

NIGC Policy on Tribal Consultation

Background

Does the NIGC have a consultation policy, and where can it be found?

Yes, The NIGC consultation policy is attached.

Why is the NIGC Updating its consultation policy?

The NIGC last updated its consultation policy in July of 2013. The policy details how the Commission will engage with tribes on a government-to-government basis and commits to reviewing its existing consultation practices and revising those practices as needed. In addition, the NIGC is supportive of the current focus across the Administration to recognize the importance of tribal consultation for cultivating a healthy federal relationship with tribal governments. In furtherance of the NIGC's existing consultation policy and in the spirit of the recent Presidential Memorandum, the Commission seeks your input on NIGC's government-to-government consultation policy.

Does Executive Order 13175 apply to the National Indian Gaming Commission?

The NIGC is an independent agency and therefore the Executive Order does not apply to the NIGC. However, the NIGC mission and the complex and technical nature of the industry we regulate, places its own imperative on the NIGC to engage in government-to-government consultation.

Will the NIGC provide its assessment of the Agency's consultation policy to the Office of Management and Budget in support of the 2021 Executive Memorandum?

Yes, the NIGC has notified the Office of Management and Budget that it will provide a report of its consultation practices and engage in consultation with tribal governments to develop its report and considerations for how the Commission might update and enhance the Agency's consultation policy.

Proposed Questions for Tribal Leaders

How can technology be used to broaden the impact of the NIGC's consultation efforts?

What procedures or practices impede a robust exchange of information during a consultation process and how might the Agency address its protocols in order to maximize tribal governments' participation in NIGC hosted consultations?

What opportunities exist for the NIGC to collaborate with other federal agencies in order to ensure federal consultation processes are most accessible for tribes and occur when federal policy related to the regulation of Indian gaming has a significant impact on the federal-tribal intergovernmental relationship?

National Indian Gaming Commission Policy on Consultation with Indian Tribes

I. Preamble

The obligation for Federal agencies to engage with Indian Tribes on a government-to-government basis is based on the U.S. Constitution and Federal treaties, statutes, executive orders, and policies. Federal agencies help to meet that obligation through meaningful consultation with Indian tribes.

The National Indian Gaming Commission (Commission) is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments) —by adhering to the consultation framework described in this Policy. Through this Policy, the Commission strives to strengthen its government-to-government relationship with Indian tribes and begin a new era of consultation. This Policy reflects the Commission’s commitment to consultation with Indian tribes, recognition of Indian tribes’ right to self- governance and tribal sovereignty.

The Commission shall review its existing practices and revise them as needed to comply with this Policy.

II. Guiding Principles

This Policy broadly defines provisions for enhancing the Commission’s consultation processes with Indian tribes. This Policy shall complement, not supersede, any existing laws, rules, statutes, or regulations that guide consultation processes with Indian Tribes. This Policy requires a government-to-government consultation between appropriate tribal Officials and Commission officials. The appropriate Commission officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for the Commission, and exercise delegated authority in the disposition and implementation of an agency action. Commission officials will identify appropriate Tribal consulting parties early in the planning process and provide Indian tribes a meaningful opportunity to participate in the consultation process as described in Section VII of this Policy. Commission officials will participate in the consultation process in a manner that demonstrates a meaningful commitment and ensures continuity in the process.

The Policy thus honors the government-to-government relationship between the United States and Indian tribes, and complies with the Presidential Memorandum of November 5, 2009, which affirms this relationship and obligates the Commission to meet the spirit and intent of EO 13175. The Commission understands that Indian gaming is tribal government gaming. Its foundation rests upon the inherent, sovereign powers of Indian tribes to make and enforce their own laws and to govern their own territory. The Commission acknowledges that Indian tribes, as sovereign nations, have the right to make their own laws and be ruled by them. Indian gaming is used by Indian tribes as a tool to effectively serve Indian tribal communities by strengthening Indian tribal

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governments, enhancing a community's self-sufficiency, and creating economic opportunities, growth and stability.

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Commission operations and governance practices. To that end, the Commission will seek and promote cooperation, participation, and efficiencies between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Commission Action with Tribal Implications. Efficiencies derived from the inclusion of Indian tribes in the Commission's decision-making processes through tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of tribal input.

III. Definitions

Collaboration – The Commission and Indian tribes working together to implement this Policy.

Commission Action with Tribal Implications – Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to:

- A. The ability of an Indian tribe to regulate its Indian gaming;
- B. An Indian Tribe's formal relationship with the Commission; or
- C. The consideration of the Commission's trust responsibilities to Indian tribes.

This, however, does not include matters that are the subject of an Enforcement Action, in litigation or in settlement negotiations, or matters for which a court order limits the Commission's discretion to engage in consultation.

Consultation Policies – Those policies established to comply with the procedures described in Section VII.

Enforcement Action - means any action taken by the Chair under 25 U.S.C. § 2713 against any person engaged in gaming, for a violation of any provision of IGRA, the regulations of the Commission, or tribal regulations, ordinances, or resolutions approved under 25 U.S.C. § 2710 or § 2712 of IGRA, including, but not limited to, the following: A notice of violation; a civil fine assessment; or an order for temporary closure.

IGRA – Indian Gaming Regulatory Act.

Adopted by the Commission on July 18, 2013

Indian Tribe or Tribe – Any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a.

Tribal Official – An elected or appointed tribal leader or official designated in writing by an Indian tribe to represent the tribe in government-to-government consultations.

IV. Accountability and Reporting

Methods that ensure accountability and reporting are essential to regular and meaningful consultation. The Commission shall include appropriate performance measures consistent with this Policy in future annual performance plans of their employees.

The Commission will report the results of its efforts to promote consultation with Indian tribes. Reporting is intended to be comprehensive and may include, but is not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities. The Commission will provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Each consultation the Commission holds will be transcribed. The transcript from each consultation will be posted on the Commission's website. Indian tribes will also be given an opportunity to submit written comments. The Commission will post on its website any documents and correspondence with Indian Tribes that address the Implementation of the Final Federal Action Stage described in Section VII of this Policy, narratives describing significant consultation efforts, and forthcoming consultation opportunities.

V. Training

The Commission will design training for Commission staff aimed at improving the Commission's capacity for promoting collaboration with Indian Tribes and executing the consultation provisions of Section VII of this Policy. The training will:

- A. Promote consultation, communication, collaboration, and other interaction with tribes;
- B. Outline and reinforce the Commission's duties concerning Indian gaming;
- C. Describe the legal trust obligation of the federal-tribal relationship; and
- D. Highlight and provide the knowledge, skills, and tools necessary for collaborative engagement to tribal and Commission staff engaged in the consultative process with attention to the unique distinctions within Indian Country.

The Commission will develop and deliver training to facilitate implementation of this Policy. This training will seek to enhance mutual understanding of cultural perspectives and administrative requirements between tribal and Federal officials and to promote inter-governmental relationships. Tribal representatives will be encouraged to participate in training along with Federal employees.

Adopted by the Commission on July 18, 2013

VI. Innovative and Effective Consultation Practices

The Commission's leadership will strive to advance Federal consultation practices and to offer examples for innovation. The Commission will identify and seek to address impediments, both external and internal, to improving its consultation processes. The Commission may:

- A. Host regular meetings between the Commission and Indian tribes;
- B. Communicate through a regular gathering of Indian tribes to discuss improving consultation practices and procedures;
- C. Solicit recommendations from Indian tribes for the initial development of performance measures described in Section IV, and thereafter for the evaluation of consultation practices.

VII. Consultation Guidelines

Consultation guidelines are meant to establish uniform practices and common standards, through an individual protocol conforming to the guidelines in this Section. Consultation and individual protocols will provide greater efficiency and transparency in Commission practices in order to maximize Indian tribes' participation. Commission Actions with Tribal Implications that are regional or impact a limited number of Indian Tribes shall be carried out in a manner consistent with this Policy while allowing discretion to employ only appropriate parts of this Section.

A. Initiating Consultation.

When considering a Commission Action with Tribal Implications, the Commission will notify the appropriate Indian Tribe(s) of the opportunity to consult pursuant to this Policy. The Commission will strive to ensure that a notice is given at least 30-days prior to scheduling a consultation. If exceptional circumstances prevent notice within 30-days of the consultation, an explanation for the abbreviated notification will be provided in the invitation letter. An Indian tribe may request an extension for timelines associated with this Policy.

Adequate notice entails providing a description of the topic(s) to be discussed, a timeline of the process, and possible outcomes. Notification of a consultation should include sufficient detail of the topic to be discussed to allow tribal leaders an opportunity to fully engage in the consultation. The notice should also give tribal leaders the opportunity to provide feedback prior to the consultation, including any request for technical assistance or request for clarification of how the consultation process conforms to this Policy.

Beginning at the Initial Planning Stage, see Section VII, Part E, Subsection 1, the Commission will consult with Indian Tribes on a Commission Action with Tribal Implications. An Indian tribe may request that the Commission initiate

consultation when the Indian tribe believes that it is considering a Commission Action with Tribal Implications. Requests should be made in writing to the Commission and should describe the specific Commission Action with Tribal Implications. If the Commission initiates consultation with a tribe but does not receive a response, the Commission will make reasonable and periodic efforts to repeat the invitation and, whenever feasible, will allow an Indian tribe to join an ongoing consultation. These efforts of engagement will be appropriately documented.

B. Role of the Commission in Consultation Process.

1. Monitoring compliance with this Policy, EO 13175, and other Consultation Policies pertaining to government-to-government consultation;
2. Promoting government-to-government consultation;
3. Implementing a reporting system to ensure that consultation efforts are documented and posted to the Commission's website and
4. Facilitating a government-to-government relationship that is honored by all parties in tribal consultations of national significance or involving multiple Regions.
5. Promoting and facilitating consultation and collaboration between Indian tribes and the Commission;
6. Advocating opportunities for and consideration of the positions of Indian tribes, consistent with the Commission's mission;
7. Striving to enhance a trusting and on-going relationship with Indian tribes, consistent with applicable law and executive orders; and
8. Serving as a contact for Indian tribes to request or inquire about consultation.

C. Guidelines for Response to Request for Consultation. The Commission will confirm receipt of a request for consultation from a tribal official. The Commission will treat an official request for consultation in an expedited fashion and respond in writing that the Commission has received the request, using the most expedient methods to communicate to the Indian tribe.

D. Stages of Consultation. The Commission will carry out the consultation stages described below for a Commission Action with Tribal Implications.

1. **Initial Planning Stage.** The Commission will consult with Indian tribes as early as possible when considering a Commission Action with Tribal Implications. The Commission may conduct a meeting or other forms of interaction with Indian tribes in order to receive and evaluate comments received as part of the Initial Planning Stage.
2. **Proposal Development Stage.** The Proposal Development Stage begins once the Commission discloses the scope of a Commission Action with Tribal Implications. The Commission will develop a process for the

Proposal Development Stage that maximizes the opportunity for timely input by Indian Tribes and is consistent with both tribal and Commission schedules.

The Commission will solicit the views of affected Indian tribes regarding the process timeline to consult on a Commission Action with Tribal Implications. The Commission will work with Indian tribes to structure a process, to the extent feasible, that considers specific Indian tribal structures, traditional needs, and schedules of the Indian tribes. The Commission will make all reasonable efforts to comply with the expressed views of the affected Indian tribes regarding the process timeline at this Stage, taking into account the level of impact, the scope, and the complexity of the issues involved in the Commission Action with Tribal Implications, along with the other factors driving the schedule. The process will be open and transparent. The Commission will then proceed with the expectation that interested Indian tribes will respond within a reasonable time period.

When the matter under consultation involves confidential or culturally sensitive information, the Commission will work with the Indian tribe to develop a consultation process that addresses the sensitivity of the information to the extent permitted by Federal law. If litigation or legal requirements impact the Commission's schedule for conducting consultation, the Commission will explain these constraints to the Indian tribe.

Examples of appropriate processes for the Proposal Development Stage include, but are not limited to, the following:

- **Negotiated Rulemaking.** Where appropriate, the Commission shall consider using negotiated rulemaking for developing significant regulations or other formal policies in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act.
- **Series of Open Tribal Meetings.** The Commission may provide open invitations for tribal leaders to attend a series of open meetings. Open meetings can be used for national, regional or subject-matter specific issues.
- **Tribal Advisory Committees.** The Commission will, to the extent necessary and appropriate, consult with affected tribes to select and establish fairly representative intertribal work groups, task forces, or advisory committees to assist the Commission and tribes in developing administrative rules or legislative recommendations to address and resolve certain issues of regulatory concern regarding the operation and regulation of Indian gaming under IGRA.

- **Single Meetings.** The Commission may host tribal officials in a single meeting to discuss a Commission Action with Tribal Implications under consideration. Single meetings are particularly appropriate for local or regional issues, or a tribe-specific issue.

If the Commission determines that the Administrative Procedure Act or other Federal law or regulation expressly prohibits continued discussion at a specified point in the decision-making process, the Commission will so inform the Indian tribes at the earliest opportunity in this stage in the process.

3. Implementation of Final Federal Action Stage.

The Commission may consider implementing a post-consultation review process where it is consistent with law, regulations, and EO 13175. The review process shall not limit the Commission's deliberative process privilege regarding internal considerations or any other applicable privilege. The Commission may invite feedback from the Indian tribe of the consultation process at this stage. The Commission also will consider the need for training or technical assistance concerning the final Federal action.

- E. **Impact of Consultation Guidelines.** Consultation does not preclude requests or recommendations by Indian tribes to collaborate and foster collaborative relationships between the Commission and Indian tribes outside of the processes described in this section.

VIII. Limitations

Except to the extent already established by law, this Policy is intended only to improve the internal management of the Commission, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Commission or any person. The Commission also does not waive by virtue of this Policy any applicable privilege that it may hold.

This policy is not intended to create a forum for resolution of specific disputes or issues that are the subject of litigation between the Commission and an Indian tribe(s) nor is it meant to replace presently existing lines of communication.

As an independent Federal regulatory agency, the Commission has authority and responsibilities under IGRA to conduct investigations, take enforcement actions, and render regulatory and quasi-judicial decisions regarding the approval of tribal gaming ordinances and third party management contracts, the suitability of management contractors to participate in Indian gaming, and tribal compliance with the Act. The nature of these statutory responsibilities necessarily places some limitations on the nature

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and type of consultation that the Commission may engage in with the involved Indian tribes. These limitations on consultation are necessary to preserve the integrity of the Commission's investigations, Enforcement Actions, and decision-making processes, and also comply with provisions of the Federal Administrative Procedures Act that limit Commission contact with parties in contested cases. Nevertheless, the Commission will endeavor, to the extent practicable and permitted by law, to reduce procedural impediments to consulting directly with Indian tribal governments to resolve issues regarding the operation and regulation of Indian gaming under IGRA.