THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED SALISH and KOOTENAI TRIBES, *et al.*,	
Plaintiffs,	**Civil Case No. 1:05cv00495**
v.	**Judge: Richard W. Roberts**
NATIONAL INDIAN GAMING COMMISSION, *et al.*	
Defendants.	

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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The Confederated Salish and Kootenai Tribes ("CSKT") and the Santa Rosa Rancheria ("Santa Rosa") respectfully submit this Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment. CSKT and Santa Rosa (collectively, "Plaintiffs") respectfully submit, and demonstrate in this Memorandum, that Defendants arguments as set forth in Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ("Defendants' Opposition Brief") are baseless and that Plaintiffs' Motion for Summary Judgment should be granted.

INTRODUCTION[1]

This case involves the National Indian Gaming Commission's ("NIGC") establishment of a tribal advisory committee ("TAC") to assist it in the development of regulations that, upon becoming effective, would establish the classification and technical standards to determine whether certain gaming devices are considered Class II or Class III devices under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721.[2] In assembling the TAC, the NIGC established criteria that all but guaranteed only technical specialists and regulatory personnel — not elected tribal leaders — would be able to serve on the TAC. Shortly after Defendants' began conducting TAC business, a steady chorus of Indian tribes, including Plaintiffs, began voicing objections to Defendants' conduct of the TAC and Defendants' exclusion of elected tribal leaders from the process, thereby eliminating any government to government discussion, and demanded that Defendants comply with the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, in conducting the TAC. (*See* Pls.' Exhibit 1-KK (May 11, 2005 letter from Daniel F. Decker to David M. Glass referencing correspondence to NIGC from 46 Indian tribes and tribal organizations objecting to TAC process).)

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[1] All of the facts set forth in this Reply are supported by appropriate citations to the record in Plaintiffs' Statement of Material Facts as to Which There is No Genuine Dispute and Plaintiffs' Statement of Material Facts to Which There is a Genuine Dispute, attached as Exhibits 1 and 2, respectively, to Plaintiffs' Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment. Unless otherwise defined herein, the defined terms in those Statements are incorporated herein by reference.

[2] IGRA divides Indian gaming activity into three classes: Class I (traditional and ceremonial games), Class II (bingo, electronic aids to bingo and certain card games), and Class III (all other forms of gaming, including slot machines and banked card games). Class III games may be played only in accordance with a compact executed between an Indian tribe and a state that is in effect. *See* 25 U.S.C. § 2710(d)(1)(C). Class II gaming, on the other hand, may be conducted without a compact. Plaintiffs note that, on August 24, 2005, this Court issued a Memorandum Opinion in *Colorado River Indian Tribes v. NIGC*, Civil No. 04-0010 (JDB), which implicates the authority of the NIGC to issue and enforce certain regulations for Class III gaming. Plaintiffs have not had opportunity to examine whether this decision has bearing or is at all relevant to the instant case, but nonetheless bring it to this Court's attention for consideration as appropriate.

Defendants ignored the tribes' objections, refusing to even respond to the tribes' concerns. Now, Defendants seek to fit their conduct into a statutory exception to FACA, 2 U.S.C. § 1534(b)(1) ("Section 1534(b)(1)"), which requires participation by elected tribal officers (or their authorized designees) acting in their official capacities. Defendants, having gone out of their way to exclude elected tribal officers from serving on the TAC, now attempt to bootstrap themselves into Section 1534(b)(1) by claiming that the technical specialists unilaterally selected for the TAC had apparent authority to represent and to bind tribal governments in an official capacity.

ARGUMENT

I. DEFENDANTS' PURPORTED STATEMENT OF DISPUTED FACTS DOES NOT COMPLY WITH LOCAL RULES AND SHOULD BE DISREGARDED BY THIS COURT.

As an initial matter, Defendants' Response to Plaintiffs' Statement of Material Facts as to Which There is No Genuine Dispute (Dkt. No. 26, attach. 1 (hereinafter "Defendants' Response Statement")) does not comply with, and is a plain violation of, LCvR 56.1. That Rule states, in pertinent part:

> An opposition to [a summary judgment] motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include reference to the parts of the record relied on to support the statement.... [T]he court may assume that facts identified by the moving in its statement of facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

"[LCvR 56.1] places the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Jackson v. Finnegan, Henderson, Farabow,*

Garrett & Dunner, 101 F.3d 145, 151 (D.C. Cir. 1996). Accordingly, courts require strict adherence to LCvR 56.1 when resolving motions for summary judgment. *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96, 103 (D. D.C. 1996). Where an opposing party fails to comply with LCvR 56.1, a court may take all facts alleged by the movant as admitted. *Id.*

In this case, Defendants' Response Statement appears to have been drafted in the form of an answer to a complaint. Defendants responded to all paragraphs of Plaintiffs' Statement of Undisputed Facts, regardless of whether Defendants purported to dispute such facts. This does little to crystallize the issues for the Court or for Plaintiffs. Most importantly, however, Defendants' Response Statement does not contain *a single citation to the record*, an inexcusable and unacceptable violation of LCvR 56.1. Defendants' failure to cite to the record deprives the Court of any ability to see whether Defendants' conclusory and unsupported contentions have support in the record. Defendants' submission is inconsistent with the letter and purpose of the Rule.

Accordingly, the Court should disregard Defendants' Response Statement and consider Plaintiffs' Material Facts as to Which There Is No Genuine Dispute (Dkt. No. 21, attach. 2) (hereinafter "Plaintiffs' Statement of Undisputed Facts")), together with accompanying exhibits, as admitted.

II. THE TAC DOES NOT FALL WITHIN ANY EXCEPTION TO FACA.

Defendants go to great lengths in Section I of their Opposition Brief in a futile attempt to counter that the text and structure of Section 1534(b)(1) required, and require, Defendants affirmatively to seek to include elected tribal leaders on the TAC. Curiously, Defendants do not dispute that their process went to great lengths to foreclose the

opportunity for elected tribal officers to serve on the TAC. Rather, Defendants contend only that neither Section 1534(b)(1) nor its implementing guidelines evidence a preference of elected tribal officers over designated employees. However, Defendants' argument ignores Section 1534(b)(1)'s implementing guidelines that provide that "agencies should seek to consult with the highest levels of the pertinent government limits, *e.g.*, the Office of the Governor, Mayor, Tribal Leader (or their designated employees with authority to act on their behalf). These officials are the ones elected to represent the people and are the ones that the public holds accountable for the actions of those government units." *Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of Public Law 104-4*, 60 Fed. Reg. 50651, 50652 (Sept. 29, 1995). Again making no attempt to conceal that they precluded tribal leaders from participating on the TAC, Defendants purport to explain their noncompliance with these guidelines in assembling the TAC by noting that "use of the term 'should' ... means that no consultation with 'the highest level of pertinent governments units ...' is required." (Defendants' Opp'n Brief at 5.)

Even if Defendants' argument had merit, which it does not, it is irrelevant. Plaintiffs have demonstrated that, at the time the TAC was assembled in March 2004, the members of the TAC were neither elected tribal leaders (as admitted by Defendants) nor "designated employees with authority to act" on behalf of tribal governments in an official capacity as required by Section 1534(b)(1) because the TAC members lacked *any* authority to act on behalf of tribal governments. That some of the tribal governments (in response to Defendant Hogen's March 17, 2005 letter) subsequently granted some members of the TAC authority prospectively to serve on the TAC in an official capacity

does not change this fact. None of the tribal governments that granted TAC members such authority did so retroactively. Accordingly, *all* of the TAC members lacked any authority to serve on the TAC from March 2004 until, at the earliest, late March 2005.

III. THE TAC MEMBERS HAD NO APPARENT AUTHORITY TO ACT ON BEHALF OF TRIBAL GOVERNMENTS.

In support of their argument that they were entitled to rely on an unsigned, unsworn, one sentence purported "verification" at the end of an unsigned and unsworn Nomination Form, Defendants do not even attempt to argue that actual authority existed. All agree it did not. Instead, Defendants rely entirely on the inapplicable doctrine of apparent authority in an attempt to bind the tribal governments to the TAC. Plaintiffs have demonstrated, however, that Indian tribes are sovereign governments and that the doctrine of apparent authority cannot bind a tribal government to a governmental act, as opposed to a commercial act. (Pls.' Opp'n to Defs.' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defendants' Opposition Brief") at 13-15.) Defendants have cited no case that supports the proposition that the doctrine of apparent authority can bind a tribal government to a governmental act. To the contrary, courts have universally held otherwise. *Id.* at 15 n.5 (citing cases requiring actual authority for tribal officials to waive tribal sovereign immunity).

Even if apparent authority could legally apply here, which it cannot, Plaintiffs have demonstrated (using the Nomination Forms associated with each TAC member) that none of the seven TAC members were clothed with apparent authority to act on behalf of and bind tribal governments. Rather than restate those details here in their entirety, Plaintiffs respectfully incorporate by reference pages 15-21 of Plaintiffs' Opposition Brief. A couple of points, however, bear further comment.

First, "for apparent authority to exist there must be some conduct on the part of the *principal* to give rise to the inference of apparent authority." *Drexel Burnham Lambert v. Commodity Futures Trading Comm'n*, 850 F.2d 742, 753 (D.C. Cir. 1988) (Starr, J., concurring in part and dissenting in part (emphasis original)). The record here is devoid of any affirmative conduct on the part of any of the Indian tribes with which the nominees ultimately selected to the TAC claimed an association that could give rise to any inference, let alone a reasonable one, that apparent authority existed. Without any proof or even a signature, anyone could have submitted the Nomination Forms to the NIGC.

Second, Defendants insist that it "proves nothing" that "the tribal governments could have been required to provide additional evidence of their nominees' authority to serve on the [TAC], and would have been required to provide such evidence if the governments had been seeking approval of management contracts ... ." (Defs.' Opp'n Brief at 7.) To the contrary, the fact that the NIGC's own regulations require (in the course of fulfilling one of NIGC's primary regulatory responsibilities) Indian tribes to submit to the NIGC "[a] letter, signed by the tribal chairman, setting out the authority of an authorized tribal official to act for the tribe concerning the management contract," as well as "copies of documents evidencing [this] authority," in connection with the approval of management contracts *proves everything*. 25 C.F.R. §§ 533.3(b), (c). These regulations demonstrate that Defendants had to know that an unsigned, unsworn Nomination Form could not be relied upon as authority for anything, let alone authority to bind a tribal government in an official capacity as a means of escaping FACA's requirements. Defendants offer no explanation of how they were unaware of their own

regulations or how there could be reasonable reliance upon absolutely nothing more than one unsigned, unsworn Nomination Form.

IV. DEFENDANTS' CONDUCT CONSTITUTES IRREPARABLE HARM AS A MATTER OF LAW AND PLAINTIFFS ARE FULLY ENTITLED TO THE RELIEF THEY SEEK.

Defendants devote Section III of their Opposition Brief to arguing that Plaintiffs are not entitled to the injunctive relief they seek because, Defendants claim, Defendants' FACA violations are harmless and have not caused Plaintiffs irreparable harm. Defendants go so far to state that not only has "no one...been harmed by [D]efendants' noncompliance with FACA," but also that "[n]or will anyone be harmed if the noncompliance continues." Defendants' bold statement is indicative of their cavalier disregard for the law and Plaintiffs' interests in this case. Defendants seemingly intend, purposefully and with knowledge, to continue to violate FACA. Plaintiffs are fully entitled to the injunctive relief they seek.

First, Defendants have made no attempt to address the overriding and distinguishing nature of the irreparable harm in this case: Defendants' infringement of tribal self government. As Plaintiffs have previously noted, the "first element" of tribal sovereignty is the authority of Indian tribes to determine who represents them in an official capacity. *Wounded Head v. Tribal Council of the Oglala Sioux Tribe of the Pine Ridge Reservation*, 507 F.2d 1079, 1082-83 (8th Cir. 1975) (citations omitted). By asserting that the technical specialists ultimately appointed to the TAC have apparent authority to act on behalf of and bind tribal governments for purposes of Section 1534(b)(1), Defendants in this case have *unilaterally* decided who represents these Indian tribes in an official capacity. For purposes of injunctive relief, interference with tribal

self-government, by itself, constitutes irreparable harm. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-1172 (10th Cir. 1998); *see also Seneca-Cayuga Tribe v. Oklahoma,* 874 F.2d 709, 716 (10th Cir. 1989) (finding irreparable harm where threatened loss of revenues and jobs created "prospect of significant interference with [tribal] self-government"); *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1233 (D. Kan. 2002), *aff'd*, 341 F.3d 1202 (10th Cir. 2003) (upholding injunction and noting that, "This not a matter of how much capital will be lost if the injunction is not imposed. Instead, the issues concern the scope of tribal sovereignty, an issue that can not be measured in dollars"). Separate and apart from the procedural harm Defendants' FACA violations have caused, Defendants' conduct therefore constitutes irreparable harm as a matter of law. Defendants have made no attempt to explain otherwise.

Second, Defendants once again proffer their "no harm, no foul" excuse for noncompliance with FACA, claiming that because "everyone with an interest in Indian gaming" – including Plaintiffs – has been given "numerous opportunities" to comment outside the TAC process, "no one has been harmed by [D]efendants' noncompliance with FACA." (Defs.' Opp'n Brief at 9-10.) For summary judgment purposes, Defendants' argument must fail because Plaintiffs have disputed the factual assertions upon which Defendants rely.[3]

Even if Defendants' contentions were accurate, which they are not, they would not advance their position. Defendants, of course, cite no case law (i) that FACA's mandatory requirements may simply be disregarded or (ii) that doing something

[3] *See, e.g.*, Pls.' Statement of Material Facts as to Which There is a Genuine Dispute, ¶¶ 2, 3, 12-13; *see also* Pls.' Exhibit 1-II (Declaration of D. Fred Matt in Support of Pls.' Opposition to Defs.' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Matt Decl.")) and Pls.' Exhibit 1-LL (Declaration of Clarence Atwell, Jr. in Support of Pls.' Opposition to Defs.' Motion to Dismiss or, in the Alternative, for Summary Judgment).

somewhat similar in part to a limited portion of the purpose of FACA excuses wholesale noncompliance with, and breach of, statutory mandates. Moreover, not only are Defendants' contentions disputed, but in yet another effort to minimize their noncompliance, Defendants boldly claim that "[D]efendants ... have complied with certain of the requirements of FACA in establishing and operating" the TAC, "but not with others." (Defs.' Opposition Brief at 1; Defs.' Response Statement ¶ 69.) Nowhere in this record have Defendants cited or otherwise identified a single provision of FACA with which they have complied or claim to have complied.

In addition, Defendants' own admissions that they do not consider the TAC to be government-to-government process deals a fatal blow to Defendants' argument. On February 10, 2005, CSKT's Treasurer Lloyd Irvine sent a letter to Defendant Hogen confirming Mr. Irvine's understanding of a conversation with Defendants Hogen and Westrin that same day. (*See* Pls.' Amended Complaint for Injunctive Relief, Dkt. No. 18, at Exhibit 12 (Feb. 10, 2005 letter from Lloyd Irvine to Defendant Hogen)). In addition to renewing CSKT's request that NIGC comply with FACA, the letter confirmed Mr. Irvine's understanding that, "per Vice-Chairman Nelson Westrin's statement ... the Tribal Advisory Committee ... utilized by NIGC for the development of Class II regulations is not viewed by NIGC as a government-to-government consultation process." *Id.* CSKT did not receive and has not received any response from Defendant Hogen or any of the other Defendants to that letter, thereby confirming (whether by tacit admission or otherwise) NIGC's stated views. (Matt Decl. ¶ 14.) Defendants have similarly expressed no objection to Mr. Irvine's understanding of the events described in the letter or to the statements attributed to Mr. Westrin in the letter. *Id.*

Finally, Defendants' statement that "[n]or will anyone be harmed if the [FACA] noncompliance continues" deserves special mention. Defendants' statement is essentially telling the Court that the Court *should not care* that a federal agency willfully refuses to comply with a federal statute. Defendants' statement also implies that Defendants intend to continue their pattern of noncompliance unless enjoined. Quite simply, Defendants' FACA violations have been willful, pervasive and ongoing. Plaintiffs have previously demonstrated that they satisfy all four factors for issuance of a permanent injunction. (Mem. in Supp. of Pls.' Motion for Summary Judgment at 24-30.) Plaintiffs have further demonstrated that they satisfy – to the extent the case may be applicable here – all of the considerations for issuance of a use injunction identified by the D.C. Circuit in *Natural Resources Defense Council v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998). (Pls.' Opp'n Brief at 26-32.) This Court has recognized that to the extent that a violation of FACA exists, the Court "must provide *some* form of relief." *Natural Resources Defense Council v. Abraham,* 223 F.Supp.2d 162, 182 (D. D.C. 2002) (emphasis original and citing *U.S. v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001)).[4] The Court should prove to Defendants that they are bound by the law, and grant Plaintiffs' request for issuance of a permanent injunction.

[4] For a discussion of the procedural history of *Natural Resources Defense Council v. Abraham*, see Plaintiffs' Opposition Brief at 28 n.10.

CONCLUSION

For all of the foregoing reasons and based upon the briefs and the record in this case, the Court should grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

/ S /
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