



By Email and Electronic Filing

March 1, 2023

Mr. Bryan Newland
Office of the Assistant Secretary - Indian Affairs
Department of the Interior
1849 C Street, N.W. MS-4660-MIB
Washington, DC 20240

Re: *Land Acquisitions, RIN 1076-AF71, and Class III Tribal State Gaming Compacts, RIN 1076-AF68*

Dear Mr. Newland:

We write to request that the Bureau of Indian Affairs (“BIA”) extend the deadline for public comments on its proposed rules regarding tribal trust land acquisitions and class III tribal-state gaming compacts.¹ The Proposed Regulations would authorize an unprecedented expansion of tribal casino gaming—and would achieve that outcome by unjustifiably restricting the ability of state governments to adopt and enforce their own policies on gaming matters. Although federal law has for decades struck a delicate balance between state, federal, and tribal interests concerning tribal casino gaming, the Proposed Regulations would upset that balance in a way that could have unintended and far-reaching effects. Given the significant public policy concerns presented by the Proposed Regulations, the current March 1, 2023, comment deadline affords insufficient time for states, local governments, and other stakeholders to fully evaluate and comment on BIA’s proposed rule changes.

We are concerned that the Proposed Regulations would bypass the legislative process and undercut the ability of Attorneys General to enforce state gaming laws. When Congress enacted the Indian Gaming Regulatory Act (“IGRA”), it recognized that states have public policy, safety, and economic interests related to class III gaming offered on Indian lands.² Those state interests persist, yet the Proposed Regulations would expand the scope of authorized tribal casino gaming through unilateral executive branch action, without any debate in Congress or the state legislatures.

For example, the Proposed Regulations would provide that a state that “allows *any* form of class III gaming” under its own laws must negotiate with tribes to allow “*all* forms of class III gaming”—including games that are prohibited under state law.

¹ See *Land Acquisitions*, 87 Fed. Reg. 74,334 (Dec. 5, 2022), and *Class III Tribal State Gaming Compacts*, 87 Fed. Reg. 74,916 (Dec. 6, 2022) (together, the “Proposed Regulations”).

² See S. Rep. No. 100-446, at 13 (1988).

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87 Fed. Reg. at 74,937 (emphases added). The practical effect of this new rule would be to allow tribal casinos to offer games that state policymakers have otherwise prohibited. Sports betting, blackjack, roulette, and *all* other forms of class III gaming would be allowed, even if the state legislatures declined to offer these games, as long as state law allows one form of class III gaming (such as a lottery or horse racing). This proposal is particularly troubling because it seeks to override precedent from several federal courts of appeals, under which states need only negotiate with tribes regarding the specific forms of gaming permitted under state law.³ Courts have raised serious questions about whether federal agencies have authority to override judicial precedent in that fashion,⁴ and an extension of the comment deadline would ensure that stakeholders have an opportunity to address those important questions.

The Proposed Regulations also intrude on state authority regarding “statewide remote wagering [and] i-gaming,” 87 Fed. Reg. at 74,919, an issue over which state legislatures and law-enforcement officials have historically had primary authority. Until now, tribal gaming under IGRA has been restricted to Indian lands—tribes’ reservations and related lands held in trust by the federal government.⁵ But that limitation would become trivial if BIA could, with the stroke of a pen, authorize tribes to offer statewide remote wagering under IGRA. The Proposed Regulations acknowledge that “the legality of gaming activity outside Indian lands remains a question of State law,” but then undermine that statement by suggesting that tribes “should have the opportunity to engage in” statewide remote wagering “pursuant to” an IGRA compact. *Id.* at 74,919. BIA should afford stakeholders adequate time to address the vague and conflicting statements in the Proposed Regulations regarding the states’ role in regulating the rapidly growing remote-wagering market. Additional time is particularly warranted here because a federal district court has already disapproved BIA’s proposed approach⁶ and remote wagering would, in many instances, violate state laws. We reject the notion that BIA—an administrative agency of the federal government—should intervene in this market and purport to

³ See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257–58 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 278–79 (8th Cir. 1993); see also *Seminole Tribe of Fla. v. Florida*, 1993 WL 475999, at *8 (S.D. Fla. Sept. 22, 1993).

⁴ See, e.g., *Baldwin v. United States*, 140 S. Ct. 690, 694–95 (2020) (Thomas, J., dissenting from denial of certiorari) (*Brand X* rule allowing agencies to override judicial interpretation of statutes “likely conflicts with Article III of the Constitution” and is “at odds with traditional tools of statutory interpretation”).

⁵ See, e.g., *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 795 (2014) (“Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.”).

⁶ See *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 273 (D.D.C. 2021).

authorize statewide gaming activities that the states themselves have not expressly authorized under their own laws.

We are also concerned with the changes the Proposed Regulations would make to federal rules governing acquisition of new tribal trust lands. The Proposed Regulations state that they would “abando[n]” longstanding BIA policy, under which “the difficulty of approving an acquisition” of lands not contiguous to a tribe’s reservation “increas[es] ... as distance from a tribe’s reservation increase[s].” 87 Fed. Reg. at 74,335, 74,338. In place of that “bungee cord” test, BIA would adopt a new policy that would affirmatively support acquisition of tribal trust lands and “presum[e]” that an acquisition is appropriate “without regard to the distance of the land from a tribe’s reservation boundaries.” *Id.* at 74,338, 74,344.

Because the Proposed Regulations would “no longer apply a limiting understanding of distance from a tribal reservation,” *id.* at 74,338, tribes could invoke the new rules as a basis to acquire new trust lands anywhere in the United States—including in states and major metropolitan areas located hundreds or thousands of miles from their present trust lands. Those new lands would then be eligible for gaming under IGRA, subject to the limitations imposed by the Indian Reorganization Act and 25 C.F.R. Part 292. State governments would then be left to navigate the residual and complex jurisdictional and political relationships associated with those new tribal relationships. The implications of that framework would be manifold for states seeking to create strong tribal partnerships and conduct effective oversight of casino gaming within their borders.

Finally, there are strong process-based reasons to delay the deadline for public comments. Although BIA consulted extensively with tribes regarding the Proposed Regulations in 2022,⁷ the agency did not begin the public consultation process until December 2022, when the Proposed Regulations were published in the *Federal Register*. As a result, non-tribal stakeholders have had comparatively less time to comment on BIA’s proposed policy changes and engage with the agency regarding their concerns. Moreover, BIA has not publicly released the vast majority of the comments received during the 2022 tribal consultation process, undermining stakeholders’ ability to evaluate the basis for BIA’s proposed rule changes. Extending the comment deadline would afford BIA time to address that issue, while also ensuring that states, local governments, and other affected parties can comment on the full evidentiary record.

⁷ See Bureau of Indian Affairs, *25 CFR Part 151 (Land Acquisition) and 25 CFR Part 293 (Class III Tribal State Gaming Compact Process)*, <https://www.bia.gov/tribal-consultation/25-cfr-part-151-land-acquisition-and-25-cfr-part-293-class-iii-tribal-state>.

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For these reasons, we respectfully request a 90-day extension of the comment deadline so that we can appropriately raise our significant concerns with the agency's Proposed Regulations.

Sincerely,



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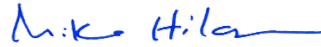
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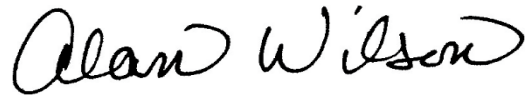
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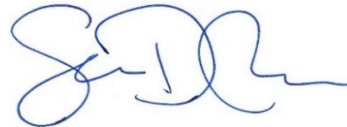
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