

[Federal Register: July 12, 2002 (Volume 67, Number 134)]

[Rules and **Regulations**]

[Page 46109-46112]

From the Federal Register Online via GPO Access [wais.access.gpo.gov]

[DOCID:fr12jy02-8]

=====

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 580

RIN 3141-AA04

Environment, Public Health and Safety

AGENCY: **National Indian Gaming Commission.**

ACTION: Interpretive rule.

SUMMARY: The **Indian Gaming** Regulatory Act established the **National Indian Gaming Commission** (NIGC or **Commission**) as an independent federal regulatory agency responsible for federal oversight of **Indian gaming**. This interpretive rule explains the **Commission's** understanding of its oversight authority in the area of environment, public health and safety.

EFFECTIVE DATE: This rule is effective August 12, 2002.

FOR FURTHER INFORMATION CONTACT: Christine Nagle at 202-632-7003; fax 202-632-7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On October 17, 1988, Congress enacted the **Indian Gaming** Regulatory Act, 25 U.S.C. 2701-21 (IGRA or Act), creating the **National Indian Gaming Commission** (NIGC or **Commission**) and developing a comprehensive framework for the regulation of **gaming** on **Indian** lands to shield **Indian** tribes from organized crime and other corrupting influences; ensure that **Indian** tribes are the primary beneficiaries of **gaming** revenues;

and assure that **gaming** is conducted fairly and honestly by both operators and players. To effect these goals, the **Commission** was granted, among other things, oversight and enforcement authority, including the authority to monitor tribal compliance with the Act, the **Commission's regulations**, and tribal **gaming** ordinances, 25 U.S.C. 2713.

A tribal government, as a condition precedent to the lawful operation of **gaming** activities on **Indian** lands, must adopt an ordinance governing **gaming** activities on its **Indian** lands, 25 U.S.C. 2710. The Act specifies a number of mandatory provisions to be contained in each tribal **gaming** ordinance and subjects such ordinances to agency review and the Chairman's approval. Approval by the Chairman is predicated on the inclusion of each of the specified mandatory provisions in the tribal **gaming** ordinance. Among these is a requirement that the ordinance must contain a provision ensuring that ``the construction and maintenance of the **gaming** operation, and the operation of that **gaming** is conducted in a manner that adequately protects the environment and the public health and safety,' ' 25 U.S.C. 2710 (b)(2)(E).

The Act further extends authority to the **Commission** to impose sanctions, including civil fines and closure orders, if the **Commission** finds that **gaming** on **Indian** lands is being conducted in violation of the provisions contained in

[[Page 46110]]

the authorizing tribal **gaming** ordinance, 25 U.S.C. 2713. Thus, it is clear that Congress intended the **Commission** to exercise at least some degree of general oversight authority with respect to whether or not a **gaming** facility is being operated in compliance with the Congressionally mandated provisions in tribal **gaming** ordinances. Otherwise, Congress would not have extended the **Commission** enforcement authority in relation to compliance matters arising under ``tribal'' **gaming** ordinances.

Since 1993, when the **Commission** became operational, the Chairman has required each tribal **gaming** ordinance to include an express statement that **gaming** facilities under the control of the tribal government submitting the ordinance would be constructed, operated and maintained in a manner that adequately protects the environment, public health and safety. In 1999, the **Commission** undertook the development of **regulations** governing the method of oversight it will use in determining tribal compliance with this provision of IGRA.

The **Commission** recognizes that tribal governments, as an incident of inherent tribal sovereignty, have broad autonomy and authority over internal tribal affairs, including, in particular, matters pertaining to tribal lands and the health and welfare of the people and the

community. Moreover, the **Commission** is aware that the principle of tribal self-determination is a cornerstone of federal **Indian** law and policy and has remained so for more than a quarter century. Accordingly, federal or other incursions upon tribal authority in such matters receive careful scrutiny by the courts. Cognizant of these facts, and bound by such federal laws and policies, the **Commission** approached this rulemaking effort with no small degree of caution and concern. Given the primacy of tribal regulation over the environment, public health and safety as well as federal policies regarding tribal consultation in matters directly affecting tribes, the **Commission** established a tribal advisory committee to assist in the development of an appropriate process through which the **Commission** could carry out its oversight responsibility under IGRA without improperly encroaching upon the authority of tribal government.

Tribal Advisory Committee

In November 1999, a Tribal-**Commission** Advisory Committee was formed to consult on the project and develop recommendations to the **Commission**. The Advisory Committee, was comprised of representatives of tribal governments and the **Commission**. It began its work in November 1999, producing a recommendation for the full **Commission's** consideration in May 2000. The Advisory Committee met four times to develop a regulatory proposal; an additional meeting was held after the close of the public comment period to discuss the comments that had been submitted. Upon consideration of the comments submitted, and discussions with the Tribal-**Commission** Advisory Committee, the **Commission** decided to revise and republish the proposal for additional comment.

The Advisory Committee through a consensus process produced a recommended rule for submission to the **Commission**. The recommendation was approved by the **Commission** for publication in the Federal Register as a **proposed** rule. Essentially, the regulation established a process for oversight based on tribal submissions of ``Environment, Public Health & Safety Plans'' (Plan) for review by the **Commission**. The Plans would then form the basis for the **Commission's** oversight activities. Each Plan was to contain a narrative specific to five distinct areas of concern: (1) Emergency preparedness; (2) food & water; (3) construction & maintenance; (4) hazardous and other materials; and (5) sanitation.

The approach taken by the Committee reflects an effort to balance the need for a uniform system of oversight with the need for flexibility given the widely varying circumstances and geographic dispersion of **Indian gaming** operations. The proposal also reflects an effort to appropriately narrow and define the **Commission's** role given

the fact that the **Commission** lacks the technical expertise and the capacity to review and evaluate tribal standards or programs or to itself establish and promulgate specific technical standards appropriate to the industry. It was the view of the Committee that Congress intended a narrow role for the **Commission**, particularly since the Act contains no other provisions pertinent to this issue, nor does the legislative history suggest that the **Commission** has the responsibility to develop expansive programs relative to the environment, public health and safety. Accordingly, the Committee concluded that the **Commission's** role is properly confined to ensuring that tribal standards are in place in each of the five key areas identified by the Committee and ensure that such standards are enforced through an on-going process of monitoring and oversight by qualified personnel.

The purpose of the Plan was to provide the **Commission** with a tribe-specific description of the systems in place in order that the **Commission** would have a means of understanding the mechanisms specific to each tribe and tailor its oversight activities accordingly. Since tribal law and governmental structures may vary substantially as well as climate and geography, it was felt that the only way the **Commission** could fairly and appropriately conduct oversight is to ensure that it is based on a sound understanding of the circumstances, systems, and standards applicable to each **gaming** tribe.

Initial Comment Period

At the close of the initial comment period the **Commission** had received 127 comments, all suggesting substantial changes to the **proposed** rule and many challenging the **Commission's** authority to promulgate the rule in the first instance. The comments reflected a widespread view that the **proposed** rule was both burdensome and intrusive, and questioned the need for it. State and local governments requested that they be given a role in deciding what was to be included in tribal Plans.

The general thrust of the comments led the **Commission** to conclude that in order to reflect the general purpose and intent of the rule, revision was warranted. The **Commission** also perceived the need for greater clarity with regard to its view that regulatory primacy and primary responsibility for ensuring compliance with the environment, public health and safety provision rests with tribal government. The Committee was re-convened to assist the **Commission** to revise the proposal in such a way to make clear that the purpose of the rule is to establish an appropriate process through which the **Commission** may carry out its discrete and limited oversight responsibility.

Second Comment Period

Upon reviewing the comments, the Advisory Committee recommended a number of revisions to the **proposed** rule, but left largely intact the provisions utilizing the Plan process. The revised proposal was published in the fall of 2000, allowing for a thirty-day comment period, which was later extended through December 29, 2001. In response, the **Commission** again received well over a hundred comments, largely raising the same objections, with the same polarization between tribal and state governments. A number of comments, however, further developed some of the issues that had been referenced in the first round of

[[Page 46111]]

comments, drawing the **Commission's** interest.

The **Commission's** Oversight Role

The overwhelming majority of tribal commenters reasserted the view that the proposal was unduly burdensome and constituted an unwarranted intrusion into the governmental prerogatives of tribes so as to exceed the statutory authority delegated by the Congress in IGRA. Many commenters asserted that Congress could not have intended an extensive role for the **Commission** given the very limited reference to the environment, public health & safety within the Act. Moreover, the commenters pointed out, the **Commission** lacks appropriate expertise to properly evaluate tribal environment, public health and safety standards and practices as well as the capacity to do so. These Commenters also asserted that matters pertaining to the environment, public health and safety are more properly within the purview of other governmental agencies, both tribal and federal. It was also asserted that there was no explicit Congressional authority to impose additional enforceable burdens on tribal governments and that in doing so the **Commission** had run afoul of federal policies restricting the imposition of unfunded mandates in agency rulemaking.

The foregoing arguments are not without a degree of merit. In fact, these points were at the forefront of the Advisory Committee's concerns in developing its recommendation and by the **Commission** in its deliberations as well. While the **Commission** does not agree that it is without authority or responsibility altogether, it does accept Congress intended the **Commission** to play a limited, rather than expansive role. IGRA explicitly accords the **Commission** a role in ensuring compliance

with the environment, public health and safety provision of IGRA. The question, therefore, is not whether the **Commission** has a responsibility in this regard, but rather the nature and extent of its responsibility.

The **Commission** does not agree that its responsibility is merely to ensure that each tribal **gaming** ordinance contains a rote recitation of the language set forth in 25 U.S.C. 2710 (b)(2)(E). Such interpretation would render this provision of the Act superfluous and constitute a breach of an agency's a fundamental duty to give full effect to the plain language of the Act in determining Congressional intent related thereto. Moreover, because IGRA authorizes the **Commission** to enforce compliance with tribal **gaming** ordinances and to sanction incidents of non-compliance through civil fine assessment and orders of temporary closure, it is impossible to conclude that Congress intended the **Commission's** role to be constrained to the degree suggested in some comments.

At the same time, the **Commission** recognizes that as a fundamental principle of federal law and policy, tribal governments have the right and authority to make their own choices in exercising their governmental powers. Tribal governmental powers are inherent and not derived from the federal government. As such, when a federal agency seeks to exert itself into an arena routinely controlled by tribal authority, the relevant inquiry is whether a statute, treaty or judicial decision authorizes federal activity in the particular area. Federal statutes affecting **Indian** affairs require broad construction when the rights of Indians are established or preserved and narrow construction when the rights of Indians are limited or abrogated.

In balancing the **Commission's** responsibility against the inherent rights of tribal governments the **Commission** has endeavored to find an objective method for meeting its oversight responsibility in a non-intrusive, non-burdensome manner respectful of tribal primacy in the environmental, public health and safety arenas. Having now had the benefit of the views and thoughts contained in nearly 300 comments, as well as opportunity for in-depth study of the issues and related federal law and policy, the **Commission** is of the view that the Plan process is more burdensome and intrusive than originally projected. It is further concerned that the estimation of the costs associated with the preparation of a Plan may have been underestimated. In considering the burden and financial impact the **proposed** rule may have had on tribal governments, the **Commission** recognizes that existing federal policy discourages the imposition of unfunded mandates on tribal, state, and local governments.

In the final analysis, the **Commission** has concluded that a simpler, less programmatic approach is warranted. This final rule represents the

Commission's interpretation of its responsibility under 25 U.S.C. 2710(b)(2)(E) and provides guidance to tribal governments as to the oversight standard the **Commission** will apply in determining tribal compliance with this provision of the Act.

What Is the **Commission's** Responsibility Under Section 2710 (b)(2)(E) in the Area of Environment, Public Health and Safety?

The **Commission** interprets section 2710 (b)(2)(E) of IGRA to mean that the **Commission** has a limited and discrete responsibility to provide regulatory oversight in relation to tribal compliance with this provision. The **Commission** discerns nothing within the Act or the legislative history to suggest that Congress intended a more extensive role for the **Commission** or manifesting any intent to relieve tribal government of any measure of authority or regulatory primacy over issues concerning the environment, public health and safety in any area within the authority of the tribe or to shift, alter, or otherwise effect any transfer of responsibility from tribal government to the **National Indian Gaming Commission**.

What Is the **Commission's** Interpretation With Regard to the Duties and Responsibilities of Tribal Governments Under Section 2710(b)(2)(E) of the Act?

It is the **Commission's** view that section 2710 (b)(2)(E) requires tribal governments electing to conduct **gaming** on tribal lands to apply, adopt or issue standards designed to ensure that **gaming** operations on **Indian** lands are constructed, operated and maintained in a manner that adequately protects the environment, public health and safety, and, furthermore, to enforce compliance with such standards through an ongoing system of monitoring, conducted by qualified personnel. At a minimum, such standards must address: (1) Emergency preparedness; (2) food & water; (3) construction & maintenance; (4) hazardous and other materials; and (5) sanitation.

How Would a Tribal Government Satisfactorily Assert Its Compliance With Section 2710 (b)(2)(E) of IGRA?

The **Commission** recognizes that tribal governments vary dramatically in terms of size, structure, and organization. Accordingly, compliance may be effected in any number of ways. For example, departments or agencies within tribal government may issue rules or procedures, conduct inspections, and bring enforcement actions. Another tribal government may enter into intergovernmental compacts with state, local or federal government to carry out such activities while others may contract privately for such functions. In the **Commission's** view, the particular manner in which compliance with tribal environment,

[[Page 46112]]

public health and safety standards is enforced is not so important. The key objective is to confirm that standards and enforcement systems are in place.

What Action May the **Commission** Take if the **Commission** Determines That a **Gaming** Operation Is Not Subject to Environmental, Public Health and/or Safety Standards or That Such Standards Are Not Routinely Enforced?

If the **Commission** determines that a tribal government has failed to apply, adopt, issue or enforce environmental, public health and/or safety standards covering **gaming** operations on **Indian** lands, the **Commission** will first notify the governing body of the tribe of its concern. If the absence of standards or failure to enforce does not present imminent jeopardy to the environment, public health or safety, the **Commission** will refer the matter to the appropriate tribal regulatory authority for appropriate action. The **Commission** will proceed to enforcement only where no corrective action has been undertaken within a reasonable time and such inaction results in a condition of imminent jeopardy to the environment, public health and safety.

What is Imminent Jeopardy?

A finding of imminent jeopardy represents the standard the **Commission** will apply in determining that a condition poses a threat of such severity to the environment or the public health or safety as to warrant the **Commission**'s intervention. For purposes of this regulation, imminent jeopardy exists where conditions are present that pose a real and immediate threat: (1) To the environment, which, if uncorrected, would result in actual harm to life or destruction of property; or (2) to human health and well being, which, if uncorrected, could result in serious illness or death.

Signed this 3rd day of July, 2002.

Montie R. Deer,
Chairman.

Elizabeth L. Homer,
Vice-Chair.

Teresa E. Poust,
Commissioner.

[FR Doc. 02-17151 Filed 7-11-02; 8:45 am]

BILLING CODE 7565-01-P