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[4310-02]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 291

RIN: 1076-AD87

Class III Gaming Procedures

AGENCY: Bureau of Indian Affairs

ACTION: Proposed Rule

SUMMARY: The Department has concluded that it has the authority to prescribe procedures permitting Class III gaming when a State interposes its immunity from suit by an Indian Tribe. The proposed rule announces the Department's determination that the Secretary may promulgate Class III gaming procedures under certain specified circumstances. It also sets forth the process and standards pursuant to which any procedures would be adopted.

DATES: Written comments must be submitted within 90 days after publication in the Federal Register to be considered.

ADDRESSES: Mail comments to Paula L. Hart, Indian Gaming Management Staff, Bureau of Indian Affairs (BIA), Department of the Interior, MS 2070-MIB, 1849 C Street NW, Washington, DC 20240. Comments may be hand-delivered to the same address from 9:00 a.m. to 4:00 p.m. Monday through Friday or sent by facsimile to (202) 273-3153. Comments will be made available for public inspection at this address from 9:00 a.m. to 4:00 p.m. Monday through Friday beginning approximately two weeks after publication of the proposed rule.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Indian Gaming Management Staff, Bureau of Indian Affairs, Department of the Interior, MS 2070-MIB, 1849 C Street NW, Washington, DC 20240, Telephone (202) 219-4066.

SUPPLEMENTARY INFORMATION:

Introduction

Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, to provide a statutory basis for the operation and regulation of Indian gaming and to protect Indian gaming as a means of generating revenue for tribal governments. Prior to the enactment of IGRA, states generally were precluded from any regulation of gaming on Indian reservations. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). IGRA, by offering States an opportunity to participate with Indian Tribes in developing regulations for Indian gaming, "extends to States a power withheld from them by the Constitution." Seminole Tribe of Florida v. State of Florida, 116 S. Ct. 1114, 1124 (1996).

Since IGRA's passage in 1988, more than 150 compacts in more than 20 States have been successfully negotiated by Tribes and States, and approved by the Secretary. Today, Indian gaming generates significant revenue for Indian Tribes. As required by IGRA, gaming revenues are being devoted primarily to providing essential government services such as roads, schools, and hospitals, as well as economic development.

IGRA divides Indian gaming into three categories. This proposed rule addresses only the conduct of Class III gaming, which primarily includes slot machines, casino games, banking card games, dog racing, horse racing, and lotteries. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4. Under IGRA, the conduct of "Class III gaming activities" is lawful on Indian lands only if such activities (1) are authorized by an ordinance adopted by the governing body of the Tribe and approved by the

Chairman of the National Indian Gaming Commission (NIGC), (2) are located in a State that permits such gaming for any purpose by any person, organization, or entity, and (3) are conducted in conformance with a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(B). The proposed regulations which follow relate primarily to this third requirement, i.e., the Tribal-State compact.

Under IGRA, a Tribe interested in operating Class III gaming initiates the compacting process by requesting the State to enter into negotiations. 25 U.S.C. § 2710(d)(3)(A). Upon receiving such a request, the State is obliged "to negotiate with the Indian Tribe in good faith to enter into such a compact." Id. If the State fails to negotiate in good faith, the Tribe may initiate an action against the State in Federal district court. 25 U.S.C. § 2710(d)(7)(A)(I). If the court finds that the State has failed to negotiate in good faith, it must order the State and the Tribe to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii). If the State and Tribe fail to conclude a compact within that period, each side must submit their last best offer to a court-appointed mediator, who selects one of the proposals. 25 U.S.C. § 2710(d)(7)(B)(iv). If the State consents to that proposal, it is treated as a Tribal-State compact. 25 U.S.C. § 2710(d)(7)(B)(vi). If the State does not consent, the Secretary of the Interior shall prescribe procedures (1) which are consistent with the proposed compact selected by the mediator, the provisions of IGRA, and the relevant provisions of State laws, and (2) under which Class III gaming may be conducted on the Indian lands over which the Indian Tribe has jurisdiction. 25 U.S.C. § 2710(d)(7)(B)(vii).

In Seminole Tribe of Florida v. Florida, the Supreme Court held that a State may assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by a Tribe alleging that the State did not negotiate in good faith. After the Seminole decision, some States have signaled their intention to assert immunity to suit in Federal court. Claiming immunity will, if no further action is taken, create an effective State veto over IGRA's dispute resolution system and therefore will stalem

compacting process. The proposed rulemaking contemplates that the Secretary would prescribe Class III gaming procedures to end the stalemate.

Secretarial Authority to Prescribe Procedures

On May 10, 1996, the BIA published an "Advance Notice of Proposed Rulemaking" (hereafter, ANPR) in response to the United States Supreme Court's decision in Seminole Tribe of Florida v. State of Florida, 116 S. Ct. 1114 (1996). 61 Fed. Reg. 21394 (May 10, 1996). In that ANPR, the Department posed, among others, the question of "[w]hether and under what circumstances, the Secretary of the Interior is empowered to prescribe 'procedures' for the conduct of Class III gaming when a State interposes an Eleventh Amendment defense to an action pursuant to 25 U.S.C. § 2710(d)(7)(B)." The Secretary of the Interior, in consultation with the Solicitor, has determined that he possesses legal authority to promulgate procedures setting out the terms under which Class III gaming may take place when a State asserts its immunity from suit.

The Secretary's authority arises from the statutory delegation of powers contained in 25 U.S.C. § 2710 (d)(7)(B)(vii) of IGRA and 25 U.S.C. §§ 2 and 9. As the Eleventh Circuit Court of Appeals explained, in the case where the Supreme Court ultimately found the States could assert Eleventh amendment immunity:

> We are left with the question as to what procedure is left for an Indian Tribe faced with a State that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the Tribe first requests negotiations with the State, the Tribe may file suit in district court. If the State pleads an Eleventh Amendment defense, the suit is dismissed, and the Tribe pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the Tribe's failure to negotiate a compact with the State. The Secretary may then prescribe regulations governing Class III gaming on the Tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016, 1029 (11th Cir. 1994) (dictum), aff'd on other grounds, 116 S.Ct. 1114 (1996).

Although Congress likely did not foresee the States' refusal to participate in the court-ordered mediation process it plainly authorized the Secretary to permit Class III gaming in the event that the court-supervised process failed to produce a joint compact. The power of an agency to administer a congressional mandate like this one is not restricted to circumstances explicitly described by Congress; the agency's power also extends to circumstances that Congress, for a variety of reasons, may not have anticipated or articulated in the statute. When Congress has not "directly spoken to the precise question at issue," courts "must sustain the Secretary's approach so long as it is based on a reasonable construction of the statute." Auer v. Robbins, 117 S.Ct. 905, 909 (1997), quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); Morton v. Ruiz, 415 U.S. 199 (1974); Kenneth Culp Davis & Richard J. Pierce Jr., Administrative Law Treatise § 3.3 (3d ed. 1994). As explained in the proposed rule, the Secretary will provide procedures only when a State has successfully asserted its immunity from an Indian Tribe's good faith lawsuit. Moreover, the proposed rule generally mirrors the mediation scheme provided in IGRA to the maximum practicable extent.

Along with the specific authority under section 2701(d)(7)(B)(vii), Congress has delegated to the Executive under 25 U.S.C. §§ 2 and 9 broad authority to issue regulations necessary to manage Indian affairs and carry into effect legislation relating to such affairs.[1] The courts on many occasions have upheld the exercise of this authority. In Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 691 (1979), for example, the Court noted with approval

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[1] "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations." 25 U.S.C. § 2. "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." 25 U.S.C. § 9; see also 43 U.S.C. § 1457 (charging Secretary of Interior with administration of "public business" relating to Indians).

regulations protective of off-reservation Indian fishing rights. Although there was no explicit delegation of authority to adopt fishing regulations in the Treaty reserving the right, the Supreme Court recognized that the Secretary's "general Indian powers" embodied in 25 U.S.C. §§ 2 and 9 gave him the authority to adopt regulations over Indian affairs. See also United States v. Eberhardt, 789 F.2d 1354, 1360-61 (9th Cir. 1986); Parravano v. Masten, 70 F.3d 539 (9th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 2546 (1996); United States v. Michigan, 623 F.2d 448, 450 (6th Cir. 1980); James v. U.S. Dep't. of Health and Human Services, 824 F.2d 1132, 1137 (D.C. Cir. 1987). Such cases fully support the exercise of Secretarial authority to promulgate regulations governing and protecting Indian rights, such as the right to engage in gaming activities, that are rooted in Federal law.

In comments on the ANPR, some States have suggested that the Supreme Court's decision in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), may preclude the Secretary's exercise of rule-making authority for gaming procedures. See Comments of Florida, et al., supra, at 9. In Organized Village of Kake, the Secretary purported to authorize off-reservation fisheries in Alaska pursuant to his general authority over Indian affairs and the White Act, 48 U.S.C. §§ 221-228. However, no treaty, executive order, statute, or Federal common law established tribal fishing rights. Accordingly, the Court struck down the Secretary's regulations authorizing the use of fish traps in violation of State law because the Tribe had no "fishing rights derived from Federal laws." Id. at 70. See McClanahan v. Arizona State Tax Com'n, 411 U.S. 164, 176 n.15 (1973) (distinguishing Organized Village of Kake as limited to situations involving non-reservation Indians without Federally-protected rights); see also Clinton, et al., American Indian Law at 593 (3d ed. 1991).

Here, in contrast, the Tribes' Federal common law right to engage in gaming activities free of most State regulation on Indian land was recognized in California v. Cabazon Band of M[illegible]

Indians, 480 U.S. 202 (1987) and pre-existed adoption of IGRA. Because tribal gaming rights are rooted in Federal law, 25 U.S.C. §§ 2 and 9 give the Secretary the authority to adopt regulations to carry into effect those rights.

The Ninth Circuit, in a case vacated after the Supreme Court's decision in Seminole, expressed concern that the Secretary would undermine congressional intent if he imposed regulations for Class III gaming when a State asserted immunity. Spokane Tribe of Indians v. Washington, 28 F.3d. 991, 997 (9th Cir. 1994) (dictum), vacated and remanded, __ U.S. __, 116 S. Ct. 1410 (1996). The court relied on the provision in IGRA that the Secretary act only after a State is provided the opportunity to participate in negotiations and mediation.[2]

In our view, Congress had at least three purposes in enacting IGRA: to recognize and give a statutory structure for gaming as a means of promoting tribal economic development, self sufficiency and strong tribal government; to provide a basis for regulating Indian gaming to ensure that it is conducted fairly and that the Indian Tribe is the primary beneficiary of the activity; and finally, to afford an opportunity for States to participate in the establishment and conduct of Indian gaming through Tribal-State compacts, but also to make a Federal backstop available should a consensual Tribal-State compact not be reached. If the Secretary were unable to issue procedures to permit gaming when a State refused to submit to a Federal court the issue of whether it was bargaining in good faith, that State would effectively be awarded a veto over all Class III Indian gaming within its borders. Congress did not contemplate or authorize such a State veto in IGRA.

The proposed rules are faithful to Congress' intent that States be able to participate in the

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[2]The Supreme Court in Seminole did not resolve the Ninth and Eleventh Circuits' conflicting dicta, stating, "[w]e do not consider, and express no opinion upon, that portion of the position of the decision below that provides a substitute remedy for a Tribe bringing suit. See 11 F.3d [illegible] (CA 11 [illegible] case below)." 116 S. Ct. at 1133 n.18

establishment and regulation of Class III gaming, through negotiation and mediation, and that Indian gaming will be protected from the influence of organized crime. Thus, contrary to the concern expressed by the Ninth Circuit, the approach of the proposed regulations is not to undermine congressional intent; instead, the regulations provide the tools necessary to fulfill congressional intent in the wake of Seminole.[3]

Faced with the "problem of defining the bounds of its regulatory authority, an agency may appropriately look to the . . . underlying policies of its statutory grants of authority." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). In this case, IGRA's underlying policies strongly support the issuance of the proposed rule. In addition, it is a well-settled principle of Indian law that Indian affairs statutes be construed where possible to benefit Tribes, not in a way that results in the backhanded deprivation of tribal rights. Bryan v. Itasca County, 426 U.S. 373, 379 (1976); C. Wilkinson, American Indians, Time, and the Law 46-52 (1987). For these reasons, the Secretary concludes that he has the authority to prescribe the following rule.

The Department invites comment on the legal analysis set forth above and in the other sections of this document.

Summary of the Proposed Rule

The proposed rule tracks IGRA's negotiation and mediation process, adjusted only to the extent necessary to reflect the unavailability of tribal access to Federal court where a State refuses to waive sovereign immunity. The proposed rule applies only where a Tribe asserts that a State is

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[3]Twenty-two States filed joint comments on the ANPR indicating their "view that the Court in Seminole did not invalidate any portion of IGRA, but that it left the Act intact. The decision merely revitalized a jurisdictional defense of the States. If a State consents to suit in Federal court, then the complete remedial scheme envisioned by Congress can be played out." Comments of Florida [illegible] at 8 (June 28, 1996). We agree that no part of the statute need be invalidated, or "severed" [illegible] statute. We note that IGRA does, however, contain a severability provision, 25 U.S.C. § 2721; generally Alaska Airlines v. Brock, 480 U.S. 678, 686 (1987).

not negotiating in good faith, files suit against the State in Federal court in accordance with IGRA, but cannot proceed in Federal court because the State refuses to waive its sovereign immunity from suit. In cases in which a State chooses not to assert a sovereign immunity defense, these proposed rules would not apply. Instead, the negotiation and mediation process set forth in Section 2710(d)(7) of IGRA would continue under the supervision of the court.

In those cases in which a State interposes a sovereign immunity defense to a tribal lawsuit in Federal court, the proposed regulations establish a process for obtaining State participation in the compacting process, prior to the Secretary's identification of procedures. It is important to emphasize that, under the proposed rules, the Secretary will not adopt procedures in any specific situation unless he first determines that the State has failed to bargain in good faith. The Department expects that, in most cases, this will require addressing the applicable scope of gaming under State law and IGRA. Scope of gaming is discussed further below.

The steps set forth in the proposed rule include:

1. Following dismissal on grounds of sovereign immunity of a Tribe's suit brought pursuant to 25 U.S.C. § 2710(d)(7) against a State, the Tribe would have the opportunity to submit a request to the Department to establish gaming procedures. The procedures submitted by the Tribe would be required to address all of the issues identified in the proposed rule, including the scope of the gaming activities being requested by the Tribe; the Tribe's position regarding whether the State has negotiated with the Tribe in good faith within the meaning of IGRA; and detailed mechanisms for regulation of the gaming, including assurances that games will be conducted fairly and that the financial integrity of the entire operation will be safeguarded. Because the good faith bargaining issue often turns on the question of the appropriate scope of gaming, the Tribe will be asked to provide a legal analysis supporting the proposed scope of gaming in view of State prohibitions and other policies on specific types of gaming.

2. The Department would notify the Tribe within 15 days that it has received the proposal and whether it is complete. Within 30 days the Department will notify the Tribe whether it is eligible for procedures. The Department will not make a determination of the "good faith" issue at this point.

3. Following issuance of a notice of completeness and eligibility, the Department will notify the State of the Tribe's request for the issuance of procedures, and solicit the State's comments on the Tribe's proposed procedures, including any comments on the proposed scope of gaming. The State also will be asked to comment on the Tribe's statements regarding whether the State

negotiated in good faith within the meaning of IGRA, particularly on the scope of gaming issue. The State will also be invited to submit alternative proposed procedures. The State will have 60 days to respond.

4. Based on its review of the submissions of the Tribe and the State, the Department shall make a determination whether the State is negotiating in good faith with the Tribe. If the Department determines that the State is not negotiating in good faith, and the State has not submitted an alternative proposal, the Department will advise the State and Indian Tribe of: (a) its approval of the Tribe's proposal; (b) its rejection of the Tribe's proposal because of its failure to meet the substantive standards in the regulation, § 291.8; or (c) its convening of an informal conference with the State and Tribe within 30 days for the purpose of resolving any areas of disagreement.

5. Alternatively, if the State submits objections to the Indian Tribe's proposal and offers alternative proposed procedures, the Tribe must file objections to the State's proposal within 60 days. If the Tribe does not submit objections to the proposed procedures, the Secretary will adopt the State's proposed procedures unless they do not meet the substantive standards in the regulations, § 291.8.

6. If the Indian Tribe objects to the State's proposed procedures, the Secretary will appoint a mediator who will receive "last best offers" from the State and Tribe. The mediator must then submit to the Secretary the proposed procedures that best comport with applicable Federal and State law. Within 60 days of receipt of the mediator's recommendation, the Secretary must notify the State and Tribe of his decision to approve or disapprove the procedures submitted by the mediator, or prescribe such procedures as he determines appropriate that are consistent with State law and the provisions of IGRA.

The Johnson Act and IGRA's Criminal Provision

The Secretary has also considered the application of criminal prohibitions found in IGRA and the Johnson Act and has concluded that those prohibitions would not apply upon the adoption of "procedures" pursuant to these proposed regulations. The Johnson Act and section 23 of IGRA make most Class III gaming in Indian country illegal unless conducted pursuant to an approved compact that is "in effect."[4] In comments on the ANPR, some States argue that these criminal

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[4]The Johnson Act makes it "unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . within Indian country as defined in 1151 of Title 18[.]" 15 U.S.C. § 1175. It does not apply when there is a Tribal-State compact "in effect." 25 U.S.C. § 2710(d)(6). Section 23 of IGRA provides that

> (a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited

statutes are applicable unless there is a compact that: (1) has been voluntarily entered into by a State and an Indian Tribe, 25 U.S.C. § 2710(d)(8)(A); and (2) is "in effect" within the meaning of IGRA by virtue of having been approved by the Secretary and published in the FEDERAL REGISTER. 25 U.S.C. § 2710(d)(3)(B). See Comments of Arizona at 18-20; Comments of Florida at 10.

That reading of IGRA is inconsistent with the statute when read as a whole, and must therefore be rejected. The Supreme Court has long recognized that: "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989); see also King v. St. Vincent's Hospital, 502 U.S. 215, 221 n.10 (1991)("in construing statute [sic] court should adopt sense of words which best harmonizes with context and promotes policy and objectives of legislature," paraphrasing United States v. Hartwell, 73 U.S. (6 Wall.) 385, 398 (1868)). Most importantly, statutes must be read to give effect to every provision. Rake v. Wade, 508 U.S. 464, 471 (1994).

The States' construction would render the section of IGRA authorizing the Secretary to establish "procedures" for Class III gaming meaningless, because thus woodenly read, no compact can be "in effect" absent a State's agreement to it. See 25 U.S.C. § 2710(d)(3)(B) (compact entered into by Tribe and State "shall take effect only when notice of approval of such compact has been published by the Secretary in the Federal Register"). Thus, even if the Supreme Court had not

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> criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
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> For the purpose of this section, the term "gambling" does not include:
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> * * *
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> (2) Class III gaming conducted under a Tribal-State compact approved under 11(d)(8) of the IGRA that is in effect.

codified at 18 U.S.C. § 1166 (emphasis added).

decided Seminole as it did, under Florida and Arizona's reading of the statute, Class III gaming would remain unlawful even if procedures were set in place by the Secretary after completion of the judicially-supervised mediation process.

Put another way, if the statute is read with such extreme literalness it has a technical flaw. It provides for Secretarial procedures in the event that States and Indian Tribes cannot agree to a compact. If they can agree, such a compact becomes "in effect" upon approval by Secretary. 25 U.S.C. § 2710(d)(3)(B). Where a State does not assert immunity from suit and procedures ultimately are adopted by the Secretary without State consent, IGRA does not call this a compact "in effect." Compare 25 U.S.C. § 2710(d)(7)(B)(vii), with 25 U.S.C. § 2710(d)(3)(B). Yet there is nothing else in the statute or its legislative history that even hints that the Johnson Act or § 23 of IGRA would criminalize Class III Indian gaming in such circumstances. If Florida and Arizona's construction were accepted, it would negate the entire part of IGRA that calls for mediation and Secretarial procedures.

To avoid such an absurd result, the statute must be read to mean that all Secretarial-sanctioned gaming is exempt from the provisions of the Johnson Act and section 23 of IGRA. The "procedures" adopted by the Secretary -- whether pursuant to the judicially-supervised mode prescribed by IGRA or pursuant to this rulemaking -- are properly viewed as a full substitute for the compact that would be "in effect" if a voluntary agreement had been reached, and thus qualify for the exemption to the criminal prohibitions on gaming.

Scope of Gaming

The most frequently contested issue among Tribes and States relates to the "scope of gaming" permitted under State law, for this is important in determining whether particular games are properly the subject of negotiation between a Tribe and a State. In the context of this proposed rulemaking,

the issue bears directly upon whether a State is bargaining in good faith with a Tribe and whether a Tribe's requested procedures include games lawful under IGRA. 25 U.S.C. § 2710(d)(1)(B). In evaluating the permissible "scope of gaming" under the various States' laws, the Department will apply the interpretation set forth as the position of the United States on the scope of gaming issue in its amicus curiae brief in the Supreme Court in Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1995), as modified on denial of petition for rehearing, 99 F.3d 321 (9th Cir 1996), cert. denied, sub nom. Sycuan Band of Mission Indians v. Wilson, No. 96-1059, 65 U.S.L.W. 3855 (June 24, 1997). Copies of the brief are available to any reviewer upon request.

As a threshold matter, the Secretary would disapprove proposals when "contemplated gaming activities are not permitted in the State for any purpose by any person, organization, or entity." Proposed 25 C.F.R. § 291.8(b)(3), infra. This conclusion is based on 25 U.S.C. § 2710(d)(1)(B), which states that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization or entity." IGRA thus makes it unlawful for Tribes to operate particular Class III games that State law completely and affirmatively prohibits. Courts have determined that a State therefore has no duty to negotiate with respect to such games. See Rumsey Indian Rancheria, supra. In other words, if a State prohibits an entire class of traditional games, it need not negotiate over the particular games within that category. Consequently, such gaming would not be permitted under Secretarial procedures

Our interpretation of the scope of gaming issues is adopted from the United States' amicus brief filed in the Supreme Court in Rumsey Indian Rancheria, supra:

> In some circumstances, a question may arise concerning whether a State law prohibits a distinct form of gaming or instead regulates the manner in which a permitted form of gaming may be played. Several hypothetical examples may illustrate the point. If State law permits five-card stud poker but permits seven-card draw poker (or prohibits parimutuel betting

> dog racing, but not on horse racing), a question could arise as to whether that State law prohibits a distinct form of gaming known as "five card stud poker" ("or dog racing"), or instead regulates the manner in which the permitted form of gaming known as "poker" ("or animal racing") may be conducted. If characterized in the former way, the State would have to negotiate concerning only seven-card draw poker (or horse racing); if characterized in the latter way, the State would have to negotiate over all poker games (or all animal racing). The relevant question in such a case would be whether, in light of traditional understandings and the text and legislative history of IGRA, the State has reasonably characterized the relevant State laws as completely prohibiting a distinct form of gaming. If the State has not reasonably so characterized its laws, it would have a duty to negotiate with respect to the gaming.

United States' Brief at 15.

It is impractical for the Department to attempt to evaluate, in advance of a tribal request, the permissible scope of gaming in each State. For that reason the proposed rule requires a Tribe to submit its own analysis along with its request for Secretarial procedures, and goes on to invite the views and active participation of the affected State with respect to the applicable scope of gaming under any Secretarial procedures.

Monitoring

Many voluntarily negotiated compacts include a monitoring role for the affected State In these compacts States often assist in background checks on key casino personnel, and/or monitor tribal financial statements. Tribes may make certain financial information available to States to ensure that applicable regulatory requirements have been satisfied. Because of the importance of this monitoring function, the proposed regulations invite State participation in the promulgation of Secretarial procedures, notwithstanding a State's assertion of immunity from suit. If a State declines to participate in such an activity, the Department believes steps ought to be taken to ensure that independent monitoring and enforcement exists. The proposed rule requires that the Tribe provide in its procedures for monitoring and enforcement by an independent and autonomous tribal regulatory commission. Further, the Department seeks comments on whether the NIGC or some other [illegible] should perform monitoring and enforcement functions, and, if so, who should bear the [illegible]

functions.

Publication of this proposed rule by the Department provides the public an opportunity to participate in the rulemaking process. Interested persons may submit written comments to the location identified in the "addresses" section of this proposed rule.

Executive Order 12988

The Department has certified to the Office of Management and Budget (OMB) that these proposed regulations meet the applicable standards provided in Sections (3)(a) and 3(b)(2) of Executive Order 12988.

Executive Order 12866

This is a significant rule under Executive Order 12866 and has been reviewed by OMB.

Regulatory Flexibility Act

We do not believe that this proposed rule will have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* The Regulatory Flexibility Act of 1980 requires preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations or governmental jurisdictions. At this time, we do not know whether any Secretarial procedures, authorized by this proposed rule, will need to be adopted. We also do not know whether the adoption of procedures in a given case will have a significant impact on small entities as defined by the Act. If procedures are proposed pursuant to this rule, States (and through the States, local jurisdictions and small entities) will be permitted to comment on a given proposal, and any concerns may be taken into account in Secretarial procedures.

It is our preliminary view that Indian tribes are not small entities within the meaning of the Regulatory Flexibility Act. The statutory definition specifically enumerates several kinds of

of governmental entities, but does not include Indian tribes. 5 U.S.C. § 601(5). This indicates that tribes should not be considered small entities. We invite comment on this issue.

Executive Order 12630

The Department has determined that this proposed rule does not have significant "takings" implications. The proposed rule does not pertain to "taking" of private property interests, nor does it impact private property.

Executive Order 12612

The Department has determined that this proposed rule does not have significant Federalism effects.

As explained above, the Secretary has determined that he has the statutory authority to adopt procedures to permit Indian gaming in appropriate circumstances. Secretarial authority was expressly provided in IGRA with respect to the judicially-supervised mediation scheme. It would be exercised under the proposed rules in a manner consistent with the statutory directive and congressional intent. The proposed rule provides the opportunity for States to voluntarily participate in a mediation process under the auspices of the Secretary of the Interior. As the Supreme Court noted in Seminole, Congress may, under the Constitution, choose to withhold from States any authority over Indian gaming. Because under the proposed rules the Secretary would be tracking the scheme set forth by Congress, and because the proposed rule would afford the States as much opportunity to participate has where it does not claim immunity from suit, we believe the proposed rule has no significant Federalism effects.

NEPA Statement

The Department has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is

required pursuant to the National Environmental Policy Act of 1969.

Paperwork Reduction Act of 1995

Sections 291.4, 291.10, 291.12, and 291.15 contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. § 3507(d)), the Department has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: When a Tribe and State do not successfully negotiate a Tribal-State compact, the Tribe will be required to collect information to document the negotiation process, and prepare proposed procedures for submission to the Secretary. The information requested will be unique for each Tribe and may be changed when necessary to fit the needs of the Tribe.

All information is to be collected upon the submission of a request by a Tribe for Class III gaming procedures. The annual reporting and record keeping burden for the collection of information is estimated to average 1,000 hours for each response and we estimate there will be approximately 25 respondents. The collection will include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information. The total annual burden is estimated to be 25,000 hours.

Organizations and individuals desiring to submit comments on the information collection requirement should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10202, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer for the Department of the Interior.

The Department considers comments by the public on this proposed collection of information in:

Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical

utility;

Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

Enhancing the quality, usefulness, and clarity of the information to be collected; and

Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

OMB is required to make a decision between 30 and 60 days after publication of this document in the FEDERAL REGISTER. Therefore, a comment to the OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the BIA on the proposed regulations.

Unfunded Mandates Act of 1995

This regulation imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

Drafting Information

The primary author of this proposed rule is George Skibine, Acting Deputy Associate Solicitor, Division of Indian Affairs, Office of the Solicitor. 208 4386

List of Subjects in 25 CFR Part 291

Indians--Gaming

For the reasons given in the preamble, the Department of the Interior proposes to establish a new Part 291 of Title 25, Chapter I of the Code of Federal Regulations as set forth below

PART 291 - Class III Gaming Procedures

Sec.

291.1 Purpose and Scope

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291.10 What must the Indian Tribe do when it receives the State's alternative proposal Class III gaming procedures?

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291.13 What must the Secretary do upon receiving the proposal selected by the mediator?

291.14 When do Class III gaming procedures for an Indian Tribe become effective?

291.15 How can Class III gaming procedures issued by the Secretary be amended?

Authority: 5 U.S.C. § 301; 25 U.S.C. §§ 2,9 & 2710

§ 291.1 Purpose and Scope

These regulations establish procedures that the Secretary of the Interior will

promulgate rules for the conduct of Class III Indian gaming when:

(a) A State and an Indian Tribe are unable voluntarily to agree to a compact and;

(b) The State has asserted its immunity from suit brought by an Indian Tribe under 25 U.S.C. § 2710(d)(7)(B).

§ 291.2 Definitions

All terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. § 2703(1)-(10).

§ 291.3 When may an Indian Tribe ask the Secretary to issue Class III gaming procedures?

An Indian Tribe may ask the Secretary to issue Class III gaming procedures when the following steps have taken place:

(a) The Indian Tribe submitted a written request to the State to enter into negotiations to establish a Tribal-State compact governing the conduct of Class III gaming activities;

(b) The State and the Indian Tribe failed to negotiate a compact 180 days after the State received the Indian Tribe's request;

(c) The Indian Tribe initiated a cause of action in Federal district court against the State alleging that the State did not respond, or did not respond in good faith, to the request of the Indian Tribe to negotiate such a compact;

(d) The State raised an Eleventh Amendment defense to the tribal action; and

(e) The Federal district court dismissed the action because of lack of jurisdiction due to the State's sovereign immunity under the Eleventh Amendment.

§ 291.4 What must a proposal requesting Class III gaming procedures contain?

A proposal requesting Class III gaming procedures must include the following information:

(a) The full name, address, and telephone number of the Indian Tribe submitting the proposal;

(b) A copy of the authorizing resolution from the Indian Tribe submitting the proposal;

(c) A copy of the Indian Tribe's gaming ordinance or resolution approved by the NIGC in accordance with 25 U.S.C. § 2710;

(d) A copy of the Indian Tribe's organic documents;

(e) A copy of the Indian Tribe's written request to the State to enter into compact negotiations, along with the Indian Tribe's proposed compact, if any;

(f) A copy of the State's response to the tribal request and/or proposed compact, if any;

(g) A copy of court proceedings in the litigation with the State in Federal district court on compact negotiations, including a copy of the order dismissing the lawsuit;

(h) The Indian Tribe's factual and legal authority for the scope of gaming specified in paragraph (j)(13) of this section;

(I) A regulatory scheme for Federal (or State, if any) oversight role in monitoring and enforcing compliance; and

(j) Proposed procedures under which the Indian Tribe will conduct Class III gaming activities, including:

(1) An accounting system maintained in accordance with American Institute of Certified Public Accountants (AICPA) Standards for Audits of Casinos, including maintenance of books and records in accordance with Generally Accepted Accounting Principles (GAAP), and any applicable NIGC regulations;

(2) A reporting system for the payment of taxes and fees in a timely manner and in compliance with Internal Revenue Code and Bank Secrecy Act requirements;

(3) Preparation of financial statements covering all financial activities of the Indian Tribe's gaming operations;

(4) Internal control standards designed to ensure fiscal integrity of gaming operations;

(5) Provisions for records retention, maintenance, and accessibility;

(6) Conduct of games, including patron requirements, posting of game rules, and hours of operation;

(7) Procedures to protect the integrity of the rules for playing games;

(8) Rules governing employees of the gaming operation, including code of conduct, age requirements, conflict of interest provisions, licensing requirements, and background investigations of all management officials and key employees, vendors, lessors, or suppliers of gaming materials, equipment or supplies of any kind in excess of $5,000 per year, that comply with IGRA requirements, NIGC regulations, and applicable tribal gaming laws;

(9) Policies and procedures that protect the health and safety of patrons and employees and that address insurance and liability issues, as well as safety systems for fire and emergency services at all gaming locations;

(10) Surveillance procedures and security personnel and systems capable of monitoring all gaming activities, including the conduct of games, cashiers' cages, change booths, count rooms, movement of cash and chips, entrances and exits of gaming facilities, and other critical areas of any gaming facility;

(11) An administrative process to resolve disputes between the gaming establishment and employees or patrons, including a process to protect the rights of individuals injured on gaming premises by reason of negligence in the operation of the facility;

(12) Hearing procedures for licensing purposes;

(13) A list of gaming activities proposed to be offered by the Indian Tribe at its gaming facilities;

(14) A description of the location of proposed gaming facilities;

(15) A copy of the Indian Tribe's liquor ordinance approved by the Secretary, if any;

(16) Provisions for an autonomous tribal regulatory gaming commission, independent of gaming management;

(17) Provisions for enforcement and investigatory mechanisms, including the imposition of sanctions, monetary penalties, closure, and an administrative appeal process relating to enforcement and investigatory actions; and

(18) Any other provisions deemed necessary by the Indian Tribe.

§ 291.5 Where must the proposal requesting Class III gaming procedures be filed?

Any proposal requesting Class III gaming procedures must be filed with the Director, Indian Gaming Management Staff, Bureau of Indian Affairs, U.S. Department of the Interior, MS 2070-MIB, 1849 C Street NW, Washington, DC 20240.

§ 291.6 What must the Secretary do upon receiving a proposal?

Upon receipt of a proposal requesting Class III gaming procedures, the Secretary must:

(a) Within 15 days, notify the Indian Tribe in writing that the proposal has been received, and whether the proposal meets the requirements of § 291.4; and

(b) Within 30 days of receiving a complete proposal, notify the Indian Tribe in writing whether the Indian Tribe meets the eligibility requirements in § 291.3. The Secretary's eligibility determination is final for the Department.

§ 291.7 What must the Secretary do if it has been determined that the Indian Tribe is eligible to request Class III gaming procedures?

(a) If the Secretary determines that the Indian Tribe is eligible to request Class III gaming procedures and that the Indian Tribe's proposal is complete, the Secretary must submit the Indian

Tribe's proposal to the Governor and the Attorney General of the State where the gaming is proposed.

(b) The Governor and Attorney General will have 60 days to comment on:

(1) Whether the State is in agreement with the Indian Tribe's proposal;

(2) Whether the State believes it has negotiated in good faith with the Indian Tribe under 25 U.S.C. § 2710(d)(3)(A);

(3) Whether the proposal is consistent with relevant provisions of the laws of the State; and

(4) Whether contemplated gaming activities are permitted in the State for any purposes, by any person, organization, or entity.

(c) The Secretary will also invite the State's Governor and Attorney General to submit an alternative proposal to the Indian Tribe's proposed Class III gaming procedures.

§ 291.8 What must the Secretary do at the expiration of the 60-day comment period if the State has not submitted an alternative proposal?

(a) Upon expiration of the 60-day comment period specified in § 291.7, if the State has not submitted an alternative proposal, the Secretary must review the Indian Tribe's proposal to determine:

(1) Whether all requirements of § 291.4 are adequately addressed;

(2) Whether Class III gaming activities will be conducted on Indian lands over which the Indian Tribe has jurisdiction;

(3) Whether contemplated gaming activities are permitted in the State for any purposes by any person, organization, or entity;

(4) Whether the proposal is consistent with relevant provisions of the laws of the State;

(5) Whether the proposal is consistent with the trust obligations of the United States to the

Indian Tribe;

(6) Whether the proposal is consistent with all applicable provisions of the IGRA;

(7) Whether the proposal is consistent with provisions of other applicable Federal laws; and

(8) Whether the State has negotiated in good faith.

(b) Within 60 days of the expiration of the 60-day comment period in § 291.7, the Secretary must notify the Indian Tribe, the Governor, and the Attorney General of the State in writing that he/she has:

(1) Approved the proposal if the Secretary determines that there are no objections to the Indian Tribe's proposal;

(2) Disapproved the proposal if it does not meet the standards in paragraph (a) of this section; or

(3) Identified unresolved issues and areas of disagreements in the proposal, and that the Indian Tribe, the Governor, and the Attorney General are invited to participate in an informal conference to resolve identified unresolved issues and areas of disagreement.

(c) Within 30 days of the informal conference, the Secretary must prepare and mail to the Indian Tribe, the Governor, and the Attorney General:

(1) A written report that summarizes the results of the informal conference; and

(2) A final decision either setting forth the Secretary's proposed Class III gaming procedures for the Indian Tribe, or disapproving the proposal for any of the reasons in paragraph (a) of this section.

§ 291.9 What must the Secretary do at the end of the 60-day comment period if the State

offers an alternative proposal for Class III gaming procedures?

Within 7 days of receiving the State's alternative proposal, the Secretary must submit the State's alternative proposal to the Indian Tribe for a 60-day comment period.

§ 291.10 What must the Indian Tribe do when it receives the State's alternative proposal for Class III gaming procedures?

(a) If the Indian Tribe objects to the State's alternative proposal, it may, within 60 days of receiving the alternative proposal, notify the Secretary in writing of its objections.

(b) If the Indian Tribe does not file written objections within 60 days of receiving of the State's alternative proposal, the Secretary must, within 60 days of the expiration of the Indian Tribe's comment period in § 291.9, notify the Indian Tribe, the Governor, and the Attorney General, in writing of his/her decision to either:

(1) Approve the State's alternative proposal for Class III gaming procedures; or

(2) Disapprove the State's alternative proposal for any of the reasons in § 291.13(b).

§ 291.11 What must the Secretary do if the Indian Tribe files timely objections to the State's alternative proposal?

If the Indian Tribe files timely objections to the State's alternative proposal, the Secretary must appoint a mediator who must convene a process to resolve differences between the two proposals.

§ 291.12 What is the role of the mediator appointed by the Secretary?

(a) The mediator must ask the Indian Tribe and the State to submit their last best proposal for Class III gaming procedures.

(b) After giving the Indian Tribe and the State an opportunity to be heard and present information supporting their respective positions, the mediator must select from the two [illegible]

the one that best comports with the terms of the IGRA and any other applicable Federal law. The mediator must submit the proposal selected to the Indian Tribe, the State, and the Secretary.

§ 291.13 What must the Secretary do upon receiving the proposal selected by the mediator?

Within 60 days of receiving the proposal selected by the mediator, the Secretary must do one of the following:

(a) Notify the Indian Tribe, the Governor and the Attorney General in writing of his/her decision to approve the proposal for Class III gaming procedures selected by the mediator.

(b) Notify the Indian Tribe, the Governor and the Attorney General in writing of his/her decision to disapprove the proposal selected by the mediator for any of the following reasons:

(1) The requirements of § 291.4 are not adequately addressed;

(2) Gaming activities would not be conducted on Indian lands over which the Indian Tribe has jurisdiction;

(3) Contemplated gaming activities are not permitted in the State for any purpose by any person, organization, or entity;

(4) The proposal is not consistent with relevant provisions of the laws of the State;

(5) The proposal is not consistent with the trust obligations of the United States to the Indian Tribe;

(5) The proposal is not consistent with applicable provisions of the IGRA; or

(6) The proposal is not consistent with provisions of other applicable Federal laws.

(c) If the Secretary rejects the mediator's proposal under paragraph (b) of this section, he may prescribe appropriate procedures under which Class III gaming may take place consistent with the mediator's selected compact, the provisions of IGRA and the relevant provisions of the laws of the State.

§ 291.14 When do Class III gaming procedures for an Indian Tribe become effective?

Upon approval of Class III gaming procedures for the Indian Tribe under either § 291.8(b), § 291.8(c), § 291.10(b)(1), or § 291.13(a), the Indian Tribe shall have 90 days in which to approve and execute the Secretarial procedures and forward its approval and execution to the Secretary, who will publish notice of their approval in the FEDERAL REGISTER. The procedures take effect upon their publication in the FEDERAL REGISTER.

§ 291.15 How can Class III gaming procedures approved by the Secretary be amended?

An Indian Tribe may ask the Secretary to amend approved Class III gaming procedures by submitting an amendment proposal to the Secretary. The Secretary must review the proposal by following the approval process for initial tribal proposals, except that he/she may waive the requirements of § 291.4 to the extent they do not apply to the amendment request.

Date: DEC - 8 1997

/s/ Kevin Gover

Kevin Gover
Assistant Secretary - Indian Affairs

cc Secretary's Surname
Secretary's RF(2)
cc: 130 Surname, Chron, Hold, 101A, Bureau RF, SOL-IA, SOL
corr per JLESHY:11/26/97, corr per Jstrylowski 12/5/97
PLHART:wsc:219-4066:11/25/97
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