

DRAFT NIGC GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION POLICY

I. Preamble

Consultation is at the heart of the special government-to-government relationship between the United States and Indian Tribes. It is a process which facilitates and formalizes the exchange of information between sovereigns and enables Tribes to participate in Federal decision making before an agency takes an action or commits to a decision with Tribal implications. As part of the consultation process, Tribal input is sought, received, responded to and considered by Federal agencies. The process is not a single act of communication, but one involving multiple steps which culminate in an outcome that reflects the views, needs and objectives of both Federal and Tribal participants.

The obligation of Federal agencies to engage with Tribes on a government-to-government basis is rooted in the centuries-old, special relationship between the Federal government and Tribes. Recognition of this special relationship can be found in the U.S. Constitution, treaties, statutes, regulations, executive actions, judicial rulings and, since 2000, Federal policy established by Executive Order 13175, *Consultation and Coordination with Indian Tribes*. As an independent Federal agency serving more than 240 Tribes with gaming operations, the National Indian Gaming Commission ("NIGC") engages with Tribes on a government-to-government basis when it consults with Tribes in accordance with this Policy and EO 13175.

The Indian Gaming Regulatory Act ("IGRA"), signed into law in 1988, provided a statutory basis for the operation of gaming by Indian Tribes and established the NIGC to oversee Indian gaming and implement the Act's regulatory scheme in partnership with Tribes and other governmental entities. A key policy of IGRA is to promote Tribal economic development, Tribal self-sufficiency and strong Tribal governments through Indian gaming. This Tribal Consultation Policy represents the NIGC's renewed and unwavering commitment to regular, meaningful and timely consultation with Tribes as it strives to fulfill its statutory mission. It reflects the continuing relevancy and vitality of the government-to-government relationship and the importance of the NIGC and Tribes working in partnership to best realize the purposes of IGRA.

II. Definitions

- A. *Consultation* – A process which enables Tribes to participate in Federal decision making before an agency takes an action, or commits to a decision, with Tribal implications. It is not a single act of communication, but consists of multiple steps which culminate in an outcome that reflects the views, needs and objectives of both Federal and Tribal participants. Consultation is triggered when the definition of an Action with Tribal Implications or Policies that Have Tribal Implications (EO 13175), or both, are met. It can be formal

(rulemaking), with established time lines and required publication of draft rules and comments, or less formal (teleconferencing).

- B. *Action with Tribal Implications* (“Action”) – NIGC proposals for regulations, rulemaking, legislation, guidance, policy formulation or actions that may have a substantial direct effect on one or more Tribes, on the relationship between Tribes and the Federal government, or on the distribution of power and responsibilities between the Tribes and the Federal government.
- C. *EO 13175 Policies that Have Tribal Implications* – Regulations, legislative comments or proposed legislation, and other policy statements and actions that have substantial direct effects on one or more Tribes, on the relationship between the Federal government and Tribes, or on the distribution of power and responsibilities between the Federal government and Tribes. EO 13175 requires certification by Federal agencies to the Office of Management and Budget that a consultation on draft regulations or a legislative proposal satisfied the EO’s consultation standards.
- D. *Indian Tribe* (“Tribe”) – An 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.
- E. *Tribal Official* – An elected or duly appointed Tribal leader or official delegate, designated in writing by a Tribe, or an authorized intertribal organization.
- F. *NIGC Tribal Consultation Officer* (“TCO”) – The NIGC employee primarily responsible for coordinating consultation efforts within the NIGC and with Tribes and for facilitating compliance with this Policy.
- G. *NIGC Consultation Point of Contact* (“POC”) – The NIGC region director, or whoever the Chairperson designates, responsible for coordinating consultation efforts within his or her region and with the NIGC central office.

III. Consultation General Principles

To the extent permitted by law, the NIGC will follow these principles when considering, formulating or implementing an Action with Tribal Implications.

- A. Indian gaming is Tribal government gaming. Its foundation rests upon the inherent, sovereign powers of Tribes to make and enforce their own laws and to govern their own territory. The NIGC acknowledges that Tribes, as sovereign nations, have the right to make their own laws and be ruled by them.

- B. Indian gaming is used by Tribes as a tool to effectively serve Tribal communities by strengthening Tribal governments, enhancing a community's self-sufficiency, and creating economic opportunities, growth and stability.
- C. The NIGC will honor Tribal treaty and other rights.
- D. The NIGC will strive to meet the responsibilities that arise from the unique legal relationship between the Federal government and Tribal governments.
- E. The NIGC will approach the consultation process on a government-to-government basis with due respect for, and deference to, the sovereign rights, power and authority of Tribal governments.
- F. The NIGC will encourage Tribes to develop their own policies to achieve program objectives, and, when possible, defer to Tribes to establish their own standards.
- G. In determining whether to establish Federal standards, the NIGC will consult with Tribal officials as to the need for the Federal standards under consideration and the availability of any alternatives that would limit the scope of the standards or otherwise preserve the prerogatives, authority and autonomy of Tribes.

IV. Consultation Guidance

According to EO 13175, "each agency shall have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies with Tribal implications." Although the substance and format of consultations can differ dramatically, the following guidance applies to all NIGC consultations.

- A. *Early Tribal Involvement* – For Tribal participation in consultation to be meaningful, it must happen early and often. The NIGC will include Tribes in the conversation before it takes an Action with Tribal Implications or adopts a Policy with Tribal Implications.
- B. *Consultation Triggers* – Consultation is required whenever the NIGC is considering an Action with Tribal Implications. The criteria found in the definition of an Action with Tribal Implications must be satisfied before consultation is required.
- C. *Adequate Notice* – Adequate notice of an opportunity to consult will include logistical information, such as date, time and place; anticipated NIGC participants; a brief description of the topic(s) to be discussed; a timeline of the process; and possible outcomes.

- D. *Timely Notice* – Timely notice of an opportunity to consult will be given to Tribes at least 45 days prior to a scheduled consultation. If exceptional circumstances prevent notice within 45 days of the consultation, an explanation for the abbreviated notification will be provided in the invitation letter.
- E. *Consultation Access* – If an individual Tribe or Tribal region is primarily impacted by the issue that is the subject of the consultation, the NIGC will make every effort to hold the consultation in that area. If the consultation involves joint action with other Federal agencies, the NIGC will attempt to hold a joint consultation with the other agencies. The NIGC will also explore opportunities for consultation through innovative sources, such as video conferencing, teleconferencing and interactive web technology.
- F. *Consultation Formats* – Consultation can take many forms and will reflect the number of expected participants and the nature and complexity of the proposed NIGC Action. For example, it may consist of national, regional or individual meetings or teleconferences with Tribes or Tribal Officials. It may consist of a series of meetings, open to all Tribes and Tribal Officials, or a single meeting with one Tribe. It can be formal (rulemaking), with established time lines and required publication of draft rules and comments, or less formal (teleconferencing).
- G. *Consultation Structure* – The seating arrangement, agenda and opportunities for dialogue will seek to respect the sovereignty of Tribes and reflect the government-to-government relationship.
- H. *Consultation Participants* – Unless exceptional circumstances dictate otherwise, NIGC representatives at consultations will include an official with decision-making authority; a subject-matter expert knowledgeable about the consultation topic; and, for regional consultations, the region's POC. The NIGC will seek participation by Tribes or Tribal Officials, and encourage participation by other Tribal representatives knowledgeable about the consultation topic.
- I. *Consultation Preparation* – To prepare for an upcoming consultation, participating NIGC employees will make every effort to learn about those Tribes participating in consultation and affected by the proposed NIGC Action, including a Tribe's geographic location, governmental structure, history, culture and economic base.
- J. *Sufficient Time for Consideration* – Throughout the consultation process, the NIGC will be as flexible as possible to allow sufficient time for Tribal governmental bodies and organizations to adequately review and analyze matters which may or do lead to a proposed NIGC Action with Tribal

Implications; to articulate their own proposals and rationales; and to engage in discussions with other affected Tribes.

V. The Consultation Process

The consultation process is triggered whenever the NIGC is considering, formulating or implementing an Action with Tribal Implications. The timing, nature, complexity and extent of the consultation will be appropriate to the Action with Tribal Implications involved. Generally speaking, the process unfolds chronologically in the following stages.

A. Identifying Consultation Issues

The NIGC will have mechanisms and procedures in place to ensure that its proposed actions are routinely screened for Tribal implications, consistent with this Policy, and that any proposed actions deemed to be Actions with Tribal Implications are then reported to the Commission. Additionally, as soon as possible, the NIGC will identify the underlying matters which may justify a proposed NIGC Action. Once identified, the NIGC will share this information with Tribes, along with an explanation as to why an NIGC action or decision may be necessary.

B. Early Consultation on Possible NIGC Action

The NIGC will consult with Tribes during the initial planning stage of an Action with Tribal Implications that is under consideration by the NIGC. The NIGC may conduct a meeting or other forms of interaction with Tribes at this stage in order to receive and evaluate comments received.

Initial planning activities include efforts preparatory to issuance of draft regulations, guidance, NIGC proposals, legislation and national or large-scale regional changes in procedures or policies.

C. Initiating Consultation

Consultation is required when the criteria for an Action with Tribal Implications are satisfied. When considering an Action with Tribal Implications, the NIGC will notify the appropriate Tribes of the opportunity to consult as set forth in this Policy.

A Tribe may request consultation with the NIGC when it believes that the NIGC is considering an Action with Tribal Implications. Requests should be made in writing to the TCO with a description of the specific Action. Once a request for consultation is received from a Tribe or Tribal Official, the TCO will promptly confirm receipt of the request and reply within 30 days.

D. Pre-consultation Event Planning

The NIGC will work with Tribes to structure a process and establish a timeline that maximizes the opportunity for timely input by Tribes and is consistent with both Tribal and NIGC schedules.

When selecting a consultation location, the NIGC will informally seek Tribal input and attempt to find a location which is convenient for attending Tribes. When feasible, the NIGC will schedule its consultations at the same time as regional and national intertribal conferences and gatherings and in coordination with other Federal agencies.

E. Consultation Events

Adequate and timely notice of a consultation event and the opportunity to consult will be provided to Tribes as set forth in this Policy. The format of the consultation event will reflect the number of participants and the nature and complexity of the proposed NIGC Action.

During the consultation event, NIGC participants will respond to questions and concerns voiced by Tribal participants and communicate openly about the NIGC's rationales, policy goals and institutional limitations.

Consultation events will be transcribed. Transcriptions will be published on the NIGC website. Written comments from Tribes, including those unable to participate or attend, will be received, considered and published by the NIGC on its website.

F. Consultation Event Follow-up

Following a consultation event, the NIGC may schedule additional, follow-up consultation. Tribes can request additional, follow-up consultation. Less formal dialogue and communication may continue between the NIGC and participating Tribes after the consultation event. Depending on the nature of the consultation, follow-up written comments may be accepted and considered by the NIGC prior to final decision making.

To the extent possible, the NIGC will respond to unanswered questions and remaining concerns of Tribes following the consultation, but before any final decisions are made.

G. Consultation Conclusion

After due consideration of Tribal comments and suggestions, and the Commission reaches an outcome, or fails to reach an outcome, consultation results will be provided to Tribes by the NIGC within 45 days of any decision. The results provided to Tribes will include a synopsis of Tribal issues and concerns; a description of the NIGC's consideration of the issues and concerns; and either the acceptance of the Tribes' suggested position or an explanation of the NIGC's determination. Consultation outcomes will be available to Tribes and published on the NIGC website.

H. Post-Consultation Review

The NIGC will implement procedures for the receipt and consideration of post-consultation complaints, objections and alleged inconsistencies with the Policy and EO 13175. Complaints, objections and alleged inconsistencies will be subject to internal review. Results of the internal review will be provided to Tribes.

VI. Accountability and Transparency

The NIGC will ensure compliance with the Policy and EO 13175 by providing both internal accountability within the NIGC and external accountability to Tribes.

A. NIGC Consultation Officials

To facilitate and enhance accountability, the NIGC Chairperson will appoint a Tribal Consultation Officer ("TCO") from the central office and a Point of Contact ("POC") from each regional office and assign them consultation-related responsibilities. The TCO and POCs will coordinate consultation-related activities within the NIGC and with Tribes at the direction of the Commission. These responsibilities will include: (1) responding to inquiries from Tribes about a specific consultation – past, ongoing or proposed; (2) responding to inquiries about the consultation process in general; (3) receiving requests from Tribes seeking to initiate consultation and then forwarding them to the Commission for consideration and a response; (4) coordinating with the Commission to identify and screen for potential consultation issues; (5) preserving and maintaining complete consultation records; (6) assisting Tribes seeking to access consultation records; and (7) receiving post-consultation complaints, objections and alleged inconsistencies and then forwarding them to the Commission for consideration and a response.

1. *Tribal Consultation Officer ("TCO")* – The TCO is the NIGC employee primarily responsible for coordinating implementation of this Policy within the NIGC and with other Federal agencies.

The TCO will provide certificates of compliance with EO 13175 for draft final regulations and proposed legislation with Tribal implications to the Office of Management and Budget.

The TCO will be responsible for communicating regularly with Tribes about consultation-related matters, including receiving and forwarding requests for consultation from Tribes to the Commission and responding to any inquiries about a specific consultation or the consultation process in general. The TCO will compile and maintain an accurate, updated contact list for communicating with Tribes. The TCO will preserve, maintain and make accessible to Tribes a complete record of each consultation.

2. *Point of Contact ("POC")* – Each NIGC regional office's region director, or whoever is designated by the Chairperson, will be the Point of Contact responsible for coordinating consultation efforts within his or her region and with the central office. The POC will communicate with Tribes in their regions about consultation-related matters and work closely with the TCO.

B. *Internal Accountability and Reports*

On an annual basis, the TCO, in collaboration with the regional POCs, shall report to the Chairperson the results of agency-wide efforts to facilitate and ensure meaningful, timely and regular consultation with Tribes. Reports are intended to be comprehensive and should include, at a minimum: (1) the scope of agency-wide consultation efforts; (2) the results of those efforts; (3) a comprehensive list of the topics on which consultations were held; (4) a list of attendees, including Tribal affiliation and title, if any; (5) a summary of the extent of engagement of senior NIGC leadership in consultations; (4) narratives describing significant consultation efforts; and (5) a list of anticipated future consultation opportunities. The report will also include a list of any training related to consultation and collaboration with Tribes.

If applicable, an NIGC employee's performance evaluation will include an assessment of his or her participation in consultation or training in furtherance of this Policy.

C. *External Accountability to Tribes*

The TCO will work with the NIGC central and regional offices to compile a list of proposed Actions with Tribal Implications requiring consultation and, once finalized, share that list with Tribes. The TCO will receive inquiries from Tribes attempting to initiate consultation and then forward them to the Commission for consideration and a response. The TCO will communicate and coordinate with Tribes about the pre-consultation planning for a consultation event at the direction of the Commission.

Once consultation is concluded, and the Commission reaches an outcome, or fails to reach an outcome, results will be provided to Tribes by the NIGC within 45 days of any decision. The results provided to Tribes will include a synopsis of Tribal issues and concerns; a description of the NIGC's consideration of the issues and concerns; and either the acceptance of the Tribes' suggested position or an explanation of the NIGC's determination. Consultation outcomes will be available to Tribes and published on the NIGC website.

Consultation events will be transcribed. A complete record of the consultation will be preserved and maintained by the TCO. Consultation records will include, but not be limited to: (1) the notice of consultation provided to Tribes; (2) requests from Tribes seeking to initiate consultation and the NIGC's response; (3) written comments submitted by Tribes; (4) transcriptions of consultations; and (5) consultation summaries (final outcome, a synopsis of Tribal issues and concerns, a description of the NIGC's consideration of consultation topics and Tribal comments, and a justification for the position adopted by the NIGC, if contrary to the Tribes' suggested position).

Consultation records will be accessible to any Tribe or Tribal Official upon request to the TCO or regional POC. The NIGC will post consultation information on its website, including comments, transcriptions and outcomes. Annual consultation reports or summaries, compiled by the NIGC, will also be posted on the NIGC website.

VII. Communication, Coordination and Collaboration

The NIGC will strive to utilize a number of opportunities for improved communication with Tribes, including consultation, information-sharing sessions, listening sessions, meeting with individual Tribes, and informal discussions with Tribal leaders. The NIGC may also use a Tribal leader task force or Tribal advisory group to help inform its decision making and gain a better understanding of the Tribal perspective on a proposed Action. The selection process for members of task forces and advisory groups will be accomplished with input from Tribes.

With Tribes

Communication methods will avoid impersonal forms of communication; be designed to effectively gain the attention of individual Tribal leaders; build on best practices; utilize appropriate forms of technology; and be routinely assessed by Tribes for their effectiveness. Communication will strive to be open and transparent.

The NIGC will prioritize the development and maintenance of accurate, updated contact lists for Tribes. It will collaborate with national and regional intertribal groups and other Federal agencies to maximize effective communication with Tribes.

The NIGC will communicate and collaborate with Tribes to accomplish regular, meaningful and early consultation. The NIGC will routinely post consultation information on its website, including comments, transcriptions and outcomes. The NIGC will assign designated employees responsibilities for communicating regularly with Tribes about consultation-related matters.

The NIGC will identify and seek to address impediments, both external and internal, to improving its consultation processes, and will routinely solicit Tribes' evaluation of specific consultation events and consultation practices generally.

With Other Federal Agencies

The NIGC will work with other Federal agencies to consult with Tribes on issues subject to overlapping jurisdiction and responsibilities, such as gaming and law enforcement. The NIGC will collaborate with other Federal agencies to maximize effective communication with Tribes.

VIII. Trainings

The NIGC will establish annual targets for providing training opportunities for its staff. NIGC employees will receive training on the government-to-government relationship with Tribes; the consultation policy and process; the Federal government's trust and treaty responsibilities; and basic information about Indian traditions, culture, history and governments. Trainings for NIGC employees will acknowledge Tribal sovereignty, and will promote self-governance and consultation, communication, collaboration and other interaction with Tribes.

IX. Judicial Review

This policy is intended only to improve the internal management of the NIGC and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies or any person.