Part 293
Written Comments Summary Report

I. Introduction

The Department of the Interior (Department) has sought public comment on proposed rules to update its regulations at 25 C.F.R. Part 293 (Class III Tribal State Gaming Compact Process). The proposed rule incorporates feedback and comments from tribal governments and other entities, explains how comments were addressed, and explains why the Department made specific changes reflected in the proposed rule. The Department published its proposed rule on December 6, 2022, requested public comments by March 1, 2023, and noticed three tribal consultation sessions held in January 2023.

The first tribal consultation was held in person on January 13, 2023, at the Bureau of Land Management Training Center in Phoenix, Arizona. The next two tribal consultations were conducted virtually on Zoom. They occurred on January 19, 2023, and January 30, 2023. Following the consultation sessions, written comments were accepted until March 1, 2023.

II. Background – 25 C.F.R. Part 293

Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988 to balance the varied interests of tribal governments, state governments, and the federal government and to shield Indian gaming "from organized crime and other corrupting influences." 25 U.S.C. 2702(2). Concerning Class III gaming, IGRA requires that Indian tribes be the primary beneficiaries of gaming operations and also requires tribes and states to negotiate agreements called "Class III Tribal-State Gaming Compacts," which establish a limited role for states to play in regulating Indian gaming.

Congress passed IGRA to allow tribal and state sovereigns to negotiate in good faith over how gaming is conducted within their borders. However, with the expansion of state lotteries and state-licensed commercial gaming, tribal governments and states may find themselves directly competing for market share. Add to the mix of advances in gaming technology and the evolving world of gaming law at both the federal and state level, and it's clear that Class III Tribal-State Gaming Compacts have expanded in scope and complexity with the influx of varied interests and realities.

The current regulations that codify the Department's review process for tribal-state gaming compacts are found at 25 C.F.R. Part 293 and were promulgated in 2008. 73 Fed. Reg. 74004 (Dec. 5, 2008). Through this rulemaking, the Department seeks to codify longstanding Departmental policies and interpretation of case law through substantive regulations, providing certainty and clarity on how the Secretary will review specific provisions in a compact.

III. General Impressions

Individual Part 293 comments were separated and categorized after closing the comment period on March 1, 2023. Some comments were submitted or received after the submission deadline but were included with a notation. Over 56 entities commented on Part 293, including tribal, state, and local governments, industry organizations, and individual citizens. In total, the submissions were separated into 607 individual comments. Generally, around 258 comments were supportive, 136 were not supportive, and 213 were neutral or provided constructive criticism.

Indian Tribes

Tribes who commented were generally supportive of the proposed Part 293 regulations. Many tribes included constructive criticism. Tribes appreciated the Department's willingness to provide approved and guidance letters, supported the Department's preference for long-term compacts, and appreciated the Department's view regarding what kind of Class III gaming is permitted. While tribes generally supported the proposed section 293.29, tribes want clarification that they already have the authority to conduct online gaming.

Not all tribes supported the proposed rule. Some tribes are concerned that the proposed Part 293 oversteps federal authority and challenges tribal sovereignty. Additionally, tribes who are party to a "pool compact"— known as a state-wide compact—are concerned that the proposed rule risks stalling statewide Indian gaming based on a single local–tribal agreement.

Industry and Non-tribal Entities

Non-tribal entities expressed concern with the proposed amendments. Industry leaders are concerned that changes in the proposed rule will have enormous economic consequences. These comments challenge the authority of the Department to enact many of the proposed regulations, including proposed section 293.29.

State and Local Governments

State and local governments also expressed concern with the regulations. Their comments challenge the authority of the Department to enact the proposed rule. In particular, state and local governments are concerned about online gaming and the so-called "If One, Then All" policy under proposed section 293.27. These commentors allege that these proposed rules disrupt the balance of federalism and remove the state government police power.

IV. Summary of Comments Received

The written comments addressed the proposed changes to Part 293. As mentioned above, tribal comments were generally supportive, and non-tribal commentors raised various concerns. Supportive comments were pleased with additional clarity and the acknowledgment of tribal authority

to offer online gaming. Concerns were related to online gaming and the "If One, Then All" rule. A summary of the public comments is below:

Discussions of changes to the Proposed Part 293 include changes in the proposed regulatory text from the Tribal Consultation Draft as well as where relevant proposed changes from the existing regulatory text in 25 C.F.R. Part 293.

1. *Section 293.1–What is the purpose of this part?*

    - Some commenters expressed support for section 293.1.

    - Some commentors noted it is helpful that the Department states the regulations contain substantive requirements for class III compacts.

2. *Section 293.2–How are key terms defined in this part?*

    - A commenter suggested that the terms "ancillary agreement" and "documents" need further defining because it is still unclear how those terms apply to sections 293.4, 293.8, 293.21, and 293.28, particularly in states like Arizona, where all tribes are required to come to the table with a single compact – one change to one tribe's compact might trigger changes to other Arizona tribes' compacts.

    - A commenter suggested that the proposed regulations better define what a "primary beneficiary" is concerning section 293.25(b)(3), noting that the current version suggests that this be measured against projected revenue to the tribe and state but that market circumstances often change.

    - Many commenters expressed support and approval for changes to definitions—including, but not limited to, "gaming facility," "gaming spaces," "amendment," and "meaningful concession."

    - A commenter requested the Department define "Gaming facility" as follows:
      "Gaming facility means any physical space within a building or structure, or portion thereof, where the gaming activity occurs."

    - A commenter noted that the definition of "gaming facility" is too broad and is concerned that it may allow the State more control than it is entitled to. Additionally, the Tribe commented that the Department's reliance on IRS safe harbor provision for tax-free bonds may bring result in a compact which extends well beyond the gaming spaces based on the structural engendering of the building. . Finally, the Tribe is concerned that the Department has not incorporated its own definition of "gaming spaces" into the substantive portions of the draft.

- One commenter believes the Department is artificially limiting the scope of compacts with the new defined terms "gaming facility" and "gaming space" in § 293.2(e) and § 293.2(f). The commenter also raised concerns these terms may bring compacts which are currently in effect out of compliance with the Proposed Rule.

- A commenter noted that "meaningful concessions" and "substantial economic benefits" are not clear terms and suggested the proposed regulations include examples. Another commenter recommended the Department should make clear that "meaningful concessions" require the state to give something up and that proposed regulations should also address what constitutes "substantial" with respect to "economic benefits."

- Some commenters are concerned with the definitions of "meaningful concessions" and "substantial economic benefit" as too narrow and vague.

- A commenter requested that section 293.2(h)(2) be revised to state "Directly related to gaming activity" instead of just "gaming."

- A commenter wants the Department to require a "directly related" nexus for tribal tax equivalents.

- A commenter requested additional defined terms and clarified definitions.
  Requested definitions include: "Beneficiary" "Projected Revenue" and clarify the difference (if any) between "great scrutiny" and "strict scrutiny".

3. *Section 293.3–What authority does the Secretary have to approve or disapprove compacts and amendments?*

   - Numerous commenters support the changes to section 293.3.

4. *Section 293.4–Are compacts and amendments subject to review and approval?*

   - Many tribes support the proposed changes made to section 293.4 because they help clarify what are considered compact amendments and timelines to submit agreements between political subdivisions and tribes. Tribes also support the ability for tribes to submit documents to the Department for review.

   - A commentor recommends striking section 293.4(b)(3) because it is vague and has no difference from 293.8(d), and contains various undefined terms (e.g., "expressly contemplates").

   - A commentor recommends qualifying proposed subsection 293.4(b)(4) by including a reference to "the State, its agencies or political subdivisions" to make it consistent with

proposed section 293.8(d). Another recommends that the Department remove "or includes any of the topics identified in 25 C.F.R. 292.24" from proposed section 293.4(b)(4). Others requested changes to proposed section 293.4(b)(4). Many commentors submitted proposed language.

- Several commenters noted the proposed § 293.4(b)(4) appeared to contain a typographical error in the cross-reference to 25 CFR § 292.24 and suggested the correct cross-reference is 25 CFR § 293.24.

- A commentor expressed great concern with proposed section 293.4(b)(4) as being vague, misleading, and unclear—especially the meaning of "directly related."

- A commentor recommends adding a backstop for the opinion letter process and offers draft language.

- A commentor is concerned about how the rule will affect "Pool Compacts" like Arizona's.

- Several commenters expressed concerns whether proposed § 293.4(b) requires review or exempts from review certain types of intergovernmental and inter-tribal agreements including "Transfer Agreements" and "Pooling Agreements."

- A commentor wants the Department to make a technical amendment to proposed section 293.4(c) to clarify when the clock begins to run on the opinion letter issuance timeline. Draft language is included.

- A commentor noted that proposed section 293.4 should be changed to be more expeditious, including a 45-day timeline with a deemed approved letter when the timeline is missed.

- A commentor wants the department to adopt language to prevent local governments from disrupting tribal gaming through revenue-sharing demands.

- A commentor would like the Department to draft a mechanism that allows tribal governments to submit for a determination without fear of an ensuing adverse action against them.

- A commentor noted that the usefulness of proposed section 293.4(c) would be limited without including reasonable parameters on review time.

- Some commentors are concerned that proposed sections of 293.4 dealing with ancillary agreements are not sufficiently holistic to prevent local government attempts to disrupt tribal gaming.

- One commenter is concerned that proposed section 293.4 brings the validity of existing compacts into question. This concern is shared by a state, which believes minor documents should not be brought under the Department's review.

- Several commenters discussed the Department's efforts to limit and review agreements between Tribal and local governments through the inclusion of §§ 293.4(b)(4), 293.8(d), 293.24(c)(5), and § 293.31 in the Proposed Rule. Other commenters questioned the Secretary's authority to review intergovernmental agreements, suggesting that the Department's efforts were misplaced, encroached on Tribal sovereignty, and may result in uncertainty regarding the validity of existing intergovernmental agreements between Tribes and local governments. Some commenters opined that these sections contain inherent internal conflicts that could be interpreted as both prohibiting the inclusion of provisions addressing intergovernmental agreements in compacts, while also requiring the submission of intergovernmental agreements for review as a compact. Some commenters noted these agreements have resulted in strong co-operative working relationships between Tribes and local governments with overlapping or abutting jurisdictions.

- Commenters stated proposed §293.4(b) appears to exempt from review minor changes through mutual agreement under provisions in existing compacts that allow for such changes. Examples offered by commenters included adding class III games or adopting a more favorable provision in a newly negotiated compact or amendment through "most favored nations" provisions.

- One commenter believes the rule is explicitly against Ninth Circuit rulings and greatly increases the Department's scope of review without authority.

- A commenter requested clarification if the Department's review of an amendment includes reviewing the underlying compact for consistency with the Proposed Rule.

5. *Section 293.5–Are extensions to compacts or amendments subject to review and approval?*

- Some commenters believe the proposed changes to section 293.5 are consistent with other provisions of the rule.

- Some commenters appreciate the addition of "[t]he extension becomes effective only upon publication in the Federal Register."

- One commenter appreciates the lessened documentation requirements.

6. *Section 293.6–Who can submit a compact or amendment?*

- Some commenters support proposed changes made to section 293.6.

7. *Section 293.7–When should the Tribe or State submit a compact or amendment for review and approval?*

- Some commenters support proposed changes made to section 293.7. Many commenters support the addition of proposed subsection 293.7(d).

- One commenter supports the proposed changes in section 293.7 that require the submission of a compact or amendment when it is "otherwise binding on the parties" to acknowledge documents and ancillary agreements that become binding on parties outside of an affirmative consent process.

8. *Section 293.8–What documents must be submitted with a compact or amendment?*

- One commenter supports the proposed changes to section 293.8.

- One commenter requested the Department strike proposed § 293.8(d) from the Final Rule, stating the subsection is unnecessary.

- Two commenters requested that proposed subsection (d) be further clarified to avoid confusion about what documents should be submitted with a compact or amendment.

- A tribal commenter believes proposed subsection (d) is unnecessary and suggested draft language.

- One commenter is concerned that proposed subsections of 293.4 dealing with ancillary agreements are not sufficiently holistic to prevent local government attempts to disrupt tribal gaming.

- Two commenters support the proposed changes to section 293.8.

- A commenter supports requiring additional showings to prove revenue sharing agreements follow actual benefits to tribes.

- A commenter is concerned that proposed 293.8 will make negotiations between state and tribal governments more difficult.

- A commenter expressed support that the Proposed Rule included a requirement of a market analysis, or similar documentation, as part of the compact submission package for compacts that include revenue sharing in § 293.8(e). This would require compacting parties to prove revenue sharing agreements provide actual benefits to Tribes.

- A commenter expressed concern that the Proposed Rule contained a new requirement of a market analysis, or similar documentation, for compacts that include revenue sharing in § 293.8(e). The commenter stated this requirement creates unnecessary delay and expense.

- A commenter requested the proposed language in subsection 293.8(e) be narrowed by including the phrase "directly related to and necessary for making a determination."

9. *Section 293.9–Where should a compact or amendment or other requests under this part be submitted for review and approval?*

    - Various tribes support the proposed changes to section 293.9—especially the Department's proposal to accept electronic submissions. Tribes believe electronic submissions will allow for increased efficiency and decreased processing times.

10. *Section 293.10–How long will the Secretary take to review a compact or amendment?*

    - Some commenters support the proposed changes to section 293.10.

11. *Section 293.11–When will the 45-day timeline begin?*

    - Some commenters support the proposed changes made to section 293.11—especially because the changes would work well with the proposed changes to section 293.9.

    - Several commenters expressed support for the inclusion of a requirement for the Department to provide an acknowledgment email for electronically submitted compacts in § 293.11 of the Final Rule and note that a confirmation email works well with the proposed changes to § 293.9.

12. *Section 293.12–What happens if the Secretary does not act on the compact or amendment within the 45-day review period?*

    - Some commenters support the proposed changes made to section 293.12, including the codification of formal letters explaining why a compact is not affirmatively approved, commonly referred to as "deemed approval" letters.

    - Several commenters requested more clarification on the potential uses of deemed approved letters, including if the deemed approval letter is "final agency action" and if the underlying compact would be ripe for litigation challenging provisions the Department identified in a deemed approval letter. Commenters offered proposed regulatory language.

    - One commenter requested that the Department increase the specificity included in deemed approval guidance letters, including identifying the provisions the Department considers

violate IGRA as well as the Department's reasoning. Additionally, the Tribe requested the proposed section 293.12 include a non-exhaustive list of IGRA violations which would compel a disapproval.

- Another commenter requested the timeline for issuing a deemed approved letter be shortened to 60 days and provided draft language to that effect.

- Several commenters are concerned that the proposed section 293.12 conflicts with *Amador County v. Salazar*, 640 F.3d 373 (D.C. Circuit 2011) where the D.C. Circuit held that IGRA requires the Secretary to disapprove compacts that violate IGRA. Commenters raised both policy and legal concerns with the Department's practice of permitting compacts with problematic provisions to be approved by operation of law.

- One commenter expressed concerns with the implementation of proposed section 293.12.

13. *Section 293.13–Who can withdraw a compact or amendment after it has been received by the Secretary?*

    - Some commenters support the proposed changes made to section 293.13.

14. *Section 293.14–When does a compact or amendment take effect?*

    - Some commenters support the proposed changes made to section 293.14.

15. *Section 293.15–Is the Secretary required to disapprove a compact or amendment that violates IGRA?*

    - Several commenters support the proposed changes made to section 293.15.

    - One commenter requested the Department include in the Final Rule a non-exhaustive list of IGRA violations which would compel a disapproval.

    - Several commenters argued that *Amador County* held the Department has an affirmative duty to disapprove illegal compacts and provided draft language to affect that duty. Commenters further noted the Department's brief in *West Flagler Associates, Ltd. V. Haaland*, appeared to adopt the *Amador County* standard is binding on the Department which appeared to conflict with the proposed section 293.15. Several commenters opposed to the entirety of proposed section 293.15.

16. *Section 293.16–When may the Secretary disapprove a compact or amendment?*

    - Two commenters support the proposed changes made to section 293.16.

- Several commenters believe proposed subsection 293.16(b) is unnecessarily punitive unless the parties are provided a timely opportunity to cure. Commenters offered draft regulatory text.

- One commenter requested language and mechanisms to allow submission of missing documents.

- Another commenter requested clarifying language regarding the Secretary's ability to approve or disapprove compacts.

17. *Section 293.17–May a compact or amendment include provisions addressing the application of the Tribe's or the State's criminal and civil laws and regulations?*

- Many commenters approve of the proposed changes to section 293.17.

- A commenter requested the Department strike the phrase "At the request of the Secretary pursuant to § 293.8(e)" from the second sentence of § 293.17. The commenter argued the change would allow Tribal control over what State regulations apply.

- One commenter is concerned that the regulations are needlessly limiting the negotiation ability of compacting parties.

18. *Section 293.18–May a compact or amendment include provisions addressing the allocation of criminal and civil jurisdiction between the State and the Tribe?*

- Many tribes who commented approve of the proposed changes to section 293.18

- One commenter would like the Department to add "reasonable" to section 293.18, as follows: "Yes. A compact or amendment may include provisions allocating reasonable criminal and civil jurisdiction between the State and the Tribe necessary for the enforcement of the laws and regulations described in § 293.17.".

- Two commenters requested the Department clarify proposed section 293.18 to allow tribes and states to agree to certain licensing standards.

19. *Section 293.19–May a compact or amendment include provisions addressing the State's costs for regulating gaming activities?*

- One tribe would like the Department to add "reasonable" to proposed section 293.19.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.19 by impermissibly interpreting IGRA—especially as it relates to interpreting "bad faith." The commenter is also concerned that draft regulations will make it difficult for states to recoup the costs of managing Class III gaming.

- Various tribes commented that there is a typo in the final sentence of proposed section 293.19—with some tribes supporting it "in the strongest of terms."

- Several commenters would like the Department to require greater proof of reasonable state costs. Commenters requested the Department include the additional language to § 293.19, requiring specific forms of proof of both the actual cost and the reasonableness of the cost during the life of the compact.

- Several commenters expressed concern with the Department's inclusion of reporting requirements in § 293.19. The commenters argued that requirement would make it difficult for States to recoup the cost of regulating class III gaming, particularly in States with multiple Tribes who operate differing numbers and sizes of gaming facilities.

- One commenter renewed its objections to proposed section 293.17 in its comments on proposed section 293.19.

20. *Section 293.20–May a compact or amendment include provisions addressing the Tribe's taxation of gaming?*

- Various tribes support the proposed changes to section 293.20.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.20 by impermissibly interpreting IGRA.

- Several commenters oppose proposed section 293.20 because the tribes are concerned States will demand tax to be collected and assessed in a particular manner.

- One commenter renewed its objections to proposed section 293.17 in its comments to proposed section 293.20.

- One tribe suggests striking "in amounts comparable to the State's taxation of State licensed gaming activities."

- Several commenters expressed concerns with the Department's inclusion of § 293.20 in the Proposed Rule and argued that States may begin demanding compact provisions addressing the taxation of Tribal gaming. Others requested the Department strike specific language

referencing State tax rates. Another commenter requested the Department include a "directly related" nexus for Tribal tax equivalents.

21. *Section 293.21–May a compact or amendment include provisions addressing the resolution of disputes for breach of the compact?*

- Various tribes support changes made to proposed section 292.21—especially regarding the ability for tribes to submit compacts or amendments they are concerned with.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.21 by impermissibly interpreting IGRA and acting without authority to review any and all court orders between tribes and states as if they are compact amendments The commenters also argued the proposed § 293.21 violates the Federal Arbitration Act.

- One commenter is concerned that changes to 293.21 could undermine previously valid and existing compacts.

- One commenter is concerned proposed section 293.21 requires the Interior's review of any state or tribal court order or an arbitration award if the Interior considers the outcome to be a compact amendment.

- One commenter requested the Department include within § 293.21 a duty on the Secretary to disapprove any compact which provides that the only remedy for a breach of compact is suspension or termination of the compact. The commenter argued that compacts should be required to include reasonable notice of alleged breach of compact with opportunities to cure any alleged violations.

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

- Various tribes who commented support the proposed changes to section 293.22 because they help specify what provisions may be included in a compact.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.22 by impermissibly interpreting IGRA.

- One tribe requested the phrase "within gaming spaces" be added to proposed section 293.22. The commenter argued this edit would be consistent with other portions of the Proposed Rule and IGRA by distinguishing between the physical space where the "standards for the operation of gaming" may properly reach, and from the gaming facility spaces where the standards for maintenance and licensing may properly reach.

- One commenter believes the Department is artificially limiting the scope of "gaming space."

- A tribe is concerned the Department is going too far in restricting how tribes can agree to revenue share.

- A commenter expressed concerns that § 293.22 may have unintended consequences by restricting provisions which a Tribe may consider germane and arising from the Tribe's conduct of gaming.

23. *Section 293.23–May a compact or amendment include provisions that are directly related to the operation of gaming activities?*

- Various tribes support changes to proposed section 293.23 partly because clarifications will help limit state overreach into Class III gaming.

- One tribe provided draft language to strengthen provisions in proposed section 293.23.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.23 by impermissibly interpreting IGRA—and is especially concerned with the definition of "directly related."

- A tribe requested that the Department clarify that provisions regarding the interpretation of "bad faith" are merely guidance.

- One tribe requested that proposed section 293.23 be struck as unnecessary.

24. *Section 293.24–What factors will be used to determine whether provisions in a compact or amendment are directly related to the operation of gaming activities?*

- Various tribes who commented support proposed changes to proposed section 293.24. A number of commenters expressed support for § 293.24 and applauded revisions the Department included in response to comments received during Tribal consultation. Commenters noted that the provisions would codify the Department's longstanding "direct connection test," which was found persuasive by the Ninth Circuit in Chicken Ranch, 42 F.4th at 1036. Commenters also stated that the proposed § 293.24 would help Tribes and States understand the limits that IGRA imposes on Tribal-State gaming compacts.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.24 by impermissibly interpreting IGRA.

- Several commenters expressed concern that, as drafted, the proposed § 293.24 could be construed to prohibit provisions addressing the collective bargaining rights of employees of a Tribal gaming facility. The commenters argued such an interpretation of the regulations conflicts with existing Ninth Circuit caselaw, citing to *Coyote Valley II* and the Biden Administration's stated policies in Executive Order 14025. One commenter requested the Department include clarifying language in § 293.24 and offered proposed regulatory text.

- One tribe is concerned that the Department is going too far in restricting how tribes can agree to revenue share.

- A commenter requested the Department clarify if the Department will defer to Tribes' sovereign decision making and negotiations when applying § 293.24. The commenter requested the Department include the phrase "the Department may consider" to §293.24(c) and the phrase "and the department will defer to the Tribe regarding whether a direct connection exists" in §293.24(d).

- One commenter expressed concern that collective bargaining is not "directly related" to Class III Gaming under current draft regulations.

- A commenter stated proposed section 293.25 would hamper negotiations between tribes and the State.

- A commenter requested the Department revise proposed § 293.24(c)(5) to clarify that any intergovernmental agreements containing provisions that are not directly related to the Tribe's gaming activities are not enforceable through a compact.

- One commenter expressed concern that, as drafted, the proposed § 293.24(b) could be construed to prohibit provisions addressing employee licensing and back of house security requirements for non-gaming business and amenities which in some instances may be necessary due to proximity to gaming spaces and gaming facility design.

- One tribe is concerned that proposed section 293.24 could hamper state-wide compacts.

- Various tribes are concerned about proposed section 293.24's effect on "third-party tribes."

- A commenter requested the Department cease its practice of approving "exclusivity compacts."

Several commenters requested the Department make typographical and stylistic edits to proposed § 293.24(c) to improve readability of the rule.

- One tribe requested various pieces of clarifying language. A commenter requested the Department revise proposed § 293.24(a) by adding the phrase "within gaming spaces" for consistency with other provisions in the Proposed Rule.

- Several commenters expressed concerns that proposed § 293.24(c)(1) could be misconstrued to limit or prohibit state-wide compacting schemes or compacts with "most favored nation" provisions. A commenter offered draft language to clarify the intended reach of § 293.24(c)(1).

- A number of commenters offered differing opinions on whether regulations should allow, require, or prevent tort claims from being heard in State courts. Some commenters noted the proposed § 293.24(c)(7) was consistent with case law, citing to Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254 (D.N.M. 2013). Other commenters requested the Department defer to a Tribe's sovereign decision making and amend § 293.24(c)(7) to allow for Tribes to request tort claims be heard in State court. Other commenters requested the Department revise § 293.24(c)(7) to effectively prohibit the inclusion of provisions addressing tort claims from compacts, arguing that such provisions can be overly burdensome on Tribes, while noting that the resolution of tort claims is not absolutely necessary for the licensing and regulation of gaming. Commenters offered proposed edits to § 293.24(c)(7) reflecting their stances on tort claims.

- A commenter questioned the legality and public policy rationale of protecting third-party Tribes while not offering similar protections to State-licensed commercial gaming operators.

- A commenter requested the Department revise proposed § 293.24(c)(8) to include provisions that would regulate conduct outside of the gaming spaces in addition to non-gaming Tribal economic development.

- Several commenters requested the Department clarify in proposed § 293.24(c)(9) that class I and class II gaming are subject to the jurisdiction of Tribes and the United States at the exclusion of the States. Commenters offered draft language.

25. *Section 293.25–What factors will the Secretary analyze to determine if revenue sharing is lawful?*

- Many commenters expressed support for the proposed § 293.29—especially regarding the Department's preference for long-term compacts. The commenters noted compact negotiations are a time and resource intensive effort.

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.25 by impermissibly interpreting IGRA—here, concerned over the Department's practice of investigating non-ambiguous language.

- One tribe is concerned that the Department is going too far in restricting how tribes can agree to revenue share.

- A commenter believes that proposed § 293.29 will needlessly limit compact negotiations, arguing that the proposed § 293.29 is inconsistent with prior affirmative approvals of compacts with fixed termination dates.

- Several commenters expressed concern that § 293.28 is overly restrictive and may result in incentivizing direct competition from State lotteries and State licensed commercial gaming.

- A commenter requested the Department cease its practice of approving "exclusivity compacts," which limit commercial gaming operators' access to some gaming markets.

- A few commenters requested various definitions or clarifications—including "great" vs. "strict scrutiny" and "projected revenue."

- Several commenters requested the Department clarify, either in the regulatory text or the preamble, that exclusivity provisions which contain enforceable remedial provisions (also referred to as "poison pill" provisions) triggered by State action are considered directly related to gaming and permitted under IGRA.
- One commenter requested adding language to allow Tribes to request guidance from the Secretary regarding revenue sharing terms during the life of the compact to ensure the Tribe remains the primary beneficiary of gaming. The commenter provided draft language, which included adding several subsections to § 293.28. The proposed additional language would provide a process for Tribes to request guidance letters, including a formal legal opinion regarding revenue sharing during the life of the compact.

- Several commenters requested the Department include examples of previously approved "meaningful concessions," similar to the lists found in proposed § 293.24.

- A commenter requested carve out language for the "revenue sharing trust fund." The commenter did not provide proposed regulatory text.

- A commenter requested that the Department define the term "projected revenue" because most compacts with revenue sharing call for the State to receive a percentage of gross revenue regardless of the costs required to develop, maintain, and regulate gaming activities. The commenter also asks the Department to analyze the need to distinguish "gross revenue" from "net revenue." Another commenter requested the Department address "free play" and "point play" as part of the revenue calculation in the regulations.

- A commenter requested carve out language for payments to local governments. The commenter argued that payments to local governments are consistent with IGRA's restrictions on the use of net gaming revenue in § 2710(b)(2)(B). The commenter argued Intergovernmental Agreements that include revenue sharing with local governments are beneficial to the relationship between the Tribe and local governments and help support critical needs of both governments. The commenter offered draft language establishing a test for such payments: "(d) In considering whether a compact provision providing for the Tribe's payment of gaming revenues to local governments is permissible, the Department may consider evidence submitted, at the insistence of the Tribe, that such a provision: (1) was created voluntarily by the Tribe; (2) is in exchange for benefits received by the Tribe; and/or (3) to offset the costs borne by such local governments as a result of the Tribe conducting its gaming activities."

26. *Section 293.26–May a compact or extension include provisions that limit the duration of the compact?*

- Various tribes who commented support the proposed changes to proposed section 293.26—especially regarding the Department's preference for long-term compacts.

- Several commenters requested the Department define "long-term" and offered suggested minimum terms ranging from 15-20 years.

- Other commenters requested the Department allow flexibility for compacts with "stacked renewal terms," which allow the compact to automatically renew for a defined period of time if neither party objects. Commenters also requested the Department include flexibility for reopener provisions.

- A commenter believes that proposed § 293.29 will needlessly limit compact negotiations, arguing that the proposed § 293.29 is inconsistent with prior affirmative approvals of compacts with fixed termination dates.

- A commenter requested the Department clarify that the existence of a compact between a Tribe and the State does not alleviate the State's obligation under IGRA to negotiate new compacts or amendments in good faith at the request of the Tribe, particularly for a period of time not covered by the existing compact.

- Commenters requested an explicit definition of "long-term compact."

- One commenter suggested that the Department is acting beyond its authority in proposed section 293.26 by impermissibly interpreting IGRA.

- A commenter believes that proposed section 293.26 will needlessly limit compact negotiations.

- A few commenters requested more flexibility included in compact negotiations.

27. *Section 293.27–May a compact or amendment permit a Tribe to engage in any form of class III gaming activity?*[1]

- Many commenters are concerned proposed section 293.30 would take away States' power to limit Class III gaming. These concerns, shared by some elected officials and State governments who commented—believe the regulation is illegal and against the principles of federalism. In addition, many non-tribal commentators said the "if one, then all" rule is illegal.

- Several commenters request that the Department provide additional analysis of the Department's interpretation of conflicting caselaw to bolster proposed § 293.30 against expected litigation.

- Several commenters expressed support for the proposed § 293.30. Commenters noted that the proposed § 293.30 is consistent with existing case law, citing to Mashantucket Pequot Tribe v. Connecticut, 913 F. 2d 10-24 (2d Cir. 1990. Commenters also opined this rule would benefit Tribes during compact negotiations.

- Several commenters are concerned the proposed § 293.30 would take away States' power to limit Class III gaming. Commenters argued that a State's allowance of charitable casino nights should not necessarily result in full blown casino gambling under IGRA. Others misconstrued the proposed § 293.30 as requiring a State to negotiate over forms of gaming expressly prohibited by State law. Commenters also noted proposed § 293.30 conflicts with some caselaw, citing to Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F. 3d 1250 (9th Cir. 1994) and Cheyenne River Sioux Tribe v. South Dakota, 3 F. 3d 273 (8th Cir. 1993).

- Various tribes who commented support proposed section 293.27.

- One commenter argued that the proposed § 293.30 impermissibly expands the scope of the Secretary's review of a compact to include the compact negotiation process.

28. *Section 293.28–May any other contract outside of a compact regulate Indian gaming?*

- One commenter expressed support for proposed section 293.28.

- Commenters requested that the Department include internal cross references to § 293.4 and §293.8, as well as make clarifying edits for consistency across the Proposed Rule.

[1] Note: The draft rule renumbered the former 293.26 as 293.27. Accordingly, some commenters refer to "293.26" when commenting on 293.27.

- One commenter requested clarity on "regulate gaming."

- Two tribes commented that the Department's proposed revisions to proposed section 293.28 are beyond its authority.

- Several commenters objected to proposed § 293.31 and argued that it exceeds the Secretary's authority to review compacts under IGRA. The commenters argue that many Tribes have intergovernmental agreements with local governments that address a wide range of topics which may affect a Tribe's gaming operation. The commenters argue that such agreements should not be subject to Secretarial Review as compacts or amendments under IGRA.

- A few commenters are concerned the proposed section 293.28 needs to be fully consistent with sections 293.4 and 293.8 and offer draft language.

- One commenter requested clarity as to what agreements the Department may consider as regulating gaming, thus triggering § 293.31. The commenter also requested the Department clarify that agreements addressing public health and safety are allowable as either a separate agreement, or as part of the compact.

29. *Section 293.29–May a compact or amendment include provisions addressing Statewide remote wagering or internet gaming?*

- Various tribes who commented support the inclusion of proposed section 293.29, especially in the rapidly changing digital world. However, many tribes also comment that they already have the authority to conduct online gaming even without the language proposed section 293.29, with some tribes requesting the draft to reflect that pre-existing authority.

- Many non-tribal organizations express deep concern about proposed section 293.29. These comments state that the Department has no authority to implement proposed section 293.29 under *Chevron* or major questions doctrine and that this provision illegally expands Indian gaming state-wide and off-reservation. The legal analysis underlying each concerned comment varies and is included in the section 293.29 Tab of the Final Written Comments Spreadsheet for Part 293.

30. *Section 293.30–What effect does this part have on pending requests, final agency decisions already issued, and future requests?*

- Various tribes who commented support the language of proposed section 293.30.

- A commenter requested that this regulation include a grandfather clause for currently valid compacts.

31. *Section 293.31–How does the Paperwork Reduction Act affect this part?*

- No comments were submitted specifically regarding proposed section 293.31.

32. *General comments not otherwise keyed to a specific section.*

- Various commenters requested more time to comment on the regulations.

- Some commenters believe the process was not transparent and tribes unfairly received special treatment. They suggest releasing detailed records of tribal comments from June 2022. Some commenters asked if the Department had engaged with commercial gaming interests in addition to Tribal governments during the development of the Proposed Rule.

- Many tribes commented to express appreciation for the hard work and consideration exhausted by the Department.

- Many tribes who commented believe the regulations were a step in the right direction but not far enough.

- Some tribes believe that the Part 293 changes will be hollow without changes to Part 291.

- One commenter requested a process for tribes to seek Department of Justice intervention as part of a Seminole fix.

- Some non-tribal commenters would like the Department to scrap the draft rule altogether.

- Some non-tribal commenters commented to discourage any allowance of Indian gaming.

- One tribe requested a finished gaming handbook.

- One commenter listed various implementation questions, which can be found under the Non-Specific tab of the Final Written Comments Spreadsheet for Part 293.

- Some non-tribal commenters believe the Department has failed to conduct a detailed review of the economic effects, despite being required to conduct one under the law. Additionally, these commenters believe a NEPA analysis must be undertaken before adopting a final rule.

- One commenter believes the Department is asserting too much authority in a way that challenges tribal sovereignty.

- Several commenters asked various process and implementation questions. Other commenters included comments addressing the Department's part 151 fee-to-trust rulemaking efforts.

- Another commenter is concerned with the Department's characterization of current law.

V. Conclusion

Overall, the draft rule has attracted tribal support and non-tribal skepticism. The submitted comments inform this general observation. Many commenters submitted red-lined draft language. The two most prominent "flash points" seem to be proposed sections 293.27 and 293.29.