UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED SALISH AND KOOTENAI TRIBES, *et al.*, Plaintiffs, v. NATIONAL INDIAN GAMING COMMISSION, *et al.*, Defendants.	No. 1:05-cv-00495-RWR DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b)(6) and 56, defendants hereby move to dismiss this action for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment. The grounds for defendants' motion are set forth in the memorandum submitted herewith.

Dated: July 28, 2005

Respectfully submitted,

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CONFEDERATED SALISH AND KOOTENAI TRIBES, *et al.*, Plaintiffs, v. NATIONAL INDIAN GAMING COMMISSION, *et al.*, Defendants.	No. 1:05-cv-00495-RWR MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs are two of the more than 200 Indian tribes that conduct gaming operations in the United States. *See* Am. Compl. ¶¶ 1, 2. In plaintiffs' opinion, certain regulations that the National Indian Gaming Commission (NIGC) has been working to develop would have "a direct impact on [their] sovereignty and regulatory responsibility." *See id.* ¶ 86. These regulations have not yet been finalized, much less published for comment.

Input into earlier drafts of the regulations was provided by an advisory committee established by NIGC in 2004, the Joint Federal-Tribal Class II Game Classification Standards Advisory Committee (Standards Committee). Until April 2005, the members of the Standards Committee included seven individuals nominated by tribal governments and appointed to the committee by NIGC. In this action, plaintiffs allege that the Standards Committee is governed by the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, because certain of the seven individuals lacked authority to act on behalf of the tribes that nominated them. Am. Compl. ¶¶ 75, 77, 80, 82, 92. Alleging that NIGC has failed to comply with FACA "in assembling [the

Standards Committee] and organizing and conducting [its] meetings," plaintiffs ask that defendants, NIGC and its three commissioners, be enjoined from "conducting [committee] business of any kind," and from replacing the committee with a successor committee, unless the successor committee is "composed of members with actual authority to act in an official capacity on their respective tribes' behalf." *Id.* ¶¶ 3-6 & 96 & prayer ¶¶ d-e. In addition, plaintiffs ask that defendants be enjoined from "using draft regulations or any other work product generated by the [Standards Committee] for any purpose, including but not limited to any further NIGC notice and comment rulemaking," and that a declaratory judgment be issued stating that FACA applies to the Standards Committee and that defendants have failed to comply with certain of the requirements of FACA in establishing and operating the committee. *Id.* prayer ¶¶ a-c, f.

For two reasons, this case should be dismissed. First, FACA is made inapplicable to the Standards Committee by 2 U.S.C. § 1534(b), a provision of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. No. 104-4, 109 Stat. 48. Section 1534(b) creates an exemption from FACA for meetings between federal employees and designated employees of tribal governments with actual or apparent authority to act on behalf of those governments. In this case, every individual appointed to the Standards Committee as the representative of a tribal government had apparent authority to act on behalf of the government that nominated him.

Second, plaintiffs would not be entitled to the relief that they seek even assuming, *arguendo*, that FACA *did* apply to the Standards Committee. No order enjoining defendants from conducting the business of the Standards Committee would be appropriate because the current membership of the Standards Committee meets the requirements of § 1534(b), even by plaintiffs' criteria. No order requiring defendants to limit the membership of any successor

committee to individuals meeting certain requirements would be appropriate because this Court would have not authority to issue such an order. No order prohibiting defendants from using the work product of the Standards Committee would be appropriate because plaintiffs waited too long to bring this action and for other reasons. No declaratory judgment would be appropriate because a significant possibility of future harm does not exist and because the judgment that plaintiffs seek would be a declaration of law without implications for practical enforcement.

THE STATUTORY SCHEME

A. FACA

FACA was enacted in 1972 to ensure the following:

> that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature.

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 446 (1989).

As used in FACA, the term "advisory committee" includes any group, other than one composed entirely of federal employees, established or utilized by a federal agency for the purpose of obtaining advice or recommendations for itself or its officers. FACA § 3(2). Certain "procedural and operating requirements" are imposed by FACA on any advisory committee to which FACA applies. *NRDC v. EPA*, 806 F. Supp. 275, 276 (D.D.C. 1992). Among other things, and with certain exceptions, a charter must be filed for each such advisory committee; notice of the meetings of each such committee must be published in the Federal Register; the meetings must be "open to the public"; "detailed minutes" of the meetings must be kept;

"interested persons" must be "permitted to attend, appear before, or file statements with [the] committee"; and "documents which were made available to or prepared for or by [the] committee" must be "available for public inspection and copying at a single location." FACA §§ 9(c), 10(a)(1)-(3), 10(b)-(d).

Criticized as "obscure" and "imprecise," FACA "leaves a myriad of questions unanswered." *Nat'l Anti-Hunger Coalition v. Exec. Comm. of the President's Pvt. Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 524 (D.C. Cir. 1983). Until the enactment of the UMRA, one question that FACA left unanswered was "the extent to which elected officials of State, local, and tribal governments, or their designated employees with authority to act on their behalf, [might] meet with Federal agency representatives to discuss regulatory and other issues involving areas of shared responsibility." H. Conf. Rep. No. 104-76, at 40 (1995), *reprinted in* 1995 U.S.C.C.A.N. 64, 78. To "clarif[y] Congressional intent with respect to these interactions by providing an exemption from FACA for the exchange of official views regarding the implementation of public laws requiring shared intergovermental responsibilities or administration," Congress enacted 2 U.S.C. § 1534(b) in 1995 as part of UMRA. *Id.* Section 1534(b) provides:

> [FACA] shall not apply to actions in support of intergovernmental communications where –
>
> 1. meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and
>
> 2. such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

Id.

B. The Indian Gaming Regulatory Act (IGRA)

Enacted in 1988 and codified as amended at 25 U.S.C. §§ 2701-2721, IGRA establishes a framework for the regulation of gaming on Indian lands and divides Indian gaming into three categories: Class I, Class II, and Class III. Class I consists of "social games solely for prizes of minimal value" and "traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II includes "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)," but does not include "electronic or electromechnical facsimiles of any game of chance." *Id.* §§ 2703(7)(A)(i), (B)(ii). Class III consists of "all forms of gaming that are not class I or class II gaming." *Id.* § 2703(8). Most casino-style games, such as blackjack, roulette, and slot machines, are considered Class III. *See id.* § 2703(7)(B).

Indian tribes have exclusive jurisdiction over Class I gaming on Indian lands. 25 U.S.C. § 2710(a)(1). Indian tribes and NIGC, an independent regulatory commission within the Department of the Interior, have authority to regulate Class II gaming. *Id.* §§ 2704(a), 2710(a)(2). Class III gaming is allowed on Indian lands only when an authorized tribal-state compact covering the conduct of such gaming is in effect, and the gaming occurs in a state that permits such activities. *Id.* § 2710(d)(1).

STATEMENT OF FACTS

A. The Standards Committee

By letter dated January 21, 2004, the Chairman of NIGC, Philip N. Hogen, advised the leaders of all tribes conducting gaming operations that "[a]dvancements in gaming technology and methods create a need to formulate definitive, technical standards for distinguishing whether electronic games are Class II or Class III games."[1] Ex. A at 1.[2] To meet this need, Mr. Hogen announced the intention of NIGC to "develop[] Class II game classification standards as NIGC regulations," and further announced the intention of NIGC to "facilitate tribal input in the process by establishing a joint federal-tribal advisory committee" – the Standards Committee – "to assist in the development of [the standards]."[3] *Id.* On behalf of NIGC, Mr. Hogen "request[ed] the nomination of tribal representatives to serve on the joint committee." *Id.*

Twenty-five individuals were nominated by tribal governments to serve on the Standards Committee. Westrin Decl. ¶ 2. By letters dated March 2, 2004, Mr. Hogen notified seven of these individuals – Norman H. DesRosiers, Joseph W. Carlini, Kenneth J. Ermatinger Sr., Jamie Hummingbird, Mark Garrow, Melvin J. Daniels, and Charles Lombardo – of their appointment

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[1]Mr. Hogen is an enrolled member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation. http://www.nigc.gov/nigc/about/bio_philip_hogen.jsp (May 12, 2005). Earlier in his career, he served for more than 10 years as the United States Attorney for the District of South Dakota. *Id.*

[2]References to exhibits are to the exhibits to this motion.

[3]The letter of Mr. Hogen referred to the Standards Committee as the Joint-Federal Tribal Class II Game Classification Standards Advisory Committee. Ex. A at 1. The nomination form enclosed with the letter referred to the committee as the Class II Game Classification Standards Tribal Advisory Committee. *Id.* at 3. Plaintiffs refer to the committee as the Joint Federal Tribal Class II Game Standards Committee, or TAC. Am. Compl. ¶ 12.

to the committee. Exs. B-H. The nomination package for each of these individuals included a form, prescribed by NIGC, containing the following verification: "Note: Submission of this form is verification that the nominee is a designated employee or representative of the tribe." Ex. I at 3; Ex. J at 4; Ex. K at 3; Ex. L at 3; Ex. M at 3; Ex. N at 2; Ex. O at 3; *see* Ex. A at 5.

The first meeting of the Standards Committee, an organizational meeting, took place on May 13, 2004. Westrin Decl. ¶¶ 4, 5. Subsequent meetings of the committee took place on August 2-3, September 13-14, and December 1-3, 2004, and January 12-13 and March 11, 2005. *Id.* ¶ 4. Believing that 2 U.S.C. § 1534(b) rendered FACA inapplicable to the committee, NIGC did not file a charter for the committee; did not publish notice of its meetings in the Federal Register; and did not keep "detailed minutes" of the meetings. Ex. P, Reqs. 13, 14, 21, 28. However, notice of each meeting, except the first, was posted on the NIGC website; each meeting was open to the public; and persons attending each meeting, except the first, were permitted to provide their views orally. Westrin Decl. ¶¶ 4-5.

The Standards Committee provided "valuable insight and assistance" to NIGC as it worked in 2004 and 2005 to develop the proposed Class II regulations and to develop proposed technical standards to accompany the regulations. Coleman Decl. ¶ 6; *see* Westrin Decl. ¶ 6. However, the establishment and operation of the Standards Committee is but one of a series of actions that NIGC has taken to obtain the input of all interested persons into the regulations and technical standards. In September 2004, NIGC provided the then-current working drafts of the regulations and technical standards to the leaders of all affected gaming tribes, including plaintiffs, and invited them to submit written comments. Westrin Decl. ¶ 6. More recently, NIGC has done the same with the current working drafts of the regulations and technical

standards. *Id.* In addition, NIGC has posted all of the working drafts of the regulations and technical standards on its website for pre-rulemaking review and comment. *Id.* As a further matter, NIGC has sent more than 500 separate invitations to individual tribes, asking them to consult with NIGC and to provide input into the formulation of the proposed regulations. *Id.* ¶ 7. NIGC has sent these invitations in keeping with its Government-to-Government Consultation Policy. *Id.* These invitations have resulted in more than 200 meetings with individual tribes and their leaders or representatives regarding the development and formulation of the regulations and technical standards. *Id.* ¶ 8. To date, NIGC has received more than 350 sets of written comments addressing the proposed regulations and technical standards, including a set submitted by one of the plaintiffs. *Id.* ¶¶ 16-17.

B. This Action

By March 2005, NIGC was ready to submit the proposed regulations and technical standards to the Federal Register for publication as a notice of proposed rulemaking (NPRM). *See* Coleman Decl. ¶ 7. Seeking to prevent the publication of the NPRM, plaintiffs commenced this action on March 10, 2005, and moved immediately for a temporary restraining order (TRO). Plaintiffs' motion for a TRO was denied at a hearing held on March 17, 2005.

By letters dated March 17, 2005, Mr. Hogen asked the leaders of the tribal governments that had nominated Messrs. DesRosiers, Carlini, Ermatinger, Hummingbird, Garrow, Daniels, and Lombardo for appointment to the Standards Committee to confirm that each such individual was a person within the contemplation of 2 U.S.C. § 1534(b), i.e., an elected officer of the tribal government that had nominated him or the "designated employee [of the tribe] with the authority to act on its behalf * * * acting in his official capacity." Ex.Q at 2; Ex. R at 2; Ex. S at 1-2; Ex. T

at 2; Ex. U at 2; Ex. V at 1; Ex. W at 1. In making this request, Mr. Hogen reminded the leaders of the tribal governments that each had "submitted a nomination form indicating that 'submission of this form is verification that the nominee is a designated employee or representative of the tribe'" and said: "[W]e believed that we could rely on that form as evidence that [the nominee] had the authority to act on your behalf." *E.g.*, Ex. Q at 1.

The letters of Mr. Hogen produced the following responses:

1. Mr. DesRosiers was nominated to the Standards Committee by the Viejas Band of Kumeyaay Indians. *See* Ex. I at 1, 3. By letter dated March 23, 2005, the Tribal Chairman of the Viejas Band advised the Acting General Counsel of NIGC that Mr. DesRosiers was "the designated employee of the Viejas Band who was appointed by the Viejas Tribal Council to serve on the NIGC Class II gaming committee with the understanding that he would have the authority to act on behalf of the Viejas Band." Ex. X at 2.

2. Mr. Hummingbird was nominated to the Standards Committee by the Cherokee Nation. *See* Ex. L at 1, 3, 4. By letter dated March 30, 2005, the Principal Chief of the Cherokee Nation advised Mr. Hogen that "Mr. Hummingbird is indeed authorized on my behalf to represent the Cherokee Nation as a member of the committee" and said: "Your assumption that by submitting the form we verified that Mr. Hummingbird was and is a designated representative for the Nation for purposes of this workgroup was correct." Ex. Y.

3. Mr. Lombardo was nominated to the Standards Committee by the Seminole Tribe of Florida. *See* Ex. O at 4. By letter dated March 22, 2005, the Chairman of the Seminole Tribe advised Mr. Hogen that "Mr. Charles Lombardo is the Seminole Tribe of Florida's designated employee with the authority to act on its behalf as a member of the Joint Federal Tribal

Committee to assist the National Indian Gaming Commission in developing Class II gaming standards." Ex. Z at 2.

4. Mr. Ermatinger was nominated to the Standards Committee by the Sault Ste. Marie Tribe of Chippewa Indians. *See* Ex. K at 1, 3. By resolution adopted April 5, 2005, the Board of Directors of the Sault Ste. Marie Tribe declared that "Kenneth J. Ermantiger is an employee of the Tribe designated with the authority to act on behalf of the Tribe in regards to the [Standards Committee]." Ex. AA. NIGC received this resolution on June 1, 2005, and forwarded the resolution to plaintiffs on the same date. *See id.*

5. Mr. Daniels was nominated to the Standards Committee by the Muckleshoot Indian Tribe. *See* Ex. N at 1, 2. By letter dated May 19, 2005, the Tribal Attorney of the Muckleshoot Indian Tribe advised the Acting General Counsel of NIGC that it was "the Tribe's desire and expectation that Mr. Daniels continue his participation on the Committee," and that the Tribal Council had adopted a resolution on May 13, 2005, "confirm[ing] that Melvin Daniels has authority to act on behalf of the Tribe." Ex. BB at 1. This resolution states: "[E]ffective immediately, Melvin Daniels is authorized to act on behalf of the Tribe in an official capacity subject to the Tribe's internal policy requiring legal review and Tribal Council resolutions on official positions of the Tribe." *Id.* at 3.

6. Mr. Garrow was nominated to the Standards Committee by the St. Regis Mohawk Tribe. *See* Ex. M at 1, 3. By letter dated March 29, 2005, the Tribal Council of the St. Regis Mohawk Tribe advised the Acting General Counsel of NIGC that "Mr. Garrow is not an elected officer of the St. Regis Mohawk Tribe, nor does he have the authority to act on behalf of the St. Regis Mohawk Tribe, except to the extent necessary for his participation on your committee."

Ex. CC at 1. NIGC construed this response as meaning that "at no time [had Mr. Garrow] been designated as having authority to act on behalf of the tribal government." Ex. DD. Accordingly, Mr. Garrow was discharged from the Standards Committee by letter of Mr. Hogen dated April 7, 2005. *Id.* However, the response of the Tribal Council said that Mr. Garrow had "the authority to act on behalf of the St. Regis Mohawk Tribe * * * *to the extent necessary for participation on your committee.*" Ex. CC at 1 (emphasis supplied). Accordingly, the response of the Tribal Council said that Mr. Garrow was authorized to act on behalf of the tribe to the extent that his membership on the Standards Committee required such authority.

7. Mr. Carlini was nominated to the Standards Committee by the Agua Caliente Band of Cahuila Indians. *See* Ex. J at 1, 4. By letter dated March 22, 2005, the Chairman of the Tribal Council of the Agua Caliente Band advised Mr. Hogen that Mr. Carlini was "not an elected officer of this Tribal Government" and had "not been designated by this Tribal Government as having the authority to act on behalf of this Tribal Government in an official capacity." Ex. EE at 1. By letter dated April 7, 2005, Mr. Hogen discharged Mr. Carlini from the Standards Committee. Ex. FF.

C. Recent Developments

The NPRM that NIGC expected to publish in March 2005 has not been published to date. Westrin Decl. ¶ 19. Instead of publishing the NPRM, NIGC has revised the proposed regulations and technical standards that would have been the subject of the NPRM; has made them available to each affected gaming tribe for pre-rulemaking review and comment; and has posted them on its website. *See id.* ¶¶ 6, 19.

On May 27, 2005, plaintiffs filed an amended complaint. Plaintiffs allege in the amended complaint that Messrs. Carlini and Garrow lack authority to act on behalf of the tribes that nominated them and further allege, on information and belief, that a resolution has not yet been adopted confirming the authority of Mr. Ermatinger to act on behalf of the tribe that nominated him. Am. Compl. ¶¶ 75, 77, 82.

ARGUMENT

I. FACA IS MADE INAPPLICABLE TO THE STANDARDS COMMITTEE BY 2 U.S.C. § 1534(b).

A. SECTION § 1534(b) CREATES AN EXEMPTION FROM FACA FOR MEETINGS BETWEEN FEDERAL EMPLOYEES AND DESIGNATED EMPLOYEES OF TRIBAL GOVERNMENTS WITH ACTUAL OR APPARENT AUTHORITY TO ACT ON BEHALF OF THOSE GOVERNMENTS.

The relationship of principal and agent may be based on either of two types of authority: actual or apparent. *See Heckler v. Cmty. Health Serv. of Crawford County*, 467 U.S. 51, 65 n.21 (1984); *Makins v. District of Columbia*, 277 F.3d 544, 548 (D.C. Cir. 2002); *Williams v. Wash. Metro. Area Transit Auth.*, 721 F.2d 1412, 1416 (D.C. Cir. 1983). Actual authority is "the power 'to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to [the agent].'" *Makins*, 277 F.3d at 548 (quoting *Restatement (Second) of Agency (Restatement)* § 7 (1958)). Derived from "'the principal's representations * * * to the agent,'" *Makins*, 277 F.3d at 550 (quoting *Sigal Constr. Co. v. Stanbury*, 586 A.2d 1204, 1218 (D.C. 1991)), actual authority exists "whether or not the third party knows of or suspects an agency relationship." *Williams*, 721 F.2d at 1416. Actual authority may be express or implied. *Ferrostaal v. M/V Sea Baisen*, 2004 WL 2734745, at *3 (S.D.N.Y. Nov. 30, 2004).

Apparent authority is "the 'power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from, and in accordance with the other's manifestations to such third persons.'" *Am. Soc'y of Mech. Engr's v. Hydrolevel Corp.*, 456 U.S. 556, 566 n.5 (1982) (quoting *Restatement* § 8); *accord Makins*, 277 F.3d at 549. In contrast to actual authority, apparent authority "can arise from 'written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to the act done on [the principal's] behalf by the person purporting to act for [the principal].'" *Makins*, 277 F.3d at 549 (quoting *Restatement* § 27). Accordingly, apparent authority "depends in large part upon the representations made to the third party and upon the third party's perception of those representations." *Williams*, 721 F.2d at 1416.

As a practical matter, the two types of authority are indistinguishable. "[T]he result of apparent authority is precisely the same as the result of real authority. In other words, in the measurement of its effects, authority is authority and the operation of apparent authority is of no lesser degree of effectiveness than is the operation of real authority." Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* 58 (1990).

2 U.S.C. § 1534(b) provides that FACA "shall not apply" to interactions between federal officials and "designated employees [of state, local, or tribal governments] with authority to act on their behalf." No distinction is drawn in § 1534(b) between actual authority and apparent authority. Nor should any such distinction be inferred. "'[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms.'" *United States v. Neder*, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503

U.S. 318, 322 (1992) (ellipsis in the original; internal quotation marks omitted); *see NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (similarly). In this case, the Supreme Court held in 1982 that "[t]he apparent authority theory has long been the settled rule in the federal system." *Hydrolevel*, 456 U.S. at 567. In 1984, the Supreme Court held that "a principal may be bound by the acts of an agent only if that agent acted with actual or apparent authority." *Heckler*, 467 U.S. at 65 n.21. Accordingly, "authority" had a "'settled meaning . . . under the common law'" that included apparent authority at the time that § 1534(b) was adopted in 1995. *See Neder*, 527 U.S. at 21 (quoting *Nationwide*, 503 U.S. at 322). Apparent authority should thus be held to be "authority" for purposes of § 1534(b).

So construing § 1534(b) would further the purpose of § 1534(b). UMRA directed the President to "issue guidelines and instructions to Federal agencies for appropriate implementation of [1534(b)]." 2 U.S.C. § 1534(c). At the direction of the President, the Office of Management and Budget (OMB) issued the required guidelines and instructions in September 1995. The guidelines and instructions state:

> In order to facilitate the consultation process, [§ 1534(b)] provides an exemption from [FACA] "for the exchange of official views regarding the implementation of public laws requiring shared intergovernmental responsibilities or administration." * * * * In accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration.

Guidelines and Instructions for Implementing § 204, "State, Local, and Tribal Government Input," of Title II of Public Law 104-4, 60 Fed. Reg. 50651, 50653 (Sept. 29, 1995).

"Under the well-established principles of administrative interpretation," the guidelines and instructions of OMB are to be "accorded substantial deference by the judiciary." *Wyo.*

Sawmills v. U.S. Forest Serv., 179 F. Supp. 2d 1279, 1304-05 (D. Wyo. 2001), *aff'd*, 383 F.3d 1241 (10th Cir. 2004), *pet. for cert. filed*, No. 04-1175 (Mar. 2, 2005). In this case, any reading of § 1534(b) that excluded apparent authority from the scope of § 1534(b) would discourage federal officials from meeting with the ostensible representatives of state, local, or tribal governments until formal assurances could be obtained of their actual authority to represent those governments. Such a reading would contravene the guidelines and instructions of OMB by making intergovernmental communications more cumbersome, not "facilitat[ing]" them. Such a reading would therefore be inappropriate.

B. EVERY INDIVIDUAL APPOINTED TO THE STANDARDS COMMITTEE AS THE REPRESENTATIVE OF A TRIBAL GOVERNMENT HAD APPARENT AUTHORITY TO ACT ON BEHALF OF THE GOVERNMENT THAT NOMINATED HIM.

Apparent authority "can arise from 'written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to the act done on [the principal's] behalf by the person purporting to act for [the principal].'" *Makins*, 277 F.3d at 549 (quoting *Restatement* § 27). In this case, every individual appointed to the Standards Committee as the representative of a tribal government was nominated on a form that said: "Note: Submission of this form is verification that the nominee is a designated employee or representative of the tribe." Ex. I at 3; Ex. J at 4; Ex.K at 3; Ex. L at 3; Ex. M at 3; Ex. N at 2; Ex. O at 3. Accordingly, each such individual was nominated pursuant to a verification that expressed on its face apparent authority to represent the tribe.

The inference of apparent authority that NIGC drew from the verification was, and is, "'reasonabl[e].'" *See Makins*, 277 F.3d at 549 (quoting *Restatement* § 27). When asked after the

commencement of this action whether each of the individuals appointed to the Standards Committee as a representative of a tribal government was a "designated employee [of the tribe] with the authority to act on its behalf," the tribal governments that nominated six of the seven individuals appointed to the committee – Messrs. DesRosiers, Hummingbird, Lombardo, Ermatinger, Daniels, and Garrow – said "yes." Ex. X at 2; Ex. Y; Ex. Z at 2; Ex. AA; Ex. BB at 1, 3; Ex. CC at 1. Only in the case of Mr. Carlini was the answer "no." Emphasizing that NIGC had been justified in relying on the verification, the Principal Chief of the Cherokee Nation said: "Your assumption that by submitting the form we verified that Mr. Hummingbird was and is a designated representative for the Nation for purposes of this workgroup was correct." Ex. Y.

In view of the foregoing, each of the individuals appointed to the Standards Committee as a representative of a tribal government had apparent authority, from the standpoint of NIGC, to represent the tribe that nominated him. Because apparent authority is "authority" for purposes of 2 U.S.C. § 1534(b), FACA is inapplicable to the Standards Committee. This action should therefore be dismissed.

II. PLAINTIFFS WOULD NOT BE ENTITLED TO THE RELIEF THEY SEEK EVEN ASSUMING, *ARGUENDO*, THAT FACA APPLIED TO THE STANDARDS COMMITTEE.

A. NO ORDER ENJOINING DEFENDANTS FROM CONDUCTING THE BUSINESS OF THE STANDARDS COMMITTEE WOULD BE APPROPRIATE BECAUSE THE CURRENT MEMBERSHIP OF THE COMMITTEE MEETS THE REQUIREMENTS OF § 1534(b), EVEN BY PLAINTIFFS' CRITERIA.

Alleging that the membership of the Standards Committee does not meet the requirements of § 1534(b), plaintiffs ask that an order be issued enjoining defendants from "conducting [committee] business of any kind." Am. Compl. ¶¶ 83, 85 & prayer ¶ d. Plaintiffs

base this request on two things: the appointment of Messrs. Carlini and Garrow to the Standards Committee and the apparent lack of a resolution of the Sault Ste. Marie Tribe confirming the authority of Mr. Ermatinger to act on behalf of the tribe as a member of the committee. *Id.* ¶¶ 75, 77, 82. But Messrs. Carlini and Garrow were discharged from the committee by letters of Mr. Hogen dated April 7, 2005, and the Board of Directors of the Sault Ste. Marie Tribe adopted a resolution confirming the authority of Mr. Ermatinger to act on behalf of the tribe as a member of the committee on April 5, 2005. *See* Ex. AA; Ex. DD; Ex. FF. Accordingly, the current membership of the Standards Committee meets the requirements of § 1534(b), even by plaintiffs' criteria. No ground therefore exists for the issuance of an injunction restraining defendants from conducting the business of the committee.

B. NO ORDER REQUIRING DEFENDANTS TO LIMIT THE MEMBERSHIP OF ANY SUCCESSOR COMMITTEE TO INDIVIDUALS MEETING CERTAIN REQUIREMENTS WOULD BE APPROPRIATE BECAUSE THIS COURT WOULD NOT HAVE AUTHORITY TO ISSUE SUCH AN ORDER.

Plaintiffs ask that an order be issued requiring defendants to limit the membership of any advisory committee established in lieu of the Standards Committee to "members with actual authority to act in an official capacity on their respective tribes' behalf." Am. Compl. prayer ¶ e. Such an order would be inappropriate. The powers of nomination and appointment "are political powers, to be exercised by the President according to his own discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803); *accord United States ex rel. Frizzell v. Newman*, 42 U.S. App. D.C. 78, 100 (1914). Accordingly, "there can be no review of the exercise of this power so long as it is exercised within the limitations of the law." *Frizzell*, 42 U.S. App. D.C. at 100.

In this case, nothing in FACA requires the members of an advisory committee to be "members with actual authority to act in an official capacity on their respective tribes' behalf." Even assuming, *arguendo*, that the appointment of members who lacked such authority would make the exception of 2 U.S.C. § 1534(b) inapplicable, the appointment itself would be "within the limitations of the law." At most, the appointment would turn the advisory committee into a committee to which the requirements of FACA applied.

Because the powers of nomination and appointment are "political," this Court lacks the authority to issue an order requiring defendants to limit the membership of any advisory committee organized in lieu of the Standards Committee to "members with actual authority to act in an official capacity on their respective tribes' behalf." *See Marbury*, 5 U.S. at 167. If NIGC wishes to create an advisory committee susceptible to challenge under FACA – however unwarranted the challenge might be – it is free to do so.

C. NO ORDER PROHIBITING DEFENDANTS FROM USING THE WORK PRODUCT OF THE STANDARDS COMMITTEE WOULD BE APPROPRIATE BECAUSE PLAINTIFFS WAITED TOO LONG TO BRING THIS ACTION AND FOR OTHER REASONS.

A "use injunction" is an injunction restraining an agency from using or relying upon the work product of an advisory committee. *NRDC v. Pena*, 147 F.3d 1012, 1014 (D.C. Cir. 1998). "Because of its First Amendment implications, punitive effect and likely standing complications, a use injunction should be the remedy of last resort." *Id.* at 1025. Accordingly, a use injunction should not be issued "[i]f the plaintiff failed to prosecute its claim for injunctive relief promptly, and if it has no reasonable explanation for its delay." *Id.* at 1026. In similar fashion, a use injunction should not be issued "if the FACA violation appears to have had little deleterious

effect on the committee's output and accountability and the public's participation." *Id.* In the same way, a use injunction should not be issued "if members of the public will have another opportunity to comment on an agency decision," and the additional opportunity to comment will render the violation of FACA "harmless (or at least less harmful)." *Id.*

In this case, plaintiffs seek an injunction restraining defendants from "using draft regulations or any other work product generated by [the Standards Committee] for any purpose, including but not limited to any future NIGC notice and comment rulemaking." Am. Compl. prayer ¶ f. Accordingly, plaintiffs seek a use injunction. For the following reasons, they are not entitled to such relief.

First, the Standards Committee held its initial meeting on May 13, 2004. Plaintiffs did not commence this action until March 10, 2005. By that time, the Standards Committee had finished providing input into the proposed regulations as they then existed. Plaintiffs do not allege that anything precluded them from commencing this action earlier. Accordingly, this is a case in which plaintiffs have "failed to prosecute [their] claim for injunctive relief promptly," and have "no reasonable explanation for [their] delay." *See Pena*, 147 F.3d at 1026. A use injunction is therefore inappropriate.

Second, the Standards Committee provided "valuable insight and assistance" to NIGC as it worked in 2004 and 2005 to develop the proposed regulations and technical standards, and did so despite the violations of FACA that plaintiffs allege. Coleman Decl. ¶ 6. Except for the organizational meeting of the Standards Committee, notice of each of its meetings was posted on the NIGC website; each meeting was open to the public; and persons attending each meeting were permitted to provide their views orally. Westrin Decl. ¶¶ 4, 5. Accordingly, the violations

of FACA that plaintiffs allege had "little deleterious effect on the committee's output and accountability and the public's participation." *See Pena*, 147 F.3d at 1026.

Third, plaintiffs will be able to submit "written data, views, or arguments" on the final version of the proposed regulations, once an NPRM proposing their adoption is published. *See* 5 U.S.C. § 553(c). Accordingly, plaintiffs will receive "another opportunity to comment on [the] agency decision." *See Pena*, 147 F.3d at 1026. This opportunity will "render harmless (or at least less harmful)" the violations of FACA that plaintiffs allege. *See id.*

Fourth, the Standards Committee is but one of several mechanisms that NIGC has used to obtain the input of all interested parties into the proposed regulations and technical standards. In addition to establishing and operating the Standards Committee, NIGC has sent two working drafts of the proposed regulations and technical standards, including the current draft, to the leaders of all affected gaming tribes, including plaintiffs, and invited them to submit their comments; posted all of the working drafts of the proposed regulations and technical standards on its website for pre-rulemaking review and comment; sent more than 500 invitations to tribal leaders, asking them to consult with NIGC to provide input into the formulation of the regulations; and conducted more than 200 meetings about the development of the regulations with individual tribes and their leaders or representatives. Westrin Decl. ¶¶ 6-8. Accordingly, the role that the Standards Committee has played in the development of the regulations, though valuable, has been modest. Because everyone with an interest in Indian gaming has been given numerous opportunities to participate in the consultative process, no one has been injured by the violations of FACA that plaintiffs allege.

For all of these reasons, plaintiffs would not be entitled to the use injunction that they seek even assuming, *arguendo*, that FACA were applicable to the Standards Committee. This case should therefore be dismissed.

D. NO DECLARATORY JUDGMENT WOULD BE APPROPRIATE BECAUSE A SIGNIFICANT POSSIBILITY OF FUTURE HARM DOES NOT EXIST AND BECAUSE THE JUDGMENT THAT PLAINTIFFS SEEK WOULD BE A DECLARATION OF LAW WITHOUT IMPLICATIONS FOR PRACTICAL ENFORCEMENT.

"There is no absolute right to a declaratory judgment in the federal courts." *Hanes Corp. v. Millard*, 531 F.2d 585, 591 (D.C. Cir. 1976). Accordingly, the issuance of a declaratory judgment "is a matter of judicial discretion." *Id.*; *see Am. Greiner Elec. v. Establissements Henry-Le Paute, S.A.*, 174 F. Supp. 918, 918 (D.D.C. 1959) (Holtzoff, J.) (similarly). An action for a declaratory judgment "allow[s] and provide[s] a method for adjudicating the rights of parties prior to the time that they are in shape for adjudication by a suit for damages or for some other affirmative relief." *Am. Greiner*, 174 F. Supp. at 918. Accordingly, the issuance of a declaratory judgment is appropriate "only where there is 'a very significant possibility of future harm.'" *Vanover v. Hantman*, 77 F. Supp.2d 91, 100 (D.D.C. 1999) (quoting *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996)). The issuance of a declaratory judgment is not appropriate "where 'the remedy sought is a mere declaration of law without implications for practical enforcement upon the parties.'" *Vanover*, 77 F. Supp. 2d at 100 (quoting *S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch.*, 24 F.3d 427, 431 (2d Cir. 1994)).

In this case, plaintiffs ask that a declaratory judgment be issued stating that FACA applies to the Standards Committee and that defendants have failed to comply with certain of its

requirements. Am. Compl. prayer ¶¶ a-c. However, "'a very significant possibility of future harm'" does not exist in this case. *See Vanover*, 77 F. Supp. 2d at 100 (quoting *San Diego County Gun Rights*, 98 F.3d at 1126). At most, NIGC will publish an NPRM proposing the adoption of the proposed regulations, thereby giving plaintiffs and other "interested persons" the opportunity to comment. *See* 5 U.S.C. § 553(c). Any violations of FACA that have occurred to date, or that may occur in the future, will be "render[ed] harmless (or at least less harmful)" by the additional opportunity to comment on the regulations that plaintiff will receive. *See Pena*, 147 F.3d at 1026.

In addition, the judgment that plaintiffs seek will be a "'mere declaration of law without implications for practical enforcement by the parties.'" *See Vanover*, 77 F. Supp. 2d at 100 (quoting *S. Jackson & Son*, 24 F.3d at 431). For the reasons discussed above, plaintiffs are not entitled to an order enjoining defendants from conducting the business of the Standards Committee, or from using its work product. Neither are plaintiffs entitled to an order limiting the membership of any successor committee to "members with actual authority to act in an official capacity on their respective tribes' behalf." Accordingly, no declaratory judgment is appropriate because "no practical enforcement is available." *See Vanover*, 77 F. Supp. 2d at 100.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss or, in the alternative, for summary judgment should be granted.

Dated: July 28, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED SALISH AND KOOTENAI TRIBES, *et al.*, Plaintiffs, v. NATIONAL INDIAN GAMING COMMISSION, *et al.*, Defendants.	No. 1:05-cv-00495-RWR ORDER

Upon defendants' motion to dismiss or, in the alternative, for summary judgment, the materials submitted in support thereof and in opposition thereto, and good cause having been shown, it is hereby ordered as follows this _____ of _____ 2005:

1. Defendants' aforesaid motion is hereby granted.

2. This action is hereby dismissed.

_____
UNITED STATES DISTRICT JUDGE