation to do so under the regulations of the Commissioner, are general in scope and would include the Indians themselves. However, section 264 of title 25 excludes from the enforcement provisions Indians of the full blood. Section 264 is the only statute which provides a method of enforcement of the laws governing trade with the Indians. Since the laws and regulations are unenforceable against Indians of the full blood, such Indians cannot be said to be required to operate under the regulations. Congress has evidently left to the tribe the regulation of traders who are Indians, restricting the term "Indian" for this purpose to persons with full Indian blood. The tribe itself could require the full-blood Indian traders to abide by the Federal laws and regulations. (Memo. Sol. I. D., April 29, 1940.)

[24] See fn. 13, *supra.*

[25] R. S. §§ 2127-2138. The Act of July 31, 1882, 22 Stat. 179, amended R. S. § 2133, 25 U. S. C. 264, by excluding the Five Civilized Tribes from its application. It also made nonapplicable to these tribes its provision that unlicensed white clerks could not be hired by Indian traders. The forfeiture provision has been regarded by the Department of Justice as not permitting seizure for forfeiture of an automobile used by an unlicensed trader to transport merchandise. D. J. File No. 90-2-7-858, Memorandum by 0. J. R., July 13, 1939.

[26] Under the special regulations for the Navajo, Hopi, and Zuni Reservations, a 3-year term is allowed. See fn. 20.

[27] 25 C. F. R. 276.11–277.11.

[28] 25 U. S. C. 246, derived from Act of March 15, 1864, 13 Stat. 29, R. S. § 2140.

[29] *United States v. 196 Buffalo Robes,* 1 Mont. 489 (1872).

constitute consideration for a note.[30] A contract by a holder of a trading license to pay a third person a portion of the proceeds of the trade, in consideration of the third person actually running the business, was considered by the courts as spurious, a subterfuge, violating the spirit and intent of the trading statutes.[31] The court, however, approved an arrangement whereby a licensed trader formed a partnership and the nonlicensed member of the partnership secured a permit to live on the reservation, to sell to the Indians and to share in the profits.[32]

While the general policy is to encourage resident ownership of Indian trading posts, in some instances the lack of local capital necessitates absentee ownership. At the present time, as a matter of actual practice, a license may be held by a resident manager instead of by a nonresident owner.[33]

To insure integrity of conduct on the part of persons employed in the Indian Service and to protect the Indians, no license is issued to any person employed in Indian affairs by the United States.[34]

A license to trade is not required in Alaska. The Act of June 30, 1834,[35] wag not extended, *ex proprio vigore*, to that Territory upon its cession to the United States.[35]

The court, in *United States* v. *Seveloff*,[37] in 1872, decided that this new possession was not Indian country, as defined and limited by the Trade and Intercourse Act. After this decision, on March 3, 1873,[38] Congress extended to Alaska the provisions of sections 21 and 22 of this statute, relating principally to the interdiction of liquor traffic. The presumption seems clear that by singling out, mentioning, and extending two sections only, the intention of Congress was to withhold or exclude from the Territory all other sections of the act. Apparently Alaska was intended to be considered "Indian country," in connection with Indian trade, only to the extent of that specifically prohibited traffic.

By the regulations of the Department of the Interior, products sold to the Indians are required to be good and merchantable, and the prices must be fair and reasonable.[39] The President, whenever in his opinion public interest requires, is authorized to prohibit the introduction of goods, or any particular article, into the country of any tribe.

For many years the sale to the Indians of means of warfare has been restricted and regulated.[40] At the present time the Secretary of the Interior may adopt such rules as may be necessary to prohibit the sale of arms and ammunition in any district occupied by uncivilized or hostile Indians.[41] Arms and ammunition may not be sold to the Indians by traders except upon permission of a superintendent of an Indian agency who has clearly established that the weapons are for a lawful purpose.[42]

Congress has provided that no person other than an Indian may, within Indian country, purchase or receive of an Indian in the way of barter, trade, or pledge a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil of the kind commonly obtained by Indians in their intercourse with whites, or any article of clothing, except skins or furs.[43]

It is against the rules laid down by the Commissioner of Indian Affairs to sell tobacco, cigars, and cigarettes to minor Indians under 18 years of age.[44] Likewise, liquor traffic is suppressed.[45]

Sale of specified harmful drugs is illegal.[46] Gambling is prohibited in trading posts.[47] Trading on Sunday presents sufficient cause for revocation of a license.[48]

At the present time credit is given at the trader's risk.[49] Traders may not accept pawns or pledges of personal property by Indians to obtain credit or loans, and Indians may not be paid in store orders, in tokens, or in any other way than in money.[50]

To protect the Indians, traders are forbidden to buy trade for, or have in their possession any annuity or other goods which have been purchased or furnished by the Government for the use or welfare of the Indians.[51] The business of a trader must be conducted on premises specified in the license.[52] Tribal or individual lands used by traders must be leased in the usual manner.[53]

No trader will be allowed to sublet or rent buildings which he occupies without the approval of the Commissioner of Indian Affairs[54] and, where the tribe is organized, without the consent of the tribal council.

The personal property, including the stock in trade of a licensed trader, is ordinarily subject to state taxation, although the privilege of doing business with Indians would appear to be exempt from state taxation.[55] As an Indian trader is not an officer of the Government, and as his goods are his own private property, which he may sell indiscriminately to Indians or non-Indians, a state tax on the personal property of a licensed trader is not a tax on an agency of the Federal Government, or an interference with the regulation of commerce with the Indian tribes.[56]

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[30] *Hobbie* v. *Zaepffel*, 17 Neb. 536. 23 N. W. 514 (1885).

[31] *Gould* v. *Kendall*, 15 Neb. 549. 19 N. W. 483 (1884).

[32] *Dunn* v. Carter, 30 Kan. 294. 1 Pac. 66 (1883).

[33] Some traders' stores have licensed resident managers who are not the owners.

[34] 25 C. F. R. 276.5-277.4.

[35] 4 stat. 729.

[36] *Waters* v. *Campbell*, 29 Fed. Cas. No. 17264 (C. C. Ore. 1876); *Kie* v. *United States*, 27 Fed. 351 (C. C. Ore. 1886): In *re Sah Quah*, 31 Fed. 327 (D. C. Alaska 1886); 16 Op. A. G. 141 (1878).

[37] 27 Fed. Cas. No. 16252 (D. C. Ore. 1872).

[38] 17 stat. 530.

[39] 25 C. F. R. 276.22.

[40] Act of August 5. 1876. 19 Stat. 216. R. S. § 2136. 25 U. S. C. 266.

[41] 25 U. S. C. 266; R. S. §§ 467, 2136.

[42] 25 C. F. R. 276.8.

[43] 25 U. S. C. 265, R. S. § 2135. For other restrictions on trade see chapter 5, sec. 3.

[44] 25 C. F. R. 276.17.

[45] See Chapter 17, Indian Liquor Laws.

[46] 25 C. F. R. 276.19.

[47] Ibid., 276.21.

[48] Ibid., 276.20.

[49] In *Tinker* v. *Midland Valley Co.*, 231 U. S. 681 (1914). it was held that a provision in the Indian Appropriation Act of June 21. 1906. 34 Stat. 325. 366. made It unlawful for traders on the Osage Indian Reservation to give credit to any individual Indian head of a family for any amount exceeding 75 per centum of his next quarterly allowance., Treaties with various tribes bear ample evidence of the grasp traders acquired by issuance of credit to their customers. A large portion of the money from the sale of ceded land passed directly to the trader for debts, and these debts in several instances necessitated cessions of land. See Chapter 8, sec. 7C.

[50] 25 C. F R. 276.24.

[51] *Ibid.*, 276.16.

[52] *Ibid.*, 276.14.

[53] See Chapter 5. secs. 9B and 11E; Chapter 11, sec. 5: and Chapter 15. sec. 19.

[54] 25 C. F. R. 276.15.

[55] See Chapter 13. secs. 4 and 5.

[56] *Thomas* v *Gay*, 169 U. S. 264 (1898). This case involved a tax on cattle owned by a lessee of Indian land. The court stated: "• • • it is not perceived that local taxation, by a State or Territory, of property of others than Indians would be an Interference with Congressional power." Accord: *Wagoner* v. *Evans*, 170 U. S. 588 (1898); *Catholic Missions* v. *Missoula County*, 200 U. S. 118 (1906); *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (1930). In the *Surplus Trading Co.* case the opinion states: "Such reservations are part of the State within which they lie and her laws. civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted appli-

In view of the fact that Congress has conferred upon the Commissioner of Indian Affairs exclusive jurisdiction with respect to Indian traders[87] and since tribal constitutions generally provide that ordinances dealing with traders shall be subject to departmental review, tribal tax levy may not be made upon licensed traders unless such tax is authorized by the Commissioner of Indian Affairs.[88]

cation to the Indian wards. Private property within such a reservation, if not belonging to such Indians, is subject to taxation under the laws of the State" (at 651). Some state cases in accord are: *Moore* v. *Beason*, 51 Pac. 875 (1898); *Coster* v. *McMillan*, 56 Pac. 965 (1899); *Noble* v. *Ambrett*, 71 Pac. 879 (1903). Contra, *Foster* v. *Board*, 7 Minn. 140 (1862).

[87] 25 U. S. C. 261–262, derived from Act of August 15, 1876, 19 Stat. 200, and the Act of March 3, 1903 (Osage Reservation), 31 Stat. 1058, 1066, as amended by Act of March 3, 1903, 32 Stat. 982, 1009.

[88] 55 I. D. 14, 46 (1934); 1 Op. A. G. 645 (1824). As the Treaty of November 28, 1785, with the Cherokees, 7 Stat. 18, and the Treaty of July 2, 1791, with the Cherokee Nation, 7 Stat. 39, provided that the United States have the sole and exclusive right of regulating trade with the Indians, the Attorney General herein expressed the opinion that the Cherokees had no right to impose a tribal tax on traders. 17 Op. A. G. 134 (1881) and 18 Op. A. G. 34 (1884) upheld the validity of permit laws of Choctaws and Chickasaws imposing a fee upon licensed traders under the provision of the treaties of June 22, 1855, 11 Stat. 611 and April 28, 1866, 14 Stat. 769 between the Choctaw and Chickasaw and the United States. Also see Chapter 23, sec. 3.

*Cf. Orabtree* v. *Madden*, 54 Fed. 426 (C. C. A. 8, 1893). The opinion in this case held a tax imposed by the Creek tribe upon licensed traders could not be enforced by the United States courts but recognized the power of the Department of the Interior to remove from Indian Territory any licensed trader who failed to pay taxes as lawfully levied by Indian tribes. *Morris* v. *Hitchcock*, 194 U. S. 384 (1904). On tribal power to tax, see Chapter 7, sec. 7.