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April 18, 2013

Ms. Tracie Stevens, Chairwoman
Mr. Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

Re: Comments on Draft Consultation Policy

Dear Commissioners:

The Quapaw Tribal Gaming Agency ("QTGA") appreciates the opportunity to submit the following comments on the February 21, 2013 NIGC Policy on Consultation with Indian Tribes ("Draft Policy"), which updates the initial draft of the policy that was issued for public comment in March 2011 ("Initial Draft"). We encourage the development of a new consultation policy supporting the initial intent of the November 5th, 2009 consultation directive, and are grateful for the efforts that the NIGC has been making to improve the quality and effectiveness of its consultation practices. It is our hope that the comments below prove useful to the NIGC as it works towards finalizing its proposed consultation policy.

The primary objective of this comment letter is to request the withdrawal of the Draft Policy and the reinstatement of the Initial Draft as the proposed consultation policy. In reviewing the Draft Policy, we were alarmed to find that it was not just a revision of the Initial Draft but rather a completely rewritten, brand new consultation policy. In its present form, the Draft Policy could hardly be characterized as even remotely related to the Initial Draft, which is troubling knowing the high level of support expressed by tribes during consultation on the Initial Draft.

As evidenced by the comments raised in writing and at the April 7, 2011 consultation meeting, tribes were generally in agreement that the Initial Draft presented a model framework for engaging tribes on a government-to-government basis with due respect for the sovereign powers, rights, and authority of tribal governments. In our own comments submitted on May 31, 2011, we noted that we were "pleased by the new direction the NIGC was taking with respect to consultation and we expressed our belief " that the consultation process as outlined in this Policy will promote a more open and mutually beneficial consultation policy."[1]

The consultation record clearly shows that we were not alone in this view. One tribe wrote that "we are confident that the NIGC's approach to consultation with genuine regard for the

[1] Comments of the Quapaw Tribal Gaming Agency on the Draft NIGC Consultation Policy, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Consultation/Regulatory%20Review%202010-2011/ConsultationPolicy/QuapawConsultationPolicy.pdf.

sovereignty of tribes will go a long way towards facilitating an open and productive dialogue."[2] Another tribal commenter expressly "encouraged the NIGC to move forward with the adoption of the NIGC Government-to-Government Tribal Consultation Policy."[3]

In addition to these general observations, a number of specific comments were also made with respect to certain provisions of the Initial Draft. One tribal commenter specifically "requested the NIGC to preserve its current draft version of the Preamble."[4] With respect to the "Consultation General Principles" outlined in the Initial Draft, one tribal commenter observed that "the NIGC's seven principles are thoughtful and good ones."[5] Another tribe stated that it "fully supported Section (F) and (G) which requires the NIGC to defer to tribes in developing its own standards and consultation with tribes for any Federal standards."[6]

In view of this overwhelmingly favorable support for the Initial Draft, we did not anticipate the post-consultation Draft Policy to depart so far from the progressive and enlightened policies set forth in the Initial Draft. As a whole, the Draft Policy represents a very generic interpretation of the minimum federal requirements for consultation. Many of its substantive provisions are unreflective of the special relationship between the NIGC and tribes in the regulation of tribal gaming activities. Furthermore, many areas of the Draft Policy falls short in providing real and meaningful guidance as to how effective consultation can be achieved.

The guiding principles section of the Draft Policy, for instance, no longer articulates clear, concrete measures for achieving meaningful consultation but instead merely recites broad policies and goals of consultation. Also, unlike the general principles outlined in the Initial Draft which were premised on the foundational principles of tribal sovereignty and self-determination, the Draft Policy's guiding principles do not contain a single reference to tribal sovereignty or the key policies of IGRA, namely, the promotion of tribal economic development, tribal self-sufficiency, and strong tribal governments through tribal gaming.

While these issues with respect to the Draft Policy are important in and of themselves, the larger problem of great concern here is, the apparent disregard of the tribal consensus that was achieved during consultation on the Initial Draft. As discussed above, the consultation record clearly shows that the Initial Draft was not only well-received by tribes, but was indicated as one of the finest policies to have been developed by a federal agency. We are unable to find any evidence of tribal objections or grievances with the Initial Draft.

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[2] Comments of the Seminole Nation of Oklahoma Gaming Agency on the Draft NIGC Consultation Policy, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Consultation/Regulatory/Consultation Policy/snoogaconsultationpolicy.pdf.

[3] Comments of the Tulalip Tribes of Washington on the Draft NIGC Government-to-Government Tribal Consultation Policy, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Consultation /Regulatory%20Review%202010-2011/ConsultationPolicy/TulalipTribesCommentsConsultationPolicy.pdf.

[4] Comments of the Picayune Rancheria of the Chuckchansi Indians on the Draft NIGC Tribal Consultation Policy, *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=ut8d2NgplWc%3d&tabid=1039.

[5] Comments of the Shoshone-Banock Tribes on the Draft NIGC Tribal Consultation Policy, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Consultation/Regulatory%20Review%202010-2011/ConsultationPolicy/ShoshoneBannockTribesCommentsTribaConsultationPolicy.pdf.

[6] Comments of the Navajo Nation on the Draft National Indian Gaming Commission Government-to-Government Consultation Policy, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/ Tribal%20Consultation /Regulatory%20Review%2020102011/ConsultationPolicy/20110524NavajoNationConsultationPolicy.pdf.

Nonetheless the Initial Draft was set aside in favor of the new policy set forth in the Draft Policy. To date, no explanation or reasoning has been provided by the NIGC to help tribes understand why a new draft was developed in spite of the overwhelmingly positive comments received in response to the Initial Draft. There has not even been an acknowledgement of the extensive consultation that took place in relation to the Initial Draft. We find this apparent failure to incorporate the tribal consensus view disappointing and very disturbing. It suggests, among other things, that no consideration at all was given to the positive feedback the NIGC received from tribes during consultation. And on a broader level, it undermines the legitimacy of the NIGC's consultation activities by bringing into question the value and effectiveness of tribal participation.

In our view, there is perhaps no better or more compelling reason to adopt a proposal than the fact that it has received the widespread support and approval of Indian Country. Consequently tribes naturally have a reasonable expectation that an agency will move forward with any policy that has gained the widespread support of affected tribes. If, however, tribal voices supporting an agency policy are ignored, tribes will inevitably lose confidence in the value of consultation and begin doubting the good faith efforts of the NIGC to engage meaningfully with tribes in accordance with federal law and policy.

In closing, we wish to emphasize that both tribes and the NIGC stand to gain from engaging meaningfully with tribes during the consultation process. Effective consultation can minimize the likelihood of disputes and help produce more productive intergovernmental cooperation, thereby strengthening the government-to-government relationship between tribes and the NIGC. We respectfully request the NIGC to keep this in mind as it proceeds with its final deliberations in relation to its consultation policy.

Thank you for your attention to these comments. We look forward to the reinstatement of the Initial Draft policy, which was highly supported as expressed by tribes during consultation as we move forward to finalize this policy.

Sincerely,

Barbara Collier, Director
Quapaw Tribal Gaming Agency