



Federal Indian Consultation: Frontline Protection for Tribal Casinos When the Feds Come Knocking

by Gabriel S. Galanda

A year ago President Obama set the tone for federal Indian policy on his watch by declaring his commitment “to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications.” His administration is so focused on consultation that federal agencies like the NIGC are engaging in tribal consultations on *tribal consultation*.

But what does President Obama’s tribal consultation mandate really mean for you, your tribe and your Indian gaming enterprise? It means that before the NIGC, IRS, FinCEN, OSHA or NLRB knock on – or attempt to bang down – your door, they must consult with your tribe. The feds must *meaningfully* consult with your elected tribal leaders before taking any hostile action toward your tribe or casino.

Consultation as Federal Law

Numerous federal statutes, presidential orders, and federal agency regulations mandate meaningful consultation with Indian tribes prior to taking any federal action concerning tribal interests. One of the first cases to describe the United States’ consultation obligations was *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979). In that case the tribe argued that the BIA violated its own written requirements to consult before making personnel decisions affecting the tribe. The federal appellate court agreed with the tribe, finding that the BIA’s actions indeed deprived the tribe “of fair notice of the agency’s intentions” in violation of “those general principles which govern administrative decision making.”

More recently, the federal district court in *Lower Brule Sioux Tribe v. Deer* held similarly that when a federal agency violates “its obligations of trust and fiduciary duties” by failing to consult – as mandated by its own regulations – it violates federal law. 911 F. Supp. 395 (D.S.D. 1995). The NIGC and IRS each have tribal consultation policies, to which they must adhere before taking enforcement action against your tribe.

Consultation as an Indian Trust Obligation

All federal agencies owe a common law trust duty to tribes – one that includes consultation. That is because, in one sense, tribal consultation means mutual communication between a tribal beneficiary and its federal trustee. The trustee must ultimately appreciate how its actions will affect its beneficiary’s assets – including gaming assets – taking into account the beneficiary’s wishes.

In *Klamath Tribes v. U.S.*, for example, the court found that common law, presidential orders, and the agency’s own internal regulations created a “substantive duty” to consult with tribes in any decision-making process that could create adverse effects on tribal resources. 1996 WL 924509 (D. Or. 1996). Most recently, the court in *Confederated Tribes and Bands of the Yakama Nation v. U.S. Dept. of Agriculture* found that because the USDA’s actions affected tribal economic resources, there were “serious questions about whether [the U.S.] adequately consulted with the [tribe] as required by... federal Indian trust common law.” 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010). This summer, the court issued an injunction prohibiting the USDA from allowing further actions affecting the Yakama. It seems some federal agencies “missed the memo” from the President on tribal consultation.

As Indian trust doctrine, and thus the federal Indian consultation right, extends to tribal gaming lands, casinos and related resources, federal regulators must consult with tribal governmental officials before seeking to enforce against any such tribal assets.

Consultation as an Indian Treaty Obligation

In *Peoria Tribe of Indians of Oklahoma v. U.S.*, the tribe argued that the federal government violated its treaty rights in 1857 when it sold the tribe’s land without meaningful consultation. 390 U.S. 468 (1968). What made this case unique was a clause in the treaty that read: “it is agreed that the President may, from time to time, *and in consultation with the Indians*, determine how much shall be invested in safe and profitable stocks.” The court held that because the tribe was not consulted, the treaty was violated and the U.S. had to pay the tribe back for the missing land, plus interest.

Would it have made a difference if the consultation requirement were not made explicit in the treaty? Likely not. Good faith consultation is required when one signatory to a bilateral agreement between nations, takes a hostile action towards the other. Such is consistent with international law, and now the *Yakama* ruling, wherein the court posed “serious questions about whether defendants adequately consulted with the Yakama Nation as required by its Treaty of 1855” – even though, unlike in *Peoria*, that treaty does not include an explicit consultation right concerning the treaty resources at issue.

If your tribe signed a treaty with the United States – “the supreme Law of the Land” according to the U.S. Constitution – that bilateral agreement between nations demands that federal casino regulators consult with tribal officials before initiating any hostile act toward your tribe.

Preemptive Consultation

In *Lower Brule*, the court made clear that “[m]eaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views.” This requires, at a minimum, a face-to-face meeting during which the federal agency notifies the tribe of its proposed action.

Rather than letting the U.S. dictate the scope of the federal Indian consultation right, tribes can and should actively exercise their rights to demand adequate consultation and force others to treat tribes as governments. In this way consultation can be used as a sword – a preemptive strike that forces federal agencies to consult before taking action that affects the tribe – as well as a shield to guard from attacks on Indian sovereignty or economic self-sufficiency. As it stands, some of the more aggressive federal agencies – the IRS, NIGC, FinCEN, OSHA and NLRB, just to name a few – assume they have free reign over Indian gaming enforcement. Beyond the doubts cast about NIGC authority over Class II gaming activities in *Colorado River Indian Tribes v. NIGC*, 466 F.3d 134, 140 (D.C. Cir. 2006) and 383 F. Supp. 2d 123, 137 (D.D.C. 2005), before any federal incursion into your tribe’s gaming affairs, the feds must meaningfully consult with tribal officials.

The Internal Revenue Service Manual requires IRS agents to consult with tribal officials in any educational or outreach endeavor, compliance review, or audit. Likewise, the NIGC’s government-to-government tribal consultation policy requires the agency to consult with a tribe when the agency conducts investigations, takes enforcement actions, or renders regulatory or quasi-judicial decisions. The Department of the Treasury, which includes FinCEN, is currently finalizing its tribal consultation policy. The Department of Labor is also developing consultation standards that will govern OSHA, the NLRB and the Employment Benefits Security Administration’s behavior in Indian Country.

In practice, this means that your tribe should not turn over anything to a federal agency in response to an information or examination request, or allow federal agents any access to tribal facilities, until they have fulfilled their consultation obligation to the tribe.

Looking Forward

The federal Indian consultation right provides tribes with significant leverage in the face of federal regulatory might. When the federal government encroaches on your tribe’s governmental gaming interests, consider immediately invoking your tribe’s consultation right. Whether the agency’s obligation to consult arises from its internal regulations, common law, or an express treaty provision, it provides tribes with an additional avenue for judicial attack on improper agency action. Know that if you must challenge a breach of the federal consultation duty in the United States’ own courts, the Oglala, Lower Brule Sioux, Klamath, Peoria, and Yakama nations have paved your way. ♣

Gabriel S. Galanda is a partner with Galanda Broadman, PLLC, a Seattle law firm focusing on legal issues critical to Indian Country. He can be reached by calling (206) 300-7801 or email gabe@galandabroadman.com.

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