

Consultation Summary Sheet of Draft Revisions to Part 293

March 28, 2022

This draft revision to 25 C.F.R. Part 293 proposes revising the existing regulations governing the class III Tribal-State gaming compact process. The Department of the Interior (Department) has prepared this draft revision to Part 293 for purposes of Tribal consultation only. The draft revision does not constitute a formal notice of proposed rulemaking. Once Tribal consultation has concluded and the Department has considered all Tribal comments, the Department plans to release a formal notice of proposed rulemaking.

This draft revision proposes to provide primarily technical amendments to the existing process-based regulations. The proposed technical amendments are intended to clarify the process and contain edits for internal consistency and improved readability. The Department also proposes to add twelve sections addressing substantive issues and organize Part 293 into four subparts. The Department proposes to revise the Title to Part 293 by removing the word “process” from the title, making it “Part 293 Class III Tribal State Gaming Compact.”

Subpart A – General Provisions and Scope

This draft reflects the proposed Subpart A, titled “General Provisions and Scope” and would contain the existing sections 293.1 through 293.5.

§ Section 293.1 – What is the Purpose of the part?

This draft section contains technical amendments to the existing section 293.1 to clarify that the proposed Part 293 Regulations contain both procedural and substantive regulations.

§ 293.2 – How are key terms defined in this part?

This draft section restructures the existing section 293.2 by removing the subsection for the introductory sentence and editing that sentence for clarity. The proposed restructuring improves clarity by using the subsections for each defined term. The existing definitions for *Amendment*, *Compact* or *Tribal-State Gaming Compact*, and *Extension* reflect proposed edits to improve clarity. This draft section includes four new definitions, *gaming activity* or *gaming activities*, *gaming facility*, *IGRA*, and *Tribe*.

§ 293.3 – What authority does the Secretary have to approve or disapprove compacts and amendments?

This draft section contains a conforming edit to the existing Section 293.3.

§ 293.4 – Are compacts and amendments subject to review and approval?

This draft section contains clarifying edits to the existing Section 293.4 subsection (a) and a new subsection (b). These proposed changes clarify that any document between a Tribe and the State or its political subdivisions which establish, change, or interpret the terms and conditions for the operation and regulation of a Tribe’s class III gaming activities regardless of whether they are

substantive or technical, must be submitted for review and approval by the Secretary. The Department is proposing a new subsection (b) to allow parties to seek a determination from the Department that their agreement is, or is not a compact. This process is modeled on the National Indian Gaming Commission's (NIGC) practice of issuing declination letters for agreements which do not trigger NIGC's review and approval of management contracts as required by IGRA at 25 U.S.C. § 2711.

§ 293.5 – Are extensions to compacts subject to review and approval?

This draft section contains clarifying edits to the existing 293.5 for consistency and readability. Additionally, the Department is proposing to add a sentence which codifies the Department's long-standing practice that an extension must be published in the Federal Register to be in effect.¹

Subpart B – Submission of Tribal-State Gaming Compacts

This draft reflects the proposed Subpart B, titled "Submission of Tribal-State Gaming Compacts" would contain the existing sections 293.6 through 293.9.

§ 293.6 – Who can submit a compact or amendment?

This draft section contains conforming edits for consistency to the existing section 293.6.

§ 293.7 – When should the Indian Tribe or State submit a compact or amendment for review and approval?

This draft section contains conforming edits for consistency to both the heading and the body of the existing section 293.7.

§ 293.8 – What documents must be submitted with a compact or amendment?

This draft section contains conforming edits for consistency to the existing section 293.8. Additionally, the Department is proposing to renumber the existing subsections and add a new subsection (d). The proposed subsection (d) would clarify that compact submission package should include any ancillary agreements, documents, ordinances, or laws required by the compact.

§ 293.9 – Where should a compact or amendment be submitted for review and approval?

This draft section contains a proposed new sentence in the existing section 293.9 to permit electronic submission of compacts.

Subpart C – Secretarial Review of Tribal-State Gaming Compacts

This draft reflects the proposed Subpart C, titled "Secretarial Review of Tribal-State Gaming Compacts" would contain sections 293.10 through 293.16. This draft subpart proposes

¹ See e.g., Notice of Final Rulemaking Part 293, 73 Fed. Reg. 74004, 74007 (Dec. 5, 2008).

renumbering the existing section 293.14 *When may the Secretary disapprove a compact or amendment?* as 293.16; renumbering the existing Section 293.15 *When does an approved or considered-to-have-been-approved compact or amendment take effect?* as 203.14; and adding a new section 293.15 *Is the Secretary required to disapprove a compact or amendment that violates IGRA?*

§ 293.10 – How long will the Secretary take to review a compact or amendment?

This draft section contains conforming edits for consistency to the existing section 293.10.

§ 293.11 - When will the 45-day timeline begin?

This draft section contains a conforming edit to the existing section 293.11 for consistency with proposed changes to section 293.9.

§ 293.12 - What happens if the Secretary does not act on the compact or amendment within the 45-day review period?

This draft section contains clarifying edits for consistency and readability to the existing section 293.12. This draft section includes a new provision codifying the Department’s practice of issuing advisory letters – also known as Deemed Approval Letters – to the parties identifying certain provisions that are inconsistent with IGRA.

§ 293.13 – Who can withdraw a compact or amendment after it has been received by the Secretary?

This draft section contains conforming edits for consistency to the existing section 293.13.

§ 293.14 – When does a compact or amendment that is affirmatively approved or approved by operation of law take effect?

This draft section suggests renumbering the existing section 293.15 as 293.14 to improve overall organization of the regulations. This draft section contains clarifying edits for consistency and readability to both the heading and the body of section 293.14.

§ 293.15 – Is the Secretary required to disapprove a compact or amendment that violates IGRA?

This draft section is new and clarifies IGRA’s limits on the Secretary’s authority to review compacts. Congress, through IGRA at 25 U.S.C. § 2710 (d)(8), provided the Secretary with time-limited authority to review a compact and discretionary disapproval authority.

§ 293.16 – When may the Secretary disapprove a compact or amendment?

This draft section renumbers and restructures the existing section 293.14 to improve overall organization of the regulations. This draft section renumbers the existing subsections and adds a new subsection (b), clarifying that if a compact submission package is missing the documents

required by section 293.8, the Department will presume that the compact or amendment violates IGRA.

Subpart D – Scope of Tribal-State Gaming Compacts

This draft reflects the proposed Subpart D, titled “Scope of Tribal-State Gaming Compacts” would contain sections 293.17 through 293.28. This draft subpart includes substantive provisions addressing the appropriate scope of a compact under IGRA. These provisions codify existing Departmental practice and provide compacting parties clear guidance on the appropriate scope of compact negotiations.

§ 293.17 – May a compact include provisions addressing the application of the Tribe’s or State’s criminal and civil laws and regulations?

This draft section is new and clarifies the appropriate scope of terms addressing the application of the criminal and civil laws and regulations in a compact. Congress, through IGRA at 25 U.S.C. § 2710 (d)(3)(C)(i), provided that a compact may include provisions addressing the application of criminal and civil laws and regulations of the Tribe or the State that are directly related to, and necessary for, the licensing and regulation of the gaming activity.

§ 293.18 – May a compact include provisions addressing the allocation of criminal and civil jurisdiction between the State and the Tribe?

This draft section is new and clarifies the appropriate scope of terms addressing the allocation of criminal and civil jurisdiction in a compact. Congress, through IGRA at 25 U.S.C. § 2701 (5), found that “[T]ribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” Congress then provided that a compact may include provisions addressing the allocation of criminal and civil jurisdiction between the Tribe and the State necessary for enforcement of the laws and regulations described in Section 2710(d)(3)(C)(i). *See* IGRA at 25 U.C.S. § 2710 (d)(3)(C)(ii).

§ 293.19 – May a compact include provisions addressing the State’s costs for regulating gaming activities?

This draft section is new and clarifies the appropriate scope of assessments by the State to defray the costs of regulating the Tribe’s gaming activity. Congress, through IGRA at 25 U.C.S. § 2710 (d)(3)(C)(iii), provided that a compact may include provisions relating to the assessment by the State of the gaming activity in amounts necessary to defray the costs of regulating the gaming activity. Congress, through IGRA at 25 U.C.S. § 2710 (d)(4), clarified any assessments must be negotiated and at no point may a State or its political subdivisions impose any taxes, fees, charges, or other assessments upon a Tribe through the compact negotiations.

§ 293.20 – May a compact include provisions addressing the Tribe’s taxation of gaming?

This draft section is new and clarifies the appropriate scope of provisions addressing a Tribe’s taxation. Congress, through IGRA at 25 U.C.S. § 2710 (d)(3)(C)(iv), provided that a compact

may include provisions relating to the Tribe's taxation of gaming activities in amounts comparable to the State's taxation of gambling.

§ 293.21 – May a compact include provisions addressing remedies for breach of the Compact?

This draft section is new and clarifies the appropriate scope of provisions addressing remedies for breach of compact. Congress, through IGRA at 25 U.C.S. § 2710 (d)(3)(C)(v), provided that a compact may include provisions relating to remedies for breach of contract.

§ 293.22 – May a compact or amendment include provisions addressing standards for the operation of gaming activity and maintenance of the gaming facility?

This draft section is new and clarifies the appropriate scope of provisions addressing the standards for the operation of gaming activity and maintenance of the gaming facility. Congress, through IGRA at 25 U.C.S. § 2710 (d)(3)(C)(vi), provided that a compact may include provisions relating to standards for the operation of such activity and maintenance of the gaming facility, including licensing.

§ 293.23 – What factors will be used to determine whether provisions in a compact or amendment are directly related to the operation of gaming activities?

This draft section is new and clarifies the appropriate scope of provisions addressing topics which are directly related to the operation of gaming activities. Congress, through IGRA at 25 U.C.S. § 2710 (d)(3)(C)(vii), provided that a compact may include provisions relating to any other subjects that are directly related to the operation of gaming activities. This draft section includes examples of subjects that the Department has found to be directly related to the conduct of gaming as well as examples of subjects that are not directly related to gaming.

§ 293.24 – What factors will the Secretary analyze to determine if revenue sharing is lawful?

This draft section is new and clarifies the appropriate scope of provisions addressing revenue sharing. Congress, through IGRA at 25 U.C.S. § 2710 (d)(4), prohibited States from seeking to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. This draft section codifies the Department's longstanding rebuttable presumption that any revenue sharing provisions are a prohibited tax, fee, charge, or other assessment. This draft section also contains the Department's test to rebut that presumption.

§ 293.25 – May a compact or extension include provisions that limit the duration of the compact?

This draft section is new and addresses the appropriate duration of a compact. The Department and IGRA anticipate that compacts are long-term agreements between a Tribe and a State that reflect carefully negotiated compromises between sovereigns.

§ 293.28 – May a compact or amendment permit a Tribe to engage in any form of class III gaming activity?

This draft section is new and clarifies the appropriate scope of class III gaming that a State permits. Congress, through IGRA at 25 U.C.S. § 2710 (d)(1)(B), requires that a Tribe seeking to conduct class III gaming be located in a State that permits such gaming for any purpose by any person, organization, or entity.

§ 293.27 – May any other contract outside of a compact regulate Indian gaming?

This draft section is new and clarifies that any agreement between a Tribe and a State or its political subdivisions which seeks to regulate a Tribe's right to conduct gaming – as limited by IGRA – is a gaming compact that must comply with IGRA and be submitted for review and approval by the Secretary.

§ 293.28 - How does the Paperwork Reduction Act affect this part?

This draft section renumbers existing section 293.16 as 293.28 to improve overall organization of the regulations.