

## NATIONAL INDIAN GAMING COMMISSION

RIN 3141-AA04

### Government-to-Government Tribal Consultation Policy

**AGENCY:** National Indian Gaming Commission.

**ACTION:** Notice, policy statement.

**SUMMARY:** This National Indian Gaming Commission Government-to-Government Tribal Consultation Policy establishes a framework for consultation between the NIGC and tribes with respect to the regulation of Indian gaming.

**EFFECTIVE DATE:** This policy statement takes effect immediately.

**FOR FURTHER INFORMATION CONTACT:** Maria J. Getoff, Staff Attorney, NIGC, Suite 9100, 1441 L St. NW, Washington, DC 20005. Telephone: (202) 632-7003; and fax, (202) 632-7066 (these are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** The information in this preamble is organized as follows:

- A. Background
- B. Response to Public Comments

#### A. Background

The Indian Gaming Regulatory Act (IGRA or Act), enacted on October 17, 1988, established the National Indian Gaming Commission (NIGC or Commission) as an independent Federal regulatory agency to provide federal regulation and oversight of Indian gaming. In carrying out its statutory responsibilities under the IGRA, the Commission represents the Federal government in its unique government-to-government relationship with Indian tribes regarding the operation and regulation of gaming on Indian land under the Act. In order to promote and strengthen that relationship and also effectively implement the provisions of the IGRA and further its stated policies and purposes, the Commission is strongly committed to meaningful consultation with Indian tribes regarding the formulation and implementation of NIGC policies and regulations that may substantially effect or impact the operation or regulation of gaming on Indian land under the Act.

The NIGC considers consultation to be a vitally important and effective means of communicating with gaming tribes to learn their concerns regarding the operation and regulation of Indian gaming, prior to, during, and after the formulation and implementation of related NIGC policies and regulations. Therefore, the NIGC has regularly

engaged in consultations with Indian tribes on matters that impact Indian gaming. For instance, during 2003, five regional consultations were held across the United States as well as numerous consultations with individual tribes and representative organizations. Many tribes attended each of the regional consultation sessions. While the NIGC viewed these consultations as highly productive, they also provided insight into the need for a formal tribal consultation policy.

As it developed this policy, the NIGC looked for guidance to Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and the published tribal consultation policies of other Federal agencies. Executive Order 13175 sets forth certain criteria that federal agencies should follow when formulating and implementing policies that affect Indian tribes.<sup>1</sup> The Executive Order further provides that agencies "shall have a process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." 65 FR 67249, 67250 (November 9, 2000).

On October 3, 2003, after several months of consultation with tribal leaders and intertribal organizations regarding the need for, and format and content of an NIGC consultation policy, the NIGC issued a Preliminary Draft Tribal Consultation Policy (Draft Policy) and solicited comments from tribes regarding the Draft Policy. Three of the five regional consultations held in 2003 occurred after the issuance of the Draft Policy, and informal comments were received during these consultations.<sup>2</sup> In addition, the NIGC received 36 written comments. The scheduled comment period ended on February 6, 2004. The majority of commenters commended the Commission for its efforts to establish this policy as an important step to foster productive government-to-government relations. Two commenters felt that the implementation of this policy actually limits consultation and does not allow tribes to express themselves fully. Due consideration has been given to each of the comments received. A discussion of specific comments follows.

<sup>1</sup> The Executive Order mandates compliance by all federal agencies with the exception of independent regulatory agencies, which are encouraged to comply with its provisions. The NIGC is an independent regulatory agency. See 25 U.S.C. 2702(3).

<sup>2</sup> The consultations occurred in Albuquerque, NM and Phoenix, AZ, October 23-24, 2003; in Temecula, CA, December 2-3, 2003; and in Crystal City, VA, February 3-5, 2004.

#### B. Responses to Public Comments

*Comment:* Several commenters recommended that the policy include a statement requiring all future proposed regulations published in the **Federal Register** include a statement that the Commission has complied with Executive Order 13175 through prior consultation and collaboration with tribal governments.

*Response:* The Commission fully intends to follow this consultation policy with respect to future proposed regulations. The Commission established this policy because of its strong belief that consultation with tribes on all issues affecting Indian gaming, including the promulgation of regulations, is vitally important. Furthermore, this policy is based in part on Executive Order 13175. However, Executive Order 13175 does not mandate compliance by independent federal regulatory agencies, of which the NIGC is one. Therefore, the Commission determined that it is neither compulsory nor necessary that the NIGC comply with the Executive Order, and instead decided it was more appropriate to develop and adhere to the terms of its own tribal consultation policy as an independent federal regulatory agency.

*Comment:* One commenter stated that, in Section I.A.1, there is no reference to Federal court decisions as part of the body of law that the NIGC must consider as it interprets the IGRA.

*Response:* The first sentence of Section I.A.1 of the Draft Policy reads as follows "The United States of America has a unique government-to-government relationship with Federally-recognized Indian tribes, as set forth and defined in the Constitution of the United States and Federal treaties, statutes, Executive Orders, and court decisions." We have inserted the word, "Federal" in front of "court decisions" to make this clearer.

*Comment:* One commenter questioned whether it was necessary to reiterate the findings and purposes of IGRA in Section I.A.2, arguing that the language of IGRA speaks for itself and does not add much to the consultation policy.

*Response:* We have restated the statutory language because we believe it provides relevant background to the policy. The policy is intended to promote and strengthen the government-to-government relationship between the NIGC and Indian tribes, in order to effectively implement the provisions of the IGRA and further accomplishment of its stated policies and purposes. Since the policies and purposes of the Act are so central to the goals of the policy, the Commission

believes they should be stated in the policy.

*Comment:* Several commenters suggested that the term, "direct substantial effect", used in Sections II.A. 5, III.A, III.F, and III.I should be defined, and should be defined liberally. Several commenters urged the NIGC to engage in consultation with tribes as to whether proposed regulation is necessary, and thereafter whether the proposed regulation has a potentially significant impact on tribes.

*Response:* We have slightly modified the text, by replacing "which will have direct substantial effect" with "which may substantially affect or impact." We do interpret this language liberally, and intend that whenever the Commission proposes to develop or implement policies or regulations that may substantially effect or impact the operation or regulation of gaming on Indian land, it will consult with the potentially affected tribes regarding the need, substance, and effect of such policies or regulations. In addition, the Commission will continue to consult on existing NIGC policies and regulations upon request and as otherwise needed.

*Comment:* One commenter questioned how the regulated community would determine whether in fact the NIGC "carefully considered" tribal positions as the policy says it will in Section III.F. This commenter suggested that the NIGC adopt a policy that it would not invoke Exemption 5 of the Freedom of Information Act (FOIA) with respect to the decision-making process of the NIGC in arriving at a policy, procedure, program, requirement, restriction, or standard. Along these same lines, one commenter suggested that the policy include a requirement that the NIGC publicly report on issues of concern identified by tribes during consultation and how such matters were handled by the NIGC.

*Response:* The Commission cannot agree to adopt a policy whereby it would release information protected by Exemption 5 of the FOIA. Exemption 5 allows the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). In addition, we believe premature release of information related to the decision-making process would hamper the free exchange of ideas and the open and frank discussions we wish to encourage during consultation on matters of policy. Furthermore, items discussed in the meetings might have no bearing on a final action. We would risk public confusion if we released information on

discussion of issues and concerns that were not relevant to our final action.

Finally, this consultation policy provides for early, robust and meaningful consultation regarding proposed NIGC policies and regulations before they are formulated and implemented. Once a final agency decision is made regarding the formulation and implementation of a policy or regulation, the NIGC will fully respond in writing to all relevant issues of concern raised in tribal comments during consultation and the rule-making process, in the same fashion it has done with regard to this policy and NIGC regulations in the past.

*Comment:* Several commenters objected to the use of the term "domestic dependent" to describe Indian tribes in Sections I.A.1 and II.A.1 as disrespectful of tribal sovereignty. These commenters proposed the term, "sovereign Indian nation" instead. These same commenters and others also objected to the use of the word, "certain" to modify the language, "rights to self-government over their internal affairs" and further objected to the use of the words, "internal affairs" as limiting in scope. Finally, some commenters objected to the term, "under its protection."

Some commenters recommended that the policy restate the Executive Order's language that: "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." Other commenters suggested that we add the language, "and, under certain circumstances, civil jurisdiction over non-members and non-Indians. Other commenters also suggested removing reference to tribal "internal affairs" from the first sentence of Section I.A.2 and ending the sentence with "\* \* \* tribal economic development, tribal self-sufficiency and strong tribal governments." One commenter suggested we either more fully describe the powers of self-government that tribes possess, or modify the sentence to end with, "\* \* \* and possess the powers of self-government over their internal affairs."

*Response:* We note that Executive Order 13175, which many tribes recommended we follow, uses the terms "domestic dependent" and "under its protection", as do many Federal court cases, to describe the Federal government's trust responsibility to Indian tribes and the extent of tribal sovereignty. Nevertheless, we have removed the words, "domestic dependent" and "under its protection" from Section I.A.1. We have also removed the language, "and certain

rights to self-government over their internal affairs." We have added "as recognized and defined in the Constitution of the United States, Federal treaties statutes, and Executive Orders, and Federal court decisions' to the end of the sentence. The sentence now reads, "Since its formation, the United States has recognized Indian tribes as sovereign nations which possess and exercise sovereign authority over their members and territory to the extent recognized and defined in the Constitution of the United States, Federal treaties, statutes, and Executive Orders, and Federal court decisions.

*Comment:* Several commenters recommended the removal of all reference to consultation with State and local governments. These commenters argued that the tribes already consult with these governments regarding class III gaming and that consultation with States and local governments on other matters are not appropriate in a policy regarding consultation with tribes. One commenter suggested we modify the language regarding states by adding the phrase, "in some instances" before the word "state" in Section I.B.3. One commenter felt differently, stating, "We agree that all three governments charged with ensuring the success and integrity of tribal governmental gaming govern best when they communicate with one another with respect and candor."

*Response:* We agree with the last comment. The Commission recognizes that states may only have a negotiated role in the regulation of Class III gaming, and would, therefore, not consult with states with respect to the regulation of Class II gaming, which is strictly within the jurisdiction of tribes and the NIGC. However, the Commission also recognizes the considerable role states may have in the regulation of Class III gaming and, therefore, believes it critical to this consultation policy to confer with state authorities where necessary to implement the provisions of the IGRA and further its stated goals. Without strong communication among all three sovereigns, the integrity of the regulated gaming operations may be compromised. We hope to facilitate the level of mutual respect, communication and cooperation between tribal, federal and state governments intended by the IGRA and necessary to accomplish its stated policies and purposes.

*Comment:* Several commenters argued that the Draft Policy implies that the NIGC has broad authority that, these commenters argue, it does not have. Several commenters argue that the NIGC has only limited regulatory responsibility over Class III gaming. These commenters point to Section

I.B.1, which states, "The Act vests the Commission with certain regulatory powers and responsibilities for Indian gaming, including broad authority to promulgate such regulations and guidelines as it deems appropriate to implement and further the provisions of the Act." The commenters believe this statement conflicts with Congress' intent to limit the Commission's authority to those items expressed in IGRA, and suggests striking the term, "certain" and substituting the term "statutory." These commenters also suggest striking the term "broad" and the phrase "as it deems appropriate to implement and further the provisions of the Act and substitute the phrase "to implement its authority consistent with the Act."

*Response:* The Commission does not believe that the inclusion of the words, "certain" and "broad" imply the existence of authority that does not exist. The IGRA does vest the Commission with certain powers and responsibilities, and the use of the word "certain" neither enhances nor diminishes the statutory authority granted to the NIGC by Congress. In addition, the exact language from IGRA is "the Commission shall promulgate such regulations and guidelines as it deems necessary to implement the provisions of [the Act]." 25 U.S.C. 2706(b)(10). This is by its very language a broad grant of authority. The Commission does agree that the word, "further" is redundant, and has removed it.

*Comment:* Several commenters suggested striking the language in Section II.A.3., "subject to independent Federal regulatory oversight and certain other conditions, restrictions and requirements prescribed by the Act" and substitute the phrase "subject to the requirements of the Act, tribal-state compact provisions, procedures in lieu of compacts, and regulations promulgated pursuant to the Act."

*Response:* The Commission agrees, in part, that the suggested language is more accurate and comprehensive and has, accordingly, changed the text to read "subject to independent Federal regulatory oversight and the conditions, restrictions, and requirements of the IGRA, Tribal-State Compact provisions, Federal procedures in lieu of a Tribal-State Compact, and NIGC regulations promulgated pursuant to the Act."

*Comment:* With respect to the section regarding increasing flexibility for waiver of regulatory requirements, some commenters propose striking the language in Section IV.A., "take whatever steps it determines appropriate and permitted by law" and

substituting "whenever appropriate and permitted by law."

*Response:* In its attempts to streamline the waiver process, the Commission will necessarily have to make the determination how best to accomplish this within the confines of the law. The Commission believes this language clarifies the conclusions it must reach before it may simplify the waiver process and therefore declines to substitute this language.

*Comment:* The language in Section II.B.3 troubled two commenters. It provides that the NIGC will defer to tribal regulations and standards (and thereby either decline to promulgate, or grant a variance or waiver of, its own regulations and standards) when the Commission determines that tribal compliance and enforcement are "readily verifiable" by the NIGC. These commenters felt that this language might give rise to unlimited and unwarranted intrusion in the name of verification and suggested that "both the concept and language of 'verification' [be] thoroughly discussed and their consequences considered to eliminate any possibility that the phrase could be used to effectively nullify the primacy of tribal regulation."

*Response:* As generally indicated in Section II.B. 6. the purpose of the preceding Sections II.B.3. through 5. is not to make unwarranted intrusions into tribal gaming operation or regulation, but instead to "grant tribes the maximum administrative and regulatory discretion possible in operating and regulating their tribal gaming operations \* \* \*". In order to achieve this goal, the NIGC must first confirm that the proposed or established tribal regulations are permitted by IGRA; that they provide adequate regulation in furtherance of the Act's purposes; that there are tribal authorities and procedures in place to ensure tribal compliance with the regulations and their enforcement; and that similar Federal regulations are not also needed or otherwise required by IGRA. Verification of the adequacy, compliance, and enforcement of the tribal regulations will be accomplished through field inspections and audits in the same way that the NIGC now monitors and confirms compliance with NIGC required tribal internal control standards and approves related tribal variances from the NIGC's Minimum Internal Control Standards.

*Comment:* One commenter requested removal of everything in Section II.B.5 after the word, "tribe(s)." No explanation was provided for this request. The complete sentence reads, "[t]he NIGC will not formulate and

implement Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming that will impose substantial direct compliance or enforcement costs on an Indian tribe(s), if the Commission determines that such Federal regulation and standards are not required by IGRA or necessary to implement its provisions or further accomplishment of its policies and purposes."

*Response:* The Commission cannot agree never to implement policies or procedures that might impose costs on Indian tribes. All regulatory efforts involve some cost. Generally, the benefits of a tightly regulated casino outweigh the costs of that regulation. That said, we think the modifying language provides assurance that the NIGC will not move forward with any requirements that are not necessary to implement the IGRA or further its stated purposes.

*Comment:* One commenter objects to the inclusion of the language, "and provide financial assistance to local governments" in Section I.B.2. The commenter argues that the IGRA does not recognize that Indian gaming is conducted even in part to provide financial assistance to local governments.

*Response:* We agree generally with this statement and have accordingly revised the language of Section I.B.2. This Section relates to the proper uses of net revenue under the IGRA, one of which is "to help fund operations of local government agencies." 25 U.S.C. 2710(b)(2)(B)(v). We have changed the language to make that clearer and to add one of the allowed uses of net revenue, which was inadvertently left out. The Section now reads, "IGRA recognizes and provides that the operation of gaming on Indian lands is primarily a function of tribal sovereignty. Indian gaming is conducted by tribal governments, who may use the net revenues derived from this gaming only to fund tribal government operations or programs; provide for the general welfare of the tribe and its members; promote tribal economic development; donate to charitable organizations; or help fund operations of local government agencies."

*Comment:* One commenter suggested that the NIGC initiate consultation 60 days prior to a final decision regarding the formulation or implementation of regulatory policies or procedures.

*Response:* The NIGC declines to set a specific time period for consultation. Section III.D. provides that the "NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies, procedures,

programs, requirements, restrictions, and standards that it is proposing to formulate and implement, before a final agency decision is made regarding its formulation or implementation." We believe that an arbitrary time period might hamper the process, particularly when complicated or controversial programs are at issue. At these times, we expect that comprehensive consultations will take substantially longer than 60 days to complete. The Commission does not want to run the risk of shortchanging the process in the name of expediency. Similarly, we also want to avoid unnecessary delay in starting and completing the consultation process. As stated in Section III.A., "\* \* \* the NIGC is committed to regular, timely, and meaningful government-to-government consultation with Indian tribes." This commitment implicitly requires that tribes be adequately informed regarding proposed NIGC policies and regulations well enough in advance for them to provide thoughtful and meaningful input regarding the need, content, and implementation of such policies and regulations, before the agency has made its final decision on these issues.

*Comment:* One commenter objects to Section III.G., which states that "[t]he NIGC has authority and responsibilities under IGRA to conduct investigations, take enforcement actions, and render regulatory and quasi-judicial decision making regarding \* \* \* tribal compliance with the Act." The commenter believes that the NIGC does not have generalized authority to take enforcement actions or render quasi-judicial decisions regarding compliance, especially over Class III gaming, and that the NIGC only has those authorities over specific tribal actions that are stated in IGRA.

*Response:* We have changed the text cited by the commenter to read "the NIGC has authority and responsibilities under IGRA to conduct investigations, take enforcement actions, and issue 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 IGRA specifically provides that the Chairman of the NIGC may issue orders of temporary closure and may levy and collect civil fines. 25 U.S.C. 2705(a)(1) and (2). The Chairman has the authority to order temporary closure for substantial violations and to levy and collect civil fines for any violation of any provision of IGRA, any regulation prescribed by the Commission, or tribal

regulations, ordinances, or resolutions approved by the Chairman. 25 U.S.C. 2713(b)(1) and (a)(1). These are enforcement powers. Pursuant to its authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [the IGRA]," the NIGC has promulgated regulations governing the enforcement process. See 25 CFR part 573.

With respect to "quasi-judicial" decisions, the IGRA provides that the Commission may "hold such hearings, sit and act at all such times and places, take such testimony, and receive such evidence as the Commission deems appropriate." 25 U.S.C. 2706(b)(8). The IGRA further provides that the Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman, 25 U.S.C. 2713(a)(2), and that, "not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order shall be made permanent or dissolved." 25 U.S.C. 2713(b)(2). Decisions of the Commission may be appealed to Federal district court. 25 U.S.C. 2713(c).

*Comment:* One commenter suggested the development of a tribal liaison office or division whose primary purpose would be to facilitate the communication and consultation process with the various tribes.

*Response:* The Commission believes that the provisions of the consultation policy itself will facilitate communication and consultation, and that a separate office is unnecessary. Furthermore, all Region Directors are tasked with the responsibility of facilitating communication with the tribes within their Region. However, as we move forward with implementation of the policy, we will revisit this issue and evaluate the need for any additional staff to oversee policy performance.

*Comment:* One commenter would like to see the policy include consultation with tribal gaming commissions as well as tribal governments.

*Response:* The policy provides that the primary focus of our consultation activities will be with individual tribes and their recognized governmental leaders. Consultation with authorized intertribal organizations and representative intertribal advisory committees will be conducted in coordination with individual tribal governments. While we recognize that tribal gaming commissions are often the

in-house authority on gaming issues within tribes and often serve as the tribal governments' representatives at our formal and informal consultations, the government-to-government relationship requires that the ultimate decision of who will represent a tribe at the consultation table is decided by the tribal government.

*Comment:* One commenter objects to the language in Section II.A.7 which states that the NIGC will work with other Federal departments and agencies to enlist their support to assist the NIGC and tribes in providing adequate environmental protections for the health and safety of the public at tribal gaming facilities. This commenter argues that the NIGC does not provide environmental protection and has no legitimate role in doing so.

*Response:* The IGRA requires that tribal gaming ordinances include a provision that the construction and maintenance of a gaming facility, and the operation of gaming be conducted in a manner which adequately protects the environment and the public health and safety. 25 U.S.C. 2710(b)(2)(E). On July 12, 2002, the NIGC published an interpretive rule with respect to health and safety that defines the Commission's responsibilities. 67 FR No. 134, 46111 (July 12, 2002). The Commission has limited and discrete responsibility to provide regulatory oversight of tribal compliance with this ordinance provision. As we stated in the interpretive rule, it is the Commission's view that this section of IGRA requires tribal governments to adopt and apply health and safety standards. If the Commission determines that tribal standards are not routinely enforced, it will so notify the tribe. Only if the Commission finds imminent jeopardy to the environment, public health or safety will it proceed to enforcement if no corrective action is taken. *Id.* at 46112. We believe the language of Section II.A.7. does not imply the Commission has powers it does not have with respect to health and safety. The role and responsibilities of the Commission are clearly set forth in the IGRA and the interpretive rule.

*Comment:* Several commenters believe that the General Limitations section, Section V, absolves the NIGC of all responsibility to adhere to the policy. These commenters would like to see this section removed.

*Response:* We decline to remove this section. This section clarifies that there are limits on the policy; it does not release the NIGC from responsibility to follow it. This is a comprehensive tribal consultation policy, which will inform and guide the Commission as it

continues to engage in active consultation with Indian tribes. Statements of policy do not typically create rights to administrative or judicial review, nor other causes of action. To avoid any misunderstanding in this regard, we believe it prudent to include this Section in the policy.

*Comment:* One commenter suggested adding the following to Section V.: "This policy is not intended to create a forum for resolution of issues between the Tribes and the NIGC. Nor is it meant to replace presently existing lines of communication. Both the Tribes and NIGC recognize that issues that are the subject of litigation or that are likely to become the subject of litigation are inappropriate for discussion in this process.

*Response:* We agree that this language would improve the General Limitations section, and we have added it, with slight modifications.

Dated: March 26, 2004.

**Philip N. Hogen,**

*Chairman, National Indian Gaming Commission.*

**Nelson W. Westrin,**

*Vice-Chair, National Indian Gaming Commission.*

**Cloyce V. Choney,**

*Commissioner, National Indian Gaming Commission.*

### **National Indian Gaming Commission Government-to-Government Tribal Consultation Policy**

The National Indian Gaming Commission ("NIGC" or "Commission"), in consultation with Federally-recognized Indian tribes, establishes and issues this Government-to-Government Tribal Consultation Policy, which shall take effect immediately and remain in effect until further order of the Commission.

#### **I. Introduction**

##### *A. Fundamental Principles of the Government-to-Government Relationship*

1. The United States of America has a unique government-to-government relationship with Federally-recognized Indian tribes, as set forth and defined in the Constitution of the United States and Federal treaties, statutes, Executive Orders, and Federal court decisions. Since its formation, the United States has recognized Indian tribes as sovereign nations, which possess and exercise inherent sovereign authority over their members and territory to the extent recognized and defined by the Constitution of the United States, Federal treaties, statutes, Executive Orders, and Federal court decisions.

Pursuant to this unique government-to-government relationship, the Federal Government has enacted numerous statutes and promulgated numerous administrative regulations that establish and define its trust responsibilities to Indian tribes and address issues concerning tribal self-governance, tribal territory and resources, and tribal treaty and other rights.

2. A principal goal of long-standing Federal Indian policy is to support the federally recognized sovereignty of Indian tribes by promoting tribal economic development, tribal self-sufficiency, and strong tribal governance and self-determination over their internal affairs. In 1988, to further this policy and also address congressional concerns regarding the absence of clear Federal standards or regulations for the conduct of Indian gaming, Congress enacted the Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. 2701 *et seq.*, for three specified purposes:

(a) To provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government;

(b) To provide a statutory basis for the regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; ensure that tribes are the primary beneficiaries of their gaming operations; and assure that the gaming is conducted fairly and honestly by both the operator and players; and,

(c) To declare that the establishment of independent Federal regulatory authority and Federal standards for Indian gaming and the establishment of the NIGC are necessary to meet congressional concerns regarding Indian gaming and protect it as a viable means of generating tribal governmental revenues and furthering the policies and purposes of IGRA.

##### *B. Tribal, Federal, State and Local Rights and Interests Regarding the Operation and Regulation of Indian Gaming Under IGRA*

1. The NIGC was established by IGRA as an independent Federal regulatory agency. The Act vests the Commission with certain regulatory powers and responsibilities for Indian gaming, including broad authority to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the Act.

2. IGRA recognizes and provides that the operation of gaming on Indian lands is primarily a function of tribal sovereignty. Indian gaming is conducted by tribal governments, who may use the net revenues derived from gaming only to fund tribal governmental operations

or programs; provide for the general welfare of the tribe and its members; promote tribal economic development; donate to charitable organizations; and help fund operations of local government.

3. The regulatory framework established by IGRA for Indian gaming provides differing, but complementary, regulatory authority and responsibility to Indian tribes, the NIGC, the Secretary of the Interior, and state governments, dependent upon which of three different statutorily defined classes of tribal gaming activity is conducted. Under IGRA, Class I gaming remains under the exclusive sovereign jurisdiction of Indian tribes and is not subject to the Act's other regulatory provisions. Indian tribes also retain primary sovereign regulatory authority and responsibility for the day-to-day regulation of Class II and Class III Indian gaming operations under IGRA. However, the Act also vests the NIGC with certain independent Federal regulatory powers and responsibilities regarding the regulation of Class II and Class III gaming activity on Indian lands. In addition, IGRA also requires that Class III Indian gaming activity be conducted in conformance with a Tribal-State compact that is in effect and approved by the Secretary of the Interior. Under IGRA, such Tribal-State Compacts may include negotiated provisions for state participation in the regulation of Class III tribal gaming activity conducted on Indian lands within the state.

4. IGRA's statutory system of shared regulatory authority and responsibility for Indian gaming will work most effectively to further the Act's declared policies and purposes, when the three involved sovereign governmental authorities work, communicate, and cooperate with each other in a respectful government-to-government manner. Such government-to-government relationships will make it possible for all three sovereign governments to mutually resolve their issues and concerns regarding the operation and regulation of Indian gaming, and efficiently coordinate and assist each other in carrying out their respective regulatory responsibilities for Indian gaming under IGRA.

5. Accordingly, the NIGC deems it appropriate to issue this Government-to-Government Tribal Consultation Policy, to promote and enhance the government-to-government relationships, consultations, and mutual cooperation among Indian tribes, the NIGC, other involved Federal departments and agencies, and state and local governments, regarding the

operation and regulation of Indian gaming under IGRA.

## II. NIGC Policy Making Principles and Guidelines

### A. Fundamental Principles

The NIGC will adhere to and be guided by the following fundamental principles of Federal Indian policy, when formulating and implementing Federal regulatory policies, programs, procedures, requirements, restrictions, or standards that may substantially affect or impact the operation or regulation of gaming on Indian lands by a Federally-recognized tribal government under the provisions of IGRA:

1. The NIGC recognizes and respects the Federally recognized sovereignty of Indian tribes, which possess and exercise inherent sovereign authority over their members and territory and have certain rights to self-government over their internal governmental affairs under Federal law.

2. The NIGC recognizes and is committed to maintaining a respectful and meaningful government-to-government relationship with Federally-recognized Indian tribes and their authorized governmental leaders, when exercising and discharging its regulatory authority and responsibilities for Indian gaming under IGRA.

3. The NIGC acknowledges that Indian tribes retain and exercise primary sovereign authority and responsibility with respect to the day-to-day operation and regulation of gaming on their tribal lands under IGRA, subject to independent Federal regulatory oversight and the conditions, restrictions, and requirements of the Act, Tribal-State Compact provisions, Federal procedures in lieu of Tribal-State compacts, and NIGC regulations promulgated pursuant to the Act.

4. The NIGC will honor and respect the provisions of Tribal-State Class III Gaming Compacts that are duly approved by the Secretary of the Interior and in effect, or, in the alternative, Federal Class III tribal gaming procedures approved by the Secretary of the Interior, in lieu of a Tribal-State Compact, pursuant to IGRA and Department of Interior regulations.

5. To the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines, or preparing legislative proposals or comments for Congress,

which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

6. The NIGC will encourage Federally-recognized Indian tribes and state and local governments to consult, collaborate and work cooperatively with each other in a respectful, good faith government-to-government manner to mutually address and resolve their respective issues and concerns regarding the operation and regulation of gaming on Indian lands under IGRA, in furtherance of the policies and purposes of the Act.

7. The NIGC will also work cooperatively with other Federal departments and agencies and with state and local governments to enlist their interest and support to assist the Commission and Indian tribes in safeguarding tribal gaming from organized crime and other corrupting influences; providing adequate law enforcement, fire, and emergency health care services, and environmental protections for the health and safety of the public in tribal gaming facilities; and accomplishing the other goals of IGRA.

### B. Other Policy Making Principles and Guidelines

To the extent practicable and permitted by law, the NIGC will also adhere to and be guided by the following additional principles and guidelines, when formulating and implementing Federal regulatory policies, programs, procedures, requirements, restrictions, or standards, that may substantially effect or impact the operation or regulation of gaming on Indian lands by a Federally-recognized tribal government(s) under the provisions of IGRA:

1. The NIGC acknowledges and will reasonably consider variations in the nature and scale of tribal gaming activity across Indian country, as well as variations in the extent and quality of tribal gaming regulation and state regulatory involvement under the different Tribal-State Compacts, when determining the need, nature, scope, and application of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming operations under IGRA.

2. The NIGC will also provide technical assistance, advice, guidance, training, and support to help Indian tribes and tribal leaders and employees understand and comply with Federal policies, regulations and standards for Indian gaming.

3. The NIGC will defer to tribally established regulations and standards for Indian gaming, when the Commission determines that they are permitted by IGRA and further its policies and purposes; that they adequately address congressional concerns regarding Indian gaming; that tribal compliance and enforcement are readily verifiable by the NIGC; and, that similar Federal regulations and standards are not statutorily required or necessary to implement the Act.

4. The NIGC will also encourage and provide technical assistance, advice, guidance, and support to Indian tribes and tribal leaders to formulate and implement their own regulatory policies, procedures, requirements, restrictions, and standards for their gaming operations, in lieu of similar Federal regulations and standards, if the Commission determines that the proposed tribal regulations and standards are permitted by IGRA and further its policies and goals; that they will adequately address congressional concerns regarding Indian gaming; that tribal compliance and enforcement will be readily verifiable by the NIGC; and, that similar Federal regulations and standards are not statutorily required or necessary to implement the Act.

5. The NIGC will not formulate and implement Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming that will impose substantial direct compliance or enforcement costs on an Indian tribe(s), if the Commission determines that such Federal regulations and standards are not required by IGRA or necessary to implement its provisions or further accomplishment of its policies and purposes.

6. In general, the NIGC will strive to grant Indian tribes the maximum administrative and regulatory discretion possible in operating and regulating gaming operations on Indian land under IGRA; and also strive to eliminate unnecessary and redundant Federal regulation, in order to conserve limited tribal resources, preserve the prerogatives and sovereign authority of tribes over their own internal affairs, and promote strong tribal government and self-determination, in accordance with Federal Indian policy and the goals of IGRA.

### C. Applicability

The NIGC will be guided by the above policy-making principles and guidelines in its planning and management activities, including budget development and execution, legislative

initiatives and comments, and policy and rule making processes.

### III. Tribal Consultation Procedures and Guidelines

A. To the fullest extent practicable and permitted by law, the NIGC is committed to regular, timely, and meaningful government-to-government consultation with Indian tribes, whenever it undertakes the formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming, either by means of administrative regulation or legislative initiative, which may substantially affect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA.

B. Based on the government-to-government relationship and in recognition of the sovereignty and unique nature of each Federally-recognized Indian tribe, the primary focus of the NIGC's consultation activities will be with individual tribes and their recognized governmental leaders. Consultation with authorized intertribal organizations and representative intertribal advisory committees will be conducted in coordination with and not to the exclusion of consultation with individual tribal governments. When the NIGC determines that its formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards may substantially effect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA, the Commission will promptly notify the affected tribes and initiate steps to consult and collaborate directly with the tribe(s) regarding the proposed regulation and its need, formulation, implementation, and related issues and effects. Tribes may and are encouraged, however, to exercise their sovereign right to request consultation with the NIGC at any time they deem necessary.

C. The Chairman of the NIGC or his or her designee is the principal point of contact for consultation with Indian tribes regarding all NIGC programs and related policies and policy-making activities of the Commission under IGRA.

D. The NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies, procedures, programs, requirements, restrictions, and standards that it is proposing to formulate and implement, before a final agency decision is made regarding their formulation or implementation.

E. The NIGC will strive to provide adequate opportunity for affected tribes to interact directly with the Commission, to discuss and ask questions regarding the substance and effects of proposed Federal regulations and standards and related issues, and to provide meaningful input regarding the legality, need, nature, form, content, scope and application of such proposed regulations, including opportunity to recommend other alternative solutions or approaches. Such consultation will be conducted with tribes by means of scheduled meetings, telephone conferences, written correspondence, and other appropriate methods of communication, before a final agency decision is made regarding the formulation or implementation of the proposed Federal regulations or standards.

F. As part of the tribal consultation process, the NIGC will answer tribal questions and carefully consider all tribal positions and recommendations, before making its final decision to formulate and implement proposed new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards that may substantially affect or impact the operation or regulation of gaming on Indian lands by affected tribe(s) under IGRA.

G. As an independent Federal regulatory agency, the NIGC 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 and type of consultation that the Commission may engage in with the involved tribes. These limitations on consultation are necessary to preserve the integrity of the NIGC'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 NIGC will endeavor, to the extent practicable and permitted by law, to reduce procedural impediments to consulting directly with tribal governments to resolve issues regarding the operation and regulation of Indian gaming under IGRA.

H. The NIGC 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 NIGC 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.

I. The NIGC will, to the extent it deems practicable, appropriate, and permitted by law, explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking, when formulating and implementing Federal regulatory policies, procedures, programs, requirements, restrictions, or standards that may substantially effect or impact sovereign tribal rights of self-government regarding the operation or regulation of gaming under IGRA, or related tribal resources, or tribal treaty or other rights.

### IV. Increasing Flexibility for Tribal Waivers of Regulatory Requirements

A. The NIGC will review the provisions and processes under which Indian tribes may apply for waivers of regulatory requirements under NIGC regulations, and take whatever steps it determines appropriate and permitted by law to further streamline those processes, consistent with the policy making principles and guidelines set forth in Part II of this policy.

B. This Part only applies to regulatory requirements that are discretionary and subject to waiver by the NIGC.

### V. General Limitations

This policy is not intended to nor does it create any right to administrative or judicial review, or any other right, benefit, trust responsibility, or cause of action, substantive or procedural, enforceable by any party against the United States of America, its departments, agencies or instrumentalities, its officers, or employees, or any other persons or entities.

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

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