

The SHOSHONE-BANNOCK TRIBES



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GAMING COMMISSION
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May 27, 2011

VIA Electronic Mail: consultation.policy@nigc.gov

Kathy Zebell
National Indian Gaming Commission
141 L Street, NW, Suite 9100
Washington, DC 20005

Re: Comments on Draft NIGC Tribal Consultation Policy

Dear Ms. Zebell:

The Shoshone-Bannock Tribes Gaming Commission (“Gaming Commission”) is pleased to provide the following comments on the National Indian Gaming Commission’s (“NIGC”) Draft Consultation Policy. We welcome the opportunity to participate and provide direction.

The Gaming Commission, located on the Fort Hall Reservation in southeastern Idaho, is a four member commission which regulates three Tribal Class II and Class III gaming facilities. The Fort Hall Reservation is comprised of 555,000 acres of land with the majority of land (97%) held in trust status.

General Comments

On February 10, 2011, we provided comments on the issue of consultation with extensive recommendations and observations about the federal consultation process. We set forth a host of practical considerations that can make consultation better and effective with Indian tribes. We incorporate those consultation comments into this document.

In general, we believe the NIGC’s Draft Consultation Policy is a good start for a process which strives to fulfill the government-to-government relationship between tribes and the federal NIGC agency. The policy sets forth extensive procedural steps for consultation as other federal agencies have adopted. We anticipate that the NIGC recognizes that the existing legal framework set out in the many federal laws, regulations and executive orders are not enough and urge NIGC to take the position or approach of doing more than what is required and when it is required.

We recognize the fact that the NIGC is striving to be as flexible as possible to allow sufficient time for tribes and tribal entities to adequately review and analyze matters which could impact tribal gaming. We also support the NIGC's proposal for tribes to request a consultation with NIGC on specific NIGC actions. This is a new process from other federal agencies and supports a positive consultation process.

Specific Comments – Preamble

The Preamble recognizes the importance of the federal and tribal government-to-government relationship. The statement fails, however, to recognize the Executive Branch's trust responsibility to tribes and the importance of the trust doctrine to harness actions taken by the Executive branch. This doctrine's central point recognizes a federal duty to protect tribal lands, resources and the native way of life from intrusions of the majority society. As a well-established doctrine which evolved judicially, the trust responsibility stands independent of treaties and benefits all tribes, treaty and nontreaty alike.

Although the draft policy expresses respect for the sovereign status of Indian tribes, it falls short of establishing any policy regarding the fulfillment of the government's trust obligations toward the tribes. The policy's silence with respect to the trust obligations is a significant shortcoming and leaves an impression that the full duty of the executive agency, NIGC, in dealing with tribes is simply a procedural one of consultation. Indeed, nowhere in the policy does the NIGC use the phrase "trust responsibility" except to disclaim the creation of such responsibility at the end of the policy. Unfortunately, NIGC adopts a policy (as other federal agencies do) that they need only provide tribes with special procedural access to agency decisionmaking through consultation, but then disregard tribal rights and its responsibility to tribes after gaining tribal input. Without fully meeting the government's sovereign trust obligations to tribes, trust self-determination and tribal sovereignty remain illusive. We hope that NIGC has a commitment to improve the consultation process, and do believe that it will given the recent consultation schedule published for the proposed regulations.

Despite NIGC's failure to fully embrace its trust responsibility to tribes in the policy, the trust responsibility has been recognized by courts, Congress and the executive branch for over two centuries. The federal-tribal relations are primarily within the executive branch agencies such as NIGC. Each federal agency is bound by the trust responsibility.

Consultation

Although there is no standard definition of "consultation", it generally should mean more than simply providing information about what a federal agency is planning to do and allowing concerned tribes to comment. As drafted the NIGC's consultation calls for merely procedural steps to address tribal interests.

Consultation should mean a two-way communication, a collaborative process between governments – a true government-to-government relationship. The goal of consultation should

be consensus, full agreement between the parties involved in the consultation rather than simply seeking comments. Providing for one-to-one consultation with tribes will go far to meeting the goals of consultation, instead of only having large forum consultations.

Consultation can vary depending on a variety of factors, including statutory requirements and limitations, proposed actions, decisions, undertakings and studies. Consultation is better described as a process of notice, communication, coordination, respect, cooperation, negotiation and policy level decision making between NIGC and tribes.

The NIGC proposes that consultation is triggered when the definition of an Action with Tribal Implications or Policies that have Tribal implications or both are met. The two triggering definitions are limited to situations when the agency's actions "have substantial direct effects on one or more Tribes" This phrase is very narrow, and we recommend that it be deleted and replaced by "agency's action which has potential to affect one or more tribes."

Consultation General Principles

The NIGC's seven general principles are thoughtful and good ones. Unfortunately, these principles may not mean anything or are for naught as the NIGC begins the section with the limiting phrase "[t]o the extent permitted by law." Accordingly, despite NIGC's statements it will "honor Tribal treaty and other rights"; "strive to meet the responsibilities that arise from the unique legal relationship between the Federal government and Tribal government"; and the NIGC will give "due respect for and deference to, the sovereign rights, power and authority of Tribal governments," these promises mean nothing and may not be adhered to if the NIGC chooses not to follow them.

We recommend that the NIGC delete this limiting phrase – "[t]o the extent permitted by law." It is critical to recognize that federal statutory protections are often woefully inadequate to protect tribal interests. There are often competing and conflicting non-Indian interests that exert overwhelming pressure on federal agencies to render decisions favorable to them. Therefore, a strong and enforceable trust duty of protection through the consultation process is particularly important. Moreover, tribal sovereignty is thwarted when NIGC seeks to treat tribes in the same manner as any other interested member of the public by failing to affirmatively recognize its trust responsibility to tribes. The NIGC has many staff members and the agency is generally well versed in the principles of federal Indian law, including its trust responsibility. This is an opportunity for the NIGC to set forth a fair and meaningful policy with regard to its special trust obligations to tribes. We urge the NIGC to do so.

Again, the consultation process must be implemented based upon the trust doctrine. The trust responsibility has two critical components – procedural and substantive – which must be fulfilled by the NIGC. The procedural mandate requires an agency to consider the effects of its actions on tribal property and other interests and assess its trust obligations to the tribe. The substantive mandate requires the agency to affirmatively protect the tribe's interest when it undertakes action. There must be a substantive mandate in the draft consultation process reflecting a prioritization of tribal interests. The NIGC should not merely go through the procedural motions of consultation such as notice, comment deadlines, etc. The trust doctrine

provides a substantive duty requiring the NIGC to affirmatively protect a tribe's interest when it undertakes action, not simply to hold a hearing.

Consultation Process

The framework and process for consultation provide for an opportunity to coordinate, communicate, share information and make a decision. Generally, the procedural steps appear to be adequate. We recommend that the notification be increased from 45 days to 60 days or language such as "The NIGC will provide ample time (more than 45 days whenever possible) to carry out the notification. The amount of time needed for effective notification or consultation will vary according to the complexity of the specific matter." Language should be added to confirm that consultation is a direct, two way dialogue that is effectuated through candid and open communication and NIGC will respond to questions and inquiries on information that will assist the tribes in making informed decisions that will ultimately assist the NIGC in meeting its consultation requirements. The NIGC should also maintain transparency, honesty and integrity in the consultation process.

Rulemaking

Notably absent is a section which addresses rulemaking that will be published in the Federal Register. Will the same consultation process apply to all NIGC actions as proposed in this policy? Tribes should be given the opportunity to work directly with NIGC staff in drafting or recommending changes in the rulemaking language. Perhaps this will be accomplished in the early process proposed by the NIGC, which is greatly appreciated.

Consensus

We recommend that a section be added regarding consensus building. As drafted the process ends with the NIGC providing a response to tribes accepting their position or an explanation of the NIGC's determination. There is a general failure to elaborate how the trust duty and process will operate in conflict situations in which the agency is called upon to consider the NIGC's interests directly adverse to tribes. No matter how consultation works as a process, conflicts may arise. Resolving these conflicts should be an important priority of the NIGC. The current draft is silent as to a resolution of differing views, conflicts of interests, etc. A consensus building or dispute resolution process section should be added to the policy. We offer the following language be added,

Reaching consensus on consultation actions and issues is a paramount priority. Implementation of the government-to-government principles contained in this policy should increase the ability of the NIGC and tribes to resolve disputes. However, it is unlikely that all issues can be resolved through consultation alone. Reasonable, accessible dispute resolution procedures are critical to successful government-to-government relations. The NIGC and tribes will develop an agreed upon dispute resolution process.

In the conclusion, President Clinton took a significant step toward fulfilling his trust obligation by directing his agency official to the Indian law principles that stand apart from the federal statutory mandates. The Obama Administration is beginning to formulate his administration's approach to Indian affairs and has urged agencies, including NIGC, to revisit their policies as many are not working to fully protect tribal interests. We urge the NIGC to take a hard look at its draft consultation policy and make revisions which will further strengthen the government-to-government relationship between tribes and the NIGC by providing a process which truly provides for a timely and open communication, sharing and exchange of information in order to make informed decisions regarding important tribal gaming matters, establishing a fair and open decisionmaking process which protects tribal interests, gaming and economic development consistent with the NIGC's trust responsibility to tribes.

Thank you for the opportunity to comment on this important Consultation Policy.

Sincerely,



Lionel Q. Boyer
Chairman, Gaming Commission

Cc: File
Fort Hall Business Council