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-DAR DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATEMENT

2 U.S.C. § 1534(b) exempts certain advisory committees from the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. *See* 41 C.F.R. § 102-3.40(g). Believing that § 1534(b) applies to the Joint Federal-Tribal Class II Game Classification Standards Advisory Committee (Standards Committee) and that FACA, accordingly, does not apply, defendants, the National Indian Gaming Commission (NIGC) and its three commissioners, have complied with certain of the requirements of FACA in establishing and operating the committee but not with others. Accordingly, the two questions that this action presents are whether § 1534(b) applies to the committee and, if it does not, whether plaintiffs, two Indian tribes, are entitled to the injunctive relief they seek. *See* Mem. Supp't Pls.' Mot. Summ. J. (Pl. Mem.) at 2, 11; Cal. Nations Indian Gaming Ass'n's & Nat'l Indian Gaming Ass'n's Amicus Curiae Br. Supp't Pls.' Mot. Summ. J. (Am. Mem.) at 2, 7.

Defendants have moved to dismiss this action or, in the alternative, for summary judgment. Plaintiffs have filed a cross motion for summary judgment. In support of their

motion, plaintiffs make three basic allegations. First, they allege that § 1534(b) does not apply to the Standards Committee because defendants did not appoint "elected officers of tribal governments" to the committee, or make efforts do so. Pl. Mem. at 14-15. Second, they allege that § 1534(b) does not apply to the Standards Committee because certain of the "designated employees with authority to act" whom defendants *did* appoint to the committee did not possess such authority. *Id.* at 17-19. Third, they allege that they are entitled to the injunctive relief that they seek because the absence of such relief will cause them irreparable harm. *Id.* 25-29. In making these allegations, plaintiffs are joined by amici, two associations of Indian tribes involved in gaming activities. *See* Am. Mem. at 1, 5-6.

As is shown below, none of plaintiffs' allegations has merit. Defendants were not required to appoint "elected officers of tribal governments" to the Standards Committee, or make efforts to to do so, in order to make § 1534(b) applicable to the committee. The individuals whom defendants appointed to the committee had authority to act that met fully the requirements of § 1534(b). Irreparable harm will not befall plaintiffs if the injunctive relief that they seek is withheld. Plaintiffs' motion for summary judgment should therefore be denied and defendants motion to dismiss or, in the alternative for summary judgment, should be granted.[1]

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[1]According to amici, defendants "concede[]" that the Standards Committee "is a federal advisory committee as defined in FACA." Am. Mem. at 2, 15; *see* Pl. Mem. at 13. This allegation is misleading. The Standards Committee is a committee established by NIGC "in the interest of obtaining advice or recommendations" for the agency. *See* FACA § 3(2). Accordingly, the Standards Committee is an advisory committee as FACA defines the term. However, § 1534(b) exempts the committee from the provisions of FACA.

ARGUMENT

I. DEFENDANTS WERE NOT REQUIRED TO APPOINT "ELECTED OFFICERS OF TRIBAL GOVERNMENTS" TO THE STANDARDS COMMITTEE, OR MAKE EFFORTS TO DO SO, IN ORDER TO MAKE § 1534(b) APPLICABLE TO THE COMMITTEE.

Subject to certain conditions, § 1534(b) provides:

> [FACA] shall not apply to actions in support of intergovernmental communications where * * * 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.

As used in § 1534(b), the phrase "or their designated employees with authority to act on their behalf" is a "parenthesis," i.e., "an explanatory or qualifying clause, sentence, or paragraph," set off by commas, dashes, brackets, or parentheses, " inserted in another sentence, or in the course of a longer passage, without being grammatically connected with it." *In re Schilling*, 53 F. 81, 83 (2nd Cir. 1892) (internal quotation marks omitted); *see American Heritage Dictionary of the English Language* 953 (1976) (similarly). Based on the existence of this parenthesis, plaintiffs allege that defendants were required by the "structure" of § 1534(b) "affirmatively to seek" the appointment of "elected officers of tribal governments" to the Standards Committee, and to seek "designated employees [with authority to act] only as a second option." Pl. Mem. at 14. For two reasons, plaintiffs are mistaken.

First, the parenthesis in § 1534(b) begins with the word "or." "Or" is "a disjunctive particle used to express an alternative or to give a choice of one among two or more things." *Black's Law Dictionary* 1095 (1990). In statutory construction, "'or' is given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to

other provisions of the statute." *In re Rice*, 165 F.2d 617, 619 n.3 (D.C. Cir. 1947). Accordingly, the use of "or" to begin the parenthesis suggests that § 1534(b) applies to advisory committees that include "elected officers of State, local, and tribal governments" *or* "their designated employees with authority to act on their behalf" *or* any combination of the two.

Second, the parenthesis in § 1534(b) is followed by the phrase "acting in their official capacities." This phrase has two antecedents: "elected officers of State, local, and tribal governments" and "their designated employees with authority to act on their behalf." If dashes, brackets, or parentheses were not used to set off the second of these antecedents, it would not be clear that the phrase "acting in their official capacities" applied to both antecedents. Accordingly, the use of the parentheses serves an important syntactical purpose unrelated to the establishment of a preference for "elected officers of State, local, and tribal governments" in advisory committee membership.

As further evidence of the existence of such a preference, plaintiffs and amici refer to § I(C)(1) of the guidelines and instructions pertaining to 2 U.S.C. §§ 1534(a) and (b) issued by the Office of Management and Budget in 1995. Pl. Mem. at 14-15; Am. Mem. at 16. However, § I(C)(1) discusses § 1534(a), not § 1534(b). *See* 60 Fed. 50651, 50652 (1995). In addition, nothing in § I(C)(1) suggests that "elected officers of State, local, [or] tribal governments" are entitled to a preference in advisory committee membership. Section 1534(a) provides:

> Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.

Section I(C)(1) provides:

> Agencies should seek to consult with the highest levels of the pertinent government units, e.g., the Office of the Governor, Mayor, or Tribal Leader (or their designated employees with authority to act on their behalf).

Id.

Section I(C)(1) contain the same parenthesis that § 1534(b) contains. As is the case with § 1534(b), the parenthesis in § I(C)(1) begins with the word "or." On its face, therefore, the parenthesis in § I(C)(1) creates no preference between consultations with "the highest levels of the pertinent government units" and consultations with "their designated employees with authority to act on their behalf."

In addition, § I(C)(1) states that agencies "*should* seek to consult with the highest levels of the pertinent government units * * * (or their designated employees with authority to act on their behalf)." (Emphasis supplied.) "The term 'should' indicates a recommended course of action, but does not itself imply the obligation associated with 'shall.'" *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001). Accordingly, the use of the term "should" in § I(C)(1) means that no consultation with "the highest level of the pertinent government units * * * (or their designated employees with authority to act on their behalf)" is required. No inference may thus be drawn from § I(C)(1) that "elected officers of tribal governments" are to be given a preference in advisory committee membership.

II. THE INDIVIDUALS WHOM DEFENDANTS APPOINTED TO THE STANDARDS COMMITTEE HAD AUTHORITY TO ACT THAT MET FULLY THE REQUIREMENTS OF § 1534(b).

Plaintiffs and amici allege that § 1534(b) does not apply to the Standards Committee because two of the individuals appointed to the committee lacked authority "to represent the

tribal leaders of the tribes with which they were associated in an official capacity," and two of the other individuals appointed to the committee did not obtain such authority until after this lawsuit began.[2] Pl. Mem. at 17-19; Am. Mem. at 3-4, 7-8, 12-13, 25. This allegation assumes that "authority" for purposes of § 1534(b) is restricted to actual authority, i.e., "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 v. District of Columbia*, 277 F.3d 544, 548 (D.C. Cir. 2002) (quoting *Restatement (Second) of Agency (Restatement)* § 7 (1958)). As amici say:

> In order for an individual to act "on behalf of" an elected tribal government official, the official must take certain actions to vest that individual with the authority to do so. The specific actions required to vest such authority depend on the laws of each respective tribe. * * * [T]ribal governmental representatives only act on behalf of their governments when those governments take legal steps to vest their representatives with the requisite authority.

Am. Mem. at 4.

As defendants have shown, "authority" for the purpose of § 1534(b) is not restricted to actual authority. To the contrary, such authority includes apparent authority, i.e., "the 'power to affect the legal relations of another person by transactions with third persons, professedly as

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[2]Mark Garrow is one of the individuals alleged to have lacked such authority. Pl. Mem. at 17; *see* Am. Mem. at 12-13. However, the record belies this allegation. By letter dated March 29, 2005, the three Chiefs of the St. Regis Mohawk Tribe advised the Acting General Counsel of NIGC that Mr. Garrow "does [not] have authority to represent the St. Regis Mohawk Tribe, *except to the extent necessary for his participation on your committee*." Pl. Ex. 24 at 1 (emphasis supplied). By so stating, the three Chiefs said that Mr. Garrow had authority to represent the tribe to the extent that his membership on the Standards Committee required it. By declaration dated July 25, 2005, one of the three Chiefs, James W. Ransom, alleges that Mr. Garrow was never "authorized by the Tribal Government to act on behalf of its officers or the Tribe as a whole." Am. Mem. Ex. D ¶ 9. This allegation is entitled to little credence. Declarations, like Chief Ransom's, prepared for the purpose of litigation are less persuasive than earlier writings that say otherwise. *See Mobilificio San Giacomo S.p.A. v. Stoffi*, 1997 WL 699299, at *6 (D. Del. Sept. 24, 1997).

agent for the other arising from, and in accordance with the other's manifestations to such third persons.'" *Makins*, 277 F.3d at 549 (quoting *Restatement* § 8); *see* Mem. Supp't Defs.' Mot. Dis. or, in Alt., Summ. J. (Def. Mem.) at 12-15. In this case, each individual appointed to the Standards Committee was nominated on a form that read: "Note: Submission of this form is verification that the nominee is a designated employee or representative of the tribe." *See* Pls.' Statement Material Facts as to Which There Is No Genuine Dispute ¶ 13. Accordingly, each such individual was nominated pursuant to a verification that expressed on its face apparent authority to represent the tribe. *See* Def. Mem. at 15-16.

Plaintiffs allege that defendants are not entitled to rely on the aforementioned verification because the tribal governments could have been required to provide additional evidence of their nominees' authority to serve on the Standards Committee, and would have been required to provide such evidence if the governments had been seeking approval of management contracts for the operation of Class II or Class III gaming activities. Pls.' Mem. at 20-21 (discussing 25 C.F.R. § 533.3). This allegation proves nothing. Apparent authority "can arise from 'written or spoken words or any other conduct of the principal which, reasonably interpreted, causes [a] third person to believe that the principal consents to the act done on the [the principal's] behalf by the person purporting to act for [the principal].'" *Makins*, 277 F.3d at 549 (quoting *Restatement* § 27). Accordingly, the issue in this case is not whether the tribal governments could have been required to provide additional evidence of their nominees' authority to serve, but whether the evidence they provided was sufficient to create an inference of apparent authority. In this case, it was. *See* Def. Mem. at 15-16.

Taking a different tack, amici allege that "[t]his case presents the fundamental question whether the intergovernmental exception to the Federal Advisory Committee Act deprives Indian tribes of their sovereign right to determine who has authority to act on behalf of tribal governments." Am. Mem. at 7; *see* Pl. Mem. at 26-27, 30. However, no such question exists. The doctrine of apparent authority applies to Indian tribes, just as it does to others. In *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001), a tribal chief was held to have "actual or apparent authority" to sign applications for federal funding on behalf of his tribe, but not to have "actual or apparent authority" to enter into contracts waiving the immunity of the tribe from suit under the Rehabilitation Act. 243 F.3d at 1287-88. In *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick*, 749 P.2d 90 (N.M. 1988), an attorney for a tribe was held to have apparent authority to enter into a settlement agreement on behalf of the tribe, and this authority was held to be "sufficient to bind the Tribe to the settlement reached." 749 P.2d at 93. Accordingly, the notion that "authority" for purposes of § 1534(b) includes apparent authority does not conflict with such principles of "tribal sovereignty" as may be applicable to Indian gaming.

III. IRREPARABLE HARM WILL NOT BEFALL PLAINTIFFS IF THE INJUNCTIVE RELIEF THEY SEEK IS WITHHELD.

Plaintiffs seek an injunction restraining defendants from conducting the business of the Standards Committee; restraining them from using the work product of the committee "for any purpose including, but not limited to, any future notice and comment rulemaking"; and requiring them to limit the membership of any committee established in lieu of the Standards Committee to "members with actual authority to act in an official capacity on their respective tribes' behalf."

Pl. Prop. Order at 2-3. The apparent purpose of such an injunction is to prevent defendants from publishing a notice of proposed rulemaking (NPRM) recommending the adoption of certain regulations "that would classify certain gaming devices under the Indian Gaming Regulatory Act." *See* Pl. Mem. at 1-2, 24. Though not finalized, plaintiffs oppose the regulations.[3] *See id.* at 28.

Recycling an argument made in support of their unsuccessful application for a temporary restraining order (TRO), plaintiffs allege that they will suffer "irreparable harm" if the injunctive relief that they seek is not granted. Pl. Mem. at 24-26; *see* Mem. Supp't Pls.' Appl'n TRO at 9-12. However, plaintiffs have not been harmed to date by the lack of such relief. Except for the organizational meeting of the Standards Committee, notice of each such meeting has been posted on the NIGC website, each meeting has been open to the public, and persons attending each meeting have been permitted to provide their views orally. Westrin Decl. ¶¶ 4, 5. Accordingly, the fact that defendants have not taken certain actions required by FACA in establishing and operating the committee has had "little deleterious effect on the committee's output and accountability and the public's participation." *See NRDC v. Pena*, 147 F.3d 1012, 1026 (D.C. Cir. 1998).

In addition, the Standards Committee is but one of numerous mechanisms that defendants have employed to obtain the input of all interested parties in the proposed regulations. In addition to establishing and operating the committee, defendants have sent two working drafts of

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[3]Though not parties to this action, amici ask that the "the actions, findings and conclusions of the [Standards Committee] be set aside." Am. Mem. at 5; *see id.* at 26. However, the committee has not taken "action," or made "findings [or] conclusions." To the contrary, its work has been limited to giving advice.

the proposed regulations, including the current draft, to the leaders of all affected gaming tribes, including plaintiffs, and invited them to submit comments; posted all of the working drafts of the proposed regulations on the NIGC website for pre-rulemaking review and comment; sent more than 500 invitations to tribal leaders, asking them to consult with NIGC to provide input in 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. Because everyone with an interest in Indian gaming has been given numerous opportunities to participate in the consultative process, no one has been harmed by defendants' noncompliance with FACA.

Nor will anyone be harmed if the noncompliance continues. What will happen, at most, is that defendants will publish an NPRM in the Federal Register recommending the adoption of certain regulations. At that point, all interested parties will be permitted to submit "written data, views, and arguments." *See* 5 U.S.C. § 553(c). This opportunity will "render harmless (or at least less harmful)" any violations of FACA that may have occurred up to that point. *See Pena*, 147 F.3d at 1026.

In *Public Citizen v. National Economic Commission*, 703 F. Supp. 113 (D.D.C. 1989), the court held that the plaintiffs would suffer irreparable harm if the defendant were not restrained on a temporary basis from closing one of its meetings to the public in violation of FACA. 703 F. Supp. at 129. In this case, plaintiffs rely on *Public Citizen* for the proposition that "an agency's violation of FACA can constitute irreparable harm." Pl. Mem. at 25. As explained above, no such harm has taken place to date, or will take place in the future, because of the violations of FACA that plaintiffs allege. Accordingly, *Public Citizen* is no more persuasive now than it was

when plaintiffs' application for a TRO was denied. The injunctive relief that plaintiffs seek should therefore be withheld even assuming, *arguendo*, that § 1534(b) does not apply to the Standards Committee.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be denied.

Dated: August 22, 2005

Respectfully submitted,

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Upon plaintiffs' motion for summary judgment, the materials submitted in support thereof and in opposition thereto, and good cause having been shown, it is hereby ordered this _____ of _____ 2005 that plaintiffs' motion be denied.

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UNITED STATES DISTRICT JUDGE