IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED SALISH AND
KOOTENAI TRIBES
P.O. Box 278
Pablo, MT 59855,

SANTA ROSA RANCHERIA
INDIAN COMMUNITY
P.O. Box 8
Lemoore, CA 93245

Plaintiffs,

v.

NATIONAL INDIAN GAMING COMMISSION
1441 L Street NW
Washington, DC 20005
The Hon. Philip Hogen, Chairman
The Hon. Nelson Westrin, Vice-Chairman
The Hon. Cloyce Choney, Commissioner
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

Civil Action No. 05-____( )

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiff Confederated Salish and Kootenai Tribes (the "Tribe") is a federally recognized Indian Tribe with its tribal headquarters located in Pablo, Montana. Plaintiff is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* ("IRA") and exercises governmental authority over the Flathead Indian Reservation

("Reservation"), which is located in western Montana. (Verified Complaint for Declaratory and Injunctive Relief ("Complaint") ¶ 1.) The Tribe owns and regulates gaming enterprises on its Reservation pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721. *Id.*

Plaintiff Santa Rosa Rancheria Indian Community ("Santa Rosa") is a federally recognized Indian Tribe with its tribal headquarters located in Lemoore, California. (*Id.* ¶ 2.) Santa Rosa is organized under the IRA and owns and regulates gaming activity on its Indian lands under the IGRA. *Id.*

Defendant, National Indian Gaming Commission ("NIGC"), is a federal agency and entity of the United States Government, located in Washington, DC. Defendants, Chairman Phil Hogen, Vice-Chairman Nelson Westrin, and Commissioner Cloyce Choney are Commissioners of the NIGC, which is headquartered in Washington, DC. (*Id.* ¶ 3.)

The Tribe and Santa Rosa (collectively "Plaintiffs") bring this action to prevent the misconduct and failure of the NIGC to follow appropriate procedure as required by the Federal Advisory Committee Act, 5 U.S.C. App. 2 ("FACA"). If the NIGC is allowed to proceed as NIGC has planned, Plaintiffs will suffer irreparable harm. Any publication of regulations developed by the NIGC with the use of any draft regulations or work product of the Tribal Advisory Committee ("TAC"), will be without the agency's compliance with FACA, including Defendants' failure to (i) failure to publish timely notice of meetings in the Federal Register;(ii) failure to allow public statements before the meetings; (iii) failure to keep detailed minutes of each meeting; (iv) failure to allow full public access to minutes and documents generated and copying of the records for the

public; (v) failure to file an advisory committee charter; and (vi) failure to provide Plaintiffs the opportunity to participate as a member of the TAC.

STATEMENT OF FACTS

On or about January 21, 2004, Defendants solicited nominations for candidates for a Tribal Advisory Committee to advise the NIGC in the development of certain technical standards regulations relating to gaming enterprises. (Complaint ¶ 10.) Defendants did not solicit such nominations by contacting Indian tribes directly. *Id.* Rather, Defendants solicited such nominations by posting information about the nomination process (together with a nomination form) on the NIGC's website. *Id.* Plaintiffs did not receive a letter, facsimile or any other direct communication from the NIGC or any other Defendant regarding nominations to the Tribal Advisory Committee. *Id.*

On or about March 8, 2004, the NIGC selected seven (7) members to serve on a NIGC Tribal Advisory Committee to advise the NIGC in the development of technical standard regulations. (*Id.* ¶ 12.) The TAC is not chartered. *Id.* The selected members of the TAC are employees of large casino enterprises, are non-tribal leaders and lack actual authority to represent the Indian tribal government(s) that they purport to represent. (*Id.* ¶¶ 13-15.) The NIGC has coordinated and facilitated on-going meetings with the TAC without publishing the notice of such meetings in a timely fashion in the Federal Register. (*Id.* ¶¶ 16, 18, 19, 21.)

In or about early October, 2004, the NIGC held a meeting with the TAC in North Carolina, in order to solicit advice regarding draft classification and technical standards. No notice to the public was provided in the Federal Register. (*Id.* ¶ 16.) Defendants

limited the Tribe and other tribal attendants their public right to participate in that meeting and refused an offer of minute-taking services to be provided. *Id.* Attorneys representing the TAC members were denied participation. No minutes of the meetings were taken. *Id.*

On or about October 5, 2004, the Tribe was concerned about the points of view of members whom the NIGC selected to be on their TAC and requested the NIGC to appoint a person with similar interests of the Tribe to be a part of the TAC, and the NIGC did not respond. (*Id.* ¶ 17).

On or about December 16, 2004, the NIGC participated in a meeting at Las Vegas, Nevada, to obtain advice from the gaming industry regarding technical standards. No advance notice to the public was provided and only selected participants were invited to attend the advisory meeting and comment on the regulations. (*Id.* ¶ 18.)

On or about December 1-3, 2004, Defendants organized and conducted a meeting of the Tribal Advisory Committee in Oklahoma City, Oklahoma. (*Id.* ¶ 19.) At that meeting, the NIGC's Acting General Counsel, Penny Coleman, and Defendant Philip Hogen announced that the NIGC did not need to comply with FACA. *Id.* Ms. Coleman and Defendant Hogen stated that FACA did not apply to the Tribal Advisory Committee. Defendants did not provide public notice of this meeting in the Federal Register. *Id.* No minutes of the meeting were taken. *Id.*

On or about December 1, 2004, the Tribe caused the hand-delivery of a letter to the NIGC requesting that the NIGC host its next Tribal Advisory Committee meeting in Montana. (*Id.* ¶ 20.) The letter noted that hosting such a meeting in Montana would allow rural, more isolated Indian tribes and tribal leaders better access to the Tribal

Advisory Committee process and information. *Id.* Defendants have not responded to that request. The NIGC did not respond to the request. *Id.*

On or about January 12 and 13, 2005, the NIGC organized and conducted a Tribal Advisory Committee meeting in Palm Springs, California. (*Id.* ¶ 21.) Defendants did not provide public notice of this meeting in the Federal Register. *Id.* No minutes of the meeting were taken. *Id.* At this meeting, copies of draft technical regulations were submitted and reviewed by the Tribal Advisory Committee. *Id.* Defendants did not provide copies of the draft regulations to the public. *Id.*

In a February 7, 2005 letter to Defendant Hogen, the Tribe requested that the NIGC comply with FACA and set aside its current work product until the NIGC complies with FACA. (*Id.* ¶ 22.) Neither the NIGC nor any of the other Defendants have responded to that request. *Id.* Although FACA exempts government-to-government consultation from the FACA process, the purpose of the NIGC's Tribal Advisory Committee meetings is to solicit advice from technicians rather than engage in government-to-government consultation. (*Id.* ¶ 24.) None of the members of the TAC are tribally-elected leaders nor have they demonstrated that they have authority to speak on behalf of tribal governments, or to act as advisors to the NIGC.

ARGUMENT

In the D.C. Circuit, a court must consider four factors in deciding whether to issue a preliminary injunction. These factors are:

1. The threat of irreparable harm to the movant;

2. The balance between this harm and the injury that granting the injunction may inflict upon the other parties;

3. The probability that the movant will succeed on the merits; and

4. The public interest.

Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); *Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989); *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991). In applying these factors, district courts "employ a sliding scale under which a particularly strong showing in one area can compensate for weakness in another." *Sociedad Anonima Vina Santa Rita v. Department of the Treasury*, 193 F.Supp.2d 6, 13-14 (D. D.C. 2001) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir.1995)).

As will be demonstrated herein, Plaintiffs will suffer irreparable harm if Defendants are allowed to publish proposed rules that were developed using an "advisory committee" process that is contrary to law, namely FACA. The procedure used, or lack thereof, in the development of draft regulations will infringe on the Plaintiffs' sovereign right to regulate the technological aids to Class II games in question. Deprivation of Plaintiffs' rights to be heard and have their views considered and evaluated and to participate in the process as provided by FACA constitutes irreparable harm. For these reasons, and because other factors also weigh heavily in favor of the issuance of a temporary restraining order, the Court should restrain the Defendants from sending any proposed regulations to the U.S. Printing Office for publication in the Federal Register, and restrain the NIGC from holding its recently scheduled meeting of the TAC in Chicago.

I. Defendants Must Comply With the Federal Advisory Committee Act When Forming an Advisory Group

When Congress passed the Federal Advisory Committee Act in 1972, it sought to ensure 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.

Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 446 (1989). FACA defines an "advisory committee" as:

> [A]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof. . ., which is – (c) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government except that such term excludes . . . (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

5 U.S.C. App. II § 3(2).

The Unfunded Mandates Act exempts certain intergovernmental communications from FACA. 2 U.S.C. § 1534(b)(1). The pertinent exemption provides that FACA shall not apply to meetings that 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." *Id.* The TAC as formed by the Defendants does not fall within this exemption – none of the TAC members are elected leaders, and indeed the Plaintiffs have provided evidence that at least one tribe has clearly communicated that their employee is not participating on a government to government basis as a member of the TAC. (*See* Complaint at Ex. 13.)

FACA imposes certain restrictions on federal agencies. To the extent that a federal agency establishes or utilizes an advisory committee, the agency is required to make affirmative findings that the committee is necessary, and to file a charter for the committee. 5 U.S.C. App. 2 §§ 5(b), (c). Advisory committee membership must be "fairly balanced in terms of the points of view represented and the functions" the committee performs. *Id.* In addition, the public is entitled to advance notice of the advisory committee meetings published in the Federal Register and – subject to Freedom of Information Act limitations – is entitled to inspect advisory committee documents. The committee must also keep detailed minutes of meetings. *Id.*

II. NIGC's Decision Not To Comply With The Federal Advisory Committee Act Constitutes a Final Agency Action Under The Administrative Procedures Act

NIGC's decision not to comply with FACA with regard to the organization and conducting of the TAC meetings constitutes final agency action for purposes of the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). The issue of a federal agency deciding not to comply with FACA is not new to this Court. For example, the National Energy Policy Development Group was an advisory committee developed to assist Vice-President Cheney in the development of a national energy policy. *See Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F.Supp.2d 20 (D. D.C. 2002), *aff'd*, 334 F.3d 1096 (D.C. Cir. 2003), *vacated and remanded on other grounds, Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S.Ct. 2576 (2004). The District Court in *Judicial Watch* noted that the failure of a committee subject to FACA to grant public access to meetings or records created therein constitutes final agency action under APA. 219 F.Supp.2d at 40. The NIGC's decision not to comply with FACA with

regard to the convening and conducting of the TAC meetings similarly constitutes final agency action under the APA. Defendant Hogen has publicly asserted that the FACA does not apply to the TAC. (Complaint ¶ 19.)

FACA applies to the TAC, and Plaintiffs' claims are based on Defendants' failure to comply with FACA in convening and conducting TAC meetings. By not complying with FACA, Defendants have acted in a manner not in accordance with law in violation of the APA. 5 U.S.C. § 706(2)(A).

III. Plaintiffs Will Suffer Irreparable Harm If Defendants Meet With The TAC and Publish Proposed Rules Derived From Defendants' Unlawful Process

The Plaintiffs will suffer irreparable harm if the Defendants are not enjoined from meeting with the TAC and, from publishing proposed regulations and if they are not ordered to comply with FACA.

On numerous occasions, the Tribe requested that Defendants comply with the FACA. Santa Rosa submitted comment on draft regulation documents and similarly called for NIGC to comply with FACA. The record in this case is clear: Defendants made a deliberate decision not to comply with FACA when it organized the TAC and has continued to conduct TAC meetings without complying with the law.

This Court has previously held that an agency's violation of FACA can constitute irreparable harm. *See Public Citizen v. National Economic Com'n*, 703 F.Supp. 113 (D. D.C. 1989). In *Public Citizen*, the Court issued a temporary restraining order against the National Economic Commission ("Commission") and the Administrator of General Services Administration that enjoined the Commission from closing its meetings to the

public.[1] In finding that FACA applied to the Commission and that the Commission's refusal to allow the plaintiffs to attend its meetings constituted irreparable harm, the Court noted:

> In the absence of injunctive relief, plaintiffs will be irreparably harmed. Should the December 12 meeting proceed behind closed doors, plaintiffs will be denied, perhaps for all time, but at a minimum during the on-going course, that which Congress expressly protected through FACA. The right to view the advisory committee's discussion of policy matters in public and the right to confront, through observation, the decision-making process as it occurs, will be obviated.

Id. at 129. Defendants' refusal in this case to comply with the FACA is tantamount to the procedural harm deemed irreparable by this Court in *Public Citizen.* The Defendants' refusal to publish notice of TAC meetings in the Federal Register constitutes a *de facto* closed-door meeting in that it withholds from the public (and the Indian tribes) information sufficient to allow the public to attend. Worse yet, at the December 16, 2004 meeting in Las Vegas in which Defendants obtained advice from members of the gaming industry and the TAC, Defendants not only failed to provide notice of the meeting but also invited only select participants to attend. (Complaint ¶ 18.)

Plaintiffs have been and continue to be harmed by the operations of the TAC. Deprivation of the rights of notice, opportunity to fully participate and access to full and complete records of the TAC meetings in and of itself constitutes irreparable harm. The failure of Defendants to comply with FACA has harmed Plaintiffs in that Plaintiffs have been deprived of their rights, granted by the FACA to have adequate notice of meetings,

[1] The Court's Memorandum Opinion granting the claimants' temporary restraining order is reproduced in its entirely as an appendix to the *Public Citizen* decision. *See* 703 F.Supp. at 121-130. In the primary portion of the *Public Citizen* opinion, 703 F.Supp. at 113-121, the Court affirms the Memorandum Opinion and converts the temporary restraining order into a permanent injunction.

to obtain documents generated by the TAC, to have an Advisory Committee that is fairly balanced in terms of the views presented, to have a full and complete record of the meetings and to have legal representation during the development of the regulations. Most importantly, they have been deprived of a full and fair opportunity to be heard and to have their views seriously considered as part of the TAC process.

Plaintiffs will continue to suffer irreparable injury unless operation of the TAC is brought into compliance with the provisions of the FACA.

Defendants have also harmed Plaintiffs for failure to comply with FACA by not making available to them detailed minutes of the TAC meetings conducted. The fact that a clear and complete record is not available deprives Plaintiffs of vital information to which they would otherwise have access to in evaluating the final product of the TAC. From the draft regulations it is apparent that NIGC is using the TAC simply to facially support a predetermined outcome. Tribes similarly situated to Plaintiffs will be harmed by the publication of the draft regulations, that upon Plaintiffs' best information, that appears to be the product that NIGC will submit for publication.

In addition to the Defendants' violations of the FACA, which alone is sufficient to establish irreparable harm under *Public Citizen*, Defendants' conduct also implicates tribal sovereignty considerations. The most recent TAC draft of the regulations will limit Plaintiffs' opportunity for self-governance and decision making in the area of Class II "technological aids" to tribal gaming. Under IGRA, Indian tribes have the governmental responsibility to regulate Class II gaming on their reservations pursuant to codes approved by the NIGC. 25 U.S.C. § 2710. The draft regulations presented to the public, to date, have the "prospect of significant interference with self-government." *Seneca-*

Cayuga Tribe of Oklahoma v. Oklahoma, 874 F.2d 709, 716 (10th Cir. 1989). The proposed regulation would take current Class II "technological aids," previously approved by courts away from tribes for use as Class II gaming devices. That tribal governments currently use or may desire to use in their economic development plans. Such rule-making, to reverse the effect of court decisions is arbitrary and capricious and will irreparably harm tribes by limiting their opportunity to pursue Class II gaming devices currently legal, and reduce economic development options with their gaming enterprises.

IV. The Balance Of Harms Weighs Heavily in Favor of the Plaintiffs.

The balance of harm test heavily favors the Plaintiffs. As discussed above, Plaintiffs will suffer substantial and irreparable harm if the Defendants do not comply with FACA. Conversely, Defendants cannot demonstrate that they or any other party will suffer any significant harm if the relief requested by Plaintiffs is granted; there would be no such harm to Defendants.

The harm to the Tribes' rights of self-governance and the regulatory authority over Class II gaming as determined by IGRA outweighs any potential harm to the agency. As discussed by the Tenth Circuit Court of Appeals in *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001), a case of competing authority over licensing and titling of vehicles. The Court found that an infringement upon tribal self-government was irreparable harm because it could not be adequately compensated for in the form of monetary damages. *Id.* at 1251. If the proposed rule moves forward it will cause damage that later cannot be undone. Tribes will have to

discontinue use of devices currently in use, and will lose the opportunity to use the court sanctioned devices in the future.

The NIGC will not be harmed if required to comply with FACA. Compliance with federal law cannot constitute harm in any legal sense. "Rather than harm, this will highlight vividly the essence of our democratic society, providing the public its right to know how its government is conducting the public's business." *Public Citizen*, 703 F.Supp. at 129. The balance of interests weigh most heavily in favor of the Tribal Plaintiffs who would be irreparably harmed by allowing Defendants' decision not to comply with FACA to remain in place, along with the work product produced by the TAC that violates FACA.

V. The Tribes Are Likely To Prevail On The Merits of Their Claims.

Plaintiffs are likely to succeed on both Counts of their Complaint. Plaintiffs allege in Count I that the Defendants' refusal to comply and accompanying violations of the FACA violates the APA and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The APA allows persons aggrieved by an agency action the opportunity to seek judicial review for agency actions "found to be ...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The D.C. Circuit has recognized that agency actions that do not have a "rational basis" will be set aside under this standard of review. *Mobil Oil Corp. v. E.P.A.*, 35 F.3d 579, 582 (D.C. Cir. 1994) (citing *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191 (D.C. Cir. 1983)). The D.C. Circuit has also noted that the APA "creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial

review would be inappropriate." *Environmental Defense Fund v. Reilly*, 909 F.2d 1497, 1504 (D.C. Cir. 1990).

The TAC is an "advisory committee" under FACA and does not fall within any FACA exceptions. As explained in Part II, above, Defendants' refusal to comply with FACA constitutes final agency action for APA purposes. It cannot be disputed that Defendants have failed to comply with FACA's procedural requirements. Accordingly, Plaintiffs' are likely to prevail on their APA claim.

Defendants are also likely to prevail on their request for declaratory relief. Plaintiffs are likely to be granted a declaration that FACA applies to the TAC because it is clear that the TAC does not fall within any FACA exception. While the Unfunded Mandates Act, 2 U.S.C. § 1534(b)(1), exempts certain communications between federal officials and designate tribal representatives from FACA, this exception does not apply here because (1) none of the TAC members are elected leaders; (2) Defendants' solicitation of nominations for membership in the TAC did not ensure that such nominated members had actual authority to represent the tribes the nominees purported to represent; and (3) Plaintiffs have provided evidence that at least one tribe has clearly communicated that their employee is not participating on a government to government basis as a member of the TAC. (*See* Complaint at Ex. 13.)

Plaintiffs are similarly likely to prevail on their request in Count II for a declaration that Defendants' (i) failure to open each meeting to the public; (ii) failure to publish timely notice of each meeting in the Federal Register; (iii) failure to allow public attendance or participation during each meeting; (iv) establishment of sub-groups without notice in the Federal Register; (v) failure to keep detailed minutes of each

meeting; and (vi) failure to file an advisory committee charter violates the FACA and is arbitrary and capricious and otherwise not in accordance with law. Notwithstanding Defendant Hogen's assertions to the contrary, FACA applies to the TAC. Again, it cannot be disputed that Defendants have failed to comply with FACA's requirements.

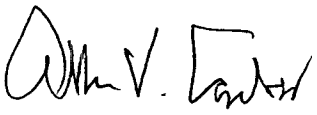
VI. The Public Interest Will Be Served If Defendants Are Required to Comply With FACA.

The public interest is always served by requiring a federal agency to comply with federal law. *Patriot, Inc. v. U.S. Dept. of Housing and Urban* Development, 963 F.Supp. 1, 6 (D. D.C. 1997) (court noting in preliminary injunction context that "the public interest is best served by having federal agencies comply with the requirements of federal law"). Requiring Defendants to comply with FACA will similarly serve the public interest here. It is certainly in the public's best to require the NIGC to conduct itself in the "sunshine" rather than take the current approach of depriving the public access to the advisory committee process. The overriding policy is to provide the public access to the government and its proceedings. By enacting FACA, Congress sought to recognize the importance of having advisory committees to the executive branch be completely open to public observation and comment. *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 903 (D.C. Cir. 1993) (noting that among Congress' purposes in enacting the FACA was "to hold the committees to uniform standards and procedures ... and to keep Congress and the public informed of their activities").

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiffs' Application for Temporary Restraining Order.

RESPECTFULLY SUBMITTED



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