

UNITED STATES DEPARTMENT OF THE INTERIOR
INDIAN AFFAIRS

TRIBAL CONSULTATION 25 CFR Part 293
GAMING COMPACT PROCESS REGULATIONS

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1:00 PM (MT)

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 **MR. NEWLAND:** We're going to go ahead and
4 get started now with our government-to-government
5 consultation between the Department of the
6 Interior and all of you on our proposed regulation
7 25 CFR Part 293 relating to tribal-state Class III
8 gaming compacts.

9 I know many of you were here this morning.
10 Some of you are new today, anyway. So my name is
11 Bryan Newland. I serve as the Assistant Secretary
12 for Indian Affairs. And we've got a brilliant
13 team here from the department working on these
14 regulations. I want to recognize our policy team.
15 Hiding in the corner over there is Rose Petoskey
16 and Stephanie Sfiridis, our counselors, Oliver
17 Whaley, who's the head of our RACA Office who
18 organizes all of these consultations, receives all
19 of your comments, organizes them, collates them
20 and makes sure that this is an orderly process for
21 us. Sharee Freeman is also joining us in the
22 Office of Self-Governance. And then I will let

1 the rest of our team up here introduce themselves.

2 MS. ISOM-CLAUSE: Good afternoon. I'm
3 Katherine Isom-Clause. I am Taos Pueblo and I
4 serve as the Deputy Assistant Secretary for Policy
5 and Economic Development, which includes working
6 with the Office of Gaming, our wonderful
7 colleagues there.

8 I'll turn it over to you, Paula.

9 MS. HART: Good afternoon. I'm Paula Hart.
10 I'm a member of the Saint Regis Mohawk Tribe. I'm
11 the Director for the Office of Indian Gaming.
12 I'll be going through the presentation with you.
13 And I have my deputy here. I'll let him introduce
14 himself.

15 MR. BRISTOL: Good afternoon. I'm Philip
16 Bristol. I'm the Deputy Director for the Office
17 of Indian Gaming.

18 MR. NEWLAND: Great. So, again, we usually
19 like to start our consultations with prayer. We
20 do not -- we weren't able to get that set up in
21 advance. So I will ask your forgiveness and
22 excuse us for skipping that part. It's no

1 disrespect intended.

2 What we're going to do is Paula and Phil are
3 going to walk us through an overview of the Part
4 293 regulations. This will be a little bit more
5 extensive than this morning because these are new
6 regulations. We're not revising -- well, they're
7 mostly new regulations. It's more extensive
8 revisions, I guess, than what's already there.
9 And then we will open the floor to all of you.

10 Those of you who were here this morning,
11 same drill. Please introduce yourself by name and
12 who you are here speaking on behalf of. We've got
13 our wonderful transcription services here, so we
14 need to make sure that we're creating a record for
15 this consultation. So, even though many of us
16 know each other, it's very helpful and necessary
17 for that part.

18 So with that, I'm going to turn it over to
19 Paula and Phil to walk us through the Part 93
20 rule, and then we'll do the most important part,
21 which is hear from you.

22 **MS. HART:** Thank you, Bryan. Our

1 consultation schedule is pretty similar, identical
2 to the 151. We're having the consultation today
3 in person. We have another one on January 19
4 virtually from one to four. We have one on
5 Monday, January 30 from two to five. And written
6 comments are due on midnight on March 1.

7 Again, these are the 25 CFR Part 293 Class
8 III Tribal State Gaming Process. The changes from
9 the notice of the proposed rulemaking include the
10 following.

11 **MR. BRISTOL:** So we updated the definitions
12 of amendment, extension, gaming facility and added
13 definitions for gaming spaces, meaningful
14 concession and substantial economic benefit.
15 Those are in 2932. We have updated or clarified
16 when ancillary agreements or documents are
17 amendments which need to be submitted for a
18 secretarial approval. There is included
19 clarification as to when the tribe and state
20 submit a game compact for review, and what
21 documents need to be submitted with that package.
22 We've updated the provision on when a 45-day

1 review period begins, which includes a requirement
2 for us to provide e-mail acknowledgement for
3 e-mail-submitted compacts and permits for
4 e-mail-submitted compacts. We've also included a
5 requirement that after the 45-day review period
6 ends, if no action is taken on a compact, the
7 secretary will issue a letter informing the
8 parties that the compact or amendment has been
9 approved by operation of law. There are
10 clarifications that a tribe may submit to the
11 department any agreement or document that a tribe
12 is concerned may amend its gaming compact for a
13 determination with a 60-day review period on that.
14 If it is an amendment requiring secretarial review
15 and approval, in hopes of providing clarity and
16 certainty to those documents, provides that, if
17 any gaming compact or amendment requires that the
18 tribe adopt standards equivalent to or exceeding
19 state law or regulations, the parties must show
20 that those mandated tribal standards are both
21 directly related to and necessary for the
22 licensing and regulation of the gaming activity.

1 It provides different examples of factors that are
2 and are not directly related to the operation of
3 gaming activity. Includes new provisions that the
4 secretary must also consider whether the tribe is
5 the primary beneficiary of gaming when analyzing
6 whether revenue sharing is lawful. We've added a
7 section allowing gaming compacts to include
8 statewide remote wagering or internet gaming,
9 relying on a similar justification that was used
10 in a Seminole letter. And added a section
11 regarding the effects of this rulemaking on
12 getting requests and decisions that have already
13 been made and future requests.

14 **MS. HART:** Those comments and the
15 adjustments were made because we received almost
16 over 900 comments. So we took the tribal leaders'
17 comments into account and made those adjustments.

18 So next steps. Again, written comments are
19 due by midnight on March 1. Register for upcoming
20 virtual consultations at the site on the screen.
21 And if you have any questions regarding this
22 effort, please contact Oliver. RACA will be

1 providing and posting everything that needs to be
2 for these comments. So we are now going to open
3 up the floor to questions and comments.

4 MS. CHARLES-NEWTON: Are we opening up the
5 comments now?

6 MR. NEWLAND: Yes.

7 MS. HART: Yes.

8 MS. CHARLES-NEWTON: Okay. Great. Good
9 afternoon. For the record, I am Eugenia
10 Charles-Newton, Council Delegate with the 25th
11 Navajo Nation Council. In the 24th Navajo Nation
12 Council, I did serve as the chairwoman for the
13 gaming subcommittee. And so I'm here to provide
14 some comments regarding the changes that are being
15 made to 25 CFR Part 293, Class III tribal state
16 gaming compact process.

17 My first question is -- thank you for
18 providing us a summary of some of the changes that
19 are, I guess, in the process of being made through
20 the proposal. Looking at the second bullet point,
21 the clarification of when ancillary agreements or
22 documents are amended which need to be submitted

1 to the secretary for approval, and it does have
2 see Section 293.4, 293.8, 293.21 and 293.28 -- and
3 perhaps I'm wrong in this, but I did check the CFR
4 to see what is the definition of ancillary
5 agreements, and what is your definition of
6 documents. I think we have a history in Indian
7 law where we assume or where we look at a term and
8 we think that everybody, you know, knows what that
9 term is, or we think that we're all on the same
10 page about something. But because you are making
11 clarifications of when this ancillary agreement or
12 the documents are amendments, I think we should
13 have a definition of what does BIA see as
14 ancillary agreements, what does BIA see as
15 documents. I say that because, if you look in
16 terms of what we're seeing with gaming compacts,
17 which is sometimes litigation, right, if the court
18 orders something, is that court order -- you know,
19 is it a document that could amend the compact?
20 And, if that's the case, then I think that there
21 needs to be proper notification, again, given to
22 the tribes. And I say that because, specifically,

1 when you're looking at states and the way that
2 they negotiate their compacts, as BIA is aware and
3 as all of us here in this room are aware, we all
4 do things differently. Navajo Nation is uniquely
5 situated in three states, Utah, New Mexico and
6 Arizona. Utah doesn't approve gaming, so we don't
7 have a gaming compact, nor are we engaged in any
8 type of conversations regarding gaming compact.
9 However, New Mexico recently completed their
10 gaming compact. And with New Mexico my
11 understanding is it was each tribe entering into a
12 compact with the State of New Mexico, which
13 required that compact to go through the
14 legislative process. Here in Arizona, it requires
15 the tribes to come as one to present and sign off
16 on one compact that they agree with, and then to
17 negotiate with the state, which is completely
18 different than the way that New Mexico does that.
19 So if you have a court order, and let's say BIA
20 decides that that court order is an ancillary
21 agreement, or it is considered to be a document,
22 it would change the terms of the compact. And

1 maybe it won't affect the tribes in New Mexico so
2 much, but it would certainly have an effect on the
3 tribes here in Arizona because we have one compact
4 that represents 21 tribes. And so all 21 tribes
5 will be affected by that court order. That may be
6 a court order for just one tribe. Does that make
7 sense? So if Navajo were to sue the State of
8 Arizona for something that we didn't agree with,
9 and the court agrees with Navajo, that may be
10 considered a document or an ancillary agreement
11 that may change the way that the compact is in the
12 State of Arizona, affecting 20 other tribes when
13 they had really nothing to do with the
14 disagreement that Navajo may have had with the
15 State of Arizona regarding the compact. So I
16 think it's really important that you define what
17 ancillary agreements are or documents, and really
18 clarify, you know, when are those considered to be
19 amendments to the compact.

20 And in addition to that, also reinforce --
21 I'd like to ask that you, you know, the
22 notification part, that that be sent out to all of

1 the tribes, again, because that document or that
2 agreement may affect other tribes' compact. And
3 that may not be something that we may want, or
4 maybe that's something that we just didn't
5 consider and that we're good with. But that
6 notification would give us the opportunity to
7 weigh on whether we want that to change the terms
8 of our compact or not. So I want to point that
9 out.

10 The second -- the second point that I would
11 like to make is that we have been reviewing the
12 proposed rules. And I say we as in Navajo. And
13 we do appreciate these discussions and the
14 consultations that are currently happening right
15 now in regards to these changes to the CFR. We
16 know how much the CFR changes the way policies
17 work in Indian country, specifically, you know,
18 how it does affect Navajo. We did submit some
19 written comments, and we'll be providing more for
20 the March 1 deadline. But I do want to emphasize
21 how important it will be for your team to think
22 hard about tribes in states like Arizona as you

1 receive and you consider comments. And I really
2 want to stress how important it is -- and I'm sure
3 everybody in this room will agree with me that
4 every tribe is different in the way that they're
5 compact is entered into and the terms of the
6 compact that they may have with the state. It's
7 also very different in the way that we work with
8 our communities and the way that we work with the
9 state. Every compact is different. But that you
10 take that all into consideration, because in -- as
11 we know, in Indian country, one rule affects the
12 entire Indian country as a whole. It doesn't
13 matter how different the tribes are, what the land
14 status might be, or, you know, how the tribes
15 might be completely different. It affects us
16 completely all the same. So we do hope that you
17 do take that into consideration.

18 Here in Arizona, as I stated, the tribes
19 negotiate with the state as a group, and we try to
20 promote inclusive consensus-based approaches to
21 compacting, and this helps us balance the
22 interests of everyone involved. And I can say

1 that with Navajo, we -- you know, we -- it was a
2 proud moment, I think, in Arizona history when 18
3 tribes came together and agreed, you know, with
4 certain terms of the compact. And we made it very
5 clear in terms of the compact where we didn't
6 agree, and that helped us to try to focus in on,
7 you know, the meetings that we had had and, you
8 know, what we had to focus on in terms of, you
9 know, like Section 2.3, you know, we don't agree
10 on that, we don't agree that the definition should
11 be this, or we don't agree that this is what Class
12 III gaming is. But it allowed us the opportunity
13 to come together to have that consensus and to be
14 able to tell the State of Arizona that we agree
15 with this compact or we don't agree with this
16 compact.

17 But I also want to state that your
18 commitment to considering our approach as you
19 draft the final rule will be very important for
20 the continued success of our compacting process
21 here in Arizona. And that's why I'm stressing,
22 again, every tribe is different, every state is

1 different in the way that they enter into these
2 compacts. I hope that that's taken into
3 consideration, which is why I think on one hand,
4 you know, it might be a little bit dangerous to
5 really kind of define what certain things mean and
6 to try to keep it general. But then, on the other
7 hand, it might be dangerous to keep it general,
8 because if you've got somebody who wants to stop
9 the actions of what the tribes are doing, they
10 could easily say, well, that's a document or
11 that's an ancillary agreement and so that changes
12 the terms of the compact, so everything, you know,
13 is void, or everything stands -- you know, stands
14 at a standstill at that point when we're trying to
15 promote sovereignty and we're trying to promote
16 economic development in Indian country. So,
17 again, I hope that that's taken into
18 consideration.

19 Thank you.

20 MS. ISOM-CLAUSE: Thank you,
21 Ms. Charles-Newton, for those excellent comments.
22 We really appreciate that. As I read it -- you

1 know, we have all of the experts up here, so
2 anyone who like to chime in on this -- I have been
3 thinking about the ancillary agreement as, from
4 the effects that it has, is that's what, you know,
5 would make it something that's subject to review
6 by the secretary. So if it is actually changing
7 the terms of the compact, that's when, you know,
8 it would be brought into that review process. But
9 we've tried to clarify that if it's -- when we say
10 implementing or clarifying, implements or
11 clarifies a provision not inconsistent with the
12 approved compact or amendment, it doesn't fall
13 under that category, so it's not subject to that
14 review and approval.

15 **MS. HART:** Yeah, and I think you make a good
16 point there. And I think we will make sure that
17 we take that into consideration is, if you have a
18 problem in Arizona, there's a legislative bill or
19 something that got passed with everybody, that's a
20 really good point. I'm glad you made that comment
21 for the record.

22 **MS. ISOM-CLAUSE:** And, just, you know, one

1 more point is, you know, I appreciate how you're
2 thinking through it just as we grapple, you know,
3 if we do this, we might get this effect; if we do
4 that that, we might get another effect. And so,
5 as you continue to reflect on it, if you do have
6 language that you think is helpful, as the
7 assistant secretary said this morning, that's
8 always really helpful just to get some red-line
9 language you'd like to see.

10 **MR. NEWLAND:** And I just want to add a
11 higher-level, overview-level policy perspective on
12 the panel where some of this stuff is coming from,
13 we are -- we do recognize that the practice of --
14 the practical application of these regulations is
15 something that we try to keep in mind. We
16 understand that in the different states the
17 process of reaching agreement is different and
18 that states have preferred approaches and some
19 tribes have preferred approaches. We start from
20 the premise that tribes have the sphere of
21 sovereignty to regulate their own gaming, and that
22 then we look to see where has Congress carved out

1 of that sphere, and it allows in the Class III
2 gaming states to negotiate with tribes over the
3 regulation of gaming activities. And so what
4 we've seen since 1988 is, you know, there's an
5 evolving and a sophisticated way of approaching
6 all of this that sometimes states want to
7 characterize agreements as not compacts, even
8 though when, in practice, the agreement would bind
9 the tribe to conduct its gaming activities a
10 certain way. We have seen instances -- you know,
11 calling it an MOU doesn't mean it's not a compact.
12 And we've also seen instances where, you know,
13 there may be -- I don't want to call out any
14 particular tribe and state for -- we don't want
15 unintended consequences. But, if there were a
16 dispute over a land claim or labor and then the
17 state or the tribe reached some sort of global
18 agreement and maybe even coordinated the agreement
19 pages, you know, one through two addressed the
20 subject matter of the dispute and pages three
21 through 150 really regulate the tribe's gaming,
22 that's a gaming compact. And we've also seen

1 compacts that reference agreements in the text of
2 the compacts, and then, if we approve the compact
3 and then we see this local MOU between the tribe
4 and the county regulates things like the square
5 footage allowed, where the development can occur,
6 hours of operation things and also provides a
7 percentage revenue share to the county and it's --
8 it purports to regulate gaming activities. And
9 those are things, when you go back to the
10 foundational principle of tribal sovereignty, with
11 exceptions, rather than tribal sovereignty being
12 the exception. We start from that. And so what
13 we -- our aim here is to capture all of these
14 things that have built up by practice over the
15 years where there's an attempt to regulate tribal
16 gaming by calling agreements something besides a
17 Class III gaming compact. So that's the aim here.
18 We recognize that, you know, we may not have
19 perfect, or that we may not be right, which is why
20 we're doing these consultations. But what we are
21 trying to do is make it clear that, if you're
22 going to try to have a short-form gaming compact

1 and reference some other agreement that does the
2 actual work of regulating tribal gaming, that by
3 law requires secretarial review and approval, and
4 we're trying to call that out here. Longwinded,
5 but I wanted to share the impetus behind this
6 section.

7 **MR. CROWELL:** Thank you. Good afternoon.
8 I'm Scott Crowell, tribal attorney. I submit
9 these comments today on behalf of the Rincon Band
10 of Luiseno Indians. Rincon thanks the tribes
11 descending from the O'odham Peoples for the
12 opportunity to have the support of carrying on
13 their aboriginal grounds. Rincon will also be
14 submitting written comments. But I also today on
15 this subject speak from my personal experience as
16 a tribal attorney in the trenches of compact
17 negotiation and litigation. Over the last 34
18 years since the passage of IGRA, I've had the
19 honor and privilege of serving as lead compact
20 negotiation counsel or lead litigation counsel for
21 nearly two dozen tribes in nine different states.
22 So my comments are coming from the experience that

1 I've had as to the way it would impact my job.
2 These proposed amendments will make it easier for
3 tribal leaders at the negotiation table and for
4 tribal lawyers in the courtroom. And I, as a
5 tribal lawyer, thank you for them.

6 Rincon specifically directed me to express
7 the tribe's appreciation that the amendments are
8 designed to prevent states from taxing tribal
9 gaming revenue and further codifies the Section
10 293.25, the holding in the Ninth Circuit in Rincon
11 Band versus Schwarzenegger. Rincon was in court
12 for nearly a decade fighting the State of
13 California for its insistence on taxing tribal
14 gaming revenue, and it's heartwarming to see the
15 department embrace the hard-fought outcome of that
16 litigation.

17 Rincon wants everyone to pay special
18 attention to Subsection B1, which requires that
19 the tribe has requested specific meaningful
20 concessions the state otherwise is not required to
21 negotiate. Rincon has been frustrated to see
22 states misinterpret the Rincon decision to suggest

1 that a state can unilaterally offer a meaningful
2 concession and insist that the tribe accept it in
3 exchange for taxation of tribal gaming revenue as
4 a condition of securing the compact. That is
5 simply wrong. The draft reflects the correct
6 reading of the Rincon decision that the tribe is
7 not seeking specific meaningful concessions that
8 the state is otherwise not required to negotiate.
9 There is no basis whatsoever for so-called revenue
10 sharing.

11 Further, Rincon applauds -- consistent with
12 the comments that were just made, Rincon applauds
13 the clarification that the regulation makes sure
14 that side agreements are intergovernmental
15 agreements with surrounding counties and towns are
16 part and parcel of the tribal state compacts and
17 must comply with IGRA's prohibitions on tax and
18 travel gaming revenue and IGRA's restrictions to
19 only address matters directly related to the
20 regulation of Class III gaming. Being coerced
21 into an intergovernmental agreement that imposes
22 taxes and fees on tribal gaming revenue, or

1 requires tribes to mirror local laws in areas not
2 directly related to the regulation of Class III
3 gaming as preconditions to securing a compact or
4 being able to proceed with a gaming project under
5 a compact is no different than the illegal
6 provisions being demanded by the state and compact
7 itself. Local governments are subdivisions of the
8 states and must be held accountable for their own
9 overreaching and illegal taxation of tribal gaming
10 revenue.

11 Rincon is operating under secretarial
12 procedures and rule of the compact. This is the
13 remedy the tribe secured in the Rincon versus
14 Schwarzenegger litigation, and the procedures have
15 proven to work very well for Rincon. Rincon would
16 not have been able to prevail in that litigation
17 if the state did not waive its 11th Amendment
18 immunity to IGRA bad-faith lawsuits when the
19 voters of California passed Proposition V in 1997,
20 but tribes in virtually every other state do not
21 have that option and continue to be frustrated by
22 states asserting 11th Amendment immunity. It is

1 for that reason that Rincon applauds the
2 commitment made in the formal Federal Register
3 Notice that the department will consider technical
4 amendments to Part 291.

5 As the tribal attorney, I am still haunted
6 by then Governor Martinez of New Mexico's coercion
7 of the Pojoaque Pueblo into an unjust compact that
8 illegally imposes a heinous tax on their gaming
9 operations. For anyone in this room or listening
10 in, with Indian lands and states that can assert
11 11th Amendment immunity, if you think what
12 happened to Pojoaque in New Mexico or the Kickapoo
13 in Texas or the Jena Choctaw in Louisiana or the
14 Seneca in New York could not happen to you, think
15 again. Today's friendly governor may be replaced
16 by tomorrow's tyrant. Today's exclusivity may be
17 replaced by tomorrow's opening of the floodgates
18 to commercial urban competition. For many of you,
19 today's compacts will eventually expire and or
20 will need amendments. Governor Martinez used 11th
21 Amendment immunity to impose her injustices on
22 Pojoaque and she established a game plan that any

1 governor in any state other than California could
2 adopt. She successfully sued the United States to
3 prevent Pojoaque from using the Part 291
4 regulations to secure the procedures that have
5 worked so well for Rincon. These changes to Part
6 293 are exceptional, and they should be applauded.
7 But they are hollow if the tribes do not have the
8 ability to require states to comply with the new
9 regulations specifically and IGRA generally.
10 Technical changes to Part 291 will go very far
11 towards holding states accountable at the
12 negotiation table.

13 Rincon also appreciates the amendment adding
14 Section 293.29 making clear that a tribe and state
15 may compact for statewide mobile wagering under
16 IGRA. The tribe's written comments will address
17 potential improvements to the section to make it
18 clear that if a state allows any person,
19 organization or entity to engage in statewide
20 mobile gaming for any purpose, that state is
21 required by IGRA to negotiate for tribes to offer
22 the same statewide mobile gaming, even if that

1 state is unwilling to allocate its jurisdiction to
2 the tribe over wagers made by patrons located off
3 of Indian lands, which was a key feature in the
4 Seminole Florida compact. This last year, Rincon
5 spent millions of dollars, which it would have
6 preferred to spend on tribal programs, to help
7 defeat Proposition 27 in which out-of-state
8 corporations use the ambiguity over whether tribes
9 could engage in statewide mobile wagering under
10 IGRA as a key part of trying to trick the
11 California voters into believing the tribes would
12 benefit from their measure. Fortunately, through
13 the expensive defensive efforts of the California
14 tribes, they lost and lost badly. But all tribes
15 in all states should be aware of how these
16 operators are using non-IGRA-based mobile gaming
17 to either exclude tribes altogether or to exploit
18 them into insulting rent-a-tribe deals. Now,
19 there are people sitting in jail today for
20 embracing this model in the arena of internet
21 lending where tribes are receiving a mere one or
22 two percent of net profits. These internet gaming

1 operators are trying to do the very same thing.
2 Section 293.29 ensures that tribes are the primary
3 beneficiary of tribally-operated statewide mobile
4 gaming operations under IGRA, and they are to be
5 applauded.

6 Thank you for allowing me to speak.

7 **MR. NEWLAND:** Thank you, Scott. Appreciate
8 your comments and your perspective. Look forward
9 to your written submission as well on some of that
10 language.

11 **MR. BERGIN:** Good afternoon. I'm Patrick
12 Bergin. I'm a tribal attorney here today on
13 behalf of Big Sandy Rancheria. I want to thank
14 the Office of Indian Gaming for their hard work on
15 these regulations. I can see an incredible
16 difference between the draft regulations and the
17 ones we have from December. Thank you for that.
18 It was a great pleasure to see that, I think, all
19 of my clients' comments were addressed in the
20 preamble, which was, you know -- it's refreshing.
21 I get to kind of brag a little bit that you guys
22 were paying attention to what we write, so that's

1 helpful.

2 Now, I do want to talk a moment and can we
3 talk a moment about the deemed-approved process
4 under 293.12? My partners and I submitted a white
5 paper in September last year outlining what we see
6 as a big problem in California at least. John
7 Peebles (phonetic) and I were negotiating the Big
8 Sandy compact this past year, and in March we
9 learned directly from the state that they had no
10 intention of negotiating an approvable compact.
11 Their entire goal was to negotiate a
12 deemed-approved compact, which meant they were
13 demanding provisions which we knew were unlawful
14 and which the department has said in its
15 deemed-approved letters were unlawful, but they,
16 nonetheless, demanded that we go along with that
17 because they viewed that as acceptable. So our
18 white paper lays out some recommendations for your
19 consideration that I'll just briefly repeat here.

20 First of all, we ask you to disapprove
21 unlawful compacts, just do not approve them.

22 Second of all, if we were going to go

1 forward with the deemed-approved process, we'd ask
2 that you say either in the letters or in the
3 regulations that those are final-agency actions
4 that are reviewable under the APA. The State of
5 California told us in our negotiations that they
6 view those letters as mere guidance and not
7 subject to review. I think they are reviewable in
8 the DC Circuit, but I'm not sure that they're
9 reviewable in the Ninth Circuit.

10 Our final comment was that we'd ask you, if
11 there's a way to do it, to sever the unlawful
12 provisions from the compact. That would give the
13 tribes a lot of authority and greater strength at
14 the bargaining table, and it would send a message
15 to the state that they need to follow the law.

16 Thank you.

17 **MS. HART:** I would like to comment on that.
18 And I think you've seen our submission, and we
19 talked about the deemed-approved letters. And I'm
20 going to speak as, as the court called me, a
21 career bureaucrat. We have to follow the guidance
22 of the administration in front of us, and that

1 guidance changes. So the deemed-approved letters
2 sometimes were -- said we're not going to issue
3 them at all. Sometimes we want to get into the
4 details and tell exactly why it's been deemed
5 approved. So I think the provisions in the
6 proposed rule absolutely help my office when we're
7 reviewing those documents. There's still some --
8 and I'll let Bryan handle this. There's still
9 some legal issues in the discussions, in our
10 proposed rule with our legal team on exactly what
11 we can do with the deemed-approved letters.

12 Phil, was there anything else?

13 **MR. BRISTOL:** So the only thing I'd add to
14 that is, as you noted, we put a lot of effort into
15 responding to comments. We were able to do that
16 because we got really good comments in, and that
17 helps us create a better product. And I certainly
18 look forward to getting another round of really
19 good comments to see if we can make this is an
20 even better set of regulations.

21 **MR. NEWLAND:** Patrick, thank you for talking
22 about the deemed-approved process. You know, it's

1 a curious creature of the law. I'm sorry. I can
2 nerd out about this stuff. I'll try not to. But,
3 you know, it's an explicit thing that Congress
4 allowed the secretary to take. And a lot of folks
5 have different views on why that was included and,
6 you know, no need to discuss that here. There
7 have been instances where we have issued
8 deemed-approved letters because some provisions
9 aren't necessarily central to the deal. And I
10 mean, you all know from negotiating these tribes
11 say yes because sometimes they say it's not worth
12 fighting about that anymore. And tribes tell us
13 that. And we recognize that. And sometimes we
14 attempt to clarify or even almost explicitly say
15 this provision about restaurant sanitation is
16 unlawful so that in the event that the tribe says,
17 you know what, the Department of Interior has said
18 this is unlawful. We're not -- we're not going to
19 adhere to this part of our compact. They're then
20 armed with agency commentary on this in any
21 dispute with the state, so they -- we try to use
22 it to serve that function. But we also know that

1 there's value in just giving an up or down
2 approval. We don't really agree with some of the
3 court decisions holding that this is a final
4 agency action, which I think, you know, we've seen
5 in some of the ongoing litigation that we're
6 involved in, you know, because Congress explicitly
7 included it. But to the extent we've done
8 deemed-approved letters, we've tried to make them
9 utilitarian and not as a way to duck hard
10 decisions, because that's our job to provide
11 guidance to say, hey, if you want the Department
12 of the Interior's considered opinion on this
13 particular issue without scuttling your whole
14 agreement and preventing the conduct of Class III
15 gaming, you've got our opinion. You can use it,
16 or you can choose to ignore it.

17 **MS. HART:** Bryan, just let me add to that.
18 The other thing when we do the review of these and
19 whether a letter comes out or not, when we do a
20 deemed approved, we expect that the tribe, if they
21 want, to litigate that issue. That is one of the
22 biggest purposes of doing a deemed approved, so we

1 haven't taken a position for approval. So when we
2 look at that and we don't make a decision, we're
3 saying to the tribes, if you feel strongly and you
4 want to fight this, go ahead.

5 **MR. CROWELL:** Yeah. If I can carry on this
6 same conversation, because -- Paula, thank you for
7 that last comment. You know, I appreciate the
8 changes that are made regarding the
9 deemed-approved letter. And, frankly, I think it
10 might have been one of my client's comments here
11 expressly referencing Kevin Washburn's article
12 about the curious creature of the deemed-approved
13 letter. But until I just heard it from you, you
14 know, all the statements -- and, you know, this is
15 remiss upon the Indian Bar as well is it's always
16 been kind of put out there that, okay, they're
17 deemed approved, and, therefore, they're only
18 valid to the extent otherwise consistent with IGRA
19 and lawful under federal law. But that kind of
20 leaves a hanging proposition of, you know, what do
21 we do about it. You know, the fact of the matter
22 is that they're -- you know, in California and New

1 Mexico alone, you know, there are dozens of tribes
2 currently operating under deemed-approved compacts
3 many of which, you know, have great frustration
4 and objection to, you know, the provisions in
5 those compacts that the deemed-approved letters
6 specifically called out as being in question. But
7 the federal courts have yet to be confronted with
8 a lawsuit by a tribe, or lawsuit involving the
9 interpretation of a deemed-approved compact.

10 It may be helpful, you know, I think --
11 following up on Patrick's comments, you know, it
12 may be helpful to finish that sentence in the
13 proposed regulations to make it clear that a
14 deemed-approved compact is ripe, you know, for
15 litigation by a tribe that believes that a
16 provision in the deemed-approved compact is
17 unenforceable and severable from the compact
18 itself.

19 **MS. HART:** Thank you, Scott. I want to
20 just -- what we do say is deemed approved as long
21 as it's consistent with IGRA, and I think that's
22 what we're -- by deemed approved, we're saying

1 there may not be -- this may not be consistent
2 with IGRA. So I think it's -- you're saying you
3 want us to say -- finish the sentence to say it's
4 ripe for litigation. What we're saying is that
5 has to be consistent with IGRA. This is only -- I
6 forget the wording about IGRA, but it's only
7 consistent -- it's only in effect that it's legal,
8 it has to be legal. So I think we kind of are
9 saying that, but let's, you know, get -- you'll
10 include that in the record in comments, and we'll
11 take a look at that.

12 **MR. NEWLAND:** Thank you, Paula. I'll add on
13 top of that, Scott and others, if you have
14 language that can help get at this, we'd be happy
15 to review that. You know, you all know, lots of
16 lawyers in this room, that compacts are
17 interpreted sometimes under contract law theory,
18 and then sometimes under Indian law, sometimes
19 under something that's just made up for that case.
20 And so it's a difficult -- you know, the legal
21 authority to sever coming from the secretary or
22 opine on this is something that I know Paula and

1 Phil have given a lot of thought to over the
2 years. We've given a lot of thought to it. But
3 if you have language for us to consider on this,
4 we would be happy to pour over it and figure out
5 if it's --

6 **MS. TUELL:** This is Secretary Loretta Tuell,
7 T-U-E-L-L. Specifically to this issue, because I
8 have a lot of other issues, but specifically to
9 this, which I don't know whether it would be
10 something you could still find under the authority
11 of the umbrella to put it in the regs
12 specifically, Paula, is something about a
13 severability clause. I mean, it seems so simple
14 on its face. But, in negotiations over the years,
15 the awareness of the states in these negotiations
16 that that clause in and of itself could create the
17 life of the compact going out with the negative
18 provisions that they've inserted coming out, it's
19 very hard in the negotiation to actually get them
20 to be okay with the severability clause. But, on
21 its face, it is one of the solutions under a
22 operation-of-law compact allowing for tribes to

1 move forward, and getting some determinations as
2 to what the scope of it directly related is. And
3 I think that that's one of the really easy pieces.
4 And how we get it into a reg that in some way,
5 shape or form that can encourage that in
6 negotiations could be helpful.

7 **MS. HART:** Thank you. Thank you, Loretta.
8 We do have -- in the preamble, we have provisions
9 that we think are best practices, and I think
10 severability clause is in there. One of the other
11 clauses that will help in all of this is one of
12 the compacts that we just seen has a provision in
13 there saying that, if any of the provisions are
14 litigated or in dispute, the compact remains in
15 effect until the dispute was resolved. I think
16 that's a great provision. So if you have a -- if
17 you have a problem with a deemed approved, that's
18 some way that the tribe doesn't -- isn't under the
19 threat of violating their or not having a compact
20 in place. So we do have in the preamble language
21 that deals with best practices, and we think that
22 we should look at all of them to be put into a

1 compact. But thank you for your comment.

2 **MS. TUELL:** And I do think that -- I mean,
3 it's crazy, after almost, you know, 35 years that
4 we're talking in the auspice of wouldn't it have
5 been great if we had had a model compact, you
6 know, that would have helped folks, you know, in
7 this negotiation and tried to frame around the
8 negotiations like we do with the tribal gaming
9 ordinance. But, you know, that cat's out.

10 And the other thing that's very ironic is
11 that after years and years of compacts that it's
12 now in 2023 that we're finally going to put, you
13 know, the auspice around what should be in a
14 compact. But then what I would say is, as a
15 policy matter and how you reach to this and how
16 you're defining it is that it's because of the
17 experience of the tribes. In the very beginning
18 you talk about the success. But I also think that
19 you should mention in there in some way, shape or
20 form the success in also not bumping up against
21 all of the negative rhetoric that happened in the
22 very beginning with IGRA. If you remember, the

1 oversight hearings at that time were based around
2 there's going to be rampant, you know,
3 infiltration of illegal characters and RICO
4 issues, you know, northwest and south all over the
5 country because tribes are gaming. I think its
6 inherent what you're saying by the success and
7 that success is breded to states. But I think we
8 have to also toot a horn for the tribes at being,
9 you know, excellent business owners, protecting
10 the gaming, it's triple oversight. We often talk
11 about this at the National Indian Gaming
12 Association of, you know, we're the most regulated
13 gaming in this country, and that those kinds of
14 things emphasize why we don't even -- and we
15 shouldn't have the infiltration of the state into
16 our civil jurisdiction. Of course, now it feels
17 like I'm giving a speech, but I do think that you
18 can add a little bit of that flavor that will show
19 that we come with clean hands. In some ways a lot
20 of the negotiations now the states are asking for
21 more when at this point they should be asking for
22 less because the tribes have proven -- for

1 example, in California, 23 years of gaming under
2 the compacts and gaming before that, you know,
3 cows on, but that they've been successful and
4 there hasn't been all of these issues that were
5 laid as a foundation of IGRA.

6 **MR. NEWLAND:** Thank you. Let's go to Jim.
7 He hasn't had a chance to speak yet.

8 **MR. JAMES:** Jim James, counsel, legal
9 counsel for the Pueblo Tesuque. I also want to
10 echo the thanks that everyone else has given for
11 the work that you all have done, Paula, and your
12 team and the assistant secretary and his team in
13 strengthening these regulations, and making it,
14 perhaps, easier for us to move forward in
15 negotiating compacts.

16 One of the issues that we're facing in New
17 Mexico and the Pueblo Tesuque as well as other of
18 the gaming tribes in New Mexico are probably going
19 to -- well, I know they're going to be submitting
20 written comments after this. We recently
21 established a coalition of New Mexico gaming
22 tribes to serve more in the capacity of an

1 informational dissemination organization to
2 provide technical assistance to tribes and to try
3 to keep information flowing among the gaming
4 tribes in New Mexico. Currently, what we're
5 facing is the legislative session is getting ready
6 to start on Tuesday in New Mexico. And, as others
7 have mentioned, internet gaming is a big thing. I
8 mean, that's -- that's really going to start
9 driving a lot of activity. Our compacts are valid
10 until 2037, but we're already seeing industry
11 folks lobbying some legislators in the state to
12 try to move those into other venues besides tribal
13 gaming, even though our compacts have reserved
14 that activity as kind of we have the first right
15 to do that. So I don't know if we can do this in
16 the regulations. I didn't see it there. I think
17 others have talked about -- and I appreciate
18 Assistant Secretary Newland's statement about
19 we're trying to, you know, get this on the level
20 of we're dealing sovereign, as opposed to, you
21 know, we're having to fight and claw our way for
22 everything that we can gain. But the

1 enforceability of compacts seem to rest within the
2 jurisdiction of courts, and there isn't any --
3 there isn't any teeth at least -- or maybe there
4 could be more teeth I should say in the
5 regulations moving forward when it comes to, you
6 know, how the state acts when it wants to start
7 making changes in the face of compacts that have
8 been approved and have been negotiated, you know,
9 before their approval. So I know that's a big
10 issue.

11 As Loretta pointed out, we end up spending a
12 lot of money and a lot of time and a lot of
13 resources in courts trying to defend our efforts
14 to maintain, you know, our gaming operations. And
15 on the other side we have the National Indian
16 Gaming Commission. We are way overregulated. But
17 the states don't have a similar, you know,
18 National Gaming Commission. They basically
19 operate within, you know, their state. So each
20 state may have a gaming commission or something
21 similar to that, but at the same time they're
22 essentially our competitors. So the playing field

1 may not be even.

2 So I don't know if that's something that we
3 can incorporate into there. I just wanted to make
4 that comment. But we will be submitting written
5 comments as well. So thank you for doing this.

6 **MR. NEWLAND:** Thank you. Thank you,
7 Patrick.

8 **MR. BERGIN:** Patrick Bergin. Again, I
9 appreciate it. This is probably my last question.
10 I'm looking at 293.26, which deals with the length
11 of time or the duration of a compact. One of the
12 comments we had submitted that's in the preamble
13 that was declined was to put a length of time on
14 what long-term compacts are. I thought I would
15 just give some more color as to why we were
16 looking at that. About 15 -- 12 years ago, I was
17 negotiating compacts in South Dakota for a tribe,
18 and the state refused to do longer than four years
19 because it didn't want to bind the next
20 administration to a long-term compact, and we had
21 to fight over that for many years. And we were
22 finally able to get them to agree to a 10-year

1 compact, but at great expense and cost to the
2 tribe. I think having some kind of standard for a
3 long-term compact might be helpful for tribes. In
4 South Dakota with the next administration, when
5 this compact comes back up for renewal, it could
6 slide back down to four years. Thanks.

7 **MR. NEWLAND:** Thank you, Patrick. I just
8 want to comment on that generally, being mindful
9 of the position I occupy and not trying to lead to
10 unintended consequences. But that's an issue that
11 we've given thought to, not only in the regulatory
12 context, but just overall, because I think there
13 are legitimate questions about whether a six-month
14 gaming compact is in good faith because it
15 frustrates the practical operation of gaming and
16 the development of a gaming facility and trying to
17 finance it. You know, it frustrates the actual
18 operation of gaming activities, even though you
19 have a nominal compact. So these are things that
20 we're trying to think through. Whether it's
21 appropriate for these regulations is something
22 we're certainly willing to consider and discuss.

1 But the question remains, and it's a question that
2 we want to continue to think about, what happens
3 when a state says we'll negotiate a gaming compact
4 for one year, three years, four years, and where's
5 the boundary between bad faith and good faith.
6 And I'll stop there, but we're thinking about it.

7 Do we have a comment up here at the front?

8 **MR. CROWELL:** Thanks. I don't want to take
9 too much time. If there's a tribal leader in the
10 room that wants to get a comment in, I defer.
11 But, you know, I want to spend a minute on the
12 sports wagering provision and distinguish -- and,
13 you know, one of the things I appreciate about it
14 is, you know, that it, I think, breathes life into
15 the approach taken in the Seminole Florida
16 compact, even if, God forbid, the DC Circuit
17 affirms the district court in West Flagler
18 litigation, you know, because it will add a new
19 level, I believe, of authority to interpret IGRA
20 subject to chevron deference as it relates to
21 tribes in the future that may adopt the approach
22 taken in the Florida Seminole compact. And, you

1 know, one of the things I give great credit to the
2 lawyers involved in putting that agreement
3 together was seizing upon the ability under IGRA
4 to allocate jurisdiction between the tribe and the
5 state and to deem the wager to occur at the site
6 of the server. You know, I think that goes far
7 towards instructing a willing tribe and a willing
8 state on how to get to the goal line. I think it
9 goes far for instructing tribes with the necessary
10 political capital, like the California tribes, on
11 how maybe to get a provision through a statewide
12 initiative. But, you know, I'm concerned about a
13 number of other tribes. And almost the whole of
14 these changes through Part 293, you know, are
15 addressing what a state must do or must not do at
16 the negotiation table. But the sports wagering
17 provision is more tailored in its current version
18 as to what a state and tribe may do. But, you
19 know, I represent the Coquille Tribe in Oregon.
20 In Oregon, the state lottery has cut a deal with
21 Draft Kings to where they have a monopoly, to
22 where they're the only entity in the state that

1 offers statewide mobile gaming, and at least the
2 former administration looked to the West Flagler
3 decision and say, oh, well, you know, even if we
4 wanted to, we couldn't negotiate an agreement with
5 you. I represent the Aquinnah Wampanoag in
6 Massachusetts. The Massachusetts legislature just
7 last fall authorized a number of entities to be
8 able to secure a license for the operation of
9 statewide mobile sports wagering. The senate
10 version of that bill in the state senate expressly
11 included federally-recognized tribes. There are
12 two in Massachusetts, the Aquinnah Wampanoag and
13 the Mashpee Wampanoag. But the house version
14 didn't in the final version out of committee
15 completely excluded the tribes. We weren't even
16 part of the discussion. You know, although this
17 proposed regulation, I think, goes 90 percent of
18 the way, it needs to -- at least it's my view as a
19 tribal lawyer that, if the state has authorized
20 any organization, entity or person for any purpose
21 to authorize statewide mobile gaming, that that
22 state then has an affirmative obligation under

1 IGRA to compact for the same games. And IGRA
2 allows us, I believe, you know, if we strengthened
3 291 consistent with the changes in 293, you know,
4 allows the tribes to force the state to give them
5 what they're entitled to do, which is the ability
6 to operate all games that the state has authorized
7 for any other person, organization or entity. But
8 compelling the state to include that game in a
9 compact is one thing. Compelling the state to
10 allocate its jurisdiction that it might have over
11 patrons that are making wagers off of Indian lands
12 is another. And, you know, I understand the
13 elegance of the Florida Seminole model through the
14 allocation of jurisdiction making it clear that
15 the operation of that game, you know, is a matter
16 of tribal and federal law. But, you know, I was
17 also involved in the Iipay Nations's litigation
18 over internet bingo. And at the district court
19 level, the Department of Justice maintained this
20 position that the wagers off of Indian lands is
21 outside of IGRA and the district court agreed.
22 But when the Ninth Circuit affirmed, it did not

1 affirm on those grounds. It affirmed on the
2 grounds that the reason the Iipay could not
3 operate that game was because California law
4 prohibited anybody from accepting internet wagers
5 for any purpose, and, therefore, is a violation of
6 the Unlawful Internet Gaming Act or UIGA. And,
7 you know, although I would prefer in a dream world
8 to sit across the table and secure the same kind
9 of approach that Florida took with the Seminoles,
10 as a lawyer, I would still prefer a situation to
11 where we could end up with concurrent jurisdiction
12 to where the compact and tribal law and federal
13 law allowed that wager to be received on the
14 reservation, which would trigger IGRA, which would
15 trigger NIGC's jurisdiction and oversight, but
16 still allow the state to exercise its jurisdiction
17 over that patron off of Indian lands. But by the
18 state entering into a compact to allow for that
19 activity, arguably, the problem in Iipay Nation
20 would be solved so -- which is why I, you know,
21 keep repeating this idea that, you know, your
22 proposed language goes far, but I think it needs

1 to go that extra step and make clear that, even if
2 they're not in agreement regarding the allocation
3 of jurisdiction in the compact, that the state
4 has -- you know, because a state can still prevent
5 the tribes from doing it by prohibiting all
6 persons for all purposes from offering internet
7 wagering. But to say the lottery can do it, but
8 the tribes can't, or that the Boston Wynn can do
9 it, but the tribes can't is an unconscionable
10 result. And I think that the language needs to be
11 tweaked to avoid that result.

12 **MR. NEWLAND:** Thank you, Scott. There's a
13 lot I want to say or could say, but again I'm
14 trying to be mindful of the stage in this process
15 that we're in. What I will say from a broader
16 policy I just want to say without ambiguity and
17 emphatically is that the department wants to
18 ensure that tribal gaming can grow with the times
19 and the technology as contemplated when IGRA was
20 drafted, and that IGRA should not be used as a
21 legal reservation as it were to keep tribes
22 confined while everybody else can grow. And so we

1 recognize that internet gaming, mobile gaming,
2 sports betting is a growing sector of the gaming
3 industry, and that tribes should have the
4 opportunity to participate in that, you know, as
5 it grows and not be confined to 20th century modes
6 of gaming now a quarter century or, you know 25
7 years into this century. So that's the policy
8 that's the guiding star. Now, the ways that we do
9 that are, you know, we're developing that. So I
10 will stop there. But that's our mindset, and
11 that's what drove the letter in the Seminole
12 Florida gaming compact. That's why we're taking
13 the, you know, position of defending that
14 nondecision decision in that litigation. And
15 that's also why it's included here in the
16 proposal.

17 MS. CHARLES-NEWTON: Thank you for making
18 that statement regarding the department wanting
19 tribal gaming to grow with technology. I think
20 that we couldn't agree any more with you on that
21 statement. We do note your provisions regarding
22 the internet mobile gaming. And we're, you know,

1 operating with sports betting, and we believe that
2 the future of gaming is digital. So I think when
3 we're talking about, you know, the tribal gaming
4 and how the department sees it's growing and we
5 use the term technology, you know, we're starting
6 to see that. You know, games are using a lot more
7 technology. They're going more digital. They're
8 kind of, you know, expanding, reaching a larger
9 audience. So I just want to say that, you know,
10 that we do agree with that comment that was made,
11 and then also where the department stands with
12 tribal gaming.

13 I also want to state that we also agree that
14 the Department of Interior taking the position
15 that all Class III gaming activities should be on
16 the table during the compact negotiation. And we
17 see this as a good thing for tribes, because then
18 there's no -- you know, there's no element of
19 surprise in there.

20 And when we're talking technology, when
21 we're talking digital, you know, those things
22 should also be taken into consideration,

1 especially because we don't know, you know, what
2 the future holds in terms of technology. You
3 know, I can see, like right now they've got those
4 little ocular glasses that put people in these
5 digital worlds where they can actually fight, or,
6 you know, they can do these exercise moves, you
7 know, they can do these things. But, you know, if
8 you think about that and the way that gaming is
9 going, I could probably think that maybe in a
10 matter of years we're going to have that where you
11 have, you know, these glasses that you put on and
12 it puts you inside of a casino that you can play,
13 but you really are playing in a casino, you know,
14 and you're betting and you're doing it from your
15 home. So I think that that's something that we
16 should take into consideration. We do agree with
17 that. Thank you.

18 **MS. TUELL:** So I want to talk about the
19 Section 293.24. Loretta Tuell. Mr. Assistant
20 Secretary, I'm trying to get some clarity as to
21 the scope of the -- directly related to gaming.
22 What I think is really great here that for the

1 first time we have some defined criteria that
2 people can see and look to, and that helps tribes
3 moving forward based on prior decisions or
4 operational block compacts. It gives clarity.
5 The thing I'm looking at is certain decisions
6 already made in the Biden administration, some
7 being with some compacts that were disapproved for
8 the first time in a very long time, specifically
9 speaking to the State of California, and others
10 that were deemed operational law, which has been
11 out there for some time in California, for quite a
12 few administrations on compacts that have been
13 submitted, and most recently the Chicken Ranch
14 case. So what I'm looking for is clarity as to
15 where the trigger will be for the prioritization
16 in decisions. So, for example, we already know
17 there are a lot of compacts out there that breach
18 these proposed regs that are currently in effect
19 and working and serving tribes out there. The
20 confusion has come from the three decisions that
21 have just been made, the operation of law or the
22 Chicken Ranch case. So is there a way to add in

1 here -- in both the disapproval letters and the
2 Chicken Ranch case, there was a term used
3 mutually, which was called other. Here you say
4 not limited to. But is there a way to do some
5 analysis in those disapproved as well as what may
6 come from a decision in Chicken Ranch as it plays
7 out to further define the other to add to this
8 list before it goes final, or if there could be
9 any clarity as to the other? In the disapproval
10 the departments didn't have to reach to the other.
11 And in the Chicken Ranch the court at this point
12 in time has not reached to the other. I think we
13 need some light on what the other may be, because
14 I've found out over the years that this is an area
15 that's ripe for the push and pull between the two
16 parties negotiating. A lot of the other factors
17 under negotiation have become less relevant, more
18 roles. This area has that discretionary nuance is
19 where we end up getting a lot of operational
20 compacts approved, and that creates confusion
21 because, you know, if the trigger has to be in the
22 state or the tribe litigate to add clarity, it's

1 in nobody's best interest, unless it's just so
2 egregious it would have been disapproved anyway.
3 So with a recent approval, we still are left to
4 understand what those others might have been in
5 the disapproval, and we won't know from the court
6 what those others are. So I'm trying to, without
7 getting too deep into the ongoing issues, try to
8 give some guidance for those tribes that are out
9 there dealing with this directly related. I'll
10 start there, if there's any comment.

11 **MR. NEWLAND:** I just want to make sure that
12 I'm understanding precisely the exact part or
13 language you're talking about. Are you referring
14 to the sentence in the .24b we say, Additionally,
15 tribal infrastructure projects or economic
16 development activities that are funded by gaming
17 revenue may service or otherwise provide a benefit
18 to the gaming activity are not directly related to
19 the conduct of gaming without other evidence of a
20 direct connection?

21 **MS. TUELL:** I think it's that, as well as
22 the sort of saving clause above that says the

1 example include, but not limited to. The ones
2 that you now articulate have become known through
3 some of the litigation as clearly on their face in
4 litigation, and then prior disapproval letters
5 made not specifically in California, but yes,
6 they're in other places across the country. So
7 we're looking at what I would call precedents, the
8 changing of precedents, the codifying in these
9 rules and regs of precedents, but us not
10 knowing -- in the most recent disapproval letters
11 in California, the department was very clear to
12 say and there are other issues within this
13 compact. And the Chicken Ranch case said and
14 there are other issues within the similar compact
15 in the litigation. But then in an approval, we
16 found approval without more clear guidance as to
17 what some of the others might have been. So I
18 just don't want us to lose the notion, as we
19 become final, will this be the codification so
20 that things that happened before are just
21 decisions prior, and this is the rule going
22 forward. Therefore, in this area, is there a need

1 to add any other that we are unaware of that would
2 be helpful, given the, some would say,
3 contradictory decisions that have been made prior
4 to this going final. So I'm just trying to find
5 the best case scenario going forward with the
6 approval and disapproval of very similar type
7 compacts, as we now reach to Chicken Ranch coming
8 out with some sort of decision and this being
9 final, these regs being final so that as tribes
10 move forward we can leave some of the stuff behind
11 and be very proactive as we go forward. I'm
12 trying to find that middle ground, Mr. Assistant
13 Secretary, so that we can still have some
14 discussion about what those others might be and
15 how we distinguish what have happened before these
16 regs and what happens after these regs.

17 **MR. NEWLAND:** So I want to -- I think I
18 understand what you're asking, Loretta. I'll give
19 an unsatisfying answer, but then I'll go into it.
20 I don't want to answer definitively because we're
21 in the midst of consultation, and I don't want to
22 lock us into a position just on the spot here.

1 What I can say is that our overall policy intent
2 here is that these regulations would replace the
3 practice of perusing the department's website or
4 the NIGC's website. And I know that there have
5 been a lot of billable hours expended, you know,
6 reading and rereading all these compact decision
7 letters, synthesizing and that these regulations
8 would provide that clarity and get us the
9 deference in the decisionmaking now that the
10 application of the regulations prospectively.
11 Whether they ratify previously-existing decisions
12 and incorporate the interpretations in those
13 previous letters, I would need for us to sit down
14 and consult with the Solicitor's Office about
15 that, because there are administrative law issues
16 there that I'm just not equipped to discuss today.
17 But I don't want to lock us in by just giving an
18 answer in this room today. What I will say is
19 that our intention is that these regulations would
20 articulate the rules of the road for negotiating
21 going forward. And I'll stop there.

22 **MS. TUELL:** That was satisfactory. And

1 that's what my hope would be, that these would be
2 prospective and the past is the past.

3 Second is the section dealing with taxation,
4 which I can't find -- oh, here. It's the 293.25,
5 and specifically the discussion about the tax fee
6 charged or other assessments. This area is
7 another area that is ripe today to try to get
8 around any kind of revenue-share ideas in other
9 parts of the compact, but to have the ability to
10 oversee what tribes are doing and spending and how
11 they're spending their own funds, and is that a
12 type of restriction that would be triggered as a
13 charge or a fee. And the reason I'm looking for
14 more clarity here, and I'm not sure how we can get
15 to it without maybe examples since we haven't had
16 a lot of examples specifically in prior decisions
17 and case law that go to this, but, as an example,
18 in California with the Tribal Nations Grant Fund,
19 what we see is something that has prior been
20 disapproved and also prior in operation of law
21 compacts, but the terms in it and reason approved
22 weren't really opining on it specifically if it

1 allows it to be still ripe for discussion on how
2 it actually is that utilized and impacts tribes as
3 more of a fee and a charge to them where a third
4 party, whether it be tribal related or not, is
5 assessing how tribes have spent their money
6 whether they get credits or not. On its face, it
7 sounds very laudable, but how it's the effect and
8 if you reach a point of no return where you now
9 have to create reasons why you're spending your
10 money to allow for a credit, there is a bit of an
11 oversight on your funds that it may not be
12 under -- square under the compact that the tribes
13 get to spend their money how they want to spend
14 their money since we have a third-party actor
15 approving or not approving. I just feel like this
16 is an area that, if we can't go by example, if
17 there's something in the preamble that you may put
18 or ruminating about taxation and its forms and how
19 it comes, because it's hard to reach this without
20 prior decisions. But we see what's happening, and
21 so far the courts in discussing the particular
22 compacts before them have not reached to this

1 issue in depth in their analysis. So I feel like
2 we need something, some direction. And I'm very
3 positive about even the fact that you've put
4 something in here about this particular area. But
5 I don't know, you or Paula, whether there's
6 something more we can do to help tribes during the
7 negotiation with this tax fee structure.

8 **MR. NEWLAND:** No disrespect to Paula, I'm
9 going to jump in here and just say, Loretta, that
10 I don't want to get deep in the weeds on the
11 Tribal Nations Grant Fund issue, because we know
12 that many of you are still negotiating around that
13 issue. The department wants to support tribes by
14 making sure that what's in IGRA is adhered to.
15 And I'm saying this now as the former practitioner
16 and tribal leader who's had to negotiate these
17 types of deals on behalf of tribes. I want to
18 make clear, though, that we do not view it as our
19 job or responsibility to participate or aid in
20 those negotiations to assist tribes in achieving a
21 better lawful deal. And so finding that line is,
22 as you were just articulating, sometimes not easy.

1 I also know that Arizona is a great example where
2 we've got now other compacts and structures that
3 deal with how revenues get allocated and shared.
4 And so it's not just the tribal -- amongst tribes
5 and between tribes. It was not just the Tribal
6 Nations Grant Fund that we're talking about.
7 There may be other creative models. So I don't --
8 the silence on that is intentional, but I do not
9 want to limit anyone's, any tribe's efforts to
10 negotiate a deal for themselves by providing
11 clarity while these conversations are still
12 happening. Sometimes I've learned the hard way
13 that government can do harm by trying to do good,
14 and I certainly want to avoid that here.

15 **MS. TUELL:** Or there's the other adage, if
16 it's working, let's fix it. That's an old BIA one
17 too. I would say that we haven't had a lot of,
18 whether regardless of the specific example, a lot
19 of guidance on the tax fee charge or other
20 assessment. And maybe looking at that, if it's
21 plain language of what a tax is, or, you know,
22 what a charge is and what a charge means under

1 IGRA, some way to help clarify those four words
2 that on their face sometimes don't even look like
3 they relate to each other, unless you're making a
4 cumulative argument because it starts with tax,
5 then a fee, then a charge and then an assessment.
6 So it seems similar, but how they're implemented,
7 if, in fact, a tax is a tax and you're paying it,
8 that's an issue. And, I guess, for us out here
9 trying to get our arms around that particular
10 phrase under IGRA and if there's any more clarity
11 that can be used through prior decisions, or
12 guidance, that can help us all have more guidance
13 in these regs.

14 **MR. NEWLAND:** Thank you. Additional
15 comments? Questions? And again let me add we're
16 here on the proposed regulation. I know folks
17 here may have questions about ongoing compact
18 issues. I'm happy to -- we're here in this room,
19 and I'm not going to duck out the back door and
20 avoid those after. But, you know, those
21 conversations may not necessarily be the right
22 conversations for a consultation. But, should we

1 have time, you know, of course I'm happy to talk
2 outside of the consultations just on particular
3 matters that folks have, but I want to make sure
4 that we're not getting pulled into those
5 conversations here during the formal
6 government-to-government consultations. Which is
7 all to say we'll hang around for a bit and try to
8 answer other questions. We are halfway through
9 our scheduled time, and what we'll do, we'll pause
10 here. We'll take a break, use the restroom.
11 We'll come back in five to seven. Maybe that
12 prompts additional comments or questions on the
13 regulations. We'll take it from there. We'll
14 adjourn here for we'll say five minutes, and we'll
15 see you back here in seven.

16 (A recess was taken.)

17 **MR. NEWLAND:** We'll go back on the record at
18 3:00 for this consultation. I know a number of
19 folks have left, but I want to make sure we're
20 capturing everyone's comments. You've still got
21 us for another hour, if you want us. So we'll
22 just turn the floor back over to you, if you have

1 comments you want to share. If not, we can end
2 early. The choice is yours.

3 I'll do a last call for comments.

4 Okay. I'll turn to my colleagues here,
5 Phil, Paula and Katherine, see if you have
6 anything you want to share with reflections or
7 impressions from the comments made here today.

8 MS. ISOM-CLAUSE: I think overall I'd just
9 like to thank everyone who's -- I know we've lost
10 several folks, but everyone who's made comments
11 both written and in person today. We have the
12 luxury of having some great minds in the gaming
13 world here with us. I really appreciate hearing
14 on the basis of all of your expertise as tribal
15 leaders and tribal attorneys and other backgrounds
16 represented here. And I just want to emphasize
17 that we take this extremely seriously. We want to
18 get this as good as it can be. So we really look
19 forward to continued comments coming in through
20 written submissions and all the virtual sessions
21 coming up. So thank you.

22 **MS. HART:** I wanted to thank everybody also

1 for coming. I also want to thank the
2 administration. You know, we in the Gaming
3 Offices really pushed hard to support tribal
4 nations, and it's unbelievable how easy it is to
5 work with this administration. So I want to thank
6 you guys. And I want to thank Stephanie also
7 there. You know, this has been a team effort to
8 do this proposed rule, and I want to make sure
9 that, you know, all the tribal leaders know that
10 it is a -- it's so refreshing to work with this
11 administration on this kind of rule as we know
12 it's really needed. Thank you.

13 **MR. NEWLAND:** Phil's got nothing to say.

14 **MR. BRISTOL:** I can't top that.

15 **MR. NEWLAND:** Okay. So, looking around the
16 room, I don't see any hands up, which means that
17 we will adjourn early this consultation. A
18 reminder that written comments are due by March 1
19 at midnight to consultation@bia.gov. We've got
20 several virtual consultations coming up.

21 And a housekeeping note not related to this
22 topic, but next week Secretary Haaland and I will

1 be back in the Phoenix area for the Road to
2 Healing Tour and the Boarding School Initiative.
3 Next Friday we will be at Gila River to hear from
4 boarding school survivors and their families. So
5 your clients and people in your communities,
6 please help us get the word out that they are
7 welcome to attend and share their stories. And
8 then next Sunday we will be up at the Navajo
9 Nation at Many Farms School for a second stop on
10 the Secretary's Road to Healing Tour as well.
11 These are very important conversations and very
12 powerful. So I look forward to being back here in
13 Arizona next week. So thank you all for taking
14 the time to come out today. Appreciate your
15 comments, appreciate your partnership and
16 collaboration. We will adjourn this consultation.
17 Thank you.

18 (The meeting adjourned at 3:04 p.m.)

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C E R T I F I C A T E .

I, Ashleigh Simmons, Professional Reporter, certify that I was authorized to and did report the foregoing proceedings and that the transcript is a true record.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

WITNESS my hand and official seal this 20th day of January, 2023.

Ashleigh Simmons



ASHLEIGH SIMMONS, CER
Notary Public - State of Florida

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