

San Manuel Band of Mission Indians

November 16, 2023

Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President

Re: RIN 1076-AF68

To whom it may concern,

On behalf of the Yuhaaviatam of San Manuel Nation (also known as the San Manuel Band of Mission Indians), thank you for taking the time to meet with us yesterday regarding the Department of the Interior's proposed amendments to 25 C.F.R. Part 151. As I stated during our discussion, the Nation fully supports the Department's proposed regulations and requests that they be finalized as soon as possible.

The Yuhaaviatam Nation is located in southern California, about 60 miles inland from Los Angeles. We have a small reservation located on the steep hillside of the San Bernardino Mountains, surrounded by our Serrano ancestral lands. We are proud of what we have built on our reservation, including housing, two fire stations, a Wellness Center, education facilities for our kids and other important resources for our Citizens.

The Nation's ability to provide these resources to its Tribal Citizens, as well as benefit for the surrounding community, is made possible in large part by its successful Tribal gaming facility. That facility operates in part under a Compact with the State of California. Although the Nation values this government-to-government relationship with the State, we acknowledge that compact negotiations in many states can be difficult, with states insisting on including non-gaming related provisions in compacts. The Nation appreciates the Administration for recognizing the need for these important regulatory updates to bring clarity to compact negotiations and ensure compacts remain focused on gaming.

By clarifying what topics can and cannot be the subject of negotiation pursuant to the Indian Gaming Regulatory Act, these regulations will allow tribes and states to sit down at the negotiating table, both aware of the boundaries of negotiation, and reach agreement on compacts that fulfill the purposes of IGRA, and only those purposes.

We are aware, for example, of comments suggesting that Compacts should explicitly include labor protections as an example of subjects "directly related to gaming" and therefore, a permissible subject of negotiation. We disagree with these suggestions, not because of any position tribes may have regarding labor, but because that subject does not belong in an agreement that is meant to be focused solely on gaming.

First, labor protections do not need to be included in compacts. The National Labor Relations Board has repeatedly applied the National Labor Relations Act to tribal gaming operations, and courts have upheld those applications. As such, the NLRA has been held to apply to tribal gaming

operations and there is no need to address this in the context of gaming compacts. Furthermore, the proposed regulations do not prohibit the inclusion of labor provisions if a tribe and state both agree to do so. But even then, the discussion of labor must be limited to its application to gaming activity.

Moreover, the inclusion of the labor-related language that has been suggested in comments would violate IGRA by applying it to a definition of "gaming facility" that attempts to expand that term beyond gaming - to include ancillary, non-gaming functions and services, such as hotel and spa services. Such a definition was ruled illegal in the case *Chicken Ranch Rancheria v. California*. There, the 9th Circuit Court of Appeals ruled that areas such as parking lots and walkways are at best "adjacent" to the gaming facility, and the application of environmental requirements to those areas was not a proper subject of negotiation. As the proposed addition to the compact regulations are unnecessary and very likely illegal in light of recent court rulings, they should be rejected.

In addition to bringing clarity to the permissible topics of negotiation, we also appreciate the Department's inclusion of language clarifying what games can be negotiated for in a compact. The proposed part 293.27 clarifies that a state's refusal to negotiate for all forms of Class III gaming *not prohibited in the state* is evidence of a violation of IGRA. Although this language is new to the regulation, it is not a new position being taken by the United States.

In its 1996 Amicus Brief in the case *Sycuan Band of Mission Indians v. Wilson*, the Department of Justice asserted that it has been the consistent position of the United States that a state has no duty to negotiate those forms of gaming that state law completely prohibits and that "under any definition of 'permit' when a state completely prohibits a form of gaming, it does not permit it." The United States reiterated this a year later in its brief before the Supreme Court in the case *Santee Sioux Tribe of NE v. US*. There, the United States argued, "The court of appeals' holding that a State need not negotiate over a form of gaming that its laws prohibit is correct. Under 25 U.S.C. 2710(d)(1)(B), 'Class III gaming activities shall be lawful on Indian lands only if such activities are *** located in a State that permits such gaming for any purpose by any person, organization, or entity.'" That statutory text makes it unlawful for Tribes to operate forms of Class III gaming that state law completely prohibits. A State therefore has no duty to negotiate with respect to those forms of gaming."

This is also not a new position expressed by the Department of the Interior. In the preamble to its current part 291 regulations for Class III Procedures, the Department wrote, "If the state has not reasonably characterized the relevant state laws as completely prohibiting a distinct form of gaming, it would have a duty to negotiate with respect to the gaming."

The proposed rule does not require a state to negotiate for all forms of Class III gaming if they permit *any* form of Class III gaming. The regulation is clear that a state would not violate IGRA if it refuses to negotiate for a Class III game that it prohibits. We therefore recommend the language stay intact and the regulations be released as drafted.

Thank you again for considering our comments on this important matter and request that these regulations be finalized as quickly as possible to further empower tribes to secure their homelands.

Sincerely,

Lynn R. Valbuena

Lynn R. Valbuena
Chairwoman
San Manuel Band of Mission Indians

