



January 27, 2022

The Klamath Tribes Tribal Council

Oregon Lottery
Lottery Commission
PO Box 12649
Salem, OR 97309

Submitted electronically to Lottery.Commissioners@lottery.oregon.gov

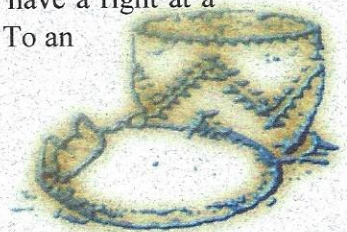
Dear Commissioners,

On behalf of The Klamath Tribes (Tribes), I submit these comments in response to the Oregon Lottery's (Lottery) request for input regarding the Lottery's Internal Operating Policy Number 1.505—Tribal Consultation (Draft Consultation Policy). We are pleased to see the Lottery's efforts to honor Tribal sovereignty and the government-to-government relationship with Oregon Tribal Nations. We welcome this prioritization of Tribal Nations and we look forward to continuing to partner with the Lottery.

The Klamath Tribes is a federally-recognized Indian tribe that has occupied the lands of South Central Oregon and Northern California since time immemorial. The Klamath Tribes, with a current enrollment of around 5,611 members, is comprised of three historical tribes: the Klamath Tribe, the Modoc Tribe, and the Yahooskin Band of Paiute Indians. The Klamath Tribes signed the Treaty of 1864 with the United States, ceding over 22 million acres of aboriginal territory and reserving approximately one million acres for a permanent homeland. The Tribes currently operate the Kla-Mo-Ya Casino in Chiloquin, Oregon. We understand that our respective gaming operations from time to time may affect one another, and that it is important to communicate as well as build relationships between your agency and our government.

In this spirit of collaboration, the Tribes are optimistic at the work put into the Draft Consultation Policy. We would like to provide some general comments that the Lottery may consider in revising the Draft Consultation Policy, and some specific considerations regarding this draft.

Agencies at both the federal and state level approach consultation with Tribal governments in different ways. At the core of consultation is the concept of free and prior informed consent—a concept adopted and embraced at an international level. State decisions may affect Tribal lands, treaty rights, traditional practices or religious beliefs, or sacred sites. Tribes and their members have a right at a fundamental level to have a say when their lives are impacted in these unique ways. To an extent, ORS 182.164 memorializes this principle into state law.



Tribal consultation has several essential elements. First, government officials must identify appropriate Tribal governing bodies and individuals from whom to seek input. This may vary based upon Tribal law, and officials should be mindful that Tribal Nations work in different ways and have different consultation processes. Any consultation policy should reflect this, and the Draft Consultation Policy seems to acknowledge these differences.

Lower-level staff liaisons can also prove critical to maintaining relationships on a day-to-day basis, and we are encouraged by the Lottery's inclusion of a liaison to Tribal nations. Such liaisons should be, as much as possible, from Tribal communities and informed about the Lottery's policies and practices affecting Tribal Nations across the state. Such liaisons are an important resource for Tribal Nations, and when the proper relationships are formed, the liaisons are often knowledgeable about whether and how decision-making processes may affect Tribal interests.

Establishing clear lines of communication between decision-makers representing Tribal and state interests is also critical to the efficiency and effectiveness of consultation processes. Such lines channel any issues that arise so that they may be dealt with in a manner that honors the intergovernmental relationships without impeding state decision-making processes.

Second, consultation requires talking with appropriate Tribal officials or individuals and asking for their views regarding proposals or other pending agency actions that might affect Tribal lands, activities, practices, or beliefs. This conversation to get input must occur from the outset *before* key decisions have been reached, expectations have been formed, or investments have been made. Consultation is meaningless when an agency has its mind made up or has begun implementing a plan and only seeks to "check the box" that consultation has occurred as a formality.

Third, agencies must treat Tribal input as a *necessary* factor in defining the range of acceptable options. Meaningful consultation should always be undertaken from a spirit of good will that seeks to reach agreement between the parties on important issues and resolve differences that arise. We would like to emphasize that true consultation is 1) a two-way dialogue and 2) involves joint decision-making that reflects the government-to-government relationship between Tribal Nations and the state government. Consultation actually requires a conversation with Tribal leaders, not simply sending a letter informing them of a decision or upcoming policy. Actions should not move forward without meaningful Tribal input. Further, there should be a mechanism for addressing disagreements or disputes, including elevating such matters to higher-level decision makers at the Tribes and the State.

Finally, consultation should require creating and maintaining a permanent record to show how Tribal information was obtained and used in the Lottery's decision-making process. This ensures accountability and helps maintain good relationships between governments. While the Draft Consultation Policy notes the publication of an annual report, we recommend bolstering this section to include drafting summaries of each consultation encounter with a Tribe. That way, both parties can revisit the record to determine what consultation has already happened on an issue.

Regular engagement is also critical to ensuring that lines of communication remain open. Tribal consultations should not occur only when a state decision must be made but rather on a regular basis in order to form a partnership capable of navigating issues that arise. Early and regular consultation

helps avoid situations in which decision-making processes are well underway by the time state partners realize there may be Tribal implications that may necessitate a change of course.

We are encouraged by many provisions and the language in the Draft Consultation Policy providing for engagement with the Tribal Nations when the Lottery considers any changes to the Lottery's Strategic Plan and allowing opportunities for the Tribal Nations to provide input. While the draft language is a step in the right direction, we urge the Lottery to make further revisions to better honor the fundamental principles of meaningful consultation. Specifically, we would recommend the inclusion of language that articulates how Tribal Nations will be involved in the joint decision-making process and how disputes and disagreements will be addressed. If state partners do not come to the table envisioning a process designed to reach agreement through meaningful dialogue, Tribal representatives may leave with the impression that consultation has been for show and that outcomes were predetermined. Thus, leaders sitting down to the table without at least the goal of reaching consensus are not placed in the best position to respect one another's sovereignty and this can undermine the development of long-term intergovernmental relationships.

Furthermore, when state actions have the potential to have significant impacts on Tribal Nations' rights, traditional lands, resources, cultures, and ways of life—such as having the potential to irrevocably affect resources upon which our cultures depend, whether economic or natural—consultation cannot be meaningful unless we have a right to say no. Although generally we wish to work with state agencies to find mutually acceptable alternatives when state actions threaten our interests, sometimes the only mitigation option that is acceptable is avoidance. Under certain circumstances consultation cannot be meaningful unless actual Tribal consent is required.

The Klamath Tribes are pleased to see the progress made thus far by the Lottery in its development of the Draft Consultation Policy, but we are mindful that there are still ways we can improve that diplomatic process. We respectfully request that the lottery include new language in that specifically provides that all Tribal consultation should have the goal of reaching consensus and that when a project will negatively affect Tribal Nations, Tribal informed consent is required. We would be happy to sit down with the Commission and other Tribal Nations to help craft language that meets these desired goals. We look forward to working with you as you take action to carry out ORS 182.162 through 182.168 and to strengthen the relationship between our governments.

Thank you,



Donald C. Gentry, Chairman
The Klamath Tribes